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12/12/2006 03:15 PM

To <Rules_Comments@ao.uscourts.gov>
cc <palong@lw-d.com>
bcc
Subject Request to Appear and Tesrify

Peter G. McCabe
Secretary
Committee on Rules of Practice of the
Judicial Conference of the United States

06 - EV - 021

Testify

Dear Mr. McCabe:

I hereby request an opportunity to appear and testify at the hearings which I understand the Judicial Conference will be conducting on January 12 in Phoenix concerning the proposed new Rule 502 of the Federal Rules of Evidence. I am a member of the Arizona Association of Defense Counsel and the President-Elect of the State Bar of Arizona.

I would appreciate if if you could confirm whether I will be afforded such an opportunity and, if so, at what time. I would also appreciate being advised where the hearings are to be conducted.

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06-EV-021

Testimony

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December 19, 2006

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

Dear Mr. McCabe:

Pursuant to the request set forth in the letter of December 13, which was not received in my office until yesterday for some reason, I enclose herewith a copy of my written statement concerning Proposed Rule 502 of the Federal Rules of Evidence.

I look forward to seeing you on January 12.

Very truly yours,

Snell & Wilmer

Daniel J. McAuliffe

DJM:mjt
Enclosure

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WRITTEN STATEMENT OF
DANIEL J. McAULIFFE

At the outset, let me state that the organization on whose behalf I will be appearing, the State Bar of Arizona, commends the Advisory Committee on Evidence Rules for coming forward with a proposed solution for what has become a vexing and costly problem in the conduct of civil litigation in the federal courts - the efforts required to protect attorney-client and work product privileges in the course of honoring discovery obligations in the production of requested and relevant documents.

The advent of a new emphasis on the conduct of electronic discovery has expanded exponentially the universe of documents that business parties retain that may have relevance to disputes that find themselves in the federal courts. While electronic tools can be, and have been, developed to facilitate the identification and gathering of documents that may be responsive to a discovery request and that are maintained only in electronic format, there does not appear to be any similar substitute for an individual review of such documents prior to their production to determine whether they are or are not subject to a privilege, and primarily either the attorney-client or work product privilege, that shields them from discovery.

The burdens which such exhaustive document reviews impose on commercial parties, and on the litigation process as well, are substantial. Armies of lawyers are gathered solely for the purpose of conducting such document reviews, all of whom have

hourly rates which far exceed the minimum wage. Personnel from the party must also be involved in the effort to insure accuracy and completeness, and this represents still an additional cost. Perhaps more importantly, it sometimes takes weeks or months, rather than the thirty (30) days euphemistically contemplated by Rule 34(b), Fed.R.Civ.P., for production of responsive material to take place, thereby unduly delaying the resolution of commercial disputes and contributing to the crowding of already overburdened federal dockets.

Corporate parties do not engage in such expensive exercises for the sheer joy of it. To the contrary, these exercises are driven almost entirely by a concern that the production of an unrelated privileged document, or the failure to locate and withhold one, may lead to a wholesale waiver of the corporation's attorney-client or work product privileges. The May 15, 2006 Report of the Advisory Committee has adequately described the failure of the development of the common law of privilege and privilege waiver to provide corporate parties with sufficient assurance that such a waiver will not be found, and there is no need to elaborate on that here. Proposed new Rule 502 of the Federal Rules of Evidence represents a necessary first step toward addressing what is becoming an increasingly serious problem.

That having been said, we believe that there are still some improvements that can be made to what has been proposed. Specifically, we believe the relationship between subparts (a) and (b) of the proposed Rule need to be clarified. Proposed Rule 502(b),

which deals with inadvertent disclosure of privileged materials, is essential to give effect to the "claw back" provisions of new Rule 26(b)(5)(B), Fed.R.Civ.P. That Rule permits a party which has produced in discovery materials that may be subject to a claim of privilege to provide the party who received it with notice of the claim, and that notice requires the notified party to return or sequester the materials until the privilege claim is resolved.

The Rule does not specifically preclude claims by the receiving party that the privilege has already been waived by the producing party; nor does it insulate the producing party from claims by third parties that the privilege has been waived for all purposes. Rule 502(b) will hopefully accomplish that. Neither it nor the accompanying Committee Note, however, explain what status is to be accorded to privileged materials in the situation where the producing party claims the production was inadvertent, but where a court subsequently determines that party did not take "reasonable precautions to prevent disclosure."

We submit that such materials should be treated as having been voluntarily produced under subpart (a) which would not result in a subject matter waiver of the privilege, and that was what the Rule intended. Neither the Rule nor the Comment, however, address that precise issue. If a determination that a party did not take what are unspecified "reasonable precautions" to avoid inadvertent disclosure is to result in the wholesale waiver of the privilege in question, then little will be accomplished by subpart

(b). Corporate parties will continue to spend exorbitant amounts, and engage in extraordinary efforts, to avoid inadvertent disclosures of privileged materials, for fear that a subsequent determination that it did not take "reasonable precautions" will result in a blanket privilege waiver.

We are of mixed minds about proposed subpart (c), the "selective waiver" provision, which the Committee has included as a subject for public comment but has not yet determined should be included in any Rule submitted to Congress. We recognize that privileges do under certain circumstances operate to shield from a fact finder highly relevant information and, in that regard, can be viewed as impeding the search for the truth. It would certainly facilitate the conduct of federal regulatory investigations if those subject to them could provide the investigating agency with pertinent materials as to which they would ordinarily claim privilege, without waiving that privilege. It is not uncommon for companies who receive notice of such an investigation to retain counsel to investigate the matter, and the work product of such retained counsel would be a valuable source of information to regulators. The subjects of such investigations would obviously have an incentive to furnish regulators with such information if it were exculpatory in whole or in part. The prospect of waiving the attorney-client privilege entirely by doing so is, however, a significant deterrent. Proposed Rule 502(c) would remove that disincentive, and we believe that would be of benefit.

We have a concern, however, that the adoption of Rule 502(c) would fuel attempts

by regulators to enforce encroachments on the attorney-client privilege. The fact that regulators have in some instances been insisting on corporate waivers of the attorney-client privilege as a condition for favorable treatment has been the subject of much critical commentary. Our concern is that a "selective waiver" provision, if adopted, could simply provide regulators with an incentive to insist on such waivers; it would certainly provide them with an additional argument as to why the subjects of an investigation should agree to such a waiver. We would be in favor of the adoption of a "selective waiver" provision if it could be crafted in a fashion that makes clear that the decision whether or not to engage in a "selective waiver" must remain a wholly voluntary one on the part of the holder of the privilege.

Daniel J. McAuliffe
President-Elect
State Bar of Arizona

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