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continued from page 1

attorney to support the work of the chapter in our new service area in Virginia. Frost Telegadas esq. will be helping to organize new programming and networking events in Richmond, Norfolk, Charlottesville, and environs.

We've developed a great working relationship with the local law schools, and this year we hope to strengthen those ties even further. Many of our members volunteer their time to meet with law students to talk about careers in-house. We hope to build on these relationships and find opportunities for our members to work with law faculty to create new student programs.

Over the past year, through the visionary leadership of our 25th president Eric Reicin, WMACCA strengthened its relationships with the legal news media, the local bars, and the other

large ACC chapters, to find projects of common interest. All of these activities have raised the profile of the in-house practice and broadened our network.

But we need you! We need your input, your volunteerism, and your engagement to keep an already strong organization focused and delivering high-quality programming and services. We need you to help find new members and retain the ones we have. We need your new ideas to generate programs, initiatives, and services.

This year is the year we **RESOLVE**: Resolve to sharpen our focus; Resolve to improve our engagement; Resolve to enhance your opportunities to participate in WMACCA programs and events; and assuredly Resolve to be both the biggest and the best we can be.

## Save The Dates

Please note these 2007 WMACCA programs and events on your calendar:

**March 29:** Global Issues Forum Symposium, presented by Eversheds LLP and Paul Hastings Janofsky & Walker LLP.

**April 26:** 2007 WMACCA Employment Law Conference, presented by Littler Mendelson, P.C.

**May:** WMACCA's Mini-Executive MBA.

**June:** General Counsel Forum Luncheon Program.

**October 25:** Third Annual Corporate Counsel Awards Reception.

For more information, visit the chapter's website at [www.acc.com/chapters/wmacca.php](http://www.acc.com/chapters/wmacca.php).



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**ACC AMERICA**  
Association of Corporate Counsel  
Washington Metropolitan (WMACCA) Chapter

First Quarter 2007

# FOCUS

## Mary E. Kennard President's Message

### RESOLVE



As our new year begins, it's wise to take stock of our accomplishments and plan for the future.

For the past two years, WMACCA has held the distinction of winning ACC's Large Chapter of the Year award. Our programming is stellar, and the coming year is shaping up to be even better than the last. You can rely on WMACCA programs to cover the issues of current concern to in-house counsel in a way that uniquely reflects our perspective. We have reached out to more in-house counsel and added many new members throughout Virginia, in suburban Maryland, and in the District of Columbia. We have increased our sponsorship rates, and our law firm and company sponsors have reacted favorably to our request for greater support. We have embarked on a number of new initiatives, including outreach to the bars in D.C., Virginia, and Maryland, and an effort to increase the visibility of the in-house bar by providing story ideas and content to trade publications and the business press.

Over the course of the coming year, the WMACCA board will engage in a strategic planning exercise to ensure that we have a collective vision and common agenda for our future, and to ensure that the tremendous changes we have undergone as an organization are consistent with where we want to go. Leadership requires continuity, and as the largest of the ACC

chapters, we have an obligation to our members to ensure high quality programs and opportunities for networking and career advancement.

But a board cannot do it alone, and we want and need feedback from you. Over the coming year, we will be asking for your input into this strategic planning process. We need to know what you want in programming and services. We want to know if you have ideas for strengthening our reputation in the legal community. We will conduct a membership survey this year to seek your feedback on our programming, activities, and goals.

Our goals:

- We want our programs and social events to create greater networking and mentoring opportunities that help to advance our members' professional and personal development, and to ensure that our members are responding to those program offerings.
- We want to be sure that our programs are offering timely information that attracts new members.
- We want to be sure that there are adequate opportunities for members who want to volunteer to be involved in WMACCA.
- We want to be sure that we are using our volunteers' time wisely.
- We want our members-in-transition to find information and opportunities that assist them in their search for new employment.

It is also important that WMACCA members understand the full value of their ACC membership. To that end, I encourage you to dig out your ACC membership number, and bookmark the WMACCA website. There's a lot of really great information on the ACC website. I confess it took me a few years to actually learn to navigate the site, but now I check the site regularly for new information and resources to help me do my work.

We are also looking at new ways to deliver information to our members because we know that it's often difficult to leave the office to attend a luncheon program, and for many the distance is prohibitive. We hope to develop new online resources to bridge the distance and deliver valuable information to our members conveniently.

Our extraordinary executive director, Ilene Reid, is the glue that holds us all together. Her emails and newsletters are a constant reminder that there are many programs, events, and opportunities just waiting for our members. She is truly amazing and I am grateful for her support through the coming year. We have added an additional

continued on page 4

**Proposed FRE 502 ..... 2**

**Special Insert by Saul Ewing LLP:  
Enforcement and Defense of Employee  
Non-Compete, Non-Solicitation, and  
Proprietary Information Agreements**

**Save The Dates ..... 4**

## Proposed FRE 502: What You Should Know About the Selective Waiver Provisions

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ACC recently filed comments with the Standing Committee on Rules of Practice and Procedure Judicial Conference of the United States, on proposed Federal Rules of Evidence (FRE) 502, concerning protections for organizational entities against third party discovery of attorney-client privilege and work product protected documents and communications. Much of what is contained in the proposed rules is laudable in that it tries to create necessary protections and establish more concrete expectations regarding large or e-discovery document production issues that implicate waiver of privilege. Thus, ACC supports proposed rules 502(a) (limiting subject matter waiver), 502(b) (adopting the majority rule on the impact of inadvertent disclosure and facilitating discovery requests that provide claw-back or related options to recover privileged documents inadvertently provided in large samples or productions), and 502(d) and (e) (which define the controlling effect of court orders and party agreements directed to privilege and disclosure). These provisions address critical and pragmatic concerns that arise in complex litigation and are particularly troublesome in the e-discovery process. They offer improved clarity and necessary reform to what can otherwise be an uncertain, inefficient and inequitable path through the jungle of discovery.

This article focuses its attention on discussion of the most controversial provision in the proposed rules – FRE 502(c), which would create a presumption of enforceability for confidentiality agreements penned by companies and the government's investigators when the company has agreed to turn over privileged information as part of a government proceeding (AKA: a selective waiver). Selective waivers are offered as a means of limiting the distribution of privileged material to the government entity that wants to review it as part of a proceeding, so that further or future re-production or distribution to third parties, such as plaintiffs' counsel, can be precluded. The point is that most Circuits have held that privileged material provided to the government is waived, and thus, future requests for its production by other parties cannot be denied based on privilege assertions.

[Below are cites to URLs where you can read ACC's comments, the Federal Court's proposed rules, other commentary file with the Court's Committees, and so on.]

### Why isn't ACC the first to jump on board to support 502(c)?

So you say, "Great! Selective waivers will protect companies from plaintiff's suits! You're all over it, ACC, right?" After all, FRE 502(c) would offer much needed relief to companies that have been forced into a full "open kimono" posture with the government. Well, the answer lies in that statement: we should first address the coercion of companies into a position where waiver of privilege is the only option – it's not right and it's not the law, and the prosecutorial and enforcement community have got folks out there believing that they have a right (rather than simply a leveraged position) to demand waiver of companies when they need it. Newsflash: they don't. They have coercive strength, but only a court can technically override your client's right to assert privilege by finding it doesn't apply, was waived, or is excepted (some kind of established doctrine, such as the crime-fraud exceptions). To support a selective waiver "solution" in 502(c) before the underlying problem of government demanding waiver in the first place is resolved, will most likely simply cement such prosecutorial abuses for all time.

502(c) has other less obvious flaws. First, the rules exceptions are designed to protect companies facing a government investigation or proceeding, and so it does not adequately address the disclosure of material that is routinely demanded outside the prosecutorial or courtroom-context. If you are asked to waive material in a situation outside a formal proceeding (before charges are filed, or in the audit context, or in the context of an ongoing regulatory (not adversarial) relationship with someone from an agency, etc., what you waive to that other party can't be protected by a limited waiver agreement with the government. You can pen the agreement, but the circuits will be likely (if the agreement is challenged) to deem it unenforceable and a waiver.

Second, there remain concerns (no fault of the federal courts) that 502(c) will not offer any firm assurances of how selective waivers will or won't be honored in the state court context. There are lots of arguments over what should happen, but I'd be lying if I told you that you should

feel secure that a selective waiver agreement penned in a federal investigatory context that is now in controversy in a state court matter will be honored by the state court judge.

Third, ACC fears that "codification" of selective waiver rights will perversely increase the number of waiver demands made of companies. With this carrot or protective tool in their kit, prosecutors and enforcement officials can and will suggest to companies that their waived disclosures will be protected against future third party discovery requests, and thus there's no rational reason why an innocent and cooperative company would refuse the request or suggestion that waiver would be welcomed. Obviously, most in-house counsel are most worried about the chill on their client communications if they can't keep the government out of their conversations on the most sensitive issues.

Finally, an overarching concern is our dis-appointment that the proposed rules do not adequately address important issues of privilege waiver that take place beyond the context of government investigations or courtroom proceedings but that may ultimately find their way into the court process: such waiver issues are often overlooked because they take place in the daily and routine processes of audit and regulatory compliance that many companies, especially those in highly regulated industries, have no choice but to comply with on an ongoing basis.

And you should be aware that the timeline for the Courts' FRE 502 approval process (which involves hearings, Congressional approvals and so on) is such that even if these provisions are passed, they won't be effective for a couple of years.

### Is selective waiver ever appropriate?

Companies need the remedy of proposed FRE 502(c) in the context of a government investigation or proceeding only after they have already been subjected to an inappropriate abrogation of their rights to assert a valid privilege claim to documents the government is not otherwise entitled to review. While it would be nice if we were in a place where it was possible for us to imagine a company truly voluntarily waiving to the government with the protection of an enforceable confidentiality agreement supporting their decision to disclose, the reality is that there is no such

thing as a truly voluntary waiver of privilege in today's highly charged prosecutorial environment. The predominant assumption that waiver in particular is needed in order for a company to be deemed cooperative, and that the full disclosure of facts and other non-privileged material will be viewed as somehow insufficient, is precisely the problem we seek to remedy. We agree that there are likely circumstances wherein it is necessary for the government to request waiver against a company's will or interests, but we would contend that the arbiter of whether that waiver should be sought and granted should be an impartial court weighing the merits of both the waiver demand and the company's rights, as well as the law; our justice system does not impart that authority upon the prosecutor.

Selective waiver protections may, however, be appropriate in other contexts that the proposed rules and many commentators to this process have not fully addressed, and indeed, may not be best situated to address. Such contexts include those wherein clients in highly regulated industries functionally operate on a routine basis with officials who have the statutory authority to review all corporate documents in real time, 24/7. Last year, legislation was enacted that is illustrative of both this problem and a possible solution to it: Senate Bill 2856 (House Bill 3505) was signed into law by the President in October of 2006 (its formal title is the Financial Services Regulatory Relief Act of 2006). Section 607 of the Act includes a provision that recognizes selective waiver in the context of regulated banks and other financial services organizations that are required by federal law to disclose any information requested by regulators on a routine basis.

This legislation, therefore, does not seek to create a government exception to gain access to confidential files they wish to review, but rather protects companies' privileged information produced in compliance with federal law from examination by the larger public (on the presumption that regulators performing that function act in the public's interests). Thus, this legislation offers a selective waiver right, but does so in a manner that actually increases the company's ability to protect privileged documents. Other highly regulated industries that operate under a similar form of government charter and strict regulation will likely wish to consider similar proposals to allow them similar protections in the future. ACC supported this selective waiver provision in the Financial

Services Regulatory Relief Act of 2006. And we would argue that in such cases, a legislative solution, rather than a court rule, would likely better address the issue since the remedy seeks to correct or prevent a problem created by the mandate of a government statute.

Likewise, it is conceivable that selective waiver might make sense in other contexts. Consider, for instance, the audit context. In the post-Enron/Sarbox world, many companies offer accountants close to full-time and full-scale access to documents and files they request. Part of what the auditor in the post-Andersen world expects from corporate clients is access to review any and all "source" material they believe is informative to their review; they suggest this is necessary in order to for them to live up to new PCAOB standards that mandate that auditors must leave no stone unturned as they ensure the integrity of the company's books and processes. While some courts have recognized a "common interest" doctrine for disclosures to auditors, others have stuck with the principle of "a waiver to one is a waiver to all." Perhaps some kind of recognition that the provision of documents required by auditors is not any kind of waiver at all (which could be a discovery or court-based rule solution or a legislative fix), or perhaps some kind of selective waiver process negotiated with the PCAOB can be recognized as enforceable by the courts. After all, auditors are engaged by the company itself to certify the integrity of their books – while they are independent, they shouldn't be seen as adversaries in the same way that a prosecutor investigating an allegation of wrongdoing is – information that is provided to auditors is offered in the interest of the company's health and well-being.

Similarly, for companies in receivership, or operating under the terms of a deferred (or non-) prosecution agreement (where an outside monitor is appointed by a court to review the company's daily work, including mandated access to privileged documents): perhaps a selective waiver is in everyone's interest in this environment, and ACC is open to exploring solutions to address these issues for these affected companies.

If ACC, working with its coalition partners and the ABA, succeeds in overturning or reversing abusive government waiver tactics, and we can all someday agree that the current culture of waiver no longer exists, then ACC may be able to talk with greater ease and sufficient

nance about general court rules that will enable companies that truly wish to volunteer a waiver to the government to negotiate a selective waiver protection against future third party disclosure requests. But until such a future dream becomes reality, we cannot support 502(c). And our focus on selective waiver rights will be limited to contextual issues where our support does not further facilitate the government's coercive and abusive culture of waiver.

### Conclusion

Proposed FRE 502(c) strikes the wrong chord by enabling government prosecutors and enforcement officials to continue to demand privilege waivers, violating corporate clients' rights to confidential counsel. But our concerns with selective waiver are not universal. Indeed, we concede that many companies forced to waive already would benefit from the passage of this rule's proposed relief, even as additional future "targets" would suffer as a result of its passage. After long and hard consideration by the ACC board and with leaders at the bar from the corporate community, ACC stands firm in its commitment that we must remain focused on protection of the privilege rather than codification of a means by which the government can continue to violate its tenets: to support anything less is to diminish the status of the corporate attorney-client privilege to that of a bargaining chip that must be forfeited when demanded by adversaries in a proceeding.

### Resources:

ACC's 502 comments: January of 2007:  
[www.acc.com/public/policy/atyclient/acfre502comments.pdf](http://www.acc.com/public/policy/atyclient/acfre502comments.pdf)

Federal Courts Study Committee FRE proposals and website:  
[www.uscourts.gov/rules/Excerpt\\_EV\\_Report\\_Pub.pdf#page=4](http://www.uscourts.gov/rules/Excerpt_EV_Report_Pub.pdf#page=4)

ACC's supported legislation to fix the waiver issue (The Specter Bill – S 186):  
[www.acc.com/public/atyclientpriv/thompsonmemoleg.pdf](http://www.acc.com/public/atyclientpriv/thompsonmemoleg.pdf)

ACC's Comparison of the McNulty Memo's protections with the Specter Legislation: [www.acc.com/public/atyclientpriv/mcnultychart.pdf](http://www.acc.com/public/atyclientpriv/mcnultychart.pdf)

ACC's Pragmatic Practices in Privilege Protection: [www.acc.com/public/atyclientpriv/pragpract.pdf](http://www.acc.com/public/atyclientpriv/pragpract.pdf)

ACC's Privilege "homepage":  
[www.acc.com/php/cms/index.php?id=84](http://www.acc.com/php/cms/index.php?id=84)

## Enforcement and Defense of Employee Non-Compete, Non-Solicitation, and Proprietary Information Agreements

By Ira M. Shepard  
Saul Ewing LLP

Increased business competition in virtually every sector of our local, national, and international economies has led to a proliferation of employee non-compete, non-solicitation, and proprietary information agreements. These agreements are standard at most large companies in the Washington Metropolitan area. The expansive growth and increased competition within our region's government contracts, high tech, biotech, and financial services industries has fueled litigation over these agreements. All levels of business management, from high-level marketers to lower-level sales and technology personnel, with the ability to take to take business, solicit fellow employees, or compete effectively, have been the subject of this litigation.

The courts in all three of our jurisdictions are amenable to enforcement of non-compete, non-solicitation, and proprietary information agreements. Virginia is probably the nation's most receptive forum for this litigation, as the Virginia Supreme Court has ruled that a violation of an employee non-compete by a former employee and a hiring competitor, in certain circumstances, is subject to the Virginia Business Conspiracy Act and therefore defendants are potentially liable for treble damages and attorneys' fees in addition to injunctive relief. See *Advanced Marine Enterprises v. PRC, Inc.*, 265 Va. 106 (Va. 1998). This is one of the few jurisdictions in our country where such extraordinary relief can be obtained.

As a result of our experience in prosecuting and defending employee non-compete cases, we have put together the following list of the top ten mistakes made by departing employees and hiring competitors. The list can serve as a useful guide for what to look for when one of your employees leaves and goes to a competitor, as well as what not to do when hiring a competitor's employee.

### Top Ten Mistakes Made by Employees Leaving for a Competitor And Employers Hiring a Competitor's Employee

#### 1. Not Knowing, Not Disclosing, and/or Not Inquiring about a Non-Compete.

We have run into cases involving every level of management in which the former employee claims that they were unaware of the binding non-compete, which they had signed as part of an employee

agreement with their former employer. In addition, there are many cases in which former employees may have known of such an agreement and failed to disclose it to their new competitor employer. Employees leaving for new employment, especially at a competitor, should make sure they are aware of the precise terms of applicable non-compete and proprietary agreement provisions, and hiring employers must make appropriate inquiries as part of the recruiting/hiring process. The first time a hiring employer learns about a non-compete should not be from a letter from counsel for the former employer.

#### 2. Failing to Consult with an Attorney Prior to Resignation or Prior to Hiring.

It is rare for a departing employee to consult with counsel prior to resignation in order to analyze the breadth of non-compete and/or proprietary agreement provisions. The majority of hiring managers also make the mistake of waiting until after the employee has been hired to consult counsel on a non-compete. Often this is too late, as the departing employee has made mistakes, some of which could implicate the hiring employer. If attorney/client privilege concerns arise during the hiring process, the prospective employee should be advised to consult with an attorney of his or her own choosing and can be reimbursed for such consultation.

#### 3. Taking Business Records.

Taking business records is a bad idea for many reasons. Doing so may violate the terms of the employee agreement, and, depending on the content of the records, it may also constitute a misappropriation of trade secrets. At a minimum, it may give rise to a claim for conversion of property. In addition, taking business records often angers employers and fuels their suspicions. When a former employer learns that its former employee has emailed information to a home email account, or that a previously full file cabinet has now been pilfered, it raises all sorts of questions. It also raises questions which could implicate the hiring employer.

#### 4. Soliciting Business or Fellow Employees Prior to Resignation.

Even if an employee lacks a non-compete agreement, it is wise to remind departing employees not to begin soliciting businesses until after their departure. Although the law varies among states as to the propriety of an employee giving customers or clients advance notice

of his or her departure, solicitation prior to an employee's departure generally is not permitted. Pre-resignation solicitation may give rise to claims of breach of duty of loyalty, and may serve as an aggravating factor for a judge, who later considers the equities when contemplating injunctive relief. Similar to solicitation of customers prior to resignation or departure, solicitation of fellow employees can be equally problematic. In our experience, the word gets out through the grapevine almost immediately when such employment solicitation occurs. Even if it does not, it will ultimately be discovered in the immediate aftermath of the employee's departure. It adds insult to injury for a former employer to learn that they had been paying a "loyal employee" to recruit for a competitor and, if combined with other problems, is the linchpin for litigation.

**5. Sabotaging Records.**

Some employees mistakenly feel that they can secure an undetectable advantage by altering company records on their way out the door. For example, we have run into cases where a departing employee has altered a telephone number in a computer system by one digit, simply to gain a head start by slowing down the company's ability to contact customers or clients, or deleted key information, assuming that no one will ever find out. With current technological advances, such misconduct is almost always discovered after the fact. Departing employees should be reminded that the gain, if any, secured by sabotaging records is far outweighed by the pain that may follow when the misconduct is uncovered and leads to a potential injunction and/or claim for damages.

**6. Failing to Require Exit Interviews.**

These are essential from the vantage point of the former employer and often are overlooked or handled by the former employer in cursory fashion. If the departing employee falsifies in any way his/her last acts during the exit interview, it can be used effectively when trying to enforce a non-compete. It is also a great platform to go over the departing employee's continuing non-compete and proprietary information obligations. A common mistake made by departing employees is to make up an inaccurate story about where they are going.

**7. Failing to Segregate Non-Public vs. Public Data.**

Departing employees sometimes take information for innocent reasons, unintentionally creating the appearance of an intentional misappropriation of trade secrets or conversion of property. A common example includes employees taking contact data that contains not only personal contact information, but also professional contact information. Other employees remove sales records with the intent of retaining information to enable them to substantiate their entitlement to commissions after they depart. Another common example includes employees taking articles or studies they wrote, simply because the employees feel proud of their work product, not realizing that the employer views the work product as belonging to the company. It is wise to advise that removal of personal information and property should be carefully analyzed to ensure that unwanted or allegedly proprietary or non-public information is not inadvertently taken.

**8. After-Hour Access.**

Employees planning to leave for a competitor often access their offices or computers during odd hours with the intention of preparing for their departure when no one is around. After-hour access can be detected by security systems, and in some cases can be recorded by computer systems. If such access deviates from an employee's normal course of conduct, it may be a sign of the employee's impending resignation. If such after-hours access is not detected until after the employee's resignation, it creates the appearance of impropriety. If coupled with other common mistakes discussed above, the appearance of impropriety grows stronger, and the likelihood of litigation also grows stronger.

**9. Badmouthing the Former Employer.**

Any time an employee leaves to join a competing firm are likely to arise hard feelings. Nothing compounds these hard feelings like an employee who badmouths the former employer on the way out the door, or even after departure. Departing employees should be reminded that badmouthing the former employer to fellow employees accomplishes little, other than providing the motivation for the former employer to make the transition difficult and to embark on possible litigation. Moreover, badmouthing the former employer to customers can backfire, resulting in the loss of otherwise obtainable business. It could, in some circumstances, lead to defamation claims. Departing employees should always be advised to take the high road.

**10. Failing to Work Until the End.**

Understandably, it is hard for a departing employee to be motivated when a new job is on the horizon. In such instances, after providing notice of resignation, employers may limit the departing employee's access to information and customers. A decrease in productivity in the weeks leading up to resignation or departure may tip an employer off, and be a warning sign for employers of impending resignation, or worse yet, may create the appearance that the departing employee was holding off on completing work with the intent to divert such work to the new employer. In such circumstances, the likelihood of litigation increases. A word to the wise: Complete all obligations and responsibilities to the end and advise new recruits that they are often remembered by how they complete their last days at their former employer.

**Conclusion**

Employee non-competes have proliferated in our region and they can be enforced successfully in the Washington Metropolitan region. Counsel should be involved from the beginning, whether it is on the offensive or defensive side. Early planning makes a real difference in guiding the ultimate outcome in either reducing theft of customers or on the other side, reducing the likelihood of adverse litigation.

*Ira M. Shepard is co-managing partner of the Washington, D.C., office of Saul Ewing LLP. He has more than 30 years experience as a labor and employment attorney representing management in numerous industries. He can be reached at IShepard@saul.com. Saul Ewing LLP is a 2007 Emerald Sponsor of WMACCA.*