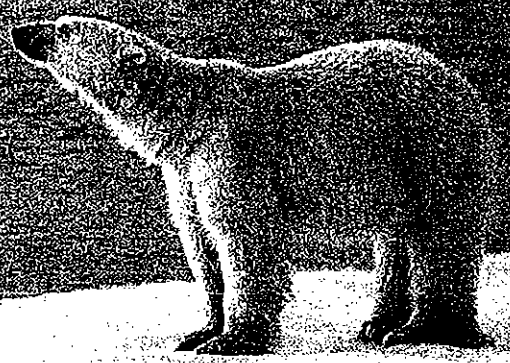
NATURAL RESOURCES & ENVIRONMENT

ABA SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES VOLUME 22 NUMBER 2 FALL 2007

WHY SPECIES MATTER



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The Pieces to the Privilege Protection Puzzle

John M. Barkett

Have you had the experience of defending a deposition where opposing counsel shows the witness a document from counsel to your client? Aghast, you instruct the witness not to answer and demand to know how your opponent obtained the privileged document.

Your opponent smiles. "You produced it."

Dazed, you quickly regain your composure and demand the return of the document, claiming the production was inadvertent. Your opponent refuses. You accuse your opponent of professional misconduct.

Your opponent scoffs, "You committed malpractice."

Stalemate. You are soon both off to court. What should the judge do?

There are at least three answers to this question in current American jurisprudence. The Rules of Professional Conduct have now entered this fray, as has Fed. R. Civ. P. 26. And assuming that new Fed. R. Evid. 502 is adopted by Congress, the landscape will radically change on the highly charged subject of privilege or work product waiver.

Courts have reacted to inadvertent waiver of attorney-client privileged information and work product in three ways. Some courts hold that inadvertent production of a privileged communication is an irretrievable waiver. The First Circuit, District of Columbia Circuit, and the Federal Circuit adhere to this view. *See Hopson v. Mayor et al.*, 232 F.R.D. 228, 235 (D. Md. 2005).

Some courts hold that unless the disclosure of the privileged information was intentional or there is gross negligence, there is no waiver. The Eighth Circuit and a number of district courts have adopted this approach. *Id.* at 235–36.

The remaining courts that have addressed the topic take a middle ground. They look at the facts to determine the circumstances of the disclosure and evaluate the reaction of the producing party to the discovery of the production. The more careless the production and the more dilatory the response to obtain return of privileged information, the more likely a court will determine the privilege was waived. *Id.* at 236.

To eliminate this disparity, a number of rules have been adopted or proposed.

ABA Model Rule of Professional Conduct 4.4(b) was added in 2002 to address a lawyer's receipt of documents, including electronically stored information, that "the lawyer knows or reasonably should know" were sent inadvertently. While Model Rule 4.4(b) does not address substantive legal issues concerning return of the documents or privilege waiver, it does impose an ethical duty on a recipient to "promptly notify the sender." Rule 4.4(b) has not yet been adopted in every state, but one can expect this notice requirement eventually to become universal.

Fed. R. Civ. P. 26(b)(5)(B) (adopted December 1, 2006) addresses a recipient's handling of inadvertently produced, privileged documents after the producing party gives notice of the mistaken production. Specifically, Fed. R. Civ. P. 26(b)(5)(B) provides that "when information is produced in discovery that is subject to 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." In addition to giving notice, which, based on the Committee Note, must be in writing "unless the circumstances preclude it" (e.g., notice during a deposition as in the hypothetical above), the producing party must "preserve the information until the claim is resolved." *Id.*

Upon receipt of this notice, the receiving party is obliged to "promptly return, sequester, or destroy the specified infor-

mation and any copies it has and may not use or disclose the information until the claim is resolved." *Id.* Fed. R. Civ. P. 26(b)(5)(B) also provides that if the receiving party has already disclosed the information before being notified of the claim of privilege, "it must take reasonable steps to retrieve it."

The "receiving party" may also "promptly present the information to the court under seal for a determination of the claim." *Id.* The Committee Note provides that in presenting the question to the district court, "the party may use the content of the information only to the extent permitted by the applicable law of privilege, protection for trial-preparation material, and professional responsibility."

Note that new Rule 26(b)(5)(B) does not give the producing party a time period within which to give notice of the production of privileged or protected documents. The rule, by design, stays out of the battle of whether the producing party's delay in giving notice results in a waiver of the privilege or protection. The Committee Note states: "Courts will continue to examine whether a claim of privilege or protection was made at a reasonable time when delay is part of the waiver determination under governing law."

The notice also must be more than perfunctory. The Committee Note explains that it must be "as specific as possible" in identifying the information inadvertently produced and must state the basis for the claim. The notice also "should be sufficiently detailed so as to enable the receiving party and the court to understand the basis for the claim and to determine whether waiver has occurred." *Id.*

Note, too, that the receiving party must keep control over copies that have been made of the privileged or protected documents. In today's litigation world, where document copies can proliferate, that may not be an easy task.

Some litigants seek to eliminate the risk of waiver or reduce the cost of a privilege review by entering into non-waiver agreements by stipulation or through a court order. These agreements allow a producing party to "claw back" privileged documents inadvertently produced even after an opposing party has had a "quick peek" of the privileged documents.

Fed. R. Civ. P. 26(f)(4) (adopted December 1, 2006) now provides that counsel, in the "meet and confer" session required under Rule 26, must consider whether they can agree that the court should enter an order protecting the right to assert any privilege or protection *after* production of the privileged or protected information. Privilege review costs are particularly concerning when electronically stored information is in issue because of, among other factors, the volume of such data; the properisity for e-mail to be forwarded to many parties; the operation of computer programs that retain drafts, editorial comments, and deleted data; or metadata.

Hence, the Advisory Committee suggested that parties consider use of "quick peek" and "clawback" agreements to minimize the risk of a privilege waiver and to reduce the costs of litigation. *See*, e.g., *J.C. Assocs. v. Fidelity & Guaranty Ins. Co.*, 2005 WL 1570140 (D.D.C. July 2005) (where plaintiff sought claims files that defendant estimated might total 1.3 million files, and plaintiff then focused on a geographic subset of 428 files, the magistrate judge proposed a quick-peek and clawback protective order and gave defendant ten days to determine whether it would surrender the 428 files on this basis); *Zenith Electronics Corp. v. WH-TV Broadcasting Corp.*, 2004 U.S. Dist. LEXIS (N.D. Ill. 2004) (clawback procedure proposed).

While there may be sensible economic reasons to enter into such agreements, litigants still fear the claim that the stipulation or court order precluding waiver is not applicable to third parties. In addition, litigants continue to seek uniformity in the law in the case of inadvertent production, especially in the area of the scope of the waiver with respect to information concerning the same subject matter as the inadvertently produced information. So there is one final piece to the privilege protection puzzle.

On April 13, 2007, the Advisory Committee on the Federal Rules of Evidence proposed Rule 502. It has two purposes: (1) to resolve the three lines of authority on inadvertent waiver and (2) to address subject-matter waiver claims by third parties where, to reduce privilege review costs, a disclosure of privileged information has been made in a federal proceeding under a court order or to a federal agency.

Specifically, Fed. R. Evid. 502(a) would provide that if a disclosure of privileged information is made in a federal proceeding or to a federal agency, the waiver extends to an "undisclosed" communication or information (so-called "subject matter" waiver) *only if* (1) "the waiver is intentional," (2) "the disclosed and undisclosed communication or information concern the same subject matter," and (3) "they ought in fairness to be considered together." In other words, for an inadvertent disclosure, subject matter waiver cannot occur at all under Rule 502(a).

Fed. R. Evid. 502(b) addresses inadvertent disclosure. It does *not* operate as a waiver in a federal or a state proceeding if the holder of the privilege or work product protection "took reasonable steps to prevent disclosure" and the holder "took reasonable and prompt steps to rectify the error," including (if applicable) following Fed. R. Civ. P. 26(b)(5)(B). This is a fact-specific inquiry to be made on a case-by-case basis.

Under Fed. R. Evid. 502(c), the district court is permitted to enter an order that protects the privileged status of a communication or information disclosed in connection with litigation pending before the district court. To ensure protection of disclosed information vis-à-vis third parties, Fed. R. Evid. 502(c) provides that such an order "governs all persons and entities in all federal or state proceedings, whether or not they were parties to the litigation."

Fed. R. Evid. 502(d) would require that to be binding on third parties, agreements among parties on the effect of disclosure must be incorporated into a court order.

Proposed Rule 502 addresses state law issues. First, if state law governs the rule of decision, Fed. R. Evid 502(f) would provide that Rule 502 still governs despite any rule of evidence to the contrary. Fed. R. Evid. 502(g) would render Rule 502 applicable to state proceedings "under the circumstances set out in the rule," again despite any rules of evidence to the

contrary. Finally Fed. R. Evid. 502(h) addresses disclosure made in a state proceeding. If a disclosure is made in a state proceeding and is not the subject of a court order, and the disclosed information is offered in a federal proceeding, the disclosure "is not a waiver" if (1) it would not be a waiver under Fed. R. Evid. 502 "if it had been made in a federal proceeding" or (2) "is not a waiver under the law of the state where the disclosure occurred."

Under 28 U.S.C. § 2074(b), Fed. R. Evid. 502 can only bind state courts if it is adopted by Congress. With an emphasis on trying to reduce litigation costs, the Advisory Committee has prepared a transmittal letter to Congress regarding enactment of Rule 502. On the assumption that Congress will approve Rule 502, it would presumably go into effect in 2008.

The Advisory Committee considered a rule on selective waiver, where a cooperating entity provides a government agency with privileged information without waiver as to third parties. It was too controversial to include in Rule 502, but the Advisory Committee provided draft language on selective waiver for Congress to consider. *See* www.klgates.com/files/upload/eDAT_ER502_ACER_Report_05152007.pdf.

Returning to the hypothetical that I started with, it should not occur in the future under Model Rule 4.4(b) because the recipient should "promptly" notify the sender. If the sender discovers the inadvertent production first, Fed. R. Civ. P. 26(b)(5)(B) should result in notice and resolution of the claim of waiver by the district court. Once Fed. R. Evid. 502 goes into effect, Rule 502(b) will provide a uniform rule of law to determine whether a waiver has occurred. Parties that wish to address the potential of inadvertent production upfront can ask the district court to enter a Rule 502(c) order to protect the parties from claims of privilege waiver by parties within the litigation or by third parties. And under Fed. R. Evid 502(a), only an intentional waiver can result in subject matter waiver if fairness dictates such an outcome and undisclosed information concerns the same subject matter.

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