NELSON • LEVINE • de LUCA & HORST
A LIMITED LIABILITY COMPANY
ATTORNEYS AT LAW

Michael R. Nelson
Direct: 610.862.6560
Cell: 215.837.4061
mnelson@nldhlaw.com

PHILADELPHIA CHERRY HILL COLUMBUS NEWARK NEW YORK LONDON

www.nldhlaw.com
Four Sentry Parkway
Suite 300
Blue Bell, PA 19422
Phone: 610.862.6500
Fax: 610.862.6501

December 1, 2006

VIA REGULAR MAIL

Peter G. McCabe, Secretary
Committee on Rules of Practice & Procedure
Of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
One Columbus Circle NE
Washington, DC 20544

06 - EV-011
Testify

Re: Federal Judicial Conference Hearing on Proposed Federal Rule of Evidence 502 – Request to Testify

Dear Mr. McCabe:

I would like to request the opportunity to testify before the Federal Judicial Committee at the public hearing on the proposed Federal Rule of Evidence 502 on January 29, 2007 in New York, New York. If my request is approved, I would appreciate receiving a confirmation of the location and time for my testimony.

Thank you for this opportunity.

Very truly yours,

NELSON LEVINE de LUCA & HORST, LLC

Michael R. Nelson

MRN/mlw

Testimony

NELSON • LEVINE • de LUCA & HORST
A LIMITED LIABILITY COMPANY
ATTORNEYS AT LAW

Michael R. Nelson
Direct: 610.862.6560
Cell: 215.837.4061
mnelson@nldhlaw.com

PHILADELPHIA CHERRY HILL COLUMBUS NEWARK NEW YORK LONDON

www.nldhlaw.com
Four Sentry Parkway
Suite 300
Blue Bell, PA 19422
Phone: 610.862.6500
Fax: 610.862.6501

January 4, 2007

VIA E-MAIL (Rules_Comments@ao.uscourts.gov)
and REGULAR U.S. MAIL

Peter G. McCabe, Secretary of the
Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
One Columbus Circle
Washington, DC 20544

Re: Comments on Proposed Federal Rule of Evidence 502

Dear Mr. McCabe:

Thank you for the opportunity to testify at the January 29, 2007 meeting of the Standing Committee in New York, New York, with regard to proposed Federal Rule of Evidence 502. My comments will focus upon two aspects of the proposed Rule. First, by providing that the inadvertent disclosure of privileged documents will ordinarily not constitute a waiver and placing significant limits upon the concept of "subject matter waiver," the proposed rule effectively addresses the challenges that the growth of electronic discovery has placed upon the ability of litigants to perform a thorough and accurate privilege review. However, the proposed rule would more effectively address this problem if it also extended to state courts, and also contained a number of modifications set forth below. Second, the language of the proposed rule pertaining to the "selective waiver" of documents provided to federal governmental agencies will only serve to encourage the recent tendency of such agencies to demand the production of privileged documents in order to avoid prosecution or enhanced administrative penalties.

As the advent of the computer age has facilitated the creation and storage of vast amounts of electronic data, the volume of potentially discoverable data has increased exponentially in recent years. As an attorney who specializes in the defense of complex litigation, I have first-hand knowledge of the challenges that this growth in discovery creates for attorneys who need to perform thorough and detailed privilege reviews in limited amounts of time. As recognized by the Advisory Committee on Evidence Rules, the risk that the inadvertent production of privileged information will be found to constitute an automatic waiver of privilege may serve to impose grossly disproportionate discovery costs on litigants. *See, e.g., Hopson v. City of Baltimore*, 232 F.R.D. 238, 244 (D. Md. 2005) (noting that "record-by-record pre-production privilege review ... would impose upon parties costs of production that bear no proportionality to what is at stake in the litigation").

Recent amendments to the Federal Rules of Civil Procedure have sought to address this issue in a number of ways. First, Federal Rule of Civil Procedure 26(f) has been amended to

require the initial discovery plan to incorporate the parties' views with regard to "any issues relating to claims of privilege or of protection as trial-preparation material, including -- if the parties agree on a procedure to assert such claims after production -- whether to ask the court to include their agreement in an order." In the Note accompanying this amendment, the Advisory Committee observes that parties may utilize the discovery conference as an opportunity to enter into a "clawback" agreement, in which the parties agree that the inadvertent disclosure of privileged material will not result in a waiver of privilege. The recent amendments also include a new provision codified as Federal Rule of Civil Procedure 26(b)(5)(B), which allows parties that inadvertently produce privileged materials to demand that the materials be returned or sequestered until the court determines whether the materials are protected by the privilege.

These amendments represent a significant and positive development, which may be further forwarded by recommending the enactment of proposed Federal Rule of Evidence 502. In cases where the amount of discoverable data may be disproportionately weighted toward a particular party, the party with the smaller discovery burden may be understandably reluctant to enter into a "clawback" agreement that will not provide it with much benefit. In the absence of such an agreement, the current rules do not prevent courts from determining that the inadvertent production constituted a waiver of privilege.

By providing that the inadvertent disclosure of privileged material in federal litigation or an administrative proceeding will not result in a waiver of privilege so long as "the holder of the privilege or work product protection took reasonable precautions to prevent disclosure and took reasonably prompt ... measures to rectify the error," proposed Rule 502(b) would effectively complete the process undertaken by amendments such as Rule 26(b)(5)(B). In so doing, the proposed rule recognizes that unduly strict approaches to waiver of privilege do not reflect the realities of discovery in the electronic era, while still requiring parties to take reasonable steps to limit (and rectify) the disclosure of privileged documents.

Even when a party fails to take reasonable steps to limit the disclosure of privileged documents (or does some other action to waive privilege), the production of these documents should generally not be found to waive privilege with regard to other documents of the same subject matter. Except in situations where the limited production of privileged documents would mislead or otherwise prejudice the opposing party, a blanket "subject matter" waiver would serve no purpose other than to raise the stakes of inadvertent disclosure. Even if a rule holding that the inadvertent disclosure of privileged documents will not constitute a waiver so long as "reasonable steps" have been taken to protect the privilege, the risk of a blanket "subject matter" waiver may encourage parties to undertake detailed, burdensome and costly reviews of electronic discovery, as even the slight risk that the production process could be deemed "unreasonable" could result in disastrous consequences.

The solution to such a problem is found in the language in proposed Federal Rule of Evidence 502(a) providing that "the waiver by disclosure" of documents protected by the

attorney-client privilege and/or the work product protection "extends to an undisclosed communication or information regarding the same subject matter only if that undisclosed communication ought to in fairness to be considered with the disclosed communication or information." This approach strikes a reasonable balance between the need to ensure that the partial disclosure of privileged documents does not prejudice or otherwise mislead parties, and the risk that the disclosure of a single privileged document could impose unwarranted consequences upon a litigant.

These provisions represent a well-reasoned response to the problems arising from the need to review substantial amounts of electronic data for privileged material. However, the Committee should consider a number of modifications. First, the requirement that a party take "reasonable precautions" to prevent disclosure of privileged material is somewhat vague. The term "reasonable steps" serves to better express the idea that a litigant must implement procedures to limit the disclosure of privileged material. The Committee Note may further explain that the determination of whether "reasonable steps" have been taken should focus upon the volume of material to be reviewed and the time frame in which the review must be performed. The Committee Note should also state that if a party takes reasonable steps to prevent disclosure, the time period to rectify errors should not begin to run until the party discovers (or with reasonable diligence should have discovered) the error.

With regard to "subject matter waiver," the Committee Note should contain language specifying that such a waiver is limited to *intentional* efforts to mislead the opposing party by producing incomplete information. Such an approach would reflect the determination of courts that a litigant should not be permitted to use privilege as a "sword and a shield" to gain a tactical advantage over an opponent. *In re United Mine Workers of Am. Employee Benefit Plans Litig.*, 159 F.R.D. 307, 312 (D.D.C. 1994).

Finally, these provisions should also be applicable to state courts. Clearly, many actions pending in these courts concern complex issues and involve significant amounts of potentially discoverable electronic data. Accordingly, the same challenges that arise from the need to perform extensive privilege reviews exist regardless of whether an action is pending in state or federal courts.

As this Committee is aware, any rules pertaining to privilege must be approved by an act of Congress. 28 U.S.C. § 2074(b). Given the significant impact that the litigation process has upon interstate commerce, Congress clearly has the power to extend the application of this rule to state courts. Extending the scope of the rule is the only way to ensure that it will provide meaningful protections to litigants who have long struggled with the need to review extensive amounts of electronic material for privilege.

In addition to the problems arising from the need to review substantial amounts of electronic data for privileged material, the ability of corporate litigants to protect privileged

materials from disclosure has also been compromised by the recent upswing in federal investigations of corporate practices. As part of these investigations, federal agencies such as the United States Department of Justice and the Securities and Exchange Commission have often requested that corporations voluntarily produce privileged documents. This presents corporations with the "Hobson's choice" of either producing these documents (thereby waiving any applicable privilege) or declining to produce the documents, which may encourage the agency to file an indictment or impose enhanced penalties in the event of a determination of wrongdoing. *See* Colin P. Marks, *Corporate Investigations, Attorney-Client Privilege, and Selective Waiver: Is a Half-Privilege Worth Having at All?*, 30 SEATTLE U. L. REV. 155, 155-56 (Fall 2006). Clearly, the risk that production will result in the waiver of applicable privileges is often the leading factor in a corporation's decision not to produce the requested documents.

Although these problems call out for a solution, the proposed language of Rule 502(c) providing for a "selective waiver" of privilege to governmental agencies will only make the situation worse. By providing that a waiver of privilege with regard to governmental agencies will not extend to non-governmental parties, the "selective waiver" provision will only serve to encourage agencies to continue their efforts to compel the production of privileged documents in support of a federal investigation. Furthermore, the proposed rule provides little actual protection to parties under investigation. First, the protections set forth in the proposed rule do not apply to information provided to state or local agencies. Therefore, the new rule does nothing to limit the ability of these agencies to demand the production of privileged material in response to an investigation. In addition, the provision contains no restrictions on how agencies can use the privileged material. Therefore, these agencies would remain free to introduce the privileged material at trial, provide the material to other agencies, or even share the material with private plaintiffs.

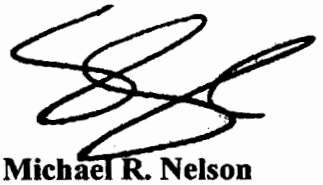
For these reasons, the "selective waiver" rule will accomplish little more than encourage the current practice of compelling parties to produce privileged documents under the threat of prosecution or enhanced administrative penalties. Accordingly, I do not support the enactment of this rule.

Finally, I support proposed Rule 502(d), which provides that an agreed order on disclosure of protected information governs all persons in all state or federal proceedings, and Rule 502(e), which codifies the rule that parties can enter into agreements to limit the effect of waiver. Both of these provisions are necessary to forward the essential goals underlying the proposed rule. However, for the reasons set forth above, the Committee Note to Rule 502(d) should specify that the provision does not authorize "selective waiver" agreements.

I look forward to testifying with regard to the proposed rule on January 29, 2007. Thank you for the opportunity to share my thoughts regarding this important proposal.

Very truly yours,

NELSON LEVINE de LUCA & HORST, LLC



Michael R. Nelson