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Privilege Waivers: The Pendulum Swings

White-collar practitioners frequently deal with questions revolving around the waiver of attorney client and work product protection, especially as they pertain to counseling clients how or when to cooperate with government investigations.

Recent amendments to the U.S. Sentencing Guidelines—spurred by criticism from the American Bar Association's Task Force on Attorney-Client Privilege—and changes in the Department of Justice's policies related to the prosecution of business organizations focus, in part, on the impact of a client's waiver in such circumstances.[1]

The significance of these issues has resulted in the proposal of a new rule of federal evidence which would codify the law governing waiver of these protections. In addition, legislation to restrict the government's ability to pressure corporations to waive the privilege is expected to see action in Congress after the summer recess.

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Judicial Conference

In June 2007, the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States approved and proposed to Congress the adoption of new Evidence Rule 502. Rule 502 was drafted by the Judicial Conference's Advisory Committee on Evidence in response to "a number of problems with the current federal common law" regarding the waiver of attorney-client privilege and work product. Specifically, the Advisory Committee noted that parties were expending a tremendous amount of time and effort in preserving these protections in order to avoid subject matter waivers that would apply beyond the case in which they were waived. The result, according to the Advisory Committee, was a significant increase in the cost of discovery, especially as related to the production of electronic information. The Advisory Committee also expressed concern about the production of confidential or work product material by a corporation subject to government investigation and the waiver implications of such disclosure.[2]

The Judicial Conference's focus on the common law of waiver of privilege and work product was prompted by Congress. Specifically, the chairperson of the House Judiciary Committee requested that the Judicial Conference initiate the rule-making process to "address the litigation costs and burdens created by the current law on waiver…." In initiating the rule-making process, the Judicial Conference was urged to craft a response that would: "(1) protect against the forfeiture of privilege where a disclosure in discovery is the result of an innocent mistake; and (2) permit parties, and courts, to protect against the consequences of waiver by permitting disclosure of privileged information between the parties to a litigation."[3]

In response, the Advisory Committee prepared a draft of Rule 502 and distributed the draft for comment to select members of the judiciary, government regulators, members of the bar, and academics. Incorporating their feedback, the Advisory Committee redrafted the proposed rule and released it for public comment during the summer of 2006. After receipt of more than 70 comments from the public, including the American Bar Association and other professional organizations, professors and private practitioners, and two public hearings during which testimony was received from more than 20 individuals, the Advisory Committee revised the rule again, sending it to the Standing Committee for review and transmittal to the Judicial Conference.[4]

As of this time, proposed Rule of Federal Evidence 502 has been forwarded to the Judicial Conference with the recommendation that it be approved and transmitted to the U.S. Supreme Court, where it is listed among the federal judiciary's "Pending Rules Amendments Awaiting Final Action."[5]

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The Substance of Rule 502

Proposed Evidence Rule 502 reflects the Advisory Committee's determination that "the discovery process would be more efficient and less costly if waiver rules were relaxed." Specifically, the Committee Notes to the proposed rule highlight the rule's dual purpose. First, the rule serves to resolve "longstanding disputes in the courts about the effect of certain disclosures of material protected by the attorney-client privilege or the work product doctrine." Second, the rule responds to "widespread complaints" about litigation costs associated with the review and protection of privileged materials and concerns that these costs "have become prohibitive due to the concern that any disclosure of protected information in the course of discovery (however innocent or minimal) will operate as a subject matter waiver of all protected information."[6]

• ***Scope of the Waiver***

Subsection (a) deals with the scope of waiver of the attorney client and work product protections in a federal proceeding. Specifically, the rule provides that where a party has waived protection with respect to a specific document, that waiver will extend to "an undisclosed communication or information concerning the same subject matter only if that undisclosed communication or information ought in fairness to be considered with the disclosed communication or information." Committee Notes state that this subdivision ensures that a subject matter waiver is recognized only in those unusual situations where "fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary."

• ***Inadvertent Disclosure***

Subsection (b) addresses inadvertent disclosure of privileged materials. It states that inadvertent disclosures made in connection with federal litigation or federal administrative proceedings does not operate as a waiver in a state or federal proceeding "if the holder of the privilege or work product protection took reasonable precautions to prevent disclosure and took reasonably prompt measures, once the holder knew or should have known of the disclosure, to rectify the error." Where applicable, "reasonably prompt measures" may include seeking the return or destruction of the information as set forth in Federal Rule of Civil Procedure 26(b)(5)(B).

The Committee Notes on this subsection point out that courts disagree as to whether an inadvertent disclosure of protected information constitutes a waiver. Some courts have found that disclosure must be intentional to constitute a waiver. In contrast, the majority of courts find a waiver only if the disclosing party acted carelessly and failed to request the return of the protected information. A small minority of courts have held that any inadvertent disclosure constitutes a waiver. Acknowledging this conflict, the Advisory Committee opted for a position in accord with the majority view or "middle ground," finding no waiver only if the disclosing party made reasonable steps to prevent disclosure and sought the return of the information.

The Judicial Conference was urged to craft a rule to: protect against forfeiture of privilege where a disclosure in discovery results from an innocent mistake; and permit parties and courts to protect against the consequences of waiver by permitting disclosure of privileged information between parties.

• ***Disclosures Made in State Proceedings***

Subsection (c) sets forth the treatment of disclosures made in a state proceeding. Where disclosure of privileged information is made in a state proceeding, the disclosure does not operate as a waiver in a federal proceeding if: (1) it would not have been a waiver under Rule 502 if it had been made in a federal proceeding; or (2) it is not a waiver under the law of the state where the disclosure occurred. The Committee Notes relate that difficult questions can arise when state and federal laws are in conflict on the question of waiver. Accordingly, the Advisory Committee determined that the proper solution for the federal court is to apply the law that is most protective of privilege and work product.

• ***Court Orders and Party Agreements Affecting Waiver***

Subsection (d) of the Proposed Rule provides that a federal court order determining that the disclosure of protected information does not constitute a waiver is binding on all parties in all federal and state proceedings regardless of whether they were parties to the initial litigation. In contrast, subsection (e) states that while parties to a federal proceeding can enter into a confidentiality agreement providing for mutual protection against waiver in that proceeding, the agreement is not binding on nonparties unless it is incorporated into a court order.

Selective Waiver Issue

As part of its request to the Judicial Conference, the House Judiciary Committee asked that the Advisory Committee also consider the possibility of proposing a rule that would "allow persons and entities to cooperate with government agencies without waiving all privileges as to other parties in subsequent litigation."[7] The voluntary disclosure of protected information solely to the government and not to any other person or entity is known as "selective waiver" and is a controversial issue within the legal community.

Disagreement over selective waiver is exemplified in diverging opinions from various federal courts. Some federal courts—most notably the U.S. Court of Appeals for the Eighth Circuit—have permitted selective waiver.[8] Other federal courts have rejected selective waiver outright.[9] In declining to recognize a selective waiver, the U.S. Court of Appeals for the Tenth Circuit specifically noted the Advisory Committee's work on proposed Rule 502 in observing that the application of selective waiver was an issue best left to the Legislature.[10]

In drafting the proposed rule, the Advisory Committee prepared a selective waiver provision as a subsection of Rule 502. This version of the rule was submitted for public comment and elicited a wide variety of responses. Public comment from the legal community was "almost

uniformly negative" according to the Advisory Committee.[11]

Comments regarding the enactment of the selective waiver provision included concern that: (1) corporate employees would not communicate openly with corporate lawyers for fear that their employer would be more likely to produce information to the government and place the employees at risk; (2) the provision allowed corporations to waive the privilege to their advantage; (3) the provision caused federalism problems because it would have to bind state courts in order to be effective, thereby changing the law of privilege in virtually every state that did not recognize selective waiver (almost all); and (4) the privilege is not protected by the provision because nothing prohibits the government from publicly disclosing the privileged information.

In contrast, federal agencies expressed strong support for the selective waiver provision in commenting on the initial draft of the rule. These government entities argued that: (1) the selective waiver provision would lead to more timely and efficient public investigations, benefiting all parties; (2) corporate employees would not be affected by the rule change because corporate counsel already must advise them that the corporation holds the privilege and may choose to waive it; and (3) even if the government chose to disclose the privileged information, it would be protected from use by private parties in subsequent litigation.[12]

After careful consideration of these comments, the Advisory Committee determined that the questions raised by the selective waiver issue—whether corporations needed selective waiver to cooperate with government investigations and if there is a "culture of waiver" how selective waiver would affect that "culture"—were essentially political in nature, and therefore could not be answered in the context of the rule-making process. Accordingly, the Advisory Committee removed the selective waiver provision from proposed Rule of Evidence 502. Recognizing, however, that Congress may be interested in considering separate legislation regarding selective waiver, the Advisory Committee prepared language to assist in the drafting of such legislation. This language also was approved by the Standing Committee and forwarded to the Judicial Conference.

The statutory language proposed by the Advisory Committee states:

> ***Selective waiver.*** In a federal [or state] proceeding, the disclosure of a communication or information protected by the attorney-client privilege or as work product—when made for any purpose to a federal office or agency in the course of any regulatory, investigative, or enforcement process—does not waive the privilege or work product protection in favor of any person or entity other than a [the] federal office or agency. This rule does not: (1) limit or expand a government office or agency's authority to disclose communications or information to other government offices or agencies or as otherwise authorized or required by law; or (2) limit any protection against waiver provided in any other Act of Congress.[13]

The Advisory Committee's Note on Selective Waiver states that the proposed language resolves the conflict present among federal courts by providing that disclosure of protected communications or information to a federal office or agency exercising proper authority does not constitute a waiver of privilege or protection to any person or entity other than that federal office or agency. Further, the Advisory Committee notes that the protection of selective waiver specifically applies when the disclosed communication or information is subsequently offered in either a federal or state court proceeding by someone else.[14]

Legislation intended to restrict Department of Justice's ability to pressure corporations to waive attorney-client privilege has been introduced in Congress and is moving toward passage. A House bill (H.R. 3013) was approved by the House Judiciary Committee in early August and is expected to go to the floor in September. An identical bill is expected to be considered by the Senate Judiciary Committee in September. The Justice Department, which opposes the legislation, has requested an opportunity to testify before the Senate Committee takes action on the bill. The bills would preclude federal prosecutors and agency attorneys from considering, in deciding whether to bring criminal charges, whether a corporation demonstrated cooperation by agreeing to waive the privilege or the protection of the work-product doctrine.[15]

Conclusion

The rule and the legislation are an outgrowth of the culture of cooperation engendered by the government's initiative against corporate fraud. This culture of corporate cooperation has blurred the line between government and private entities and permitted the government to get its "nose under the tent" in an unprecedented manner. The consequences of these developments remain to be fully appreciated. Action to restrict the government's ability to pressure corporations to waive privilege will be a welcome development to the business and legal communities. In the meantime, practitioners should take note.

1. Elkan Abramowitz and Barry A. Bohrer, "Waiver of Corporate Attorney Client and Work Product Protection," New York Law Journal (Nov. 1, 2005).
2. Report of the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure (May 15, 2007) (available at http://www.klgates.com/files/upload/eDAT_ER502_ACER_Report_05152007.pdf).
3. Id. Draft of Cover Letter to Congress on Proposed Rule 502.
4. Id.
5. See http://www.uscourts.gov/rules/newrules6.htm#proposed0806.
6. Report of the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure.
7. Id. Draft of Cover Letter to Congress on Selective Waiver.
8. See, e.g., *Diversified Industries v. Meredith*, 572 F2d 596 (8th Cir. 1977) (en banc); see also *In re McKesson HBOC, Inc. Securities Litigation*, 2005 WL 934334, at **2, 9-10 (N.D. Cal. March 31, 2005) (selective waiver permitted where confidentiality agreement limited SEC's ability to disclose information to third parties); *In re Leslie Fay Cos., Inc. Securities Litigation*, 161 FRD 274, 284 (SDNY 1995) (court allowed selective waiver where confidentiality agreement allowed the government to disclose privileged information only "as necessary to further law enforcement objectives").
9. See, e.g., *In re Qwest Communications International Inc. Securities Litigation*, 450 F3d 1179, 1192 (10th Cir. 2006) (rejecting the argument that a failure to recognize selective waiver in current "culture of waiver" would discourage corporations from cooperating with government investigations); *Westinghouse Electric Corp. v. Republic of the Philippines*, 951 F2d 1414 (3rd Cir. 1991) (rejecting selective waiver).
10. *In re Qwest*, 450 F3d at 1201.
11. Report of the Advisory Committee on Evidence Rules to the Standing Committee on Rules of Practice and Procedure, Draft of Cover Letter to Congress on Selective Waiver.
12. Id.
13. Id.
14. Id.
15. 81 Criminal Law Report 641.