06 - EV - 006 Testify

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10/20/2006 02:34 PM

To <Rules_Comments@ao.uscourts.gov>
cc <snyderp@gtlaw.com>
bcc
Subject Federal Judicial Conference Rules Hearing on January 29, 2007 in New York

Evidence

Dear Mr. McCabe:

This requests the opportunity to testify at the referenced public hearing. Please advise if you require any additional information. Thank you.

Very truly yours,

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January 23, 2007

VIA EMAIL

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

Re: Comments on Proposed Fed. R. Evid. 502

Dear Mr. McCabe:

Per your request, the following summarizes the points that I intend to make when I testify before the Advisory Committee on Monday, January 29, 2007. (An appendix of citations to pertinent cases will be provided at that time.)

My testimony will focus on the need for uniformity between proposed Federal Rule of Evidence 502, which I will endorse, and conflicting state rules of evidence and common law governing the preservation and waiver of the attorney-client privilege. Notably, proposed Fed. R. Evid. 502 is itself an effort to achieve uniformity among the federal courts, which currently apply, to state law-governed issues, the conflicting attorney-client privilege laws of the various states in which the courts are situated.

As a trial lawyer who spends much of his time defending complex litigation and putative class actions brought in state and federal courts throughout the country, I will testify as to the practical problems that the present lack of uniformity on this issue causes. Problems arise, for example, where a particular document is discoverable in a number of actions venued in various state and federal courts. Such cases require parties to implement privilege protections and make strategic privilege-related decisions against a backdrop of different and often conflicting state privilege laws.

The problem is further complicated when documents are produced in a particular case and the potential exists for other litigations to be filed in unknown jurisdictions. In such cases, in addition to mastering the relevant privilege waiver standards from the jurisdiction(s) in which the litigation has already been filed, lawyers must also "prepare for the unknown." They may thus counsel their clients and make document production decisions with the broadest waiver standards in mind, which can skew effective legal representation.

The most significant difference in the privilege waiver laws of the various states involves the inadvertent production of an otherwise privileged document. Depending on the state, any one of three different standards may be applied to determine whether the production can be deemed to constitute a waiver of the privilege. In some states, inadvertent disclosure never waives the privilege. In others, inadvertent disclosure waives the privilege regardless of the care taken to prevent disclosure. In still others, inadvertent disclosure waives the privilege depending on the circumstances. Many state courts in the latter category apply a variety of intricate, multi-factor balancing tests that turn on a number of objective and subjective criteria designed primarily to measure the degree of care taken to prevent disclosure of the privileged matter and the promptness of the measures taken to retrieve the document.

State law also differs as to the scope of a waiver. In some states, the privilege is waived only as to the document inadvertently produced. In other states, inadvertent disclosure gives rise to a full-blown "subject matter waiver" that requires the production of all otherwise privileged documents and testimony relating to the same subject as the disclosed document.

Another important area of difference involves the question of whether the disclosure to a government agency or entity or independent auditor of an otherwise privileged document waives the privilege for litigation purposes. Some states find such production an absolute waiver of the privilege, while others find only a selective waiver, provided the party communicated the document to the government or auditor with the specific intent to preserve the privilege (e.g., by entering into a confidentiality agreement).

This lack of uniformity can result in critical documents relevant to liability and damages (or perhaps large categories of documents comprising an entire area of discovery) being unavailable to a requesting party in one court while being fully available to that party in another court. Conflicting outcomes may thus occur in otherwise identical matters. Such a result is obviously both inequitable and undesirable.

The problem becomes even more serious when the competing suits are class actions (pending in either state or federal court) arising out of the same transactions or with respect to the same consumer products or services. The potential difference in outcome in those cases often affects, not only the named plaintiff, but untold numbers of similarly-situated absent class members in the pending or future class action suit.

Interestingly, lack of uniformity was the impetus for the Class Action Fairness Act of 2005 ("CAFA"), which was enacted to address that issue as it related to the treatment of putative national class actions pending in multiple state courts. CAFA is designed to permit otherwise non-diverse state cases to be removed and consolidated before a single federal court. CAFA has not entirely solved the "uniformity" problem, however, as clever plaintiffs' lawyers have found that some competing class actions can be kept in state court through, among other things, artful pleading or by limiting the geographic scope or desired damages in their cases. Other class actions, having been dismissed in one court, have been re-filed in altered form in another court (for example, with different class representatives or new factual or legal allegations).

In order to ensure the same does not happen with respect to the privilege waiver issue, I intend to recommend, not only that proposed Fed. R. Evid. 502 be adopted to bring uniformity to the federal courts, but that Congress act, either through the Rules Enabling Act, or by statute through the exercise of its Article I Commerce Clause powers, to bind the state courts to the same rule.

I am grateful to the Advisory Committee for the opportunity to present my comments.

Sincerely yours,

PHILIP R. SELLINGER