06-CR-010
06-EV-043

**Peter Goldberger**
**<peter.goldberger@verizon.net>**

12/27/2006 12:38 PM

To "Peter G. McCabe, Secretary" <rules_comments@ao.uscourts.gov>
cc lsg@lsgoldmanlaw.com, stephanie@nacdl.org, "William J. \"Willie\" Genego" <wgenego@hotmail.com>
bcc

Subject Requests to Testify

History: This message has been replied to.

Dear Mr. McCabe:

The National Association of Criminal Defense Lawyers requests allocations of time to testify concerning the current round of proposed amendments to the Federal Rules of Evidence and the Federal Rules of Criminal Procedure.

In Washington on Friday, January 26, 2007, NACDL would like of present testimony from me, Peter Goldberger, Esq. (of Ardmore, PA), as co-chair of our Committee on Rules of Procedure, concerning the criminal rules. I proposed to focus on the suggested amendments to Rule 29 and the various "Victims' Rights" amendments. We will submit detailed written comments on all the proposals either before that time, or at least by the 2/15 deadline. I assume this meeting will be at the Thurgood Marshall Building. Please confirm this, and let me know the time.

In New York on Monday, January 29, 2007, we would like to offer the testimony of Lawrence S. Goldman, Esq. (of New York City), a former President of NACDL and currently co-chair of our Committee on White Collar Crime. At NACDL's quarterly meeting held in Boston in October, our Board of Directors discussed the proposed amendment to FRE 502 and voted unanimously to oppose it. Please let us know the time and location of the Advisory Committee meeting/ hearing that day. Again, we hope to have our comments in writing at or before that date, but will in any event have them to you before the deadline.

-- Peter Goldberger, Ardmore, PA, co-chair, NACDL Committee on Rules of Procedure

Testimony

# NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Testimony of Lawrence S. Goldman, Esq.
on behalf of
The National Association of Criminal Defense Lawyers

Before the Advisory Committee on Rules of Evidence of the
Judicial Conference of the United States

Hearing on the Proposed Amendments to the Federal Rules of Evidence

January 29, 2007
New York City

---

## I. Introduction

My name is Lawrence S. Goldman. I have practiced criminal defense law on behalf of individuals and corporations here in New York for 35 years, after a five-year stint as a prosecutor. I am a past president of the National Association of Criminal Defense Lawyers and the co-chairman of NACDL's White Collar Committee. Today, I appear on behalf of NACDL and its 13,000 members – the largest criminal defense bar organization in the United States.

NACDL limits its comments today to one specific aspect of proposed Federal Rule of Evidence 502. We believe strongly that 502(c), which provides for what has come to be known as "limited waiver," would seriously weaken citizens' ability to consult with their attorneys in a confidential – and therefore meaningful – manner. As a matter of principle, the privilege must be applied consistently and without favor in order to give sufficient weight to a defendant's constitutional right to counsel in the criminal context, and in order to preserve the adversarial system's search for truth in all contexts.[1] Condoning a rule that allows a potential defendant to breach the confidentiality of privileged material[2] for its own advantage in one

---

[1] *See United States v. Gonzalez-Lopez*, - 548 U.S.--, 126 S. Ct. 2557, 2563 (2006) ("representation by counsel is critical to the ability of the adversarial system to produce just results") (citation omitted).

[2] Throughout this testimony I will use the term "privileged material" to apply to information that is protected by the attorney-client privilege and/or work product. Where a distinction between the two is appropriate it will be made explicit.

setting while preserving it in others poses a direct threat to this centuries-old precept.

Moreover, as a practical matter, proposed FRE 502(c) would not solve, but rather would exacerbate, what most observers and practitioners agree are real and undeniable problems caused by privilege waivers that are made during the course of governmental investigations.[3] Many commenters have already explained how the policies initially propounded by the Department of Justice in the "Holder Memorandum," and reiterated in the "Thompson Memorandum" and most recently as the "McNulty Memorandum,"[4] have created a culture in which business organizations that are under investigation feel that they must waive privilege or perish. This is because a corporation's willingness to waive the confidentiality of its internal investigations, and often all of the underlying interviews and privileged documents that were collected during the investigation, has been and still is considered under DOJ policy to be a factor in deciding whether to indict an organization.[5] And this decision, in turn, can determine whether a business lives or dies long before a jury chooses guilt or innocence. As a result, federal prosecutors have "routinely pressure[d] companies and other organizations to waive their privileges as a condition for receiving cooperation credit ... even before the government has sought to obtain information through techniques such as grand jury subpoenas, warrants, and in appropriate circumstances, compulsion of testimony."[6] One respondent to a recent survey of over 1,200 corporate lawyers succinctly observed, "the government now expects a waiver as [its] inherent right."[7]

Proponents of selective waiver believe that it will alleviate some of these problems by creating a situation in which a corporation can help the government to ferret out corporate wrongdoers without making itself automatically vulnerable to lawsuits from third parties. These proponents believe that this would preserve the incentive for full communication between attorney and client. This position, however, ignores that selective waiver will not operate in a vacuum but must be inserted into a legal environment already tainted by the culture of waiver. Currently, the frequency of prosecutorial "requests" for, and "voluntary"offers of, privilege waivers may be tempered by the government's and organization's recognition of the risks of automatic disclosure to third parties. Selective waiver as a proposed solution to this problem simply misses the point; it purports to alleviate a symptom (third party lawsuits made possible by privilege waiver in government investigations) while leaving the actual problem (frequent and coercive government demands for confidential material) untreated.

---

[3] *See* Coalition to Preserve the Attorney-Client Privilege, *The Decline of the Attorney-Client Privilege in the Corporate Context: Survey Results* at 20 (2006), *available at* http://www.acca.com/Surveys/attyclient2.pdf.

[4] Memorandum from Eric H. Holder, Jr., Deputy Attorney General, on Bringing Criminal Charges Against Corporations to All Component Heads and United States Attorneys (June 16, 1999); Memorandum from Larry D. Thompson, Deputy Attorney General, on Principles of Federal Prosecution of Business Organizations to Heads of Department Components, United States Attorneys (Jan. 20, 2003); Memorandum from Paul J. McNulty, "Principles of Federal Prosecution of Business Organizations," (December 12, 2006), available at http://www.nacdl.org/public.nsf/WhiteCollar/ WCnews061/$FILE/McNulty.pdf

[5] NACDL believes that the policy has not materially changed with the issuance of the McNulty Memorandum.

[6] Letter from American Bar Association to the Honorable Howard Coble, Chairman, Subcommittee on Crime, Terrorism and Homeland Security, Committee on the Judiciary, U.S. House of Representatives, (Mar. 3, 2006) [hereinafter ABA Letter], at 1, *available at* http://www.abanet.org/poladv/lettermarch32006.pdf (identifying attorney-client privilege as "the bedrock of the client's rights to effective counsel and confidentiality in seeking legal advice").

[7] *See supra* note 3.

For the balance of my testimony, I will outline what NACDL views as the three most important, but certainly not exclusive, infirmities with the proposed rule. NACDL's written comments, which we intend to submit in accordance with the Judicial Conference's procedures, will explain our views at greater length.

## II. Proposed F.R.E. 502(c) runs counter to centuries-old reasons for protecting a strong attorney-client privilege.

The Supreme Court has stated time and again that the attorney-client privilege is essential to clients' ability to communicate freely with their lawyers, and as a critical corollary, to their efforts to comply with the law.[8] A potential white collar defendant – be it a Fortune 100 business, a CEO, a manager, or a site foreperson – now faces as many as 10,000 regulatory crimes and over 100 definitions "general intent" in the federal system alone.[9] In this vein, the Supreme Court in *Upjohn* (even 25 years ago, when the environment was less complicated) recognized the importance that the corporate privilege carries for ***every*** employee: An "uncertain" attorney-client privilege "not only makes it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem but also threatens to limit the valuable effort of corporate counsel to ensure their client's compliance with the law. In light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, 'constantly go to lawyers to find out how to obey the law.'"[10]

NACDL agrees that the discovery and punishment of corporate malfeasance is an important government function – in fact, a critically important function in light of our free market system. Creating incentives for corporate participation in this task may be helpful, and even indispensable, to the goal of ensuring greater corporate responsibility. However, as the late Chief Justice Rehnquist observed in *Upjohn* (quoted above), a strong attorney-client privilege is necessary to accomplishing this goal, not contrary to it. And a for the attorney-client privilege to be strong, it must be both predictable and consistent. This is the source of the objection of many bar and business organizations to the policies of DOJ – that by incentivizing organizations to waive the confidentiality of their communications with their lawyers, these policies sow uncertainty as to whether any attorney-client communications will remain confidential into the future. Proposed FRE 502(c) would do nothing to improve the inconsistency that the privilege currently suffers in the corporate context; in fact, the proposed Rule would ***increase*** that unpredictability because it would take away one of the few existing obstacles to asking for, and granting, privilege waivers.[11] Although the rule attempts to introduce more rather than less consistency into the privilege landscape by preventing discovery of disclosed information by third parties, it introduces considerable ***uncertainty*** for corporate employees who have no way of

---

[8] *See Upjohn Co. v. United States*, 449 U.S. 383, 389-93 (1981); *Hickman v. Taylor*, 329 U.S. 495 (1947).
[9] JOHN S. BAKER JR., THE FEDERALIST SOCIETY FOR LAW AND PUBLIC POLICY, MEASURING THE EXPLOSIVE GROWTH OF FEDERAL CRIME LEGISLATION (2004).
[10] *See Upjohn*, at 394.
[11] For detailed findings on this issue see Earl J. Silbert & Demme Doufekias Joannou, *Under Pressure to Catch the Crooks: The Impact of Corporate Privilege Waivers on the Adversarial System*, 43 AM. CRIM. L. REV. 1225 (2006).

predicting whether that they tell their employer's lawyer will get turned over to the government (unless, it would seem the answer is "yes").

Even more directly, "limited waiver" would do violence to one of the bedrock principles of privilege law: A citizen's decision to withhold information by asserting a privilege, or to produce it by waiving that privilege, must not be reducible to a mere stratagem. As it is commonly put, privilege cannot be used as a "sword" in one context and a "shield" in another. This is precisely why only one federal court of appeal has ever recognized limited waiver as a valid permutation of privilege law. Courts – the arbiters of privilege law since before the founding of this Republic – have exacted a price from individuals who wish to take advantage of the judge-made law that prohibits courts from considering otherwise relevant evidence: That "traditional price" is that "a litigant who wishes to assert confidentiality must maintain genuine confidentiality."[12] Running afoul of this principle is letting the camel's nose into the privilege tent, and will produce a weakened privilege that will be difficult to keep upright on all posts.

## III. Proposed F.R.E. 502(c) creates an unlevel playing field for other participants in the legal system.

Let us be clear about one thing: Although by its terms the proposed "limited waiver" rule is not applicable only to organizations, this will be its primary effect. An individual's chief concern in producing information to the government is not whether she has waived privilege as to that information alone, or as to an entire subject matter, or as to any privileged documents that she might have relied on in her proffer. In fact, in the vast majority of cases involving individuals, the potential scope of a privilege waiver is not an issue at all. Rather – to state the obvious – an individual is concerned primarily about whether she can receive Fifth Amendment immunity from prosecution in exchange for her information. It is only an organizational defendant, which incidentally has no Fifth Amendment right under 100-year old case law, that is primarily concerned about privileged material vis-à-vis the government. Privilege is one of the only sticks in its bundle of rights, but more practically, only an organization is likely to be engaged in gathering material from multiple sources pursuant to a privilege (as opposed to a work-product protection). The very real possibility of creating a federal rule of evidence that is applicable only to one type of potential defendant (*i.e.*, an organization that is the subject of a governmental investigation) should alone militate against using the considerable power and resources of the judiciary, and the careful balancing inherent in evidentiary rulemaking, in this imbalanced manner.

The few who have supported the concept of a "limited waiver" for corporate disclosures to the government have recognized that this essentially creates an investigative privilege for organizations.[13] The value in limited waiver, they assert, is that it provides for more efficient law enforcement in the corporate context by removing barriers to the transfer of valuable information (from a private citizen to the government). This view, however, ignores the fact that

---

[12] *Permian Corp. v. United States*, 665 F.2d 1214, 1222 (D.C. Cir. 1981) (rejecting limited waiver in context of SEC investigation).

[13] *See, e.g., In re Columbia/HCA Healthcare Corp. Billing Practices*, 293 F.3d 289, 307 (6th Cir. 2002) (Boggs, J., dissenting).

there are many such barriers – such as, for example, a subpoena issued with the "oversight" of a grand jury – and they are there for a purpose: to maintain the health of the adversarial system of justice.

The vitality of our adversarial system depends on at least two things: first, as described above, a client's ability to consult freely and therefore confidentially with its lawyer; and second, the full provision of accurate and relevant information to our courts, ***subject to certain very limited rules such as the attorney-client privilege.*** Such rules, therefore, must be applied narrowly even while their strength is maintained in the proper contexts. Thus, as the Third Circuit observed, "although a selective waiver rule might increase voluntary cooperation with government investigations, a new privilege must 'promote[] sufficiently important interests to outweigh the need for probative evidence. 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."[14] Other courts have taken this rationale further, and noted that the provision of information from the organization to the government is only marginally more weighty an interest than that involved in many private civil suits. As a result, a protection as important as the attorney-client privilege must avoid "difficult and fretful line drawing" between parties who are entitled to privileged information, and those who are not.[15] NACDL does not take a position as to whether any potential litigants, public or private, have a limited interest in having exclusive access to privileged material. We note, however, that given our adversarial system's interest in the full and reliable discovery of facts, it would seem unwise to enact a federal evidentiary rule barring such discovery in an entire category of cases.

Moreover, this proposed rule directly diminishes the rights of ***individuals*** – even while doing little to strengthen a corporation's attorney-client privilege. The proposed rule necessarily operates in the following manner: Suppose, for example, a corporation provides privileged information, including statements of its employees made to corporate counsel, to the government under FRE 502(c). Pursuant to this and other information subsequently collected by the government, individual employees of the corporation are indicted. When the employees demand material for their defenses pursuant to Fed. R. Crim. P. 16, 18 U.S.C. 3500/Fed.R.Crim.P. 26.2,[16] and the Confrontation Clause, they will run into the same problem as the defendant in *Jencks v.*

---

[14] *Westinghouse Corp. v. Repub. of the Philippines*, 951 F.2d 1414, 1425-26 (3rd Cir. 1991) (citations and quotations omitted).

[15] *See, e.g., In re Columbia/HCA Healthcare Corp.*, 293 F.3d 289 (2002).

[16] FED. R. EVID. 16(a): "Upon a defendant's request, the government must disclose to the defendant the substance of any relevant oral statement made by the defendant, before or after arrest, in response to interrogation by a person the defendant knew was a government agent if the government intends to use the statement at trial." 18 U.S.C. 3500(b): "After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use."

*Unites States*, 353 U.S. 657 (1957). That is, they will be told that they cannot have this information because it is protected by an assertion of privilege. The only difference is that the privilege that would prevent turning over the material to the employees belongs to the corporation pursuant to FRE 502(c), rather than to the government, as it did in *Jencks*. Hopefully, courts would apply *Jencks* and its progeny to force the federal rule to give way to the defendants' rights. Note, however, the result: The "limited waiver" rule would be rendered a nullity and the heretofore privileged material would have to be made available to "all comers." NACDL submits that creating a barrier – although likely a temporary one – to individual's rights under the 5th and 6th Amendments is an unintended, but inevitable and highly improper, result of any "limited waiver" rule.

## IV. A federal rule of "limited waiver" runs afoul of federalism principles

The most important benefit to obtain through proposed FRE 502(c) cannot be accomplished through the Federal Rules of Evidence, since by their terms, these rules cannot be applied to actions in state courts. As already noted when the rule was published for comments, "this Committee is well aware that a privilege rule proposed through the rulemaking process cannot bind state courts."

Even if Congress were to approve a federal rule of selective waiver, it is at least an open argument whether, under principles of federalism, Congress can regulate what are undeniably state evidentiary privileges created by and enforced in state courts. In fact, in its 2005 report on recent assaults to the attorney-client privilege, the ABA expressed concern about limited waiver based on this problem.[17] Laws that have heretofore been offered as precedent for Congress to legislate in this area are, in fact, distinguishable.

The Class Action Fairness Act uses Congress' Commerce Clause power to create federal jurisdiction for certain kinds of interstate class actions; it does not regulate causes of action in state court, much less the rules of evidence (including privilege) applicable there. The Federal Arbitration Act legitimizes arbitration agreements with respect to interstate commercial transactions. Other more limited examples of Congressional power in this arena, such as laws that protect the privileged nature of information that is turned over to the federal government pursuant to statutory obligation, are exercises of Congress' power under the Necessary and Proper Clause, or its Commerce Clause power in the realm of interstate activity. (The Financial Institutions Regulatory Relief Act of 2006, passed late in the last session of the last Congress, is an example of this; it protects the privileged nature of certain information that a bank is required to turn over to federal examiners in all other fora.) Under recent Supreme Court jurisprudence, it is unlikely that, when Congress is acting in the area of criminal enforcement, an implied but unstated – and often completely absent – nexus with interstate commerce would be enough to support legislating in an area of traditional and sacrosanct state power such as attorney-client privilege.[18] In *Morrison*, in which the Supreme Court struck down portions of the Violence Against Women Act, the rationale for Congressional creation of civil liability for perpetrators of domestic violence was the high "cost of crime" for states. This was rejected by the Court for

---

[17] Report of the ABA's Task Force on the Attorney-Client Privilege, 60 BUS. LAW. 1029 (2005).
[18] *See United States v. Morrison*, 529 U.S. 598, 610-11 (2000).

proving too expansive a reach of federal power. The rationale for this limited waiver rule – essentially, the costs of enforcement – comes perilously close to that offered in *Morrison*.

NACDL does not pretend to be able to resolve this complicated question at this juncture. However, we would urge the Judicial Conference against endorsing a change in the rules that would complicate the landscape of privilege, rather than clarify it, because of the federalism challenges (among others) that such a change would inevitably provoke.

*1150 18th St. NW, Suite 950 Washington, DC 20036*
*(202) 872-8600 - Fax (202) 872-8690*
*www.nacdl.org - assist@nacdl.org*