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Erosion Of The Attorney-Client Privilege And Work Product Doctrine: The ABA And Other Groups Seek Reversal Of Government Waiver Policies

By R. William Ide, III

The American Bar Association has joined forces with a broad and diverse coalition of legal and business groups and others in an effort to protect the attorney-client privilege and work product doctrine and roll back various federal governmental policies and practices that have seriously eroded these fundamental rights. Despite some recent success, the ABA and the coalition are gearing up for a sustained campaign to restore and protect federal recognition of the privilege and the doctrine.

The Importance Of The Attorney-Client Privilege

The attorney-client privilege enables both individual and organizational clients to communicate with their lawyers in confidence, and it encourages clients to seek out and obtain guidance in how to conform their conduct to the law. The privilege facilitates self-investigation into past conduct to identify shortcomings and remedy problems, to the benefit of corporate institutions, the investing community and society-at-large. The work product doctrine underpins our adversarial justice system and allows attorneys to prepare for litigation without fear that their work product and mental impressions will be revealed to adversaries.

Federal Government Policies That Erode The Attorney-Client Privilege

Unfortunately, a number of federal governmental agencies – including the Department of Justice, the U.S. Sentencing Commission, and others – have adopted policies in recent years that weaken the attorney-client privilege and the work product doctrine in the corporate context by encouraging federal prosecutors to routinely pressure companies and other organizations to waive these legal protections as a condition of receiving credit for cooperation during investigations. While the Department's policy was formally established by the so-called 1999 "Holder Memorandum" and 2003 "Thompson Memorandum,"[1] the incidence of coerced waiver has increased dramatically during the past several years. The problem of government-coerced waiver was exacerbated in November 2004 when the Commission added language to the Commentary to Section 8C2.5 of the Federal Sentencing Guidelines that, like the Justice Department's policy, authorizes and encourages prosecutors to seek privilege waiver as a condition for cooperation.[2]

R. William Ide, III

In an attempt to address the growing concerns being expressed about government-coerced waiver, then-Acting Deputy Attorney General Robert McCallum sent a memorandum to all U.S. Attorneys and Department Heads in October 2005 instructing each of them to adopt "a written waiver review process for your district or component," and local U.S. Attorneys are now in the process of implementing this directive.[3] Though well-intentioned, the McCallum Memorandum does not establish any minimum standards for, or require national uniformity regarding, privilege waiver demands by prosecutors. As a result, it is likely to result in numerous different waiver policies throughout the country, many of which may impose only token restraints on the ability of federal prosecutors to demand waiver. More importantly, it fails to acknowledge and address the many problems arising from government-coerced waiver.

Unintended Consequences Of Federal Government Waiver Policies

Substantial new evidence has demonstrated that these policies adopted by the Justice Department and the Sentencing Commission have resulted in the routine compelled waiver of attorney-client privilege and work product protections. According to a new survey of over 1,200 in-house and outside corporate counsel that was completed by the Association of Corporate Counsel, the National Association of Criminal Defense Lawyers, and the ABA in March 2006,[4] almost 75% of corporate counsel respondents believe that a "culture of waiver" has evolved in which governmental agencies believe that it is reasonable and appropriate for

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***R. William Ide, III** is a Senior Partner with McKenna, Long & Aldridge LLP in Atlanta and is Chair of the ABA Task Force on Attorney-Client Privilege. Mr. Ide is also a former president of the American Bar Association and the former senior vice president, general counsel, and secretary of the Monsanto Corporation. He can be reached at bide@mckennalong.com.*

Partners Notes

Proskauer Rose Seminar Explores The Challenges Of E-Discovery In Employment Litigation

A May 11th breakfast seminar hosted by the Labor and Employment Law Department of Proskauer Rose LLP considered a variety of challenges raised by e-discovery in employment litigation. The well-attended program, which accorded CLE credits, was held at the Manhattan Ballroom of the Grand Hyatt New York at Grand Central Station, New York. The speakers were Kathleen M. McKenna, Partner in Proskauer's Labor and Employment Law Department, and Lloyd B. Chinn, Senior Counsel in the Department.

Kathleen M. McKenna

Lloyd B. Chinn

Ms. McKenna introduced this relatively new and increasingly important area of law by noting the principal challenges it poses for the profession: its multidisciplinary complexity; the costs associated with it, which are asymmetrical in terms of being borne principally by the employer; and the potential for sanctions – which she characterized as the cost of getting it wrong.

She went on to point out the absolute necessity for every organization to formulate and implement an official retention policy for its records, including those stored in an electronic form. She noted that, in the event of litigation, the existence of such a policy would go a long way in refuting any suggestion that the employer had destroyed information for the purpose of advancing its interests in the litigation. Among the points to be covered by such a policy, she said, were the designation of a point person responsible for its implementation and for compliance at all levels of the organization; the extension of the policy to all forms of electronic data; and provision for routine deletion of unnecessary data pursuant to a specified schedule.

Mr. Chinn spoke about *when* the obligation to preserve data is triggered, with particularly reference to the *Zubalake* decisions. He pointed out that the duty to preserve arises on notice of litigation, and that that includes constructive notice – when the defendant knew or *ought to have known* that litigation looms. "Once a party reasonably anticipates litigation," he said, "it must suspend its routine destruction policy through the imposition of a 'litigation hold.'" He went on to discuss the amendments to the Federal Rules of Civil Procedure that will likely become effective on December 1st of this year, noting that the current rules already cover electronic data. A key point here is that under new FRCP 26(b)(2)(B), a party is *not* required to provide electronically stored information that it identifies as from sources *not reasonably accessible* because of the undue burden of cost. In such event, the burden shifts to the requesting party, which is required to show *good cause* that the need for discovery outweighs the cost. Predictably, "good cause" will be the subject of further litigation.

The form of production received considerable attention from Mr. Chinn. After a review of a variety of formats, he noted that "native format" – which includes metadata and embedded data – may well be the default form of production required by the amended FRCP (even though production in native format raises several difficult issues, including the production of proprietary or privileged information).

Mr. Chinn next addressed the crucial issue of cost of production and cost-shifting between the parties. After a review of the factors underlying the tests utilized in *Rowe* and *Zubulake*, he noted that some state courts had chosen to rely on state statutes rather than any of the formulations utilized by federal courts. He also pointed out that the FRCP amendments do not expressly adopt either the *Rowe* or *Zubulake* tests, so this too will be an area of further litigation.

Following a brief discussion on privilege and attorney work product – and what to do in the event of inadvertent disclosure – Ms. McKenna and Mr. Chinn presented an e-discovery hypothetical which touched upon most of the issues they had raised during the program. Their presentation was lively, informative and, given the fact that this is an emerging area of the law where there are more questions than answers, very thought provoking. The presentation included some very practical words of advice as well: "Where you have inadvertently produced some privileged e-mails to the other side, move as quickly as possible to recover them once the error is discovered. The more time that passes before you attempt to recover the e-mails, the more likely it is that the court is going to think you have been too cavalier in what you turned over in the first place, and *that* argues for a waiver of the privilege." Or, in response to a question from the audience: "Suppose there is no backup tape, and e-mails are only saved locally, on computer hard drives. On notice of litigation, routine destruction must be suspended, and that means that individual employees must be alerted not to destroy their e-mails. They, however, may be the very people who have a direct interest in seeing that those e-mails never see the light of day. What to do? You may be well advised to surreptitiously photograph what is on their hard drives *before* alerting them to the litigation."

The one criticism this reporter can make concerning the seminar is that an hour and a half is too brief a time to do anything but scratch the surface of this important and timely subject. *The Metropolitan Corporate Counsel* proposes to at least attempt to rectify this state of affairs by interviewing these extremely capable practitioners in the near future. Please stay tuned.

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Attorney-Client

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them to expect a company under investigation to broadly waive attorney-client or work product protections. In addition, 52% of in-house respondents and 59% of outside respondents have indicated that there has been a marked increase in waiver requests as a condition of cooperation in recent years. Corporate counsel also indicated that when prosecutors give a reason for requesting privilege waiver, the Thompson/Holder/McCallum Memoranda and the amendment to the Sentencing Guidelines were among the reasons most frequently cited.

These government policies weaken the attorney-client privilege and work product doctrine and undermine companies' internal compliance programs. By requiring routine waiver of the privilege, these policies discourage entities from consulting with their lawyers, thereby impeding the lawyers' ability to effectively counsel compliance with the law. In addition, by requiring waiver of the work product doctrine, the policies discourage entities from conducting internal investigations designed to quickly detect and remedy misconduct. Therefore, these policies undermine, rather than promote, good corporate compliance practices.

The ABA's Response To The Privilege Waiver Problem

The ABA is working to protect the attorney-client privilege and work product doctrine in a number of ways. In 2004, the association established a Task Force on Attorney-Client Privilege to study and address the policies and practices of various federal agencies that have eroded attorney-client and work product protections. The ABA Task Force, which I have had the privilege to chair, held a series of public hearings on the privilege waiver issue and received testimony from numerous legal, business, and public policy groups. The Task Force also crafted new ABA policy – unanimously adopted by our House of Delegates last August – supporting the privilege and opposing government policies that erode the privilege. The new ABA policy and other useful resources on this topic are available on our Task Force website at www.abanet.org/buslaw/attorneyclient/.

The ABA and its Task Force on Attorney-Client Privilege also have been working with a broad and diverse coalition of influential legal and business groups – ranging from the U.S. Chamber of Commerce and the Association of Corporate Counsel to the American Civil Liberties Union and the National Association of Criminal Defense Lawyers – in an effort to modify both the Justice Department's waiver policy and the 2004 privilege waiver amendment to the Sentencing Guidelines to clarify that waiver of attorney-client and work product protections should not be a factor in determining cooperation.[5] Materials relating to the work of the ABA and the coalition are available at www.abanet.org/poladv/acprivilege.htm.

After receiving extensive written comments and testimony from the ABA, the coalition, numerous former senior Justice Department officials – including three former attorneys general from both parties – and other organizations, the Sentencing Commission voted unanimously on April 5, 2006, to reverse the 2004 privilege waiver amendment to the Sentencing Guidelines.[6] The change will be included in the package of amendments that the Commission sends to Congress on May 1, 2006. Unless Congress acts to modify or reverse the change, it will become effective on November 1, 2006.

While the Commission's vote to remove the privilege waiver language from the Guidelines is a very positive and encouraging development, the Justice Department has not yet taken steps to reexamine and remedy its role in the growing problem of government-coerced waiver. As a result, many federal prosecutors continue to routinely demand that companies waive their privileges as a condition for receiving cooperation credit. In addition, the McCallum Memorandum, which requires all 93 U.S. Attorneys around the country to adopt their own local privilege waiver review procedures, will further complicate this problem.

In an effort to address the problems created by the Justice Department's waiver policies, ABA President Michael Greco sent a letter to Attorney General Alberto Gonzales on May 2, 2006. In that letter, available online at www.abanet.org/poladv/acprivgonz5206.pdf, Greco expressed the ABA's concerns over the Department's privilege waiver policy and urged it to adopt specific revisions to the Holder/Thompson/McCallum Memoranda that were prepared by the ABA Task Force and the coalition. These suggested revisions would remedy the problem of government-coerced waiver while preserving the ability of prosecutors to obtain the important factual information they need to effectively enforce the law by (1) preventing prosecutors from seeking privilege waiver during investigations, (2) specifying the types of factual, non-privileged information that prosecutors may request from companies as a sign of cooperation, and (3) clarifying that any voluntary waiver of privilege shall not be considered when assessing whether the entity provided effective cooperation. This new language would strike the proper balance between effective law enforcement and the preservation of essential attorney-client and work product protections.

Outreach To State And Local Bars

In recognition of the nationwide implications of the privilege waiver problem, the ABA has also reached out to state and local bar associations and other organizations throughout the country on this issue. On January 31 and again on May 2, 2006, ABA President Greco sent a letter to hundreds of state and local bar leaders across the country urging them to take the following steps:

Establish Their Own Committees. Several state and local bars – including the New York, California, Arkansas, Connecticut and Boston bars – already have established committees to educate themselves on the issue and to assure that the privilege is protected. The ABA is urging the bars to establish committees or task forces and then coordinate their efforts with those of the ABA Task Force.

Contact Local U.S. Attorneys and the Justice Department. Just as the ABA wrote to Attorney General Gonzales, it is also urging state and local bars to write to their U.S. Attorneys urging them to adopt waiver review procedures that do not allow any requests, direct or indirect, for waiver of the privilege and work product. Bar groups are also being encouraged to

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