

Will Waiving the Privilege Save It?

By C. Evan Stewart

During the Vietnam War, we had the spectacle of an army unit deciding to destroy a town in order to “save” it. Fast forward to a different era and a very different subject matter, when there seems little dispute that the attorney-client privilege in the United States is under significant attack from a wide variety of sources: prosecutors, regulators, an often hostile judiciary, skeptical legal academics, etc.¹

The organized bar’s response, at first, was a fairly tepid set of bromides; the ABA, for example, adopted a series of resolutions in support of the privilege.² More recently, there have been two more significant initiatives. This article will look at these recent initiatives and consider whether the medicine will cure, kill, or merely sedate the patient.

I. Inadvertent Waiver

Lawyers who litigate complex commercial disputes are frequently concerned that massive discovery production will lead to privileged materials being handed over to adversaries. This concern first led to “non-waiver agreements” being entered into by litigants, then to a number of federal districts adopting such agreements as a matter of local protocol, and most recently to the Federal Rules Advisory Committee issuing proposed revisions to the Federal Rules of Civil Procedure (hereinafter FRCP). Under proposed Rule 26(b)(5), a federal district judge would be empowered to enter an order whereby any inadvertent waiver of privileged (and work product) materials would not be deemed a waiver.

This new rule (and analogs to it in Rules 16, 33, 34, and 37) became effective on December 1, 2006. Thus, there is little point in debating now whether all this fuss was necessary. That being said, however, it seems evident that having no inadvertent waiver as part of the formal rules of procedure will have some consequences. There are at least two of some moment.

A. Problem One

The first is a practical problem: such agreements do not address the *substantive* issue of whether privileged or work product protections have been waived.³ Courts facing this issue in the past have traditionally taken three routes:

- the “strict” approach—inadvertent waiver equals waiver (i.e., “once confidentiality is lost, it can never be restored”);⁴
- the “forgiveness” approach—inadvertent waiver which is unintentional does not equal waiver (i.e., “to err is human”);⁵
- the “balancing test” approach—a case-by-case analysis to determine whether the conduct is “excusable.”⁶

An Article III judge applying the foregoing standards to Rule 26(b)(5) could reach very different results. Under the first approach, there would be a waiver; under the second there would not; and under the third there could well be a waiver (especially if all that had been done to ensure confidentiality was to have followed the dictates of the non-waiver order).⁷

Recognizing that those inconsistent results might prove a not-insignificant roadblock to the likely success of this proposed “reform” to the FRCP, the U.S. Judicial Conference Advisory Committee on Evidence Rules stepped into the fray with a proposed amendment to Federal Rules of Evidence (FRE) 502:

[A] voluntary disclosure does not operate as a waiver if—the disclosure is inadvertent and is made during discovery in federal or state litigation or administrative proceedings—and if the holder of the privilege or work product protection took reasonably prompt measures, once the holder knew or should have known of the disclosure to rectify the error. . . .

By this proposal, the substantive legal issue would be addressed by adopting the “balancing test” approach.

B. Problem Two

The second problem raised by the “non waiver” rule is whether such agreements—regardless of whether they are voluntary or ordered by a court—can be binding on third parties.⁸ To deal with this matter, the Advisory Committee on Evidence Rules again rode to the rescue, and again proposed amending Rule 502. The proposed rule sets forth that a court order as to such an arrangement would be binding on “all persons or entities, whether or not they were parties to the matter before the court.”

C. Problems Solved?

Heaven on Earth may not have been achieved by the interventions of the Advisory Committee on Evidence Rules, unfortunately. Why not? Well, first off is the small matter that there are serious constitutional questions (under the Commerce and Due Process Clauses) as to the breadth of pre-empting the states’ substantive laws on privilege and whether non-parties can be deprived of rights without notice.⁹ Equally important, at least from a practical perspective, is that (unlike changes to the Federal Rules of Civil Procedure) any change to the Federal Rules of Evidence must be part of a law enacted by Congress.¹⁰ And as will be discussed below, the likelihood of Rule 502 amendments getting through Congress any time soon seems highly doubtful. We are therefore likely to have Rule 26(b)(5) with

us sooner than soon (i.e., December 1, 2006), without the “safeguards” of Rule 502. Caveat counselor.

II. Selective Waiver

Not content with “fixing” inadvertent waiver, the U.S. Judicial Conference’s Advisory Committee on Evidence Rules also tackled the issue of selective waiver. On April 26, 2006, the Advisory Committee unveiled another amendment to FRE 502. Designed to address the highly problematic cooperation mantra with which governmental targets must now deal,¹¹ proposed Rule 502(b)(3) would provide for selective waiver of materials covered by the attorney-client privilege or the work product doctrine. If this provision were to be enacted by Congress, companies would be able to employ both a sword (providing the government said materials) and a shield (refusing to produce said materials to private litigants) strategy.¹²

As justification for Rule 502(b)(3), the Advisory Committee wrote that selective waiver “further[s] the important policy of cooperation with government agencies, and maximizes the effectiveness and efficiency of government investigations.” If that sounds too good to be true, it is probably because that is the case. And that is true for at least three reasons.

The first is a practical one: it is highly doubtful that this proposed reform will ever get through Congress. Because the people who would be impacted most negatively by Rule 502(b)(3) are the private plaintiff’s bar, it seems unlikely that they will take this lying down; indeed, given that group’s proven political muscle, it seems highly probable that they will be able to convince their congressional allies to block Rule 502(b)(3).

A second reason is the proposed justification for it—i.e., companies will not “cooperate” with the government unless there is selective waiver; this rationale is not supported by any evidence. Every circuit court—save one, the U.S. Court of Appeals for the Eighth Circuit about 30 years ago—has concluded that there is no evidence whatever to support the notion that companies will not cooperate with the government, but for selective waiver.¹³ And this state of affairs (i.e., no evidence) was just recently reaffirmed by the U.S. Court of Appeals for the Tenth Circuit in *In re Qwest Communications International Inc. Securities Litigation*.¹⁴

The last, and perhaps most compelling reason to oppose the selective waiver, is that it is directly at odds with one of the principal foundations of the attorney-client privilege—for a confidential communication to be protected it *must* be kept confidential. Moreover, and as the *Qwest* court correctly noted, rather than promoting the purposes served by the privilege and work product doctrine, selective waiver could well have the effect of making corporate officials reluctant to speak to company lawyers—a result directly antithetical to why the U.S. Supreme Court extended the corporate attorney-client privilege to all employees in *Upjohn v. U.S.*¹⁵

III. Conclusion

While it seems indisputable that the attorney-client privilege has never been weaker, finding ways to further breach confidentiality seems like a counterintuitive strategy to reverse that trend. The best way to protect client confidences is to keep them confidential. And that, to be repetitive, has been a basic principle undergirding the privilege dating back to jolly old England. Perhaps a return to the tried and true is worth a try?

Endnotes

1. I have been writing about this state of affairs for over 15 years. See, e.g., Whither the Attorney-Client Privilege?, N.Y.L.J., October 11, 1990; *The Corporate Attorney-Client Privilege: Is Nothing Sacred?* THE CORP. CRIM. & CONSTIT. L. R. Vol. 1 No. 17 (April 5, 1991); *Corporate Counsel and Privileges: Going, Going . . .*, N.Y.L.J., July 11, 1996; *The Attorney-Client Privilege: The Best of Times, the Worst of Times*, THE PROF’L LAWYER (1999). During most of that time, however, many observers (mostly non-practicing lawyers and academics) believed that all was hunky dory. See, e.g., F. Zacharias, *The Fallacy that Attorney-Client Privilege has been Eroded: Ramifications and Lessons for the Bar*, THE PROF’L LAWYER (1999).
2. See *ABA is Urged to Express Opposition to Government Incursion on Privilege*, BNA LAWYERS’ MANUAL ON PROF’L CONDUCT 303 (2005).
3. U.S. Magistrate Judge Paul Grimm was the first to be alert to this issue. See *Hopson v. Baltimore*, 232 F.R.D. 228 (D. Md. 2005).
4. See 8 J. Wigmore, WIGMORE ON EVIDENCE § 2325 (McNaughton rev. 1961).
5. See, e.g., *Mendelhall v. Barber-Greene Co.*, 531 F. Supp. 931 (N.D. Ill. 1982).
6. See, e.g., *Lois Sportswear U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103 (S.D.N.Y. 1985).
7. As a matter of legal ethics, see ABA Formal Ethics Op. 92-368 (1992) (lawyer who receives privileged material when it was unintended (1) should not review the material, (2) should notify the other side regarding its receipt, and (3) should abide by the other side’s instructions vis-à-vis the material).
8. See C. Wright & K. Graham, FEDERAL RULES OF EVIDENCE, Ch. 6 § 5507, 579 (1986).
9. See J. Solovy & R. Byman, *Grant Us Serenity*, NAT’L L.J. 12 (April 24, 2006).
10. 28 U.S.C. § 2074 (b) (the Rules Enabling Act).
11. See C.E. Stewart, *When the Government Comes Knocking*, N.Y.L.J., (March 15, 2005). Interestingly, there now appears to be some swinging back of the pendulum, if a recent (9/21/06) speech by SEC Commissioner Paul Atkins is representative of the Commission’s current enforcement attitude.
12. The use of a “sword” and “shield” strategy has usually been a controversial one. See *In re von Bulow*, 828 F.2d 94 (2d Cir. 1987); *In re Kidder Peabody Securities Litigation*, 168 F.R.D. 459 (S.D.N.Y. 1996).
13. See *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977). But see *In re Subpoena Duces Tecum*, 738 F.2d 1367 (D.C. Cir. 1984); *Westinghouse Electric Corp. v. Republic of the Philippines*, 951 F.2d 1414 (3d Cir. 1991); *In re Steinhardt Partners, LP*, 9 F.3d 230 (2d Cir. 1993).
14. 450 F.3d 1179 (6th Cir. 2006).
15. 449 U.S. 383 (1981).

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