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VIA EMAIL AND FEDERAL EXPRESS

Secretary of the Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

Rules_Comments@ao.uscourts.gov

Re: Proposed Federal Rule of Evidence 502
Selective Waiver of Attorney-Client Privilege and Work Product Protection

Ladies and Gentlemen:

We are writing in response to your request of August 10, 2006 for comments on proposed Rule 502 of the Federal Rules of Evidence ("Proposed Rule 502") under consideration by the Judicial Conference's Advisory Committee on Evidence Rules (the "Advisory Committee").

The comments in this letter are provided on behalf of the Corporations Committee (the "Corporations Committee") of the Business Law Section of the State Bar of California (the "Business Law Section"), with authorization from the Executive Committee thereof. The Business Law Section is composed of attorneys regularly engaged in advising business enterprises in California. The Corporations Committee is one of the Business Law Section's standing committees. The members of the Corporations Committee are attorneys who regularly advise California corporations and out-of-state corporations transacting business in California. Our members include both in-house corporate counsel and attorneys representing corporations in private practice, all of whom interact with non-legal employees of corporations during internal investigations, the negotiation of business transactions and routine corporate matters.

We support and applaud the Advisory Committee's efforts to advance most of the provisions of Proposed Rule 502 and the Advisory Committee's objective of reducing the burden, expense and complexity associated with privilege evaluations of documents produced in response to discovery requests. For the reasons set forth below, however, we oppose inclusion of the selective waiver provisions of subsection (c). In our view, Proposed Rule 502(c) (1) will not encourage cooperation with governmental investigations; (2) improperly interferes with the attorney-client relationship; (3) will lead to unintended disputes between government agencies and private corporations; and (4) will not be applied uniformly in all jurisdictions. Consequently, it is our position that Proposed Rule 502(c) will not accomplish the Advisory Committee's objective of reducing the burden and expense of the discovery process.

I. Introduction: Purpose of the Attorney-Client Privilege.

In *Upjohn Co. v. United States*, 449 U.S. 383 (1981), the U. S. Supreme Court explained the purpose and rationale for the attorney-client privilege and its role in our legal system. Noting that the attorney-client privilege is the oldest privilege for confidential communications known to the common law, the Court stated that the purpose of the privilege "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." *Id.* 449 U.S. at 389. The Court recognized that the basis for the privilege is the need, in the interests of justice and its administration, for the assistance of licensed professionals who have knowledge of the law and are skilled in its practice, and that such assistance can be readily obtained only when free from the consequences or the fear of disclosure. The privilege encourages clients to make full disclosure to their attorneys, and therefore enables the attorney to obtain all information pertinent to the client's reasons for seeking representation, so that the attorney can represent the client effectively. The Court acknowledged that complications may arise when the client is a corporation, but reaffirmed that the attorney-client privilege applies equally to corporations and to individuals. *See id.*

II. Proposed Rule 502(c) Will Not Encourage Cooperation in Governmental Investigations.

Based on our experience, Proposed Rule 502(c) will discourage a corporate client's frank discussion of legal issues and will therefore not promote a corporate client's understanding of and compliance with law. Corporate officers' and employees' expectations of confidentiality will be diminished by the knowledge that the corporation may seek to barter the privilege or selectively disclose the content of their communications. Officers and employees will lose a key incentive to be candid with corporate counsel, even in situations where an officer or employee has no risk of personal liability but wishes to protect the corporation's interests. This reticence will only increase in an environment where information disclosed to a governmental agency can

be redistributed by the agency freely "to other governmental agencies or as otherwise authorized or required by law." Prop. Fed. R. Evid. 502(c).

If corporate clients are inhibited from speaking frankly and openly with corporate counsel by the selective waiver rule, the rule will lead to a reduction in both the quantity and the quality of information disclosed to corporate counsel. As a result, counsel will have less information about the matter that was investigated and a lesser understanding of their liability or lack thereof. This lack of understanding will make it more difficult for corporations to determine whether and how to cooperate with a governmental investigation. If a corporation decides to cooperate, it will have less information to provide to the government. The net effect will be to impede rather than accelerate the resolution of the matters under investigation.

Indeed, if the "culture of waiver" becomes pervasive, internal corporate investigations will become largely indistinguishable from governmental investigations. Subjects of internal investigations, knowing that the results of the investigation are sure to be disclosed to the government, will treat the investigation as if it were being done by the government, not corporate counsel. As such, they will be much more likely to insist that they have counsel to represent them and to invoke their right not to answer questions. Internal investigations will therefore become more time consuming, contentious and expensive while producing less information. As a result, corporations may become less inclined to conduct them, or, perhaps, governmental investigators will decide not to wait for the results of internal investigations before filing charges. In any case, it seems certain that the selective waiver regime will not result in governmental investigations being resolved more quickly or easily than they are under current rules.

III. The Proposed Selective Waiver Rule Improperly Interferes With the Attorney-Client Relationship.

To serve the interests of justice, corporate clients need to feel secure in disclosing potentially relevant information to their attorneys, and attorneys need to be able to provide informed, candid and concrete advice to their clients. The Proposed Rule will undermine both of these goals by creating uncertainty as to whether attorney-client communications will remain confidential. Although Proposed Rule 502(c) could apply in a number of contexts, it would have a particularly significant, and deleterious, impact on attorneys attempting to conduct an internal investigation for a corporate client regarding a matter that is an actual or potential subject of a governmental investigation.

Internal investigations are essential for companies to take prompt preventive and remedial actions and to formulate appropriate responses to misconduct. In our experience, an attorney conducting an internal investigation normally wishes to obtain the cooperation of employees (or other agents) of the corporation, who may themselves be potential targets of the governmental investigation. An employee's willingness to cooperate with an internal corporate investigation will be influenced by their belief of the likelihood that the corporation itself will waive the privilege. Under a selective waiver regime, corporations will be motivated to waive

the privilege and disclose the results of any such investigation to the government, in order to be viewed as "cooperative" and to obtain benefits from governmental investigators. In addition, corporations may be motivated to implicate certain employees in wrong-doing in order to avoid sanctions on the corporation itself. In such environment, officers and employees, whether or not they believe that they personally have been involved in any wrongdoing, are likely to be cautious about cooperating with the investigation. Conversely, corporate counsel may feel that it is unethical to press too hard to obtain information from officers and employees unless those individuals are represented by counsel. A selective waiver regime thus creates potential and actual conflicts of interest between attorneys and their corporate clients and impedes the ability of attorneys to obtain useful information from corporate officers and employees.

The possibility of a selective waiver will also influence the form and type of advice that attorneys provide to their clients. In general, on conclusion of an investigation, attorneys like to provide, and corporations like to receive, a clear and candid assessment of the matter under investigation. Among other things, that provides the corporation with a useful tool for designing procedures that will avoid repeated occurrences of the problem and thereby facilitate self-imposed compliance. A selective waiver regime would hinder that frank and open communication. Knowing that there is a strong possibility that the results of the investigation are likely to be provided to a governmental investigator, attorneys may decide that their clients would be best served if their conclusions were more circumspect or oblique, or were provided in oral rather than written form. Such an approach could easily lead to miscommunication or a client's failure to understand fully the gravity of its situation.

The negative impact of selective waiver would be particularly great in contexts where governmental investigators are following the procedures set forth in the U. S. Department of Justice Memorandum, released on December 13, 2006, from Deputy Attorney General McNulty, addressed to Heads of Department Components and United States Attorneys (the "McNulty Memo"). The existence of a selective waiver rule will make it difficult for corporations to argue that they will suffer collateral damage from disclosing the results of a corporate investigation. Moreover, governmental investigators will have a strong arsenal of incentives and punishments available to compel the corporation to disclose those results. In this setting, all participants in an investigation will operate under the assumption that otherwise privileged communications must be disclosed to governmental investigators. Thus, it will be extremely difficult for attorneys to obtain the cooperation of a corporation's employees or to provide informed and candid advice.

It is important to note that even if the privilege waiver component of the McNulty Memo were repudiated, a selective waiver rule would still have a negative impact on attorneys' ability to serve their clients. Even without the McNulty Memo, a corporation may conclude that waiving the privilege with respect to the results of an internal investigation will result in more favorable treatment from a governmental investigator. Because a selective waiver rule will decrease the perceived costs of disclosing the results of an investigation, all parties in the investigation will adjust their behavior to reflect the increased likelihood that the corporation will choose to disclose the information to the government.

IV. Proposed Rule 502(c) Will Lead to Unintended Disputes between Government Agencies and Private Corporations and Undermine the Policy of Furthering Cooperation with Government Entities Animating the Rule

Rather than promote cooperation with government entities, Proposed Rule 502(c) is simply a new privilege, a "government-investigation privilege," with a breadth of scope that will result in greater disputes and confusion within our judicial system. *See In re Qwest Communications Int'l, Inc.*, 450 F3d 1179, 1192 (10th Cir. 2006). As the Third Circuit stated, "selective waiver does not serve the purpose of encouraging full disclosure to one's attorney in order to obtain informed legal assistance," and it merely "extends the privilege beyond its intended purpose." *Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414, 1425 (3d Cir. 1991). In effect, Proposed Rule 502(c) would create an exception to the attorney-client privilege and work-product protections for government agencies. Unfortunately, in our modern system of governmental oversight and enforcement, the exception cannot work and inevitably will lead to confusion and further disputes between private corporations and government entities.

Proposed Rule 502(c) is exceedingly broad in scope. Specifically, Proposed Rule 502(c) applies to "*disclosures of communications or information,*" that would otherwise be inaccessible to a government litigant as attorney-client or work product information. If those communications or information are "made to *a federal public office* or *agency* in the exercise of its *regulatory*, *investigative*, or *enforcement authority*," other non-governmental litigants would be unable to assert that the discloser of the information had lost its ability to claim the information remained protected work product or attorney-client privileged information. Prop. Fed. R. Evid. 502(c) (emphasis added). However, Proposed Rule 502(c) applies to more than just federal enforcement actions or formal investigations by the U.S. Department of Justice or the Securities and Exchange Commission immediately preceding a pending action. Proposed Rule 502(c) applies to information disclosed to any federal public office or agency acting in its official capacity. The result is that any federal government employee, carrying out routine regulatory or investigative fact-finding, is empowered to reach communications made by company employees in the course of day-to-day inspections and interactions with private corporations. The government employee need only tell the line-level employee of a private corporation that the information he or she is seeking would remain protected under Proposed Rule 502(c), and soon, the Proposed Rule (a rule intended to encourage cooperation by protecting private litigants) becomes a powerfully one-sided discovery device in the hands of all government agencies.

As the Sixth Circuit has recognized, there is "no logical terminus" to the classes of persons or entities who would benefit from waiver of the privilege. *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 303 (6th Cir. 2002). For instance, private litigants may have just as great an interest in obtaining privileged information as the government. Private litigants who act as private attorneys general (*e.g.*, in *qui tam* actions or in shareholder derivative lawsuits) arguably have the same public interest as government agencies in discovery of privileged information. It is difficult to understand, as a practical matter, how Proposed Rule 502(c) can justifiably distinguish federal governmental agencies as particularly more deserving of access to otherwise privileged information than other parties.

V. It Is Not Likely a Federal Selective Waiver Rule Would Be Applied Uniformly in All Jurisdictions.

Any effort to establish an effective selective waiver rule would be successful only if the rule is applied uniformly in both federal and state courts. If otherwise protected information is made available to a party in one jurisdiction, but those protections are not upheld in another jurisdiction, a complete waiver of the attorney-client privilege will result. The facial protection of the federal selective waiver rule will prove to be illusory. As stated by the Supreme Court in *Upjohn*, "if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Upjohn Co.*, 449 U.S. 383, 393 (1981).

Uniformity of application of Proposed Rule 502(c) could occur only if the rule effectively preempts all state law on attorney-client privilege. For the reasons set forth below, however, it is highly doubtful that a federal rule of evidence on selective waiver would or even could preempt all inconsistent state law or that all state courts would be required to respect the ostensibly limited scope of a waiver given.

Regulation of Attorney-Client Relationship is Within the States' Police Power. The admission and regulation of attorneys is historically a matter of state law, a matter within the province of the police power traditionally left to the states under the Tenth Amendment of the U. S. Constitution. As the U. S. Supreme Court has recognized, "the states have a compelling interest in the practice of professions within their boundaries, and . . . as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions." *Goldfarb v. Virginia State Bar*, 421 U. S. 773, 792 (1975). *See also Florida Bar v. Went For It, Inc.* 515 U.S. 618 (1995). Like all other states, the state of California extensively regulates the practice of law within its boundaries. *See, e.g.*, Cal. Bus. & Prof. Code §§ 6000 et seq.; Cal. State Bar Rules (including the Rules of Professional Conduct, Rule 1-100 et seq.). California's attorney-client privilege is embodied in detailed provisions of the California Evidence Code. *See* Cal. Evid. Code §§ 950–962. The work product doctrine is found in California Civil Procedure Code Section 2018. Proposed Rule 502(c) therefore intrudes on an area traditionally regulated by the states within the scope of the police power.

Federal Preemption is Subject to Constitutional Limits. In general, the scope of federal preemption of any state law is a matter determined under the Supremacy Clause of the U. S. Constitution, art. VI, cl. 2. Within Constitutional limits, Congress does have authority to preempt state laws, but whether Congress has done so in a particular case is a matter of congressional intent. First, Congress' intent to preempt state law may be found when a federal statute expressly preempts other laws. Second, preemption may be implied under the doctrine of "field preemption" where it is clear from the statute and surrounding circumstances that Congress intended to occupy the field, leaving no room for state regulation. Third, even if

Congress has not entirely displaced state law in a specific area, state law may be preempted under so-called "obstacle preemption" if the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 203-04 (1983) (citations omitted); *Sherwood Partners, Inc. v. Lycos, Inc.*, 394 F.3d 1198 (9th Cir.), cert. denied, 2005 U.S. LEXIS 7186 (2005).

Despite these three avenues for federal preemption, the Supreme Court has always addressed claims of federal preemption starting from the premise that Congress does not intend to supplant state law, especially in fields of traditional state regulation. When a federal law attempts to override state action in an area traditionally occupied by the states, the historic police powers of the states are not to be superseded by federal law unless that is the "clear and manifest purpose of Congress." *California Division of Labor Standards Enforcement v. Dillingham Constr., N.A.*, 519 U.S. 316 (1997); *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995); *Hillsborough Cty. v. Automated Medical Labs., Inc.*, 471 U.S. 707, 713 (1985). California courts are guided by the same principles in evaluating preemption claims. *See Department of Transportation v Superior Court*, 17 Cal. App. 4th 852 (1996).

As a consequence, even if Proposed Rule 502(c) were modified to expressly declare that it preempted conflicting state evidentiary rules, it is uncertain whether a court would find it effective to do so, given the historical role of the states in regulation of all aspects of the attorney-client relationship. Congress has clearly not "occupied the field" of attorney regulation. And, in light of the historic importance of the attorney-client privilege to the administration of justice in our system of government, it cannot be said that the attorney-client privilege "stands as an obstacle" to any Congressional endeavor. There is no case law precedent directly supporting preemption by a federal-level selective waiver rule. It is therefore uncertain whether and how such federal-level rule would be applied in state court cases.

State Laws Conflict; Results are Uncertain. California does not recognize any form of selective or limited waiver of its attorney-client privilege. Proposed Rule 502(c) thus squarely conflicts with California law. California Evidence Code § 912(a) provides that the privilege is "waived with respect to a communication protected by such privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication . . . to anyone" (emphasis supplied). State courts normally follow their own rules of procedure, including their own evidentiary rules. *See generally Rosenthal v. Great Western Fin. Securities Corp.*, 14 Cal. 4th 394, 408-409 (1996). Unless Proposed Rule 502(c) is found to preempt Cal. Evid. Code § 912(a), a total waiver of the privilege will occur in California when information is disclosed under a federal selective waiver rule to a governmental agency, even if the recipient agency agrees to keep the information confidential. *See McKesson HBOC, Inc. v. Superior Court*, 115 Cal. App. 4th 1229, 1236-38 (2004) (corporation's disclosure of documents to SEC and U.S. Attorney subject to confidentiality agreement constituted waiver of the attorney-client privilege with respect to those documents in later civil actions).

It is also possible that a state court and a federal court sitting within the same state would reach different conclusions on the preemption issue. For example, *compare Sherwood Partners, Inc. v. Lycos, Inc.*, 394 F.3d 1198 (9th Cir.), cert. denied, 2005 U.S. LEXIS 7186 (2005) (holding that U.S. Bankruptcy Code § 544(b) preempts Cal. Civ. Proc. Code § 1800), *with Credit Managers Assn. of California v. Countrywide Home Loans, Inc.*, 144 Cal. App. 4th 590 (2006) (holding that U.S. Bankruptcy Code § 544(b) does not preempt Cal. Civ. Proc. Code § 1800). Such an inconsistent outcome would render it impossible for corporate counsel to properly advise their clients concerning the ultimate scope of any purportedly "selective" waiver given.

What does seem certain is that federal and state courts reviewing Proposed Rule 502(c) are likely to reach widely differing conclusions as to its scope and application in particular cases. Because there is little or no precedent directly relevant to the preemption question, a selective waiver rule would spawn a morass of litigation, likely resulting in non-uniform application of the selective waiver rule at the state level.

VI. Selective Waiver Will Not Reduce the Burden or the Expense of the Discovery Process.

Proposed Rule 502(c) will not advance the Advisory Committee's objective of reducing the burden, expense and complexity of the discovery process. The Proposed Rule is likely to create significant confusion and disagreement between and among private litigants, corporate clients, corporate counsel, government agencies and the state and federal courts. In our experience, a rule of this nature requires a practical clarity for consistent application, which we believe this rule lacks. Ultimately, we believe Proposed Rule 502(c) entails uncertainties inherent in the basic concept of selective waiver. Consequently, the rule will increase — not decrease — the need for judicial intervention and resulting litigation costs.

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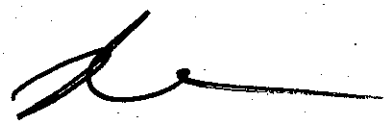
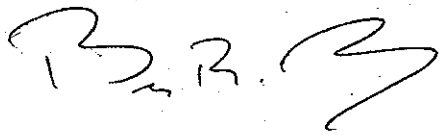
We hope our comments will prove useful to the Advisory Committee in considering appropriate modifications to Proposed Rule 502 before making further recommendations. There is much in proposed Rule 502 that will be useful in preserving the confidentiality of the attorney-client relationship. But the Corporations Committee believes that the Advisory Committee's ultimate goals will be undermined by including the selective waiver provision in Proposed Rule 502(c). In our view, Proposed Rule 502(c) will not protect the attorney-client privilege, but rather will significantly erode it, and will only serve to foster demands for waiver by private litigants as well as government agencies.

Please do not hesitate to contact either of the undersigned if you have any questions on the matters raised in this letter.

Please note that the positions set forth in this letter are only those of the Corporations Committee. As such, they have not been adopted by the Business Law Section or its overall

membership, or by the State Bar's Board of Governors or its overall membership, and are not to be construed as representing the position of the State Bar of California. Membership on the Corporations Committee and in the Business Law Section is voluntary, and funding for their activities, including all legislative activities, is obtained entirely from voluntary sources.





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