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The Honorable Peter G. McCabe
Secretary of the Committee on Rules
of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

Re: Proposed Federal Rule of Evidence 502 – Issues of Implied Waiver

Dear Mr. McCabe:

On behalf of the American Bar Association ("ABA") and its more than 410,000 members, I write to submit the ABA's comments on one aspect of Proposed Federal Rule of Evidence Rule 502 ("FRE 502") currently being considered by the Advisory Committee on Evidence Rules (the "Advisory Committee") but not currently addressed by the current draft of the proposed rule: the threat of "implied waiver."[1] The increasingly important function of internal corporate investigations is being seriously impaired by uncertainty regarding whether a purely factual report to an enforcement authority of the results of an investigation could constitute waiver, as to underlying communications and documents on which such report is based, of the attorney-client privilege or attorney work protect protection (collectively, (the "Protections"). We believe that this issue of implied waiver is just as problematic as others addressed in FRE 502, and that it could properly be remedied there. The purpose of this letter is to provide suggested text for how the problem could be addressed. As Chair of the ABA Task Force on Attorney-Client Privilege (the "Task Force"),[2] I have been authorized to express the ABA's views on these important issues.

The impact of implied waiver on internal investigations has come up in communications between the ABA and the Department of Justice. By letter dated May 2, 2006, the President of the ABA encouraged the Attorney General to revise the Justice Department's corporate cooperation standards outlined in the so-called "Thompson Memorandum"[3] to cover, as one element of cooperation,

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1 The ABA also is submitting separate comments on proposed FRE 502(b) and on Federal Rule of Criminal Procedure 29. In addition, on January 29, 2007, the ABA submitted comments on Rule 17 of the Federal Rules of Criminal Procedure.

2 The activities of the Task Force are regularly reported at its website, which also provides a list of its Members, Liaisons, Advisers, and Staff: http://www.abanet.org/buslaw/attorneyclient/.

3 Memorandum from Larry D. Thompson, Deputy Attorney General, to Heads of Department Components and United States Attorneys on *Principles of Federal Prosecution of Business Organizations* (January 20, 2003), available at http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm.

situations in which a company could provide purely factual information to the Department as long as doing so did not jeopardize the Protections.[4] That proposal was not accepted by the Department when it recently issued the McNulty Memorandum[5] to replace the Thompson Memorandum. We understand that at least one reason the Department of Justice elected not to do so was concern that attorneys would decline to provide such factual information on the basis that doing so might be held to constitute an implied waiver of the Protections with respect to underlying communications or documents. While we do not believe that is an analytically defensible basis for rejecting the proposed revision, it does highlight a point that falls within the scope of efforts regarding FRE 502: minimizing uncertainties with regard to the Protections.[6]

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[4] The rewrite offered by the ABA provided that prosecutors could reasonably consider the following in assessing cooperation:

1. Whether the entity has identified for and provided to attorneys within the Department all relevant data and documents created during and bearing upon the events under investigation other than those entitled to protection under the attorney-client privilege or work product doctrine;
2. Whether the entity has in good faith assisted attorneys within the Department in gaining an understanding of the data, documents and facts relating to, arising from and bearing upon the matter under investigation, in a manner that does not require disclosure of materials protected by the attorney-client privilege or work product doctrine;
3. Whether the entity has identified for attorneys within the Department the individuals with knowledge bearing on the events under investigation;
4. Whether the entity has used its best efforts to make such individuals available to attorneys within the Department for interview or other appropriate investigative steps;
5. Whether the entity has conducted a thorough internal investigation of the matter, as appropriate to the circumstances, reported on the investigation to the Board of Directors or appropriate committee of the Board, or to the appropriate governing body within the entity, and has made the results of the investigation available to attorneys within the Department in a manner that does not result in a waiver of the attorney-client privilege or work product doctrine; and
6. Whether the entity has taken appropriate steps to terminate any improper conduct of which it has knowledge; to discipline or terminate culpable employees; to remediate the effects of any improper conduct; and to ensure that the organization has safeguards in place to prevent and detect a recurrence of the events giving rise to the investigation.

The ABA letter to Attorney General Gonzales dated May 2, 2006 and the attached suggested rewrite of the Thompson Memorandum are available at http://www.abanet.org/poladv/documents/acprivgonz5206.pdf.

[5] Memorandum from Paul J. McNulty, Deputy Attorney General, to Heads of Department Components and United States Attorneys on *Principles of Federal Prosecution of Business Organizations* (December 12, 2006), available at http://www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf. The McNulty Memorandum continues to allow prosecutors to request that companies and other organizations waive their attorney-client and/or work product protections so long as the prosecutors first receive approval from the applicable United States Attorney and, in some cases, additional high-level Departmental approval.

[6] *Compare, e.g., In re Woolworth Corporation Securities Class Action Litigation*, 1996 U.S. Dist. LEXIS 7773 (S.D.N.Y. June 7, 1996) [herein "*Woolworth*"], *with In re Kidder Peabody Securities Litigation*, 168 F.R.D. 459 (S.D.N.Y. 1996) [herein "*Kidder*"].

Proposal

In that context, we urge the Advisory Committee to consider adding the following additional provision to FRE 502:

> (x) EFFECT OF DISCLOSURE OF FACTUAL SUMMARIES OF INTERNAL INVESTIGATIONS.—
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> (1) IN GENERAL.—A covered disclosure shall constitute a waiver as to that document to the extent required under applicable law, but shall not constitute a waiver as to any other communication or document that remains undisclosed to any other party, of the attorney-client privilege or the protection against compelled disclosure of attorney work product, as to any person.
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> (2) COVERED DISCLOSURE.—In this [subsection], the term "covered disclosure" means the provision, whether orally or in writing, of factual information collected or generated in the course of an internal investigation conducted by an organization, or an attorney or other agent for such organization, to any other party. For these purposes, "factual information" shall not include any excerpt or quotation of a specific communication covered by the attorney-client privilege or a paraphrase of any such communication.
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> (3) OTHER PARTY.—In this [subsection], the term "other party" means a person who is not an authorized employee, representative, or agent of the organization providing the factual information.
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> (4) DISCRETION OF DISCLOSING PARTY.—A decision to make a covered disclosure under this subsection, and the content, extent and nature of any covered disclosure, are at the sole discretion of the party doing so and may not be compelled by any person or court based upon the provisions of this subsection. Without limiting the foregoing, no governmental authority may grant a benefit to a party making such disclosure, or withhold a benefit or impose a penalty or sanction based on the failure to do so, in any case where the covered disclosure would itself constitute (with respect to any person) a waiver as to the content thereof of the attorney-client privilege or the protection against compelled disclosure of attorney work product.
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> (5) EFFECT ON STATE LAW.—
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> (A) IN GENERAL.—Except as provided in subparagraph (B), nothing contained in this [subsection] shall be deemed to modify, negate, supersede, or preempt any state law on the attorney-client privilege or the protection against compelled disclosure of attorney work product. These provisions shall, however, be observed in all legal proceedings in which state law is applicable and does not prohibit the application of these provisions.
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> (B) DISCLOSURE TO FEDERAL GOVERNMENT.—In the case of a covered disclosure to the Federal Government in connection with its exercise of regulatory, investigative, or enforcement authority, this [subsection] shall preempt any inconsistent state law on the attorney-client privilege or the protection against compelled disclosure of attorney work product.

We should note that the Task Force began exploring this concept in the context of other potential federal legislative initiatives under consideration. The Task Force may well make additional refinements to this text for those purposes, but we would expect any such changes to be completed expeditiously, and possibly before the Advisory Committee meets in April to discuss comments on

FRE 502. Nonetheless, the Task Force has determined that it would be prudent for the ABA to submit the proposal in its current form within the deadline for public comment, rather than wait to do so in the context of the meeting of the Standing Committee on Rules of Practice and Procedure to be held in June.

Commentary

We offer the following commentary on the proposal, primarily to illustrate the concepts set forth in it, but also for potential use by the Advisory Committee in preparing Commentary on this portion of FRE 502.

Covered disclosure. A covered disclosure can be made to any person, not just federal prosecutors. The disclosures in many of the most prominent implied waiver cases were made not only to the Securities and Exchange Commission,[7] the Internal Revenue Service,[8] Federal Energy Regulatory Commission,[9] and the Commodity Futures Trading Commission,[10] but also in many cases to the general public.[11] They also could be made to state government agencies, to quasi- or nongovernmental entities such as stock exchanges or the National Association of Securities Dealers, to auditors, or even to the news media. A principal goal of this proposal is not to restrict the flexibility of organizations to choose to whom, to what extent, or why to make disclosures. Instead, it is designed (i) to ensure that any possible implied waiver extends *only* to the facts thus provided and not to any underlying communications or documents and, at the same time, (ii) not to provide a basis for demanding disclosure of communications or documents that would otherwise be covered by the Protections.

Factual information. This phrase expressly excludes "any excerpt or quotation of a specific communication covered by the attorney-client privilege or a paraphrase of any such communication." This limitation has several purposes:

- It is meant to codify cases like *Woolworth*[12] and *Natural Gas*[13] that have held disclosure of factual reports not to constitute implied waiver of underlying documents such as witness statements. Those cases, and this limitation, track Supreme Court cases drawing a distinction between facts, the disclosure of which may not waive the attorney-client

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7 *Kidder*, *supra* note 6; *see also In re Steinhardt Partners, L.P.*, 9 F.3d 230 (2d Cir. 1993).

8 *See Upjohn Co. v. United States*, 449 U.S. 383 (1981).

9 *See In re Natural Gas Commodity Litigation*, 2005 U.S. Dist. LEXIS 11950 (S.D.N.Y. June 21, 2005); *aff'd*, 232 F.R.D. 208 (S.D.N.Y. 2005) [herein "*Natural Gas*"].

10 *Id*.

11 *See Woolworth* and *Kidder*, *supra* note 6.

12 *See* note 6, *supra*, 1996 U.S. Dist. LEXIS at *6-*7.

13 *See* note 9, *supra*, 232 F.R.D. at 212-13.

privilege or work product protection, and things like witness statements – or paraphrases of them – that may well be covered by the Protections.[14]

- It provides some limited protection to witnesses. Even though witnesses ought to be receiving "Corporate Miranda" warnings that the company may well waive the privilege regarding anything they say, this limitation would at least discourage disclosure of the substance of specific statements by specific individuals (because such disclosures would fall outside the proposal's protections and possibly trigger implied waiver).

Protected status of covered disclosures. The proposal does not have any effect on whether the disclosure itself is privileged, leaving that to existing law in the relevant jurisdiction. This proposal takes no position on the issue, leaving it up to submitting organizations to decide whether they want to try and maintain some sort of protection (*e.g.*, via a confidentiality agreement) or instead to make the disclosure public (as many in relevant cases did[15]). Very significantly, however, this proposal does ensure that, even if the covered disclosure is itself held to be unprotected, that waiver cannot extend to other communications or documents that were not disclosed to any other party.

Avoidance of a Cooperation "Litmus Test." Many observers have expressed concern that any effort that would allow protection for information disclosed to investigative, regulatory, or enforcement agencies might serve as an incentive for those agencies to demand delivery of information in a covered disclosure and use that as a "litmus test" for assessing "cooperation." Paragraph (4) is intended to militate against that result.

Preemption. The proposal preempts state law in the case of disclosures "to the Federal Government in connection with its exercise of regulatory, investigative, or enforcement authority." In all other disclosures, the proposal would not preempt state law, but would operate in any proceeding in which state law was applicable and would not prohibit its application. This bifurcated approach is modeled on proposed FRE 502(d).

Conclusion

We are aware that the "selective waiver" provision of proposed FRE 502(c) has not been recommended by the Advisory Committee and instead has been submitted without recommendation to elicit public comment. Although the ABA has not taken a position on that proposal, we believe

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[14] *Hickman v. Taylor* drew a distinction between (i) responses to interrogatories, which the Court said were proper to compel and would not be considered work product, even if they were based on interviews of witnesses conducted by counsel, and (ii) counsel's mental impressions or memoranda regarding oral statements made by witnesses, which the Court would not allow to be compelled. *See* 329 U.S. 495, 508-512 (1947). The Court in *Upjohn* quoted from this discussion when it contrasted "the underlying facts by those who communicated with the attorney," which were not privileged, with "oral statements made by witnesses," which it said were "the sort of material the draftsmen of [FRCP 26] had in mind" when they created the special standard protecting work product revealing "mental impressions, conclusions, opinions or legal theories . . . ." *See* 449 U.S. at 395-402.

[15] *See* note 11, *supra*.

that the approach set forth in our implied waiver proposal would achieve many of the same potential benefits as selective waiver but with far less controversy.

We appreciate the opportunity to provide our comments and thank the Advisory Committee for considering our proposal. If there are any questions regarding the ABA's position, please contact me at (404) 527-4650 or R. Larson Frisby of the ABA Governmental Office at (202) 662-1098.

Sincerely,

R. William Ide, III, Chair
ABA Task Force on Attorney-Client Privilege

cc: All Members and Liaisons of the ABA Task Force on Attorney-Client Privilege
R. Larson Frisby, ABA Governmental Affairs Office