06-EV-035

"Van Itallie Jr, Taysen [JJCUS]" <TVANITA@CORUS.JNJ.com>

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To "'Rules_Comments@ao.uscourts.gov'" <Rules_Comments@ao.uscourts.gov>

cc

bcc

Subject Hearing on proposed Federal Rule of Evidence 502 on January 29 in New York City - request to testify

History: This message has been replied to.

Dear Sirs:

I am head of litigation for Johnson & Johnson and respectfully request an opportunity to testify before the rules advisory committee at the hearing scheduled in New York City on January 29, 2007 regarding the proposed new Rule of Evidence 502. I appreciate any consideration you can give to my request.

Taysen Van Itallie
Associate General Counsel
Johnson & Johnson
New Brunswick, NJ 08540
tel: 732-524-2075
fax: 732-524-1277

Johnson & Johnson

Testimony

OFFICE OF
GENERAL COUNSEL

ONE JOHNSON & JOHNSON PLAZA
NEW BRUNSWICK, N.J. 08933-7002

January 8, 2007

Peter G. McCabe
Secretary, Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Washington, D.C. 20544

Proposed Federal Rule of Evidence 502

Dear Mr. McCabe:

Thank you for the opportunity to submit these comments to the Advisory Committee regarding proposed new Federal Rule of Evidence 502.

In general I support the new Rule, except the selective waiver portion, which I believe will further erode the attorney client privilege and which I therefore very much oppose. The other portions of the proposed Rule are valuable contributions to a complex area made more demanding by the vast scope of electronically stored information and the new discovery requirements applied to it. I have several thoughts for changes to the Rules in line with their spirit which I set forth below.

First, I support the goal of Rule 502(a) to define the scope of subject matter waivers resulting from voluntary disclosure of attorney-client or work product protected materials. The Comment to Rule 502(a) indicates it concerns voluntary rather than involuntary or inadvertent disclosures, which clearly makes sense. It is hard to conceive of an inadvertent disclosure resulting "in fairness" in a broader waiver, unless the waiving party makes affirmative use of disclosed material.

I also support the effort in proposed Rule 502(b) to bring more clarity to the circumstances under which inadvertent production of privileged material will work a waiver. There is a clear benefit in establishing that disclosure of privileged information in federal proceedings does not operate as a waiver in a state or federal proceeding if the holder of the privilege "took reasonable precautions to prevent disclosure and took reasonably prompt measures, once the holder knew or should have known of the disclosure, to rectify the error."

However, I am concerned that the concept of "reasonable precautions" and the "should have known" time limit are invitations to satellite litigation that could swallow the benefits of the Rule. I would substitute a standard which will be less of an invitation to litigation, such as providing that if the holder of the privilege "took reasonable steps in light of the extent of and schedule for the review" there would be no waiver. I would also

eliminate the "should have known" component of reasonable promptness, limiting the start of the clock to when the holder of the privilege "knew" of the inadvertent disclosure.

As a large enterprise with a full docket of litigation, Johnson & Johnson, like many major companies, has seen huge increases in the cost of reviewing for production the vast stores of electronic data generated and received in the course of typical business activity. As the Committee appreciates, privilege reviews are one of the key drivers of this cost. It is often impracticable under pressures of quick productions to assure comprehensive review at reasonable cost and thus privileged documents inevitably will be produced.

In this context I am concerned that the standard of "reasonable precautions" may appear to set too high a bar in light of the vast scope of electronic data that must be rapidly squeezed through the privilege review screen. I would urge the committee to set a lower threshold of "reasonable steps, in light of the extent of and schedule for the review" to make it clear that the test is more objective, and that it turns on the size of and schedule for the review.

Next, I would urge the committee to withdraw its proposed rule on selective waiver, 502(c). I recognize the Committee is not endorsing the Rule, but I would urge that it not even be advanced. As in house counsel, I have an acute sense of the need to foster free and open dialogue on critical compliance and other legal issues with business leaders. Lack of confidence in the privacy and protectability of those discussions is corrosive. The so-called "culture of waiver" created by the Thompson and Holder Memos whether real or imagined has had an impact on U.S. business. Even the recent McNulty Memorandum seeks to encourage waivers by indicating they will be rewarded, even if more rarely sought.

As a multi-national corporation, we have direct experience with the decision of European Union regulators to disdain any claim of privilege attaching to communications with in-house counsel, indeed to directly target the files of in-house counsel in so-called dawn raids.[1] It is self-evident that such an approach discourages business leaders from seeking advice from in-house counsel. I would argue that any lack of confidence in the sustainability of the privilege – including the invitation to waiver in Rule 502(c) – corrodes its purpose of encouraging early and comprehensive discussion with counsel on compliance and other legal issues. I believe that the selective waiver concept "greases the skids" for government disclosures and thus undermines the willingness to engage in the effective advice-seeking which should be encouraged.

I would also respectfully suggest that the Advisory Committee's interest in statistical or anecdotal evidence respecting the impact of selective waiver on cooperating with the government and the cost of government investigations is misplaced. The issue is not just whether investigative expenses are increased, but

[1] Akzo Nobel Chemicals Ltd. v. Commission of the European Communities, Joined Cases T-1225/03 and T-253/03 R (Court of First Instance, 30 Oct. 2003).

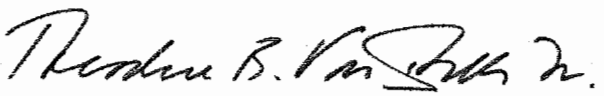
whether the negative impact of selective waiver on the impulse to seek legal advice is too high a price to pay for any reduced government investigative costs. No scheme of enforcement can yield the same degree of legal compliance as encouraging business leaders to seek advice about how to conform business conduct to the law.

Finally, I would also like to express my strong support for proposed Rules 502(d) and (e). I agree with the Committee that confidentiality orders are increasingly important in limiting the costs of privilege review and production. The utility of a confidentiality order in reducing discovery costs is unquestionably diminished if it provides no protection outside the particular litigation in which the order is entered. I also support Rule 502(e), which codifies the rule that parties can enter into agreements to limit the effect of waiver.

The Committee should make clear that these provisions concern inadvertent waivers, or they could provide through the back-door establishment of the selective waiver construct of 502(c) which above I urge the Committee to abandon.

Thank you very much for the opportunity to submit these comments.

Sincerely,



Theodore B. Van Itallie, Jr.
Associate General Counsel
Chief, Litigation Group