06-EV-038

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12/27/2006 03:42 PM

To <Rules_Comments@ao.uscourts.gov>
cc
bcc
Subject January 29 Hearing on Proposed Federal Rule of Evidence 502

History: This message has been replied to.

To: Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, DC 20544

Mr. McCabe:

I would like to testify at the public hearing on proposed Federal Rule of Evidence 502 on January 29, 2007 in New York, New York. I will submit written comments on the proposed rule prior to the public hearing.

Please let me know if you would like additional information from me prior to the hearing.

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January 23, 2007

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, DC 20544

RE: Proposed Federal Rule of Evidence 502

Dear Mr. McCabe:

Thank you for the opportunity to present my comments on proposed Federal Rule of Evidence 502. I am a member of Lawyers for Civil Justice (LCJ), and I support the comments submitted by the LCJ regarding the proposed rule. In these comments, I would like to present my views on certain sections of the proposed rule from the perspective of a practicing attorney.

There is no doubt that the costs of privilege review of documents in litigation is growing. In one recent case in which I was involved, my client gathered tens of millions of documents in response to discovery requests and ultimately produced several million pages of documents. Technology was both a blessing and a curse to this process. Software tools allowed my client to review millions of documents, many of which were stored electronically, to determine which were potentially relevant to the litigation. Computer technology also allowed us to review documents on-line and produce them electronically.

Even with the efficiencies that technology provided, however, my client incurred far higher costs for this document review than it would have even a few years ago. Because of the ease of electronic storage of information, much more information was available for review, and so the scope of the document gathering process was far larger. In addition, software tools could only identify the documents that were potentially relevant. For many documents, it was still necessary for attorneys to review the documents identified by the software to confirm that the documents were responsive to discovery requests. Similarly, while technology was very helpful

in identifying potentially privileged documents, each such document had to be individually reviewed by an attorney who could make a judgment on whether a privilege applied. That particular review cost the client several million dollars, a substantial amount of which was spent on the privilege review.

Thus, I agree with the Committee's premise that the costs associated with pre-production privilege review is a major problem. I also agree that uniform rules regarding privilege waiver are crucial to reducing those costs as well as to promoting and protecting the attorney-client privilege and work product doctrine. I believe that the proposed rule goes a long way towards accomplishing the Committee's goals. I believe, though, that to achieve the goals the Committee has set, it is important that Rule 502 apply in both federal and state courts. From the standpoint of an attorney advising clients on avoiding waiver of privilege in document production, one of the most important issues is the predictability of the rules governing waiver. Rules 502(a) and 502(b) provide that predictability for litigation that will not extend beyond the federal courts. For litigation that can give rise to claims in multiple forums, however, the proposed Rule would not change the advice I would give to a client on conducting a privilege review. Obviously, the client only wishes to conduct such a review a single time, and so the scope of the privilege review will be determined by the potential forum with the broadest rules on privilege waiver. If there is a substantial possibility that the client will be sued in a jurisdiction that applies a broad subject matter waiver rule or holds that any inadvertent disclosure constitutes a waiver, a client has no choice but to comply with those standards, and so Rule 502 will be of no benefit. As the Committee's Reporters stated in their March 22, 2006 Memorandum, if "conduct does not constitute a waiver in federal practice but does so in a state court, parties would have no assurance that information protected by privilege or work product will remain protected."[1]

The arguments against application of Rule 502 in state courts and federal courts appear to center on federalism concerns and on the concern that it is inappropriate or anomalous for a federal rule of evidence to govern state court procedure. These are legitimate issues, but I believe they can be overcome. First, it should be kept in mind that Rule 502 as currently proposed already has provisions that would be binding on the states. Rule 502(b) for example, governs the effect in a state proceeding of inadvertent disclosures made in a federal proceeding.[2] Rule 502(a) could be amended to provide similar limitations on subject matter waivers for disclosures that first occur in a federal proceeding, though I believe both sections should be amended to encompass disclosures made in either federal or state proceedings.

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[1] Memorandum to Advisory Committee on Evidence Rules from Dan Capra, Reporter and Ken Broun Consultant dated March 22, 2006 at 2.

[2] Similarly, Rule 502(d) provides that a confidentiality order entered in federal court is binding on litigants in both federal and state courts.

Second, the Committee could make a separate recommendation to Congress that Congress enact legislation to make Rule 502 applicable to state proceedings. While this alternative would achieve the same result, I think it is important for the Committee to make the rule itself applicable to state proceedings to emphasize the importance of the issue. Moreover, the Committee's focus should be on developing a rule that meets the goals the Committee has set. The rule that most effectively addresses the increasing time and effort devoted to pre-production review for privilege is one that applies to both federal and state proceedings. The Committee should leave to Congress whether it is best to accomplish that objective through the rule or through parallel legislation.

Finally, if Rule 502 does not apply to both state and federal proceedings, then the protection arguably afforded by Rule 502(c) disappears. I oppose the promulgation of any rule providing for selective waiver for the reasons stated in the LCJ comments and the comments filed by the Association of Corporate Counsel (ACC), among others. I wish only to point out that if the rule includes a selective waiver provision, that provision will not be effective unless it applies in both state and federal courts. If a selective waiver rule only applies in federal court or does not apply equally to state and federal officials, then any benefit of the rule is entirely lost.

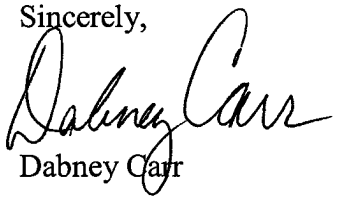
The only other portion of the Rule on which I wish to comment is the provision in Rule 502(b) which provides that the holder of the privilege must take measure to retrieve privileged information which has been inadvertently disclosed "once the holder knew or should have known of the disclosure." I do not believe that the language of the rule needs to be changed, but the Committee should provide additional guidance in the Committee Note to assist Courts and practitioners in applying the "should have known" standard. A "should have known" standard contains a subjective element, and a Court could find that the holder of the privilege "should have known" of an inadvertent disclosure at the time of the disclosure itself, effectively imposing a strict liability standard on the holders of the privilege.

I believe that the Committee Note can provide valuable guidance to courts and practitioners as to the intended application of the "should have known" standard. In particular, I support the recommendation by LCJ that the Committee Note should state that the time period for the holder of the privilege to rectify an inadvertent disclosure does not begin to run until the holder discovered, or with reasonable diligence should have discovered, the inadvertent disclosure. In most cases, a party will not learn of an inadvertent disclosure until the receiving party brings the disclosure to the holder's attention, and the holder should not be penalized if the receiving party does not promptly notify the holder of the inadvertent disclosure. As long as the holder of a privilege acts with reasonable promptness after some notice of the inadvertent disclosure, no waiver should be found.

Again, I appreciate the opportunity to submit these comments, and I wish to commend the Committee for drafting a rule which should be of substantial benefit to both Courts and practicioners.

With kind regards, I am

Sincerely,



Dabney Carr

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