Testify

Administrative Office of the U.S. Courts 06 - EV - 008

Mr. McCabe,

I respectfully request to testify at the public hearing on the proposed amendments to the Federal Rules of Evidence, scheduled to take place in Phoenix, Arizona on January 12, 2007.

Please send me the details of the time and place of the hearing, if I am permitted to speak.

Sincerely,

George L. Paul
Lewis and Roca, LLP
40 N. Central Avenue
Phoenix, Arizona 85004
602-262-5326 office
602-734-3858 fax
602-463-5300 mobile
gpaul@lrlaw.com e-mail

LEWIS AND ROCA LLP LAWYERS

George L. Paul
40 North Central Avenue
Phoenix, Arizona 85004-4429

Direct Dial: (602) 262-5326
Direct Fax: (602) 734-3857
GPaul@LRLaw.com
Admitted in: Arizona

Our File Number: 80000-80140

February 12, 2007

06 - EV-008

Mr. Peter G. McCabe
Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
1 Columbus Circle Northeast
Washington, D.C. 20544

Re: Proposed Federal Rule of Evidence 502

Dear Mr. McCabe:

This letter is in response to the request for public comments on proposed Federal Rule of Evidence 502, and supplements my testimony in Phoenix of January 12, 2007.

The "Floor vs. Harbor" Conundrum. Risk of Unintended Consequences of *Expressio Unius est Exclusio Alterius*

My concern with 502's current wording is that any proposal resulting from the Committee's hard work will be considered a "floor" for what is necessary to avoid waiver, and not instead, a "safe harbor." With the last 12 words of 502(d), litigants are held hostage to the need to reach agreements if they want protection from third parties in future state court actions.

Courts interpreting the proposed new rule of decision should be instructed in commentary that they can still find there was no waiver vis-à-vis third parties, even if there was no agreement involving the producing party. Agreements incorporated into court order should be a safe harbor, and not a minimum requirement for third party protection under 502(d).

Hypothetical

What if a litigant without any electronically stored information requests and is entitled to huge amounts of ESI from an opposing party? What if she refuses to enter into an agreement regarding inadvertent waiver?

What if the producing party is not negligent or unreasonable, but inadvertently produces attorney client privileged material, or work product, in a court action governed by the 502 norm?

My fear is that any court interpreting 502 will feel obligated – as a result of legislative substantive law – to hold that if there is no court-endorsed agreement, there is no protection from inadvertent production. In other words, an unintended consequence of these efforts may be to cut off the appropriate "common law function" of courts and actually make inadvertent production more lethal, and punitive in result, than it was previously. This would be an outcome of the tenet of statutory construction known as *expressio unius est exlusio alterius.* See generally, § 47.23, SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION (Sixth ed., Singer ed. 2000). "When what is expressed in a statute is creative, and not in a proceeding according to the course of the common law, it is exclusive, and the power exists only to the extent plainly granted. Where a statute creates and regulates, and prescribes the mode and names the parties granted right to invoke its provisions, that mode must be followed and none other, and such parties only may act." *Foxgord v. Hischemoeller*, 820 F.2d 1030 (9th Cir. 1987). *See also* § 47.23 SUTHERLAND, *supra.*

Leave Room for the "Common Law Function"

The policy goals all agree are the objective of this effort will likely be served if there is an agreement, but may well be severely frustrated in the absence of agreement – unless the Committee is explicit that under some facts there might properly be no waiver of privilege to third parties, even in the absence of an agreement with an opponent.

My testimony on January 12 attempted to emphasize that there may well be 10 times as much information resident in enterprises just a few years from now than there is today. There may be 100 times more information within a short time. Litigants will likely need to resort to artificial search and retrieval technologies in order to accomplish privilege reviews, as a matter of economic necessity. They may need to do this in the absence of agreements.

For these reasons the "common law function" deciding what is "reasonable" and "appropriate" concerning privilege reviews, and adjudicating the discoverability by third parties or possibility of waiver, should not be unwittingly killed off by a legislative effort.

Sincerely,

George L. Paul

GLP/edl