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June 20, 2006 VIA ELECTRONIC MAIL

Honorable David F. Levi
Chair, Standing Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Chief Judge, United States District Court
United States Courthouse
501 I Street, 14th Floor
Sacramento, CA 95814

Re: Proposed Rule 502 on Waiver of Attorney-Client Privilege and Work Product

Dear Chair Levi,

On behalf of the Association of Corporate Counsel ("ACC"), I respectfully request the opportunity to submit these comments on Proposed Rule 502 concerning limited waiver protections for organizational entities against third party discovery of attorney-client privilege and work product protected documents and communications.

ACC appreciates that the Advisory Committee on Evidence Rules and the Standing Committee are focusing their important attention on this issue and seeking solutions to this complex, frustrating, and timely problem through the federal rulemaking process. The business and corporate legal community, including particularly members of the in-house bar who ACC represents, have an intense interest in this issue: we have been grappling with the questions it raises before Congress,[1] in the courts,[2] at the Justice Department,[3] and at the U.S. Sentencing

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[1] Hearings were held in the House Judiciary Committee's subcommittee on Crime, Terrorism and Homeland Security on March 7, 2006 (see our testimony at http://www.acca.com/public/accapolicy/coalitionstatement030706.pdf and the transcript of the hearings at http://www.abanet.org/poladv/attyp_transcript5706.pdf). Hearings in the Senate Judiciary Committee's subcommittee on Crime and Drugs will be held in July at a date to be determined after the 4th of July holiday break (between July 10 and the end of the month).

[2] In fact, in an opinion issued just yesterday, the 10th Circuit explicitly noted the Standing Committee's upcoming consideration of this issue and the role the federal rulemaking process has to play in addressing it. *In re Qwest Communications International, Inc.*, No. 06-1070, slip op. at 48-50 (10th Cir. June 19, 2006), *available at* http://www.ck10.uscourts.gov/opinions/new/pdf/06-1070.pdf.

Commission[4], as well as in the media and with our members as they seek to educate and prepare their clients for the possibility that their privilege rights may be ignored or trampled when they are most needed.

While ACC applauds the decision to take this important issue on and to do so with great sensitivity, we urge you in your upcoming meeting to consider carefully the larger impact of the recommendation of the Advisory Committee on Evidence Rules regarding Proposed Rule 502 ("Limitations on Waiver"): we believe that while well-intentioned, it may have a negative impact on the larger issue given the current context of a "culture of waiver" that's been created by government enforcement officials and prosecutors who have abused their discretion by routinely coercing companies to waive their privileges.

Interest of ACC

ACC is the in-house bar association, with more than 19,000 members worldwide who practice inside the legal departments of corporations and other organizations in the private sector. ACC presents the perspective of in-house counsel who advise corporate clients on virtually every conceivable matter of law, compliance, and legal policy, including on issues of how clients should treat attorney-client privileged communications that are sheltered by the attorney-client privilege and the work product doctrine. ACC members are at work in more than 8,000 corporations in the United States and abroad, including public and private companies, both large and small, as well as in various not-for-profit organizations.

ACC – by itself and as part of a broad and diverse coalition whose participants include the U.S. Chamber of Commerce, the National Association of Manufacturers, the Business Roundtable, and the ACLU – has performed extensive studies, given testimony, submitted briefs and authored commentary regarding recent developments in and the need for the preservation of the attorney-client privilege and work product doctrine.[5] Given this background and the ongoing interest of its

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[3] ACC and its coalition partners have met with DOJ leaders on several occasions, including Associate AG Robert McCallum (who has been designated as the responsible official on this issue), member of the DOJ's policy teams, and even the Attorney General Alberto Gonzales himself. See, e.g., http://www.acca.com/public/attyclientpriv/gonzales021306.pdf, http://www.acca.com/public/attyclientpriv/mccallum042106.pdf, and even our letters in 2000 to Deputy AG Eric Holder when The Thompson Memo's predecessor memo, authored by then Deputy Holder was first published: http://www.acca.com/public/accapolicy/holder.html. See also the similar letters of our partners working in tandem with us on this issue, such as the ABA's letter to General Gonzales at http://www.acca.com/public/article/attyclient/aba_to_ag.pdf.

[4] ACC and its coalition partners fighting privilege erosion have repeatedly requested the US Sentencing Commission to rescind language it added to the Corporate Guidelines (Chapter 8, Section 8.2(c)5) regarding privilege wavier and the appropriateness of Justice Department requests for waiver in order for a corporation to be deemed eligible for cooperation credits. Our most recent testimony before the Commission (available at http://www.acca.com/public/attyclntprvlg/coalitionussctestimony031506.pdf) and the empirical evidence of abuse of this "demand power" by the Justice Department (see http://www.acca.com/Surveys/attyclient2.pdf) led to a decision by the Commission to reverse their policy in their most recently proposed amendments offered to Congress (see http://www.ussc.gov/FEDREG/2006finalnot.pdf).

[5] *See, e.g.,* Coalition to Preserve the Attorney-Client Privilege, *The Decline of the Attorney-Client Privilege in the Corporate Context: Survey Results* (2006), *at* http://www.acca.com/Surveys/attyclient2.pdf; Association of Corporate Counsel, *Executive Summary, Association of Corporate Counsel Survey: Is the Attorney-Client Privilege Under Attack?* (2005), *at* http://www.acca.com/Surveys/attyclient.pdf; *White Collar Enforcement (Part I): Attorney-Client Privilege and Corporate Waivers Before the Comm. on the Judiciary's Subcomm. on Crime, Terrorism and Homeland Security,* 109th Cong. (Mar. 7, 2006), *at*

members, ACC hopes that it can provide some perspective from our experience and our membership and looks forward to participating in the federal rulemaking process on this crucial area of the law in whatever ways the Advisory Committee on Evidence Rules or Standing Committee would find helpful.

Erosion of the attorney-client privilege and work product protections

In the corporate context, the attorney-client privilege and work product doctrine promote client candor by encouraging executives and other employees of companies to seek guidance and ask difficult questions regarding the most sensitive issues. Candid communication with clients allows attorneys to gain a comprehensive understanding of the facts surrounding an issue so as to render the best legal advice. In short, when confidentiality is predictable and assured, employees feel safer and more comfortable engaging in the "full and frank communications" necessary to avoid, uncover and address corporate wrongdoing and errors. *Upjohn Co. v. United States*, 449 U.S. 383, 389-93 (1981).

Unfortunately, the attorney-client privilege and work product doctrine are in serious jeopardy. In its prosecutorial zeal, the government has inappropriately stepped into the role reserved by the U.S. Supreme Court for impartial courts, claiming – under its own internal guidelines and policies, such as the Thompson Memorandum at the Department of Justice ("DOJ") or the Seaboard Report at the Securities Exchange Commission ("SEC") – that it is within the government's purview to decide when a corporate client's privilege should be waived.

By unilaterally deciding to treat a corporation's rights to confidential counsel as a bargaining chip to be played in the investigation and charging process (certainly well before any determination of guilt or often even confirmation of wrongdoing), the government has created a "culture of waiver" that is dismissive of clients' rights and of a balanced playing field for litigants in the adversarial process. In today's highly-charged legal compliance environment, prosecutors find it all too easy to coerce companies that wish to survive an investigation (let alone a prosecution) to abandon the fundamental protections guaranteed to every party participating in our justice system.

The mounting alarm and frustration in response to such coercion of clients' rights is clear, but companies are at a loss for knowing to whom they can turn to seek redress:

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http://judiciary.house.gov/oversight.aspx?ID=222 (submission by the Coalition to Preserve the Attorney-Client Privilege, *at* http://www.acca.com/public/accapolicy/coalitionstatement030706.pdf); Brief for *Amici Curiae* the Association of Corporate Counsel and the Chamber of Congress of the United States of America Supporting Qwest Communications International, Inc.'s petition for Writ of Mandamus, *In re Qwest Communications International, Inc.*, No. 06-1070 (10th Cir. filed March 13, 2006), http://www.acca.com/public/amicus/qwest.pdf; *Amicus* Brief of the Association of Corporate Counsel in Support of Relators' Petition for Writ of Mandamus, *In re Stone & Webster, Inc., The Shaw Group Inc., and Ernst & Young LLP*, No. 05-0552 (Tex. filed Jul. 19, 2005) (No. 05-0552), *at* http://www.acca.com/public/amicus/txamicus.pdf; *Comments of the Association of Corporate Counsel (ACC) to the ABA Attorney-Client Privilege Task Force Hearings* (2005), *at* http://www.acca.com/public/comments/attyclient/privilege.pdf; comments by both ACC and the Chamber before the United States Sentencing Commission (August 15, 2005), *at* http://www.acca.com/public/accapolicy/attyclient.pdf; ACC *Amicus* Brief, *Exxon-Mobil Corp. v. Ala. Dep't of Conservation& Natural Res.*, *at* http://www.acca.com/public/amicus/exxon/; Letter from ACC to Deputy Attorney General Eric Holder of June 16, 1999, *at* http://www.acca.com/public/accapolicy/holder.html (protesting the publication of the DOJ's new corporate charging policies and their impact on privilege).

- "Prosecutors act as if a claim of privilege were an implement of the crime itself or a legal concept without any historical or important basis in our jurisprudential system."
- "The government now expects a waiver as their inherent right."
- "It seems the government has taken the stand that because they are the government the rules do not apply to them and [they] can by force and intimidation take whatever they want."
- "[W]ithin a matter of a few years, these [government prosecutors] have utterly eviscerated the attorney client privilege and undermined the most important aspect of the attorney client relationship."
- "We are forced to practice in a world where we cannot expect that any privilege will be respected by government investigators."
- "[T]he government's policy and position that companies should/must waive privilege and threatening criminal sanctions if they refuse to cooperate from the outset is frighteningly wrong, unconstitutional, over-reaching by the government, misguided, and is serving to undermine the efficacy of our system of jurisprudence and the assumption of innocent until proven guilty."
- "The balance of power in America now weighs heavily in the hands of government prosecutors. Honest, good companies are scared to challenge government prosecution for fear of being labeled uncooperative and singled out for harsh treatment. See Arthur Andersen for details . . . oh yeah . . . they cease to exist."
- "For all intents and purposes, there is no such thing as an attorney-client privilege or work product protection in a public company."

Coalition to Preserve the Attorney-Client Privilege, *The Decline of the Attorney-Client Privilege in the Corporate Context: Survey Results* at 14-22 (2006) (all quotes verbatim from ACC's privilege survey results summary).[6]

Limited waiver in the broader context of this "culture of waiver"

Given this "culture of waiver," situations are common in which private plaintiffs seek the disclosure of privileged documents which a company previously was coerced to provide to government enforcers. While some companies and the government have sought to prevent this practice by entering into confidentiality agreements that would limit the company's waiver of documents and communications, some courts will not recognize or enforce such agreements, suggesting that once the company turns over privileged materials to the government, it waives the company's privileges to an essentially limitless universe of third parties. Such an inequitable result -- especially *after* the government strips the company of its practical ability to say "no" to demands for privileged material in the course of an investigation or prosecution – reinforces the message that the attorney-client privilege in the corporate context is unreliable; and an unreliable privilege is meaningless in terms of its practical application. *See Upjohn*, 449 U.S. at 389-93 (noting that "[a]n uncertain privilege . . . is little better than no privilege at all").

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[6] The summary of this survey, reflecting responses from over 1,200 in-house and outside corporate counsel, is available online at http://www.acca.com/Surveys/attyclient2.pdf. The broad coalition that conducted this survey is comprised of ACC, the Chamber, the American Civil Liberties Union, the American Bar Association, The Business Roundtable, the National Association of Manufacturers, and the National Association of Criminal Defense Lawyers, among others.

Although the concept of "limited waiver" is attractive to the extent it prevents further inequitable results for companies in this situation, it would not solve – and could exacerbate – the crucially important underlying problem of government enforcement policies eroding attorney-client and work product protections. This is why we urge participants in the federal rulemaking process to exercise caution in addressing this issue.

While the drafters of Proposed Rule 502 clearly are trying to fashion a remedy for companies that have been forced to waive their privileges against future litigants (even despite the existence of confidentiality agreements with the government ostensibly designed to avoid such waiver), to do so in the Federal Rules in the manner proposed might have the impact of creating a presumption on the part of the government that it is appropriate to demand waiver in all circumstances (indeed, that it is indefensible for a company to reject a waiver request), given that the government can now offer protection against third party disclosures. If the concern regarding waiver is a chill in the communications necessary to ensure corporate legal compliance and inclusion of corporate lawyers in even the most sensitive of decisions made in the company, then surely we must secure for employees the confidence that their decision to include lawyers will not lead to a likely disclosures to the government or possible self-incrimination. Employees making these decisions are not very concerned about some distant, possible third party lawsuit; they are concerned about whether consulting with the company's counsel will likely lead to their indictment as the target of the government's investigation into any future related failure.

ACC urges the Advisory Committee on Evidence Rules and the Standing Committee to ensure that any proposed solution they fashion will address the problems caused by the government's broader "culture of waiver" and will seek to ensure that companies grappling with government requests in the future for waiver of their privilege rights will not feel painted into a "waiver" corner because the Federal Rules suggest that companies have no legitimate grounds to deny such a government intrusion as long as there is a protection against a blanket waiver to the larger world.

ACC appreciates the Standing Committee's consideration of these issues and hopes that you will share our views with the other members of the Standing Committee as well as with any other participants in the federal rulemaking process that you feel would be appropriate. Please let us know if we can be of service to you or other participants in this process in any of your upcoming work and deliberations.

Sincerely,

Susan Hackett

Susan Hackett
Senior Vice President and General Counsel

cc: Honorable Jerry E. Smith, Chair, Advisory Committee on Evidence Rules
Fred Krebs, President, Association of Corporate Counsel

Barry Nagler, CLO of Hasbro and Chairman of the Board, ACC
Muzette Hill, Chairman, and the Advocacy Committee of the Board of ACC
Steve Cannon and Todd Anderson, Constantine Cannon