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December 6, 2007

Hon. John Conyers, Jr.  
Chairman  
Committee on the Judiciary  
U.S. House of Representatives  
2426 Rayburn Building  
Washington, DC 20515

Hon. Lamar Smith  
Ranking Member  
Committee on the Judiciary  
U.S. House of Representatives  
2409 Rayburn Building  
Washington, DC 20515

Re: Support for Legislation Adopting Federal Rule of Evidence 502

Dear Representatives Conyers and Smith:

As the Presidents of Lawyers for Civil Justice, DRI, International Association of Defense Counsel and Federation of Defense & Corporate Counsel, we are writing to express our strong support for legislation that will enact into law Federal Rule of Evidence 502. LCJ is a national coalition of corporate and defense counsel supporting civil justice reform. Its membership includes senior corporate counsel from over thirty major American companies and the three major defense bar associations, DRI, the Federation of Defense and Corporate Counsel, and the International Association of Defense Counsel, which collectively represent over 20,000 civil defense trial lawyers in the United States.

Our members commend you for supporting legislation adopting proposed Rule 502 and we look forward to working with you toward its passage and enactment into law. As you well know, Rule 502 is the product of the thorough review and approval process of the United States Judicial Conference for federal rules of evidence, but because it is a Rule governing waiver of an evidentiary privilege, it must be enacted by Congress. The Judicial Conference recommended the Rule and we support it because it will provide significant protection against waiver of the attorney-client privilege and attorney work product immunity and will help reduce the unreasonable costs, excessive burdens, and long delays of pretrial discovery.

Proposed Rule 502 will help limit the skyrocketing costs and delays that result from the need to conduct the exhaustive privilege reviews currently required to

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ensure against waiver of the attorney-client privilege and attorney work product protection. The Rule responds to the needs of both plaintiffs and defendants and is widely supported by judges, lawyers, and litigants. Particularly in modern day litigation where voluminous amounts of electronically stored information have significantly increased the expense and burden of privilege reviews, setting clear standards and guidelines regarding waiver of privilege and attorney work product is essential to reducing the costs of litigation and to achieving the "just, speedy, and inexpensive" resolution of lawsuits mandated by Federal Rule of Civil Procedure 1.

Proposed Rule 502 will provide predictable and consistent standards for determining the consequences of disclosing privileged information in discovery. Current law on the effect of inadvertent production of privileged information is varied and uncertain, but the risks are clear. Under current law, if a single document containing privileged information or work product is produced, the producing party risks waiving the privilege or work product protection not only as to the specific documents produced, but also as to all documents dealing with the same subject matter. The waiver may be found even if the producing party took reasonable steps to avoid disclosure and prompt action to remedy the error; furthermore, the waiver is not limited to the case in which the production occurred but can apply to other cases filed subsequently in state or federal courts. To minimize these risks, litigants must spend huge amounts of time and money to conduct exhaustive pre-production document reviews.

We strongly support legislation enacting Rule 502 into law and join you in working for its early consideration and passage. LCJ, DRI, IADC, FDCC and our national corporate and defense counsel membership experience daily the risks of waiver of attorney-client privilege and work product protection due to the demands of pretrial discovery and the limitations of current law. Legislation enacting Rule 502 is a means to reduce that risk and enhance the effectiveness of the civil justice system.

Respectfully,

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CC: Members, House Committee on the Judiciary