

**Testimony Before the Advisory Committee on Evidence Rules Regarding FRE 502**

**Given by Paul J. Neale<sup>1</sup> on January 29, 2007**

I would like to start by thanking the Advisory Committee on Evidence Rules for granting me the opportunity to testify at this hearing regarding proposed new Federal Rule of Evidence 502.

As one of, if not the only, non-lawyers testifying before the Committee today, I have a unique perspective which will provide you with some practical and empirical insights to consider. My testimony today incorporates the dual roles I assume that are relevant to FRE 502. First, as an executive of a Company, I interact with and seek advice from our General Counsel on a daily basis on matters relating to the operations of our company and our management of potential and pending legal actions. Second, acting as a consultant within my company, Doar Litigation Consulting, I advise corporations and their counsel on assessing and mitigating litigation risk and on the best practices associated with building a cost-effective, defensible discovery plan in response to regulatory actions, civil litigation and white collar criminal matters. In this role, I have consulted on many of the seminal cases that go to the heart of the discussions on FRE 502. For example, I was the testifying expert before Judge Sand in the United States v. Rigas matter on the issue of the government's inadvertent disclosure of privileged work product. I am also

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<sup>1</sup> Mr. Neale is the Executive Vice President of DOAR Litigation Consulting and can be reached at (516) 823-3997 or [pneale@DOAR.com](mailto:pneale@DOAR.com).

currently leading a team of consultants advising the Plaintiffs in the widely reported Hopson v. City of Baltimore matter before Judge Grimm in Maryland, who has incorporated non-waiver and “clawback” provisions in his orders and has spoken extensively about selective waiver. I have also acted as an expert in regulatory proceedings on the issues of the proper preservation, collection, management and production of information with a specific emphasis on electronically stored information.

At the outset, I would like to say that I am highly cognizant of the importance of the issues that Proposed Rule 502 is intended to address and commend the Committee’s efforts in this regard. My testimony today is limited to two sections of 502: first, my comments on Rule 502 (b) on inadvertent disclosure, and second, my comments on Rule 502 (c) regarding selective waiver.

**502(b) inadvertent disclosure**

Let me start with my comments regarding proposed Rule 502 (b) related to inadvertent disclosure. In today’s complex litigation climate, given the sheer volume of information that needs to be addressed, and the methods for doing so, the inadvertent production of privileged material is virtually inevitable. The result has been protracted legal wrangling over what constitutes a waiver between/among ever more sophisticated litigants focusing on the methodology to determine privilege and how the information was produced. I applaud the intent and efforts of the Committee in drafting a rule that is wholly consistent with the case law on this issue. However, I believe that the proposed Rule can be made stronger with a few changes to the language.

First, I am concerned that the rule, as is currently stands, only offers protection for privileged documents that are inadvertently produced in the context of Federal proceedings; the inadvertent production of privileged documents in matters initiated at the state level is not protected. In my experience, litigants are often dealing with both state and federal matters at the same time. In fact, the types of legal matters that are most affected by a rule change meant to reduce the burden and cost of privilege review are those that relate to the types of issues that involve government inquiries at both the state and federal levels and parallel or derivative suits in state and federal courts. Corporations cannot streamline their privilege review processes unless the rule is consistently applied to both Federal and State jurisdictions. Given that one of the main motivations for the proposed rule is to reduce the burden of time, cost and effort of document screening for privilege, I strongly urge the extension of this rule to State jurisdictions as well.

In my opinion, the Committee should also clarify what constitutes “reasonable precautions” to prevent disclosure. Needless to say, what constitutes “reasonableness” and what actions are considered adequate precautions are highly subjective, and have been and will continue to be the focal point of legal battles about privilege waiver. Again, given the Committee’s primary goal of reducing the burdens associated with the traditional document-by-document privilege screening process, the use of technology, like the Inference system which Ms. Kershaw and Mr. Oot just discussed, to address the huge proliferation of discoverable material should be specifically considered by the Committee. The Committee should be aware of and consider how litigants are dealing with document-intensive litigation, and what technologies and methods they are using and may use in the future to facilitate a more streamlined privilege review. When a party uses statistical, analytical and/or linguistic tools in lieu of traditional review methods, would that be considered as taking reasonable precautions? Members of the Committee, as you know, studies

have shown that these analytical software applications are at least as accurate as, if not more accurate than, traditional human review methods. Nevertheless, they too could certainly result in the inadvertent production of privileged material. However, these technologies do allow enormous reductions in time, cost and effort over traditional review, and there is no doubt that the use of such technology is a key component of managing litigation today and is only going to increase in the future. A related issue is whether a company or its counsel that uses a third-party provider to apply these analytical tools or other technology to facilitate privilege review can be deemed to have taken “reasonable precautions”. My firm has been involved in evidentiary proceedings related to the production of privileged information as a result of the reliance by counsel on a third party provider who mistakenly misapplied the production criteria to the system that was being used by the lawyers in their document review efforts. Is that type of reliance reasonable? To reflect these contemporary and vital issues of document production, and to address the inherent ambiguity in the phrase “reasonable precautions”, I recommend that the language be changed to “reasonable methods”, I repeat – reasonable methods, whereby the definition of these methods would include; a) the reliance on qualified third parties and vendors and b) the use of technology.

I also have great concern regarding the “should have known” language in 502(b) and would like to share with the Committee my experience on matters that are relevant to this issue. In our consulting engagements, we typically deal with the very large, complex productions of electronically stored information. Once a privilege and relevancy review is completed and productions are made, it is often the case that the documents that were produced are not reviewed again by the producing party for several months if at all (particularly in government proceedings where you typically sit back and hope the government doesn’t come knocking again). Therefore,

it is oftentimes the case that several months or years has passed or it is not until the receiving party identifies a privileged document that was produced that the producing party knows of the inadvertent production. The key issue here is should they have known and what criteria should be used to determine the standard. To illustrate, I refer to the *Rigas* matter where my firm was retained by the defense. Very shortly after the government's production to the defense, we discovered that the Government had produced material that was obviously privileged. We notified our clients, who in turn immediately notified the Government and the court. We, and our clients, felt that the government had waived their privilege due to the circumstances surrounding the production. There was a protracted briefing period and evidentiary hearing which took months and at a significant cost to both sides, after which the Court did conclude that the Government had taken reasonable precautions to prevent the disclosure and had acted promptly. In this case, the standard of when the Government "should have known" was not discussed and so, the point of intimation by the Defense was judged to be the time at which the holder of privilege knew about the inadvertent disclosure. In conclusion, I ask that the Committee consider clarifying or removing the "should have known" language.

Overall, I support Rule 502 (b), with applicability at the state level and with the suggested language modifications to include reasonable methods and to clarify or remove the "should have known" language.

**502 (c): Selective Waiver**

With regard to 502 (c), I respectfully request that the Committee withdraw the proposed section of the rule. Consistent with my opinion on 502 (b), I believe that the absence of State applicability raises serious concerns. In my consulting experience, I have worked with clients in the investment banking, mutual fund, pharmaceutical and insurance industries who are frequently

the subject of State-led regulatory inquiries. The specter of discovery in derivative lawsuits is a key consideration for these companies and drives their decision-making during the regulatory actions. I would like to offer what I think is a very good example of this issue. My firm is currently involved in the white collar defense of individuals accused of bid-rigging activities in criminal proceedings at the state level which are derivative of state investigations into the insurance industry. During the state investigations, insurance companies, as well as insured companies as third parties, produced massive amounts of information to states' attorneys general who in turn then produced them wholesale to the criminal defendants without any further review or notice to the producing parties from the initial inquiries. Last week, I just so happened to be at a surety conference in San Francisco which was attended by corporate counsel from many of the insurance companies whose information was ultimately produced in the criminal action. I spoke to lawyers from three of the insurance companies and none of them was aware that the information they produced as a result of subpoenas from state regulators was produced in the criminal proceedings. My point being that not only were potentially privileged documents not protected from waiver, the companies were not even given a chance to consider the issue. For such companies, without the comfort and assurance of protection for any privileged documents initially produced to a state regulator, voluntary waiver decisions are extremely risky. However, I recognize the difficulties in extending selective waiver provisions to State jurisdictions, given issues of federalism. But since, as it currently stands, proposed Rule 502 (c) does not provide any comfort to corporations contemplating waiver, and will not achieve the objective of encouraging companies to cooperate with regulatory/governmental agencies, I recommend its withdrawal.

I also believe that selective waiver would cause a significant erosion of attorney-client privilege.

In my own firm, I think it is very critical that all the executives and other employees in the

company can approach the General Counsel for guidance on sensitive matters and engage in candid discussions. I am convinced that “selective waiver” will cast a shadow on proactive compliance initiatives and that employees will be reluctant to engage in full and frank communications with company counsel. Additionally, as a consultant on a wide variety of matters, I am aware of instances where executives in government-led investigations have hit the panic button and destroyed information that they fear may implicate them in any alleged wrongdoing. Given the climate of white collar prosecutions, executive anxieties are already riding very high. It is my opinion this kind of “panic behavior” will only be enhanced with the specter of selective waiver. With the two-pronged effect of deterring candid communications with counsel and enhancing undesirable suppressive behavior, selective waiver will ultimately undermine the larger goal of encouraging corporate compliance and proactively responsible behavior on the part of corporate executives. Therefore, I reiterate my sentiment that paragraph 502 (c) be removed from the rule.