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January 9, 2006 VIA ELECTRONIC MAIL

The 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 FRE 502: Waiver of Attorney-Client Privilege / Work Product Protections

Dear Chairman Levi,

On behalf of the Association of Corporate Counsel ("ACC")[1], please accept these comments on Proposed FRE 502, concerning protections for organizational entities against third party discovery of attorney-client privilege and work product protected documents and communications.

The business and corporate legal community, including particularly members of the in-house bar whom ACC represents, have an intense interest in this issue: ACC has engaged in advocacy on these issues before Congress,[2] in the courts,[3] at the Justice Department,[4] and before the U.S.

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[1] ACC is the in-house bar association, with more than 21,000 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 protected by the attorney-client privilege and the work product doctrine. ACC members are at work in more than 9,000 corporations in the United States and 64 other countries, including public and private companies, both large and small, as well as in various not-for-profit organizations.

[2] Hearings were held in the House Judiciary Committee's subcommittee on Crime, Terrorism and Homeland Security on March 7, 2006, and in the Senate Judiciary Committee on September 12, 2006. The result of these hearings is the introduction of legislation by Senator Arlen Specter that would prohibit federal entities and agents from considering privilege waiver when determining a company's cooperation. ACC and its coalition partners, joined by the American Bar Association, we instrumental in calling for hearings and supporting the proposal of legislation.

[3] Recently, the 10th Circuit explicitly noted this 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. ACC and the U.S. Chamber of Commerce co-filed an amicus brief in the Qwest matter, arguing that it is

Sentencing Commission[5], as well as in the media. Indeed, ACC's groundbreaking surveys were dispositive in offering the first empirical evidence that privilege erosion is a routine occurrence (see the survey analysis of the "culture of waiver" resulting from the impact of the Thompson Memo in DOJ prosecutions and the Seaboard Report in SEC investigations), and has a negative impact on client counseling and corporate compliance.[6] As a result, ACC also works 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.

Summary of Concerns

While ACC applauds the committee's well-intentioned effort in proposed FRE 502(c) to provide protection to companies that are forced to waive their attorney-client and work product privileges, ACC respectfully submits that this focus is misguided for three reasons: first, because 502(c) is designed to "protect" companies facing a government investigation or proceeding, and so it does not adequately address the disclosure of material that is routinely demanded outside the prosecutorial or courtroom-context; second, because it assumes that the remedy to the problem of inappropriate coercion of corporate disclosures of attorney-client protected confidences is to protect further disclosure to third parties, rather than censuring and prohibiting the original government demand that is inappropriately made; and third, because we fear that any "codification" of selective waiver will perversely increase the number of waiver demands made of companies (since prosecutors and enforcement officials can suggest to companies that their waived disclosures will be protected against future third party discovery requests). Thus, we believe that the "solution" of offering protections for those who've waived addresses the collateral impact of the government's inappropriate waiver practices, but does nothing to encourage the necessary abstention from engaging in the underlying practice in the first place.

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inequitable for a company to be required to waive and then left bereft of the benefits of a carefully negotiated confidentiality agreement that was offered as the incentive to waiver: http://www.acca.com/public/amicus/qwest.pdf.

4 ACC and its coalition partners (and the ABA) have met with DOJ leaders on several occasions. 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.

5 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).

6 ACC's survey results can be found at http://www.acca.com/Surveys/attyclient2.pdf.

Abbreviated nature of our comments

We note that a number of excellent comments have been provided to you for consideration that address these general points and provide extensive background and contextual information; we don't need to reiterate arguments that have already been conveyed, many in a far more eloquent fashion than we could hope to employ. In addition, ACC filed comments with the committee during the last phase of their process in June of 2006, and rather than repeat what we've already submitted, we simply note that the text of our previous submission still reflects our concerns, and is available to you at http://www.acc.com/resource/v7465.

This comment letter, therefore, raises the following four points in summary form:

1. ACC supports proposed rules 502(a) (limiting subject matter waiver), 502(b) (adopting the majority rule on the impact of inadvertent disclosure and facilitating discovery requests that provide claw-back or related options to recover privileged documents inadvertently provided in large samples or productions), and 502(d) and (e) (which define the controlling effect of court orders and party agreements directed to privilege and disclosure). These provisions address critical and pragmatic concerns that arise in complex litigation and are particularly troublesome in the e-discovery process. They offer improved clarity and necessary reform to what can otherwise be an uncertain, inefficient and inequitable path through the jungle of discovery.

2. ACC opposes FRE 502(c) regarding selective waiver because we believe that the government should not be empowered to request or demand waivers in the first place. FRE 502(c) is a remedy designed to address the wrong problem. We do believe there are circumstances in which selective waiver protections may be appropriate, but these are found in far more limited and nuanced situations than those addressed in the proposed rule.

3. ACC is disappointed that the proposed rules do not adequately address important issues of privilege waiver that take place beyond the context of government investigations or courtroom proceedings but that may ultimately find their way into the court process: in this regard, we wish to note to the committee that such waiver issues are often overlooked because they take place in the daily and routine processes of audit and regulatory compliance that many companies, especially those in highly regulated industries, have no choice but to comply with on an ongoing basis.

4. We agree with the analysis and concerns articulated in the comments of a number of other groups submitting their perspectives to you, including comments we've been able to review from Lawyers for Civil Justice (LCJ) and the National Association of Criminal Defense Lawyers' (NACDL). We would particularly note these groups' excellent review of the rise of the "culture of waiver" that we believe exists due to current prosecutorial and enforcement tactic and practices; we also share their concerns regarding the need for this committee to address the applicability of these rules to state court proceedings. Because both NACDL and LCJ have eloquently raised these points and you have them to review, we won't repeat them again, but wish to incorporate support for these arguments by reference.

Is selective waiver ever appropriate?

ACC contends that courts (and not the party who is the adversary to the company asserting its privilege rights) are charged with determining when the privilege or an exception to the privilege rules should be applied to a corporate assertion of confidentiality. Of course the government supports this committee's draft of rules that would recognize the enforceability of the selective waiver agreements they've penned to usurp the court's authority over privilege determinations, thereby offering a carrot to companies whose rights they've already abused; the passage of FRE 502(c) would legitimize their waiver demand practices.

Companies, on the other hand, generally require the remedy of proposed FRE 502(c) in the context of a government investigation or proceeding only after they have already been subjected to an inappropriate abrogation of their rights to assert a valid privilege claim to documents the government is not otherwise entitled to review. While it would be nice if we were in a place where it was possible for us to imagine a company truly voluntarily waiving to the government with the protection of an enforceable confidentiality agreement supporting their decision to disclose, the reality is that there is no such thing as a truly voluntary waiver of privilege in today's highly charged prosecutorial environment.[7] The predominant assumption that waiver in particular is needed in order for a company to be deemed cooperative, and that the disclosure of facts and other non-privileged material will be viewed as somehow insufficient, is precisely the problem we seek to remedy. We agree that there are likely circumstances wherein it is necessary for the government to request waiver against a company's will or interests, but we would contend that the arbiter of whether that waiver should be sought and granted should be an impartial court weighing the merits of both the waiver demand and the company's rights, as well as the law; our justice system does not impart that authority upon the prosecutor.

ACC has, therefore, focused its attention on reversing government policies and practices that tend to coerce waiver in the first place (embodied in such documents as the Holder/Thompson/McNulty Memo, the SEC's Seaboard Report, and similar policies). While we know that companies that have already been caught up in the government's abusive practices regarding privilege waiver would likely enjoy what limited protections they might be able to secure for what's left of their lawyer-client confidences, to enact this proposal on that ground would be extremely short-sighted. We assert that several hundred years of privilege protections aren't "broken" and therefore don't need a 502(c) "fix"; privilege rights in the corporate context

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[7] ACC rejects the notion that without a selective waiver protection, companies that wish to voluntarily provide information to the government will be stymied and frustrated. Indeed, companies that self-report to the government currently do so in a manner that is an acknowledged self-waiver, or in a manner that provides all information necessary to facilitate the government's inquiry without disclosing privileged documents (so no waiver occurs). The latter is the better category, and indeed, if it were possible for us to articulate what kinds of disclosure a company might make that would not require them to offer privileged information but still satisfy everyone's concerns that they'd cooperated fully in addressing their failings, that could be the ideal solution. But of those who do disclose and must include privileged documents in their submissions (since it seems that prosecutors are satisfied with nothing less), most would not describe their disclosures as voluntary, even if offered a selective waiver protection: companies (and the people who make decisions about waiver within them) are worried about both disclosure to third parties *and* disclosure to the government (the possible negative impacts of which are far more immediate and calculable). Again, in this regard, FRE 502(c) provides only a limited remedy, and only after the horses are already out of the barn.

are simply not afforded the protections or respect that they deserve because government waiver requests and the company's coerced acquiescence occur most frequently before the court-supervised process has begun. Passing proposed FRE 502(c) would tacitly condone the injustice of forced privilege waivers and further propagate this practice.

Selective waiver protections may, however, be appropriate in other contexts that this committee and many commentators to this process have not fully addressed, and indeed, may not be best situated to address. Such contexts include those wherein clients in highly regulated industries functionally operate on a routine basis with officials who have the statutory authority to review all corporate documents in real time, 24/7. Last year, legislation was enacted that is illustrative of both this problem and a possible solution to it: Senate Bill 2856 (House Bill 3505) was signed into law by the President in October of 2006 (its formal title is the Financial Services Regulatory Relief Act of 2006). Section 607 of the Act includes a provision that recognizes selective waiver in the context of regulated banks and other financial services organizations that are required by federal law to disclose any information requested by regulators on a routine basis. This legislation, therefore, does not seek to create a government exception to gain access to confidential files they wish to review, but rather protects companies' privileged information produced in compliance with federal law from examination by the larger public (on the presumption that regulators performing that function act in the public's interests). Thus, this legislation offers a selective waiver right, but does so in a manner that actually increases the company's ability to protect privileged documents. Other highly regulated industries that operate under a similar form of government charter and strict regulation will likely wish to consider similar proposals to allow them similar protections in the future. ACC supported this selective waiver provision in the Financial Services Regulatory Relief Act of 2006. And we would argue that in such cases, a legislative solution, rather than a court rule, would likely better address the issue since the remedy seeks to correct or except a problem created by the mandate of a government statute.

Likewise, it is conceivable that selective waiver might make sense in other contexts. Consider, for instance, the audit context. In the post-Enron/Sarbox world, many companies offer accountants close to full-time and full-scale access to documents and files they request. Part of what the auditor in the post-Andersen world expects from corporate clients is access to review any and all "source" material they believe is informative to their review; they suggest this is necessary in order to for them to live up to new PCAOB standards that mandate that auditors must leave no stone unturned as they ensure the integrity of the company's books and processes. While some courts have recognized a "common interest" doctrine for disclosures to auditors, others have stuck with the principle of "a waiver to one is a waiver to all." Perhaps some kind of recognition that the provision of documents required by auditors is not any kind of waiver at all (which could be a discovery or court-based rule solution or a legislative fix), or perhaps some kind of selective waiver process negotiated with the PCAOB can be recognized as enforceable by the courts. After all, auditors are engaged by the company itself to certify the integrity of their books – while they are independent, they shouldn't be seen as adversaries in the same way that a prosecutor investigating an allegation of wrongdoing is – information that is provided to auditors is offered in the interest of the company's health and well-being.

Similarly, for companies in receivership, or operating under the terms of a deferred prosecution agreement (where an outside monitor is appointed by a court to review the company's daily work, including mandated access to privileged documents): perhaps a selective waiver is in everyone's interest in this environment, and ACC would be open to exploring solutions to address these issues for these affected companies.

In spite of this discussion about circumstances in which selective wavier might be appropriate, we would be remiss if we did not close by once again touching base with the committee on the importance and priority we place on attacking the abusive prosecutorial and enforcement policies that erode the privilege in the corporate context and make waivers something that committees like yours feel forced to seek to address. If ACC, working with its coalition partners and the ABA, succeeds in overturning or reversing abusive government waiver tactics, and we can all someday agree that the current culture of waiver no longer exists, then ACC may be able to talk with greater ease and sufficient nuance about court rules that will enable companies that truly wish to volunteer a selective waiver to the government to do so and be protected against future third party disclosure requests. But until such a future wish becomes reality, we cannot support 502(c).

Conclusion

Proposed FRE 502(c) strikes the wrong chord by enabling government prosecutors and enforcement officials to continue to demand privilege waivers, violating corporate clients' rights to confidential counsel. But our concerns with selective waiver are not universal. Indeed, we concede that many companies forced to waive already would benefit from the passage of this rule's proposed relief, even as additional future "targets" would suffer as a result of its passage. After long and hard consideration, ACC stands firm in its commitment that we must remain focused on protection of the privilege rather than codification of a means by which the government can continue to violate its tenets: to support anything less is to diminish the status of the corporate attorney-client privilege to that of a bargaining chip that must be forfeited when demanded by adversaries in a proceeding.

ACC appreciates the opportunity to provide these comments and hopes to be of service to you in your 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
Richard White, CLO of The Auto Club Group and 2007 Chairman of the Board, ACC

Laura Stein, CLO of The Clorox Company, and 2007 Vice-Chairman of the Board, ACC
Alberto Gonzalez-Pita, CLO of Tysons Foods, Inc. and Chairman of the Advocacy Committee of the Board, ACC