06 - EV-014

Testify

"Carol Cure"
<carol.cure@jfshea.com>

12/07/2006 07:13 PM

To <Rules_Comments@ao.uscourts.gov>

cc <bbauman@lfcj.com>, <DDK@hurwitzfine.com>

bcc

Subject Federal Rule of Evidence 502

I would like to be included in those testifying on January 12, 2007, in Phoenix, Arizona in support of the positive aspects of proposed Federal Rule of Evidence 502 (Attorney–Client Privilege and Work Product; Limitations on Waiver).

Carol Cure, Division Counsel
SHEA HOMES LIMITED PARTNERSHIP
8800 N. Gainey Center Drive, Suite 350
Scottsdale, AZ 85258
Direct Line: 480-348-6161
Fax: 480-948-8048
Cell: 602-402-2424
carol.cure@sheahomes.com

The information contained in this e-mail message is confidential and may be legally privileged and is intended only for the use of the individual or entity named above. If you are not an intended recipient or if you have received this message in error, you are hereby notified that any dissemination, distribution or copy of this e-mail is strictly prohibited. If you have received this e-mail in error, please immediately notify us by return e-mail or telephone if the sender's phone number is listed above, then promptly and permanently delete this message. Thank you for your cooperation and consideration.

Testimony

January 12, 2007

VIA E-MAIL (Rules_Comments@ao.uscourts.gov) and U.S. MAIL

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

Professor Daniel J. Capra, Reporter
Judicial Conference Advisory Committee on Federal Rules of Evidence
c/o Fordham University School of Law
Lincoln Center
140 W. 62nd Street
New York, NY 10023-7485

Dear Committee Members:

I very much appreciate this opportunity to testify and share my views with the Committee. My name is Carol Cure. I am a former member of the ABA House of Delegates and the Arizona Bar's Board of Governors, as well as a former chair of the Rules Committee of the ABA's Tort & Insurance Practice Section. I also served as Chair of the Trial Practice section of the Arizona Bar. I was in private practice here in Arizona for 24 years, but for the past 4 years I have served as Division Counsel for the Arizona division of a large privately held homebuilding company. As one who is now responsible for protecting the attorney-client privilege and sustaining work product protection within my company, I want to thank the Advisory Committee for tackling this important issue and for drafting the provisions of proposed Rule 502 that are intended to mitigate the substantial attorney and party costs and time required for exhaustive document reviews, fueled by the fear that an inadvertent disclosure may lead to a wholesale waiver of the company's attorney-client or work product protections.

The views I am expressing here are my own, but I suspect they are representative of many others in my position who support the effort to provide a clear standard for disclosures on which everyone can rely. The most important principle in my mind is the need for certainty and for the rules to have uniform application at both the state and federal level. As the Supreme Court said in the *Upjohn* case, "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all" *U.S. v. Upjohn*, 449 U.S. 383 (1981).

I strongly support the adoption of proposed Rule 502(b) and believe that a uniform inadvertent disclosure exception is essential, particularly in this electronic age. As I know the Committee is aware, huge volumes of e-mails are generated daily in virtually every company in our country, large or small, and this quantity has made the burden of protecting against inadvertent disclosure exponentially more difficult, if not impossible. Recent estimates indicate that daily e-mail traffic may be as much as 80 billion e-mails, up from only 30 billion as recently as 2002.[1] Some industry analysts estimate a 50-100% growth in e-mail volume should be expected each year. The difficulties of managing this quantity of electronically stored information are almost unimaginable. Most companies are only beginning to think about how they can locate and retain what may be needed for legal purposes and, while automated review technologies are being developed, privilege analysis is generally more subtle than any automated process can handle. There is often little consultation between the IT and Legal Departments of companies and, in many companies, these departments don't even report to the same place within the company. The new e-discovery rules have provided an impetus for change, but I suspect that most companies are just starting down this road. In a poll taken by the Association of Corporate Counsel, less than 10% indicated that their companies were prepared for the new e-discovery rules and over 90% said they were still taking steps to prepare their organization for compliance.

When you consider the effort involved in attempting to cull relevant e-mails from the millions of other e-mails, it raises questions about the standard that should be used to determine whether the company's conduct was "reasonable." The standard proposed in Rule 502 may well be too high for most companies and, for this reason, I support changing the language to use the phrase "reasonable steps" instead of "reasonable precautions." This change would allow the Court to consider each case on its own facts and to take into account whether the organization has taken appropriate steps to implement an effective compliance program such as writing an effective policy, providing training to employees, providing sufficient resources, and monitoring the program to remediate any deficiencies.

I also believe that the inadvertent disclosure provisions of Rule 502(b) should be extended to apply to disclosures to government officers or agencies in regulatory investigations, as well as to inadvertent disclosures made in the context of Federal Arbitration Act proceedings so that any such disclosures do not act as a waiver in subsequent litigation.

In regard to Rule 502(d) and (e), in order for the parties to have certainty and be able to rely on confidentiality agreements, they must be binding not only as to the parties, but as to third parties, in both state and federal courts. Otherwise, the rules will have no practical utility and there will be no reduction of the burden of privilege review. Such a rule can be adopted by Congress pursuant to its commerce clause powers as well as its Article III powers in aid of the Federal Courts.

---

[1] Estimates from University of California Berkeley's School of Information Management & Systems.

I encourage the Committee to also consider providing that all Federal Court Confidentiality Orders – including but not limited to those incorporating the agreement of the parties – will protect against waiver.

I do want to speak briefly about proposed Rule 502(c) which is very controversial and may or may not be adopted by the Committee. There is much concern about the selective waiver provisions because of the fear that this provision will encourage government abuses and coerced waiver tactics that will further erode the attorney-client privilege and violate fundamental rights. If this provision is considered, it should be made clear in the comments that the decision whether to engage in selective waiver must be completely voluntary and not coerced, and that prosecutors should not condition charging decisions in any way on waiver of any privilege. Also, in my opinion, the language would need to be changed to provide that it applies to disclosures made at the state level when they are sought to be used in a federal proceeding. This approach, in line with the third option in Professor Capra's October 15 report discussing uniform choice-of-law treatment, would ensure that the parties could rely on Rule 502 in Federal Court in both diversity and federal question cases no matter whether the disclosures were made at the state or federal level and would prevent state law from overriding federal policy. Also, if this provision is considered further, this subsection would need be coordinated with Section 607 of the new Regulatory Relief Bill.

I very much appreciate the Committee taking the time to hear my views and appreciate all the work that has been accomplished to create a solution to one of the most vexing problems we face in civil litigation today.

Sincerely,

Carol Cure
4615 N. Royal Palm Circle
Phoenix, AZ 85018
(602) 402-2424
carolcure@cox.net