The Attorney-Client Privilege Renaissance
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On September 19, 2008, the President signed into law S.2450, signaling an end to the dark ages of inadvertent waivers of attorney client privilege and ushering in an era of stronger protections on attorney client privilege and the work-product doctrine.

The legislation, which creates new Federal Rule of Evidence 502, applies to both criminal and civil actions in federal court and protects against the inadvertent waiver of the attorney client privilege or the work product protection. The new rule will apply in all proceedings commenced after the date of the enactment of the law, and insofar as is just and practicable, in all proceedings pending on the date of enactment. And while the rule is binding on state courts and federal court-mandated arbitration proceedings where the initial disclosure is in a federal proceeding, the rule has no effect where the initial disclosure is in state court and the waiver issue is being decided in a subsequent state proceeding.[1] Where the initial disclosure is in a state court, and the waiver issue is being decided in a subsequent federal proceeding, the decision is governed by Rule 502 or state law, whichever is more protective against the waiver.

Under the new federal rule, disclosure of privileged materials will not be a waiver of the privilege if disclosure is inadvertent; if the holder of the privilege or protection took reasonable steps to prevent disclosure;[2] and if the holder took reasonable steps to rectify the error.[3] The rule also addresses the issue of subject-matter waiver in providing that, whenever a party produces one privileged document, any resulting waiver of the privilege would not extend to other related documents, as long as there was no intentional and misleading use of protected information. It also will make federal court orders protecting against waiver enforceable in both federal and state courts.[4] The rule also makes confidentiality agreements between parties that are incorporated into court orders enforceable against nonparties.[5]

The enactment of S.2450 resolves some longstanding disputes in the courts about the effect of certain disclosures of communications or information protected by the attorney-client privilege or a work product – specifically those disputes involving inadvertent disclosure and subject matter waiver. Designed to provide predictability and cost savings for all parties in litigation, Federal Rule of Evidence 502 is a whiff of fresh air for corporate litigants embattled in massive electronic discovery actions.

And while the U.S. House of Representatives on September 8th sent the legislation enacting the new rule to President Bush, and it was signed into law on September 19, 2008, the resulting

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[1] Arkansas is a notable exception here, as the state Supreme Court has adopted a model version of Evidence Rule 502. *See In re: Arkansas Rules of Civil Procedure 4 and 26; Administrative Order Number 20; and Rule of Evidence 502*, Per Curium, Jan. 10, 2008

[2] Fed. R. Evid. 502(a)

[3] Fed. R. Evid. 502(b)

[4] Fed. R. Evid. 502(c)

[5] Fed. R. Evid. 502(e); Subpart (d) establishes "controlling effect" of a court order issued during litigation, stating that a privilege is not waived by disclosure. Subparts (f) and (g) state that the rule applies to court-ordered arbitration and is limited to attorney-client privilege and work product protection.

legislation was many years in the making – with many of the seeds to this renaissance having began germinating not on Capitol Hill or the White House, but in the federal judiciary.

Before Evidence Rule 502 – The Dark Ages

In the lengthy run-up to the signing of Evidence Rule 502 into law, there were a series of important events taking place outside of Congress and the White House that were working to shore up the classical protections enshrined in the attorney-client relationship. Before analyzing the attorney-client privilege renaissance – much of which we can attribute to Judge Grimm's opinion in *Hopson v. Mayor and City of Baltimore*,[6] it is also critical to analyze parallel happenings in the early days of the Bush Administration's Justice Department, to appreciate the normalized erosion of attorney-client protections.

An excellent place to start is the Department of Justice's Thompson Memorandum, issued in 2003 by then-Deputy Attorney General Larry D. Thompson. The Thompson Memo specified factors that federal prosecutors were required to use when making charging decisions. In order for suspect businesses to prove their cooperation, the Thompson Memo demanded that corporations waive the attorney-client privilege, produce the results of their internal investigations, and deny payments of attorneys' fees to employees under investigation.[7] The Securities and Exchange Commission (SEC) issued a comparable document in 2001 through the so-called Seaboard Report.[8]

These controversial policies allowed federal agents to force waiver of the attorney client privilege and to prohibit payment of employees' legal fees. Such policies have played an important role over the last several years in eroding the protections of attorney-client privilege for corporations suspected of criminal wrong-doing.

And while much of the case law responsible for 502's creation comes from the civil side, the new rule does speak to the waiver of attorney-client privilege in cases of criminal prosecution as well.[9] Thus the DOJ guidelines serve as an important looking glass to analyze the corrosive trends in attorney-client privilege protections during the Bush years.

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[6] 232 F.R.D. 228 (D. Md. 2005)

[7] Larry D. Thompson Memorandum, *Principles of Federal Prosecution of Business Organizations*, U.S. Dept. of Justice, January 20, 2003.

[8] *Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions*, October 23, 2001. http://www.sec.gov/litigation/investreport/34-44969.htm

[9] Before 502 was approved by the House, Senator Arlen Specter (R-Pa) proposed legislation to amend the Federal Criminal Code to prohibit such attorney client privilege waivers in criminal matters. On June 26, 2008, Senator Arlen Specter (R-Pa.) reintroduced the Attorney-Client Privilege Protection Act of 2008 (S. 3217) that would overrule the McNulty Memo. Deputy Attorney General Paul McNulty issued his own memorandum scaling back the more egregious aspects of the Thompson Memorandum. The McNulty Memorandum required prosecutors to obtain prior senior supervisory approval before making a waiver demand. However, the McNulty memorandum did not outlaw waiver demands if there was a "legitimate need" for the information. Consequently, DOJ policy continued to allow a prosecutor to consider a corporation's willingness to waive privileges in determining whether that entity has cooperated with the government's investigation. Thus, in a July 9, 2008 hearing before the Senate Judiciary Committee, Senator Specter asked Attorney General Michael Mukasey what justified "coercing a waiver of the attorney-client privilege" and whether legislation is necessary. In response, Attorney General Mukasey revealed that Deputy Attorney General Mark Filip, Paul McNulty's successor, was drafting a letter to Sen. Specter addressing "real significant proposed changes" that could replace the McNulty memorandum. Mukasey said, "In particular, we

Critics of the DOJ Prosecution Guidelines (these Guidelines have since been rescinded) argued, that as a matter of policy and practice, prosecutors should not be able to coerce corporations to waive the attorney-client privilege and work-product protection, and to deny the advancement of legal fees to employees, in order for corporations to receive credit for "cooperation" with the government. Many of those critics included the American Bar Association, the US Chamber of Commerce, and the ACLU.[10]

And while many legal analysts have credited the shift to stronger attorney-client privilege protections as a response to legislative pressure – the role of the federal judiciary has been integral in spurring the DOJ to alter its practices, and in getting Congress to revamp the Federal Rules of Evidence to protect against unconscionable waivers of attorney client privilege.

As early as 2005, federal judges began addressing the problem of unintended waivers in some remarkably creative ways. United States Magistrate Judge Paul W. Grimm's opinion, in *Hopson v. Mayor and City of Baltimore*[11] represented a watershed moment on the road to enacting Evidence Rule 502. The opinion provided that neither the attorney-client privilege nor the work product protection is waived in a federal proceeding as a result of disclosure in connection with litigation pending before the court if the order incorporates the agreement of the parties before the court. Some e-discovery experts have called the *Hopson* opinion "a treatise on how to avoid waiving the privilege while conducting a reasonable privilege review, as well as how to provide an adequate privilege log."[12]

Not all courts have been so charitable and there has been some inconsistency between jurisdictions. If one were to compare the more generous protections against waiver in Judge Grimm's 4th Circuit with what Judge Facciola called the 10th Circuit's "niggardly reading of the circumstances under which waiving [attorney client privilege] can be avoided,"[13] the need for consistency within the federal courts emerged as a paramount concern for jurists seeking to harmonize the law on waiver of the attorney-client privilege.

Given the schizophrenia across jurisdictions with regard to when attorney-client privilege waivers occurs, the costs for corporations whom were likely to be hauled into court would prove prohibitive absent a comprehensive document retention program. Very few corporations have a

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will no longer measure cooperation by waiver of the attorney-client privilege." *U.S. Senate Judiciary Committee Hearing,* "Oversight of the U.S. Department of Justice," July 9, 2008. Webcast available at: http://judiciary.senate.gov/hearings/hearing.cfm?id=3453

[10] *Confer* U.S. Chamber of Commerce Amicus Curiae Briefs filed on behalf of Movants, Jan 28, 2008; *See also* America Bar Association Resolution and Report Regarding Attorney Client Privilege and Work Product Doctrine, August 9, 2005, http://www.abanet.org/poladv/priorities/privilegewaiver/.

[11] 232 F.R.D. 228 (D. Md. 2005)

[12] Alan J. Ross, "Waiving at Privilege: Of Hopson, Creative Pipe, and Proposed Evidence Rule 502 With a Bit of Nilavar for Good Measure," *eDiscoTECH*, June 26, 2008. http://www.bricker.com/legalservices/practice/litigation/ediscotech/eblog/display.aspx?id=136

[13] Judge John M. Facciola, "Sailing on Confused Seas: Privilege Waiver and the New Federal Rules of Civil Procedure," *Federal Courts Law Review*, 2 Fed Ct. L. Rev 57, 63, Fall 2007, referring to Tenth Circuits rejection of the claim that disclosure to a government agency of computer information, pursuant to a confidentiality agreement, was not a waiver of the privilege as to third parties. *See In re Qwest Communications Int'l Inc*., 450 F.3d 1179 (10th Cir. 2006)

document control policy, and even few have devised ways to quickly identify privilege information. Furthermore, given the often prohibitively expensive nature of a privilege review of electronically stored information, Judge Facciola opined before the passage of Evidence Rule 502 that "federal courts will try fewer [cases] if the cost of privilege review is not reined in. Indeed, the high cost threatens to make the federal courts the exclusive litigation playground of the super rich who may be the only ones who can afford a privilege review of their computer systems."[14]

But as a coda to *Hopson*, an uncanny catalyst for some of that tectonic shift was *U.S. v. Stein*.[15] Critics of inadvertent and coerced waivers were eventually vindicated on August 28, 2008 with the 2nd Circuit's affirming Judge Kaplan's ruling in *Stein IV*, holding that the pressure exerted by the Thompson Memorandum and by prosecutors seeking to induce a company to deny the advancement of legal fees to current and former employees under criminal investigation infringed upon their Sixth Amendment right to counsel. Ironically, on the same day as the Appeals Court in *Stein* issued its ruling, the DOJ rescinded its Guidelines[16] – lightening striking twice. "Sunlight is said to be the best disinfectant; electric light the most efficient policeman."[17] Let there be no doubt federal judges have been critical to the pendulum shift, making not only litigating in federal court less costly, but keeping the doors ajar for litigants deprived of classical 6th Amendment attorney client protections.

Nevertheless, in *Hopson*, Judge Grimm sets out the procedure for a workable and cost-efficient exchange of information. Employing a privilege log, claw back or quick peek agreements are just a few of the techniques espoused to protect attorney-client privilege. Now, the Federal Rules do not use the word "claw back" or "quick peek," but instead speak only to a post-production claim of privilege and allow for a new form of protection under the claw back agreement. In fact, Rule 26(b)(5)(B) of the Federal Rules of Civil Procedure intimates best how a claw back would work.[18]

A claw back agreement is an agreement where the parties agree to screen out any privilege or work product material before production, and agree that if for any reason, privilege or work product material happens to fall into the hands of the unprivileged party, one party notifies the other side of the claim of privilege and thus the material is returned with an agreement between

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[14] *Id* at 59.

[15] *U.S. v. Stein* (*Stein I-IV*), 541 F.3d 130, (2nd Cir. N.Y.)(2008). In *United States v. Stein*, a case arising out of the criminal prosecution of former employees of the KPMG accounting firm for selling allegedly illegal tax shelters, the district court declared unconstitutional that portion of the Thompson Memorandum that led government prosecutors to pressure KPMG not to pay the legal fees of these employees, contrary to KPMG's standard practice.

[16] Department of Justice Press Release, *Remarks Prepared for Delivery by Deputy Attorney General Mark R. Filip at Press Conference Announcing Revisions to Corporate Charging Guidelines,* New York, NY, Thursday, August 28, 2008. http://www.usdoj.gov/dag/speeches/2008/dag-speech-0808286.html

[17] Louis Brandeis, *Other People's Money* , Ch 5 (1914)

[18] F.R.C.P. 26(b)(5)(B) explains: "If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specific information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved."

the parties that the production will not result in a waiver. Creative arrangements between counsels may result in "claw backs," but these agreements are not without their ethical concerns either: attorney-client privilege conflicts stemming from such arrangements have been noted in at least one jurisdiction.[19]

The distinction between "claw backs" and "quick peeks" is also an important one. A quick peek is a cost conscience way to produce materials that intentionally allows the other side to view privileged or work product material with either a partial review or no review at all of the material produced – all with the understanding that a waiver will not result from the production of the materials. However, these quick peek agreements may prove more problematic than the claw backs, as an attorney's affirmative duty to do a "reasonable" privilege review and to represent their clients vigorously would very well include the protecting of the sensitive trade secrets or other privileged materials that, upon production, would seriously disadvantage their client, and expose the attorney to ethical discipline.

In the wake of cases like *Hopson* and *Stein*, Evidence Rule 502 provides a more predictable, just, and uniform set of standards by which parties can determine the consequences of a disclosure of a communication or information that is protected by attorney-client privilege or the work product doctrine, while protecting the fundamental privileges intrinsic to the attorney client relationship. "Two familiar messages permeate the new rule and its commentary: preparedness and collaboration are the best defenses against waiver. Parties that have consistent and predictable processes in place to identify, preserve, and collect and review ESI will better be able to meet the as-yet 'reasonable steps' standard and in the end, the best protection is a negotiated agreement between the parties that is then incorporated into a court order."[20]

Those that wonder as to the administrability and effectiveness of Fed R. Evid. 502 will no doubt find themselves again relying on federal courts to preserve one of the hallmarks of our judicial system – and given the protracted and constitutionally confined responses of the political branches, public confidence in the judiciary to fill those gaps caused by technological advances have been readily validated, ensuring that corporate litigants will never again return to the dark ages of dressed-down attorney client privileges or persistent perceptions of prosecutorial bullying.

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[19] See *Maldonado v. New Jersey*, 225 F.R.D. 120 (D.N.J 2004) holding such agreements may lead to disqualification of attorney if, even after a privileged document is returned, if the opposing attorney's temporary possession of the document "creates a substantial taint on any future proceedings." The question as to what constitutes a substantial taint, though not the subject of this article, remains central to deciding whether employing a "claw back" or "quick peak" will be an adequate technique for protecting the attorney-client privilege.

[20] Dennis Kiker, "The New Rule 502: What does it mean to you?" *The Electronic Discovery Counselor*, October 8, 2008.