WHAT'S HAPPENING TO THE ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE?

PROPOSED FEDERAL RULE OF EVIDENCE 502

THE ATTORNEY-CLIENT PRIVILEGE PROTECTION ACT OF 2007

THE MCNULTY MEMORANDUM

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I. OVERVIEW

There is a growing consensus that the attorney-client privilege and work product protections face new and dangerous threats. Some threats stem from the increasing complexity of modern technology and multi-forum litigation. A more serious threat stems from a paradigm shift in the way government officials treat corporate privilege claims in law enforcement and regulatory investigations. In both instances, extensive and needless litigation and untenable choices surround this area of the law.

Strong, effective, and predictable attorney-client privilege and work product protections improve the quality of justice in our court systems and promote the common welfare. In the criminal justice system, these protections are an integral part of the right to counsel. In the civil justice system, they encourage individuals and companies to abide by the rules and regulations that govern their conduct and allow those accused of wrongdoing to seek and obtain legal advice more freely. These protections enhance corporate accountability and compliance with the law. They protect fundamental fairness in regulatory and adjudicative processes. In *Upjohn v. United States*, the Supreme Court explained the purpose underlying the attorney-client privilege:

> Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. [1]

Similarly, *Hickman v. Taylor* declared the need to protect attorney work product:

> In performing his various duties… it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel.[2]

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[1] *Upjohn v. United States* , 449 U.S. 383, 389 (1981).

[2] *Hickman v. Taylor*, 329 U.S. 495, 500 (1947).

The ability of corporate officers and employees to engage in full and frank communication with a corporation's lawyers is evaporating, however. In a recent survey by the Association of Corporate Counsel, almost seventy-five percent (75%) of in-house and outside corporate counsel agreed that a "'culture of waiver' has evolved in which government agencies believe it is reasonable and appropriate for them to expect a company under investigation to broadly waive attorney-client privilege or work product protections."[3] As one former federal prosecutor stated in response to the survey, requests for privilege waivers "have become so prevalent as to be casual. To fail to waive is to impede, it is said, often with the suggestion that a decision not to waive is to obstruct."[4]

The Department of Justice's recent "McNulty Memorandum"[5] provides limited procedural protections but still allows prosecutors to make waiver requests and to consider a corporations' refusal to agree to a waiver in charging decisions. Moreover, similar policies adopted by other government agencies, such as the Security and Exchange Commission's "Seaboard Report,"[6] do not even contain the limited procedural protections provided in the McNulty Memorandum. In the view of many, the privilege waiver and employee rights policies embodied in the these guidelines have led to the

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[3] The Decline of the Attorney Client Privilege in the Corporate Context: Survey Results (2006) at 3, available at http://www.acca.com/Surveys/attyclient2.pdf.

[4] *Id*. at 17.

[5] The Justice Department's cooperation standards are outlined in the 1999 "Holder Memorandum," the 2003 "Thompson Memorandum," and the 2006 "McNulty Memorandum." The McNulty Memorandum is available on the Justice Department's website at http://www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf.

[6] The SEC's Seaboard Report, formally known as the "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," was issued on October 23, 2001, as Releases 44969 and 1470. A copy of the Seaboard Report is available on the SEC's website at http://www.sec.gov/litigation/investreport/34-44969.htm.

routine compelled waiver of the attorney-client privilege and work product protections and undermined corporate internal compliance programs.

A broad and diverse coalition of business and legal groups, including the U.S. Chamber of Commerce, the American Bar Association and the American Civil Liberties Union, has opposed these policies. Likewise, Congressional leaders from both parties have expressed serious concerns regarding the Justice Department's policy. In January, 2007, Sen. Arlen Specter (R-PA) introduced the "The Attorney-Client Privilege Protection Act of 2007," which would bar all federal agencies from seeking privilege waivers or considering the assertion of privilege in charging decisions. In addition, in March, 2007, the House Judiciary Committee's Subcommittee on Crime, Terrorism and Homeland Security held a hearing on the McNulty Memorandum in which representatives of the ACC and the corporate defense bar made clear that despite the Justice Department's new policy, pressure to waive privilege continues.

The attorney-client privilege has also been the subject of significant rulemaking activity. In May, 2006, the Advisory Committee on Evidence Rules of the U.S. Judicial Conference published proposed Federal Rule of Evidence 502, which seeks to clarify and make uniform the law concerning privilege waivers and to reduce the substantial cost associated with privilege reviews - especially in the context of electronic discovery. Proposed Rule 502, includes provisions limiting subject matter waiver and waiver as the result of the inadvertent disclosure of privileged material, clarifying the enforceability of confidentiality orders, and allowing for "selective waiver", i.e., allowing for the disclosure of privileged material to federal law-enforcement authorities without waiving the privilege as to other parties. The public comment period for proposed Rule 502 has

closed, and it is anticipated that the Advisory Committee will approve a final rule to propose to Congress at its next meeting on April 12 and 13.

II. PROPOSED FEDERAL RULE OF EVIDENCE 502

Proposed Rule 502 does not purport to entirely preempt the field of attorney-client privilege; nor does it seek to alter long-standing principles of federal or state law concerning whether materials are protected by the privilege. Instead, Rule 502 governs only those aspects of the law related to waiver by disclosure. Since the proposed rule involves a rule of privilege, it must be directly enacted by Congress, rather than merely being adopted by the ordinary rulemaking process.[7]

A. Rule 502(a) - Limitations on Subject Matter Waiver

As the Advisory Committee states, one of the goals of proposed Rule 502 is to "respond[] to the widespread complaint that litigation costs for review and protection of material that is privileged or work product 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." Accordingly, proposed Rule 502(a) provides that the waiver by disclosure of privileged information extends to an undisclosed communication "only if that undisclosed communication or information ought in fairness to be considered with the disclosed communication or information." The Committee Notes state that subject matter waiver is reserved for "unusual" situations in which fairness requires a further disclosure or related, protected information and rejects the rule that inadvertent disclosure of documents during discovery automatically constitutes a subject matter waiver.

Proposed Rule 502(a) strikes a fair balance, but the defense bar expressed some concern that the Advisory Committee should define more clearly the "ought in fairness" language, which is taken from Fed. R. Evid. 106. In general, the rule is meant to protect agains the selective, misleading presentation that is unfair to an adversary. Thus, application of the rule should be limited to those situations in which a disclosing party attempts to affirmatively use the disclosed information while withholding other privileged information on the same subject.

B. Rule 502(b) - Limitations on Waiver as the Result of Inadvertent Disclosure.

Proposed Rule 502 resolves a conflict among the federal courts regarding the effect of the inadvertent disclosure of privileged information.[8] A few courts find that a disclosure must be intentional to be a waiver. At the other end of the spectrum, a few courts hold that any mistaken disclosure constitutes waiver. Proposed Rule 502(b) adopts the majority view, or so-called "middle ground" approach,[9] which provides that the disclosure of privileged information in federal proceedings does not operate as a waiver in a state or federal proceeding if the holder of the privilege "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."

One major shortcoming of proposed Rule 502(b) is that it only applies to disclosures made in federal proceedings. Thus, a litigant facing related federal and state

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[7] *See* 28 U.S.C. § 2074 (b) ("Any such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress.").

[8] *See generally Hopson v. City of Baltimore,* 232 F.R.D. 228, 235-236 (D. Md. 2005) (discussing the three approaches to inadvertent disclosure).

[9] *See Alldread v. City of Grenada*, 988 F.2d 1425, 1434 (5th Cir. 1993) (noting that the majority of courts have adopted the "middle ground" approach to inadvertent waiver).

court litigation will be forced to comply with the broadest privilege waiver rules applicable in the forums in which they could be sued, or risk waiving the privilege for all forums. As initially proposed, Rule 502 applied in both state and federal proceeding, but the rule was scaled back before it was published for public comment, due in large part to concerns expressed by state court judges. A number of members of the defense bar, including Lawyers for Civil Justice (LCJ), advocated that the Committee return to its original stance and recommend to Congress that the provisions for subject matter waiver and inadvertent disclosure fully applicable to both state and federal proceedings, but it is at best uncertain whether the Committee will take such action.

C. Rule 502(c) - Selective Waiver.

Proposed Rule 502(c) provided that in either a federal or state proceeding, the disclosure of privileged information to a federal authority does not operate as a waiver in favor of non-governmental persons or entities. The Advisory Committee published Rule 502(c) in brackets, to indicate that it had not yet taken a position on the merits of the provision and that public comment would be especially important to the Committee's determination. Public comment on Rule 502(c) from the corporate and defense bar was overwhelmingly negative. A selective waiver rule, it was argued, would exacerbate the current trends toward more frequent waiver requests and encourage a growing and questionable presumption amongst government investigators that it is appropriate to demand a waiver in all circumstances. If adopted, the proposed rule would make it impossible for a company to ever again assert the right not to waive the privilege in any government investigation. The criticisms of selective waiver have apparently been successful. According to comments made by the Advisory Committee's Reporter,

because of the opposition from the corporate community and the defense bar, Rule 502 as submitted to Congress will not include a provision on selective waiver.

D. Rule 502(d) and 502(e) - Confidentiality Orders and Confidentiality Agreements by the Parties.

Proposed Rules 502(d) and (e) are both welcome clarifications of the law. Proposed Rule 502(d) provides that an agreed order on waiver of privilege governs all persons in all state or federal proceedings. A common provision of confidentiality orders is a "claw back" or "quick peek" agreement governing privileged materials. The recent amendments to the Federal Rules of Civil Procedure encourage such agreements and provide procedures for retrieval of privileged material that is inadvertently produced.[10] Those amendments, however, are merely procedural. They have no substantive effect and cannot address whether confidentiality orders bind non-parties. The problem is that if provisions of a confidentiality order protecting privileged materials apply only to the parties, such protection is illusory. Today, the reality is that litigants with similar interests are organized into functioning groups which quickly share information through electronic networks. Privileged information can therefore be disseminated around the country in a few seconds, into jurisdictions with death penalty waiver policies, for use in suits there against a party who inadvertently produced the information under a Court endorsed confidentiality agreement. Rule 502(e) codifies the rule that parties can limit the effect of waiver by agreement but such agreement do not bind third parties. Rule

[10] *See* Fed.R.Civ.P. 16(b)(6), 26(f)(4) and 26(b)(5)(B). For an explanation of the new federal rules on e-discovery, see George L. Paul and Bruce H. Nearon, *The Discovery Revolution: E-Discovery Amendments to the Federal Rules of Civil Procedure*, p. 145 (American Bar Association Publishing, 2006).

502(e) effectively requires parties to seek Court approval of such agreements to make them enforceable against third parties.

III. THE ATTORNEY-CLIENT PRIVILEGE PROTECTION ACT OF 2007

In January, 2007, Sen. Specter introduced S. 186, titled "Attorney-Client Privilege Protection Act of 2007" (the "Act"). The bill is identical to a bill Sen. Specter introduced in the closing days of the prior Congress in December, 2006. The stated purpose of the Act is to place on federal government agencies "clear and practical limits designed to preserve the attorney-client privilege and work product protections available to an organization and preserve the constitutional rights and other legal protections available to employees of such an organization." The Act does so by barring agents or attorneys of the federal government from:

- Demanding, requesting or conditioning treatment on the disclosure of privileged communications;
- Conditioning or using as a factor in a charging decision, the valid assertion of privilege, the provision of counsel to an employee, the entry into a joint defense agreement with an employee, the sharing of information relevant to an investigation with an employee, or failing to terminate an employee
- Demanding or requesting that an organization not take any of the described actions.

The Act does not bar a government investigator from seeking communications that the investigator reasonably believes are not privileged and does not bar an organization from making a "voluntary and unsolicited offer to share the internal investigation materials of such organization."

In March, 2007, the House Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security held a hearing on the McNulty Memorandum and waiver requests by government investigators. Representatives of the ABA, the ACC and the corporate defense bar testified and were unanimous that the protections in the McNulty Memorandum were inadequate. The witnesses stated that the new policy had not changed prosecutorial practices and that waiver requests were still being made. Their criticism of the policy focused on the fact that, while the new policy prohibits prosecutors from penalizing corporations that refuse to share privileged information, it still allows prosecutors to make waiver requests and to consider a corporations' refusal to agree to a waiver when making charging decisions. In addition, they argued, the "culture of waiver" created by waiver requests actually harms efforts at corporate compliance by making employees less willing to share information with in-house counsel because of a fear that their testimony will ultimately be disclosed to the government.

Members of the Subcommitee indicated that they plan to introduce legislation to track the Specter bill, and some suggested that the Specter bill requires an enforcement mechanism to ensure that the Justice Department stops pressuring corporatnios to waive the privilege.

IV. THE MCNULTY MEMORANDUM

Under the Thompson Memorandum issued in 2003, "one factor the prosecutor may weigh in assessing the adequacy of a corporation's cooperation is the completeness of its disclosure, including, if necessary a waiver of the attorney-client privilege, both with respect to its internal investigation and with respect to communications between specific officers, directors and employees and counsel." In response to criticism of this

provision of the Thompson Memorandum, both from the corporate community and Congress, at an LCJ meeting in December, 2006, Deputy Attorney General Paul McNulty announced a new policy, now known as the McNulty Memorandum, to supersede and replace the guidance in the Thompson Memorandum.[11]

According to the McNulty Memorandum, a privilege waiver is not a prerequisite to a finding that a company has cooperated in a government investigation, and prosecutors may only request a waiver when there is a legitimate need, which does not include that it is merely desirable or convenient to obtain privileged information.[12] If a legitimate need exists, the McNulty Memorandum instructs that a prosecutor should first request purely factual information (called Category I information), which may or may not be privileged.[13] Category I information includes witness interview and investigative facts gathered by counsel. To request Category I information, a prosecutor must obtain written authorization from the U.S. Attorney, who must consult with the Assistant Attorney General for the Criminal Division before granting the request.[14]

If Category I information provides "an incomplete basis to conduct a thorough investigation," a prosecutor may then request attorney-client communications or non-factual attorney work product, including legal advice given to the corporation before, during and after the underlying misconduct occurred (called Category II information).[15] The McNulty Memorandum states that Category II information should only be sought in

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[11] *See* McNulty Memorandum, http://www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf.

[12] *Id*. at pp.8-9.

[13] *Id*. at p. 9.

[14] *Id*.

[15] *Id*. at p. 10.

rare circumstances, and the United States Attorney must request written authorization from the Deputy Attorney General and must set forth the legitimate need for the information in the request.[16]

If a corporation declines to provide a waiver for Category II information, prosecutors cannot consider this declination against the corporation in making a charging decision. Prosecutors may, however, "favorably consider a corporations acquiescence to the government's waiver request in determining whether a corporation has cooperated in the government's investigation."[17] In addition, a corporation's promise of support to an employee, such as retaining the employee without sanction for their misconduct or through providing information to the employee through a joint defense agreement,, may be considered by the prosecutor in weighing the corporation's cooperation. A corporation's compliance with contractual obligations to advance attorneys' fees to an employee, however, "cannot be considered a failure to cooperate."[18]

[16] *Id*.

[17] *Id*.

[18] *Id*. at p. 11.