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VIA EMAIL: RULES_COMMENTS@AO.USCOURTS.GOV

The Honorable Jerry E. Smith
Chair
Advisory Committee on Evidence Rules
The Judicial Conference on the United States
Administrative Offices of United States Courts
Washington, D.C. 20544

re Follow-Up Comments
Proposed Rule 502, Federal Rules of Evidence

Dear Judge Smith:

Thank you again for the opportunity to appear before the Advisory Committee at the hearings held on January 12, 2007 in Scottsdale, Arizona, and present testimony on behalf of the Executive Committee of the Business Law Section of the State Bar of California. I am submitting this letter as a follow-up on issues raised on the "selective waiver" provisions of Proposed Rule 502(c) during my appearance and other portions of those hearings and also addresses additional related issues raised in other testimony, but I do so *only in my individual capacity*.[1] For convenience, however, I will continue the protocol set forth in the written testimony of addressing attorney-client privilege and attorney work product immunity separately, referring to the former as "Privilege" and the latter as "Immunity" and the protections of the confidentiality of the attorney-client relationship afforded by them as the "Protections."

FOLLOW-UP ON ISSUES RAISED DURING MY APPEARANCE

Several issues came up during my appearance that, in a less time-compressed environment, I would have liked to address. Given the large number of witnesses scheduled to appear and the limited time for the hearing, I thought it would be more efficient to address them in a subsequent submission. Those topics are set forth in this Section.

The Request to the Advisory Committee – Selective Waiver

It seemed during the questions portion of my testimony that there might be some frustration by the Advisory Committee in the responses to the proposal for selective waive. As I

1 I am simultaneously requesting the staff of the Administrative Offices to log this under a different control number from that used for the written testimony presented by me at the hearing to avoid any confusion.

recall, you indicated that the Advisory Committee had been asked to prepare the proposal. I assumed that to be a reference to the letter dated January 23, 2006 to Mr. Leonidis Mecham, Director of the Administrative Office of the U.S. Courts, from Representative F. James Sensenbrenner, Jr., then Chairman of the House of Representatives Committee on the Judiciary.[2] I assume, however, that the mere fact a request was made does not dictate the outcome of actions taken by Judicial Conference of the United States (at any stage, including proceedings of the Advisory Committee) with respect to it, else there really would be no substantive role for the Advisory Committee or perhaps even the processes implemented by the Judicial Conference.

That letter did not itself invoke the provisions of 28 U.S.C. § 2072 *et seq.* but that is, of course, the basis of authority for the Judicial Conference to act and thus of actions taken by the Advisory Committee with respect to it. Setting aside the status of the letter itself or the source of it, the record clearly demonstrates that the Advisory Committee addressed that request in good faith. Doing more than that solely because a request was made undermines the credibility of the process. Borrowing from former First Lady Nancy Reagan, it would be entirely within the mandate of the Advisory Committee to "just say 'no' " to the request as reflected in FRE 502(c). I urge the Advisory Committee to do so.

The Divisiveness of Selective Waiver

Justice Hurwitz noted that the selective waiver provision had resulted in polar extremes of response: those that favored it thought it was great, and those that opposed it thought it was anathema. It is clear that the issue is intellectually divisive, but I would have cast that in a somewhat different light: those that favored it did not seem willing to address the underlying analytical issues that opponents raise, and those that opposed it did not seem willing to address the benefit that proponents assert it presents. I have been among those pointing out the failure of the proponents to address those underlying analytical issues so it behooves me to break that cycle and address whether there actually is a benefit and, if so, whether it justifies the change to centuries of judicial reasoning on which the protections of Privilege Immunity are based.

Addressing the benefit described in the bracketed Committee Note to 502(c)[3] may not be persuasive to those proponents of selective waiver who do not acknowledge the underlying

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2 I hope the members of the Advisory Committee will indulge me some confusion. The original proposal for FRE 502 was received by the ABA staff in time to include in meeting materials for the ABA Task Force on Attorney-Client Privilege circulated on February 3, 2006. Even if the letter from Representative Sensenbrenner was received by the Administrative Offices on the date of it (the letter actually bears evidence that it was FAXed to the Administrative Offices from the Judiciary Committee offices two days later), that leaves a maximum of 10 days for its preparation. Responses to contemporaneous inquiries to the staff of the Administrative Offices left the impression that the proposal was under preparation well before the request was made.

3 "A rule protecting selective waiver in these circumstances furthers the important policy of cooperation with government agencies, and maximizes the effectiveness and efficiency of government investigations."

analytical issues identified by me in the written testimony. One of the latter is the large reservoir of case law on the topic of selective waiver, which includes a rather rigorous framework for assessing a "cost/benefit" analysis inherent in issues relating to the Protections generally.

It is at best curious that the Committee Note quotes the text of the dissent of Judge Boggs in *In re Columbia/HCA Healthcare Corp.*,[4] asserting that there is a "public interest in easing government investigations."[5] The Committee Note characterizes Judge Boggs' dissent to the effect that the quoted benefit "justifies a rule that disclosure to government agencies of information covered by the attorney-client privilege or work product protection does not constitute a waiver to private parties."[6] In offering that view, the Committee Note studiously ignores the portion of the opinion itself rejecting that balance:

> Without a doubt, disclosure of information to the Government in a cooperative manner encourages settlement of disputes and by encouraging cooperative exchange of information, selective waiver would improve the ability of the Government and private parties to settle certain actions. *** However, this argument has several flaws. As noted by the First Circuit, it "has no logical terminus." *MIT*, 129 F.3d at 686. Insofar as the "truth-finding process" is concerned, a private litigant stands in nearly the same stead as the Government. This argument holds considerable weight in the numerous circumstances whereby litigants act as private attorneys general, and through their actions vindicate the public interest. A plaintiff in a shareholder derivative action or a qui tam action who exposes accounting and tax fraud provides as much service to the "truth finding process" as an SEC investigator. Recognizing this, a difficult and fretful linedrawing process begins, consuming immeasurable private and judicial resources in a vain attempt to distinguish one private litigant from the next.[7]

All of the Court of Appeal decisions on selective waiver that have addressed the benefit cited in the Committee Note and the analysis of how to balance it against the cost of impinging on the "truth finding process" have come to the same conclusion.[8] Indeed, the sole Court of

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4 293 F.3d 289 (6th Cir. 2002).

5 *Id.*, at 314.

6 Committee Note [c].

7 293 F.3d 289, 303 (6th Cir. 2002).

8 *See, e.g., In re Steinhardt Partners, L.P.*, 9 F.3d 230, 236 (2nd Cir. 1993): "An allegation that a party facing a federal investigation and the prospect of a civil fraud suit must make difficult choices is insufficient justification for carving a substantial exception to the waiver doctrine."; *Westinghouse v. Republic of the Philippines*, 951 F.2d 1414, 1425-26 (3rd Cir. 1991): "We do not question the importance of the public interest in voluntary cooperation with government investigations. We have little reason to believe, however, that this interest outweighs "the fundamental principle that 'the public . . . has a right to every man's evidence.' " *University of Pennsylvania*, 110 S.Ct. at 582 (citations omitted)."; *In re Qwest Communications Securities Litigation*, 450 F.3d 1179, 1197 (10th Cir. 2006): "Qwest justifies its proposed new rule on a policy of cooperation with government investigations. It does not ground its advocacy on the purposes underlying the attorney-client privilege. At least one court has indicated that such justification is suggestive of a new privilege, rather than

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Appeal decision upholding selective waiver, *Diversified Industries, Inc., v. Meredith*, does not even address this benefit. Instead, it focuses on the activity for which "cooperation" credit has been given:

> As Diversified disclosed these documents in a separate and nonpublic SEC investigation, we conclude that only a limited waiver of the privilege occurred. [citations omitted] To hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers.[9]

In short, the Court assumed that an internal investigation could not be conducted without delivery of protected information to a governmental entity, but there is *no* evidence of that whatsoever.

Senator Specter addressed the cost/benefit balance in his remarks in the Senate upon introduction of S. 186 ("Attorney-Client Privilege Protection Act of 2007"):[10]

> As a former prosecutor, I am acutely aware of the enormous power and tools a prosecutor has at his or her disposal. *** [T]he federal prosecutor has enough power without the coercive tools of the privilege waiver, whether that waiver policy is embodied in the Holder, Thompson, McCallum, or McNulty memorandum. I see no need to have the Justice Department publicly express a policy that encourages waiver of attorney-client privilege, especially where the policy is backed by the heavy hammer of possible criminal charges. Cases should be prosecuted based on their merits, not based on how well an organization works with the prosecutor.[11]

He invoked no less an authority in support of his views than former Justice Robert H. Jackson, speaking then as Attorney General in a speech to the U.S. Attorneys in 1940:

> The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. He can have citizens investigated and, if he is

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gloss on an ancient one. *See Westinghouse,* 951 F.2d at 1425."; *Permian Corp. v. United States*, 665 F.2d 1214, 1221 (D.C. Cir. 1981): "Voluntary cooperation with government investigations may be a laudable activity, but it is hard to understand how such conduct improves the attorney-client relationship. If the client feels the need to keep his communications with his attorney confidential, he is free to do so under the traditional rule by consistently asserting the privilege, even when the discovery request comes from a 'friendly' agency."

9 572 F.2d 596, 611 (8th Cir. 1977).

10 Congressional Record (January 4, 2007) S181-S183.

11 *Id.*, at S182.

that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations.[12]

An group of 11 former senior officials of the Department of Justice[13] stated the same in a joint letter to Attorney General Alberto Gonzalez dated September 5, 2006: "Prosecutors can obtain needed information in ways that do not impinge upon the attorney-client relationship – for example, through corporate counsel identifying relevant data and documents and assisting prosecutors in understanding them, making available witnesses with knowledge of the events under investigation, and conveying the results of internal investigations in ways that do not implicate privileged material."[14]

The proponents of the selective waiver provision of Proposed Rules 502(c) have asserted a benefit but have not actually addressed the significance of it. They also have not engaged in even a cursory examination of whether that benefit outweighs the cost of it. Indeed, the preponderance of authority offered in this matter demonstrates that the benefit does not actually exist, is overblown, *or* falls far short of what would be required to justify creation of it. I believe the Advisory Committee could come to the same conclusion, and should.

Congress and Selective Waiver

I was more than a little stunned when the assertion was made that Congress had already recognized the justification of selective waiver in passing the Financial Services Regulatory Relief Act of 2006 (the "FSRRA").[15] I trust that the information and analysis provided by me at that time fully disabused the members of the Advisory Committee of any misconceptions about the nature of that Act.[16] Unfortunately, there was no time to discuss the most recent indication of Congressional sentiment on selective waiver as a matter of generic application.

The Bill introduced by Senator Specter referenced above (S. 186) was originally introduced in the waning days of the 109th Congress. Before it was, however, a draft copy was circulated to members of the Senate Judiciary Committee and staff member of them, and other

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12 *Id.*

13 Consisting of 4 former Attorneys General, 3 former Deputy Attorneys General, and 4 former Solicitors General.

14 Available at http://www.abanet.org/buslaw/attorneyclient/materials/065/065.pdf.

15 S. 2856 (109th Congress), P.L. 109-351.

16 The comment letter dated January 9, 2007 from the Association of Corporate Counsel (06-EV-045) provides a very similar summary as that which I provided at the hearing. Both set forth analysis included in a memorandum dated March 28, 2006 circulated by me to the ABA Task Force on Attorney-Client Privilege and a follow-up report to it dated May 30, 2006 listing the existing statutory basis demonstrating that the regulators for which Section 607 of the Act was designed already have *full* access to the documents and communications protected by it. If requested, I will be happy to provide forms of that memorandum and report suitable for inclusion in the public record of the hearings of the Advisory Committee.

interested parties, which included the following provision reputedly requested by the Department of Justice:

> (e) Effect of Disclosure to Government.–
>
> (1) In general.–A covered disclosure (including a disclosure under subsection (d)) shall not waive the attorney-client privilege or the protection against compelled disclosure of attorney work product to any nongovernmental person.
>
> (2) Definition.–In this subsection, the term "covered disclosure" means a disclosure of any communication protected by the attorney-client privilege or any attorney work product by, or authorized by, the organization holding the privilege or protection to the Federal Government, in the exercise of its regulatory, investigative, or enforcement authority.[17]

If the FSRRA actually demonstrated what was asserted at the hearing (Congressional acceptance of the legitimacy of selective waiver), the selective waiver provision of S. 186 would have remained in the Bill. It did not. After input from members of the Judiciary Committee and others (including public interests thought to be close to the incoming majority), it became apparent that the Bill with that provision in it would be dead on arrival but the Bill without it had legitimate potential for passage.

Federalism Issues

As part of his observation that commenters either loved or hated FRE 502(c), Justice Hurwitz noted that no one had commented on whether it actually would work or, if not, what revisions would have to be made so that it would.[18] He invited me to make suggestions as to how that could be done. My observation was both a purely individual response and a somewhat provocative one: the proposal would not work and the only way to make it do so would be to nationalize the Privilege and the Immunity in order to preserve the Protections of them. The written testimony I provided demonstrated my opposition to that alternative, but I did not have time to delve into the history of the Federal Rules of Evidence that demonstrated the political reality of insurmountable obstacles to that approach.

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17 To the best of my knowledge, the original draft was never publicly released although it was circulated to members of the Financial Services Roundtable and thereafter to members of the White Collar Crime Committee of the ABA Criminal Justice Section. If requested, I will provide the Advisory Committee with the hard copy which I received on or about November 17, 2006.

18 Part of the problems is the lack of precision as to what exactly the provision would do if it actually "worked." If the issue truly were "cooperation" as draft Committee Note [c] asserts, the provision could logically specify that the disclosure would not constitute waiver *even with respect to the government authority receiving it*. The point is that the "cooperation" for which selective is offered as protections is not limited to knowledge of factual matters but actual receipt of acknowledgement of legal culpability. In other words, a corporation defending itself is not "cooperating." That is inconsistent with the fundamental nature of an adversarial system. It also effectively cuts out the judicial process of supervising the impact of disclosure through grand or denial of protective orders.

What ultimately was promulgated by Act of Congress on January 2, 1975 as the Federal Rules of Evidence included 13 separate Rules on "privileges" as originally approved by the Supreme Court pursuant to 28 U.S.C. 2075.[19] Those covered a wide variety of topics, some of which had traditionally been regulated by state law and some of which were controversial because of the power it gave to the government to withhold information. None of them survived as presented.[20] Rule 501 replaced all of them and meaningfully preserved the role of state law.

Both the Commerce Clause[21] and the Necessary and Proper Clause[22] of the Constitution have been offered by proponents of "nationalization" as authority for Congress to preempt state law on Privilege and Immunity and thereby "nationalize" them. Whatever authority those Clauses provide,[23] they are both modified by the Reserved Powers Clause of the Tenth Amendment. If the goal of Proposed Rule 502 is to secure certainty, any component based on preemption of state law will single-handedly defeat that. While there may be many equally pristine examples of rights and powers of the States covered by the Reserved Powers Clause, none should be clearer than the authority of the States to establish the type of system upon which the Protections are predicated: (a) courts adjudicating the law, (b) licensing of persons permitted to practice law before those courts, (c) regulation of proceedings before those courts, (d) regulation of the practice of law upon which those proceedings depend, and (d) the conduct by those persons so licensed. If the history of the Federal Rules of Evidence is a guide, including the provisions of section (c) in Proposed Rule 502 will create the same quagmire that Proposed Rules 501-513 did in 1973.

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19 56 F.R.D. (1973). The Federal Rules of Evidence normally would have taken effect automatically following approval by the Supreme Court unless Congress rejected them. In essence, Congress provided a sweeping rejection of *all* of the Rules by enacting P.L. 93-12 (March 30, 1973) specifying that none of them would take effect absent affirmative approval of Congress through enactment of them.

20 The continued status of the original proposals has been a source of confusion in some sectors. As a matter of formality, *none* of the proposed Rules on "privileges" survived but *all* of them were approved by the Supreme Court. Those that originally occupied numbers 502-513 are occasionally referred to as Standards rather than Rules and have been cited in case law for purposes of analysis even though they have no authoritative force. See, Michael H. Graham, HANDBOOK OF FEDERAL EVIDENCE, Sixth Edition (2007), Volume 5.

21 Article I, Sect. VIII, Para. 3.

22 Article I, Sect. VIII, Para. 18.

23 As a matter of precision, the Necessary and Proper Clause does not have free-standing substance. It merely provides a mechanism for implementing the enumerated powers of paragraphs 1-17 in Article I, Section VIII. I have yet to see any commentary on selective waiver demonstrating that there is anything in those preceding paragraphs relevant to selective waiver and thus triggering the Necessary and Proper Clause, except as based on assertions that the Commerce Clause itself does so.

Cross-Border Issues

The response regarding "nationalizing" the Protections led to further discussion of the fact that even doing so would not actually assure that the selective waiver mechanism actually "worked," specifically in the context of increasing cross-border issues. The written testimony I presented that day included an example of U.S.-Canada inconsistencies. Continuing the discussion beyond national issues, I referenced that and problems arising as between the U.S. and the EU and the further complications of inconsistencies as between the EU member states.

That elicited a comment from the Reporter that I was trying to prove too much. In essence, he commented that if such inconsistencies were fatal then they also eliminated the value of the Protections generally even without reference to selective waiver. The discussion moved quickly from there and I did not have a chance to address that remark. Aside from the fact that it was not particularly germane to the discussion, I hope the members of the Advisory Committee were fully cognizant at that point that I actually was *not* seeking to prove *anything*. I was, instead, merely responding to the inquiry raised by Justice Hurwitz. Indeed, the further discussion by the members of the Advisory Committee demonstrated the issue as between EU states.

There was, however, an important point to be made and the opportunity to do so passed. It is true that cross-border differences as to application of the Protections presents some significant challenges and can result in loss of them. In reality, those challenges arise far less frequently than might otherwise be predicted based on such inconsistencies. There is a very simple reason for that: there is a wealth of knowledge and experience that has grown up over the decades (even centuries) of corporate entities engaged in cross-border operations, providing opportunities to navigate through those inconsistencies. It is possible that similar knowledge and experience could develop over time that would permit similar navigation arising out of application of selective waiver provisions in the U.S. Even if it did, however, the path to that point would be littered with instances in which clients availing themselves of selective waiver had lost the Protections completely, many of them to very damaging impact on the entity itself and to its shareholders. There is simply no avoiding the fact that adoption of selective waiver would initiate a very costly start-up learning curve for clients operating in multiple international jurisdictions.

That was the point being made, not some proof that cross-border issues were somehow unique to selective waiver. Whatever the rest of Proposed Rule 502 may accomplish, section (c) will *not* "provide a predictable, uniform set of standards under which parties can determine the consequences of a disclosure of communications or information covered by [the Protections]."[24] The cross-border arena is just one in which selective waiver will have exactly the reverse effect.

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24 Committee Note, p. 9.

The Paradigm Choices

The written testimony presented by me at the hearing included an example of two employees, the purpose of which was to assess which of them would be more likely to be candid in discussions with counsel to a company. Judge Hinkle expressed some skepticism whether the choices presented were realistically likely to exist. The conversation took a turn away from that to focus on the fact that the continuum of realistic examples was continuing to shift in response to pressure from the Department of Justice for corporate entities to waive the Protections.

The point being made in the written testimony actually is not impacted by that. Wherever the continuum is and wherever it may go in response to those pressures, the question should be equally applicable to any employee, even randomly selected. Whichever employee is selected, the model choice assumes she or he is properly aware of the fact that the Protections are held by the company and not by the employee because the attorney-client relationship exists between that attorney and the company, not between the attorney and the employee. The model further assumes the employee is aware that companies come under substantial pressure from the Department of Justice to waive the Protections once an investigation into corporate conduct is initiated, even by the company itself.

In Scenario A, the employee also knows that the company will lose the Protections if the information included in the communication between that employee and the attorney if the content of it is provided *to any third party*. In Scenario B, of the employee knows that the company can provide such information to the Department of Justice *without losing the Protections as to a third party*. I submit that there *will* be a difference in how an employee would act as between Scenario A and Scenario B. I further submit that the awareness by the employee in Scenario B will, as a general matter, result in *less* candor than would be the case in Scenario A.

While there may be no way to quantify that impact, there should be no need to do so. The issue should be whether there is a reasonable basis to believe that the impact would result. Given the limited credibility of the purported benefit from selective waiver, virtually any negative impact on employee candor would more than fully offset it.

FOLLOW-UP ON ADDITIONAL ISSUES RAISED DURING THE JANUARY 12 HEARING

One of the witnesses appearing at the hearing indicated that he had planned to speak in support of the selective waiver provisions of FRE 502(c). He indicated that, after hearing the presentations preceding his appearance and reading the written presentations available at it, he felt that the provision would be suitable *only* if steps could be taken to be sure that the availability of selective waiver did not serve as justification for government officials to demand waiver much less be a catalyst for doing so. One other witness had previously made a similar point. Both of them acknowledged that they had not considered a specific way to modify the provision to accomplish that, but each suggested one way would be to specify that the provisions of FRE 502(c) would apply *only* where disclosure had been objectively voluntary.

That led to a very enlightening colloquy among the members of the Advisory Committee. One view supported the idea that FRE 502(c) should apply only where disclosure had been voluntary. The other view was that voluntary disclosure was a prototypical waiver and that selective waiver should *not* be permitted in that context. The former focused on what it would take to implement selective waiver in an otherwise neutral environment. The latter focused on continuity in applying general principles of waiver in the absence of justification not to do so.

This byplay illustrates a fundamental flaw with selective waiver. It is only necessary in terms of *preserving* the Protections (to whatever extent it would) where the waiver of them occurs through coerced disclosure. Adoption of selective waive would thus facilitate further coercion, if not provide tacit legitimacy to it. More to the point, disclosure cannot by nature *ever* be fully voluntary if failure to do so results in the very detriment that selective waiver is intended to avoid: a perception by law enforcement (and thus potentially the market) of being less than fully cooperative.

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I hope the foregoing is useful. Again, thank you and the Advisory Committee for undertaking this process and for considering the voice of the bar and public in so doing.

Very truly yours,

/s/

Steven K. Hazen