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December 7, 2007

Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Honorable Arlen Specter
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Re: Legislation to Adopt Proposed Federal Rule of Evidence 502

Dear Chairman Leahy and Senator Specter:

On behalf of the American Bar Association and its more than 400,000 members, I write to express our strong support for your draft legislation that adopts proposed Federal Rule of Evidence 502 ("FRE 502") as approved by the Judicial Conference of the United States (the "Judicial Conference").

Recognizing the importance to practitioners of having consistent rules providing for protections against inadvertent waiver of the attorney-client privilege and the work product doctrine, in August 2006 the ABA adopted policy sponsored by our Section of Litigation to articulate consistent principles on these subjects. Since that time, the ABA has been actively involved in commenting upon the drafts developed by the Judicial Conference Committee on Rules of Practice and Procedure and its Advisory Committee on Evidence Rules.¹

After considering the ABA's comments regarding the original version of FRE 502(b) on the issue of inadvertent disclosure, the Advisory Committee on Evidence Rules added important refinements that substantially address our concerns. The Advisory

¹ On February 15, 2007, the ABA submitted two separate comment letters to the Committee on Rules of Practice and Procedure of the Judicial Conference regarding consideration by the Advisory Committee on Evidence Rules of proposed Federal Rule of Evidence 502. The first letter addressing proposed FRE 502(b) regarding the issue of "Inadvertent Disclosure" is available at <http://www.abanet.org/buslaw/attorneyclient/materials/079/079.pdf>. The second letter encouraging addition of a new subdivision to proposed FRE 502 that would address issues involving implied waiver during government investigations of organizations is available at <http://www.abanet.org/buslaw/attorneyclient/materials/078/078.pdf>.

December 7, 2007

Page 2

Committee also made other beneficial changes to proposed FRE 502(a) regarding scope of waiver, including expanding its coverage to include not just disclosures “made in a federal proceeding” but also disclosures “to a federal office or agency.” These revisions were approved by the Committee on Rules of Practice and Procedure and the Judicial Conference.

The ABA believes that your proposed draft legislation will greatly improve the practice of law for those facing conflicting rules and therefore urges its speedy introduction and adoption by Congress before adjournment.

Sincerely,

A handwritten signature in cursive script that reads "Denise A. Cardman". The signature is written in black ink and includes a horizontal line at the end.

Denise A. Cardman
Acting Director

cc: Members of the Senate Judiciary Committee