August 1, 2007

The Saga of the Selective Waiver Doctrine

Grace M. Giesel

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The issue of selective waiver of the attorney-client privilege has knocked around in the courts for at least thirty years, receiving, at best, a chilly reception.[1] Lately, the issue has garnered even more attention. Last summer, the federal Advisory Committee on Evidence Rules put forth a new rule adopting selective waiver. The federal Judiciary's Committee on Rules of Practice and Procedure published this rule for public comment. The proposed Rule of Evidence 502(c) stated:

> In a federal or state proceeding, a disclosure of a communication or information covered by the attorney-client privilege or work product protection—when made to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority—does not operate as a waiver of the privilege or protection in favor of non-governmental persons or entities. The effect of disclosure to a state or local government agency, with respect to non-governmental persons or entities, is governed by applicable state law. Nothing in this rule limits or expands the authority of a government agency to disclose communications or information to other government agencies or as otherwise authorized or required by law.[2]

The response to the proposed rule was "almost uniformly negative."[3] As a result, the Advisory Committee on Evidence Rules, in the Spring of 2007, dropped the selective waiver language from the proposed rule. The Committee on Rules of Practice and Procedure and the Judicial Conference did not disagree.[4] So, what does all this mean? What is happening here?

The Attorney-Client Privilege

Let's start at the beginning with the attorney-client privilege. The attorney-client privilege attaches to communications between attorneys and clients. To be privileged, the communication must be intended to be confidential and for the purpose of obtaining or rendering legal assistance. No privilege attaches if the communication is in furtherance of a crime or fraud.[5]

The rationale for the privilege is that the promise of confidentiality encourages clients to make full disclosure to their attorneys. With access to all facts, attorneys can render appropriate legal advice. Thus, by encouraging full disclosure, the attorney-client privilege encourages the rendering of the best possible legal advice and assistance. Full disclosure is essential to legal advice not only after a problem arises but also in an effort to prevent problems. As the court said in *United States v. Chen*, "counseling clients and bringing them into compliance with the law" is a "valuable social service [that] cannot be performed effectively if clients are scared to tell their lawyers what they are doing."[6]

Waiver

Even if the privilege attaches to a communication, a client can waive the privilege by voluntary disclosure. If a client consults with an attorney in confidence for the purpose of obtaining legal advice, the communication between attorney and client is privileged. If the client then regales the crowd at the neighborhood bar with the tale of what the client told the attorney and what the attorney said to the client, then the client waives the privilege. By telling others, the client indicates that the client no longer views the conversation as confidential. The privilege, once waived, is waived as to all, not just the patrons of the bar who hear the client's interesting tale.

The same result occurs when a party in a litigation matter voluntarily reveals a privileged communication to the opposing party. The party, by such action, waives the privilege as to the opposition and all others. Revealing the communication indicates that the party no longer views the communication as confidential so no privilege exists.

Selective Waiver

"Selective waiver" is the name given to the notion that a party should be able to waive the privilege as to one person or purpose but not as to another. Often the issue arises in corporate wrongdoing settings. A government entity, engaging in an investigation of the corporation, asks the corporation to disclose to it documents relating to the matter in question. The attorney-client privilege would apply to many of these documents, but if the corporation releases the documents to the government voluntarily, the corporation waives the privilege.

A collateral effect of the corporation's disclosure of these communications to the government is that the corporation waives the privilege as to the world. Commonly, a matter that is the subject of a government investigation is also the basis of private actions. Those plaintiffs have a much easier road when they have the ability to access documents the corporation disclosed in the course of a government investigation.

Government Requested Waivers

In recent years, the government has frequently requested voluntary production of communications and thus waiver of the privilege. The government has indicated that it considers production of the communications and waiver of the privilege as an indicator of cooperation. This cooperation can lead the government to treat the corporation more favorably.[7] Not surprisingly, many corporations have disclosed otherwise privileged communications in an effort to minimize the negative effect of the government's investigation. These entities perform a cost-benefit analysis and conclude that the benefit of disclosure of at least some of the requested documents outweighs the cost of the lost privilege.

This situation has led to renewed interest in

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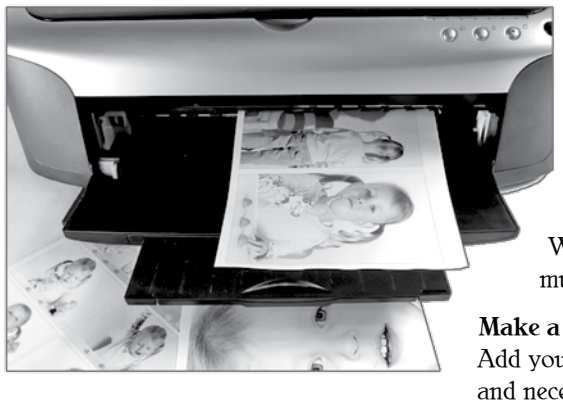
Buying a Printer

Consider More Than Initial Cost



Buying the right printer can be tough. You have to consider not only the initial cost of the printer itself, but sometimes more importantly the ongoing maintenance costs as well. In other words, be careful or they'll get you with the cost of the cartridges even if you do get a good deal on the printer.

Here are some printer-buying tips from "Shopping for the Perfect Printer," by Kimmy Powell on *Geeks.com:*

Know what you need.
What are your printing needs and how much is your budget?

Make a list.
Add your one-time costs such as the printer and necessary cables and ongoing costs like ink and paper.

Look at initial costs.
Inkjet printers are generally less expensive than laser printers when you consider your initial investment.

Inkjet vs. laser toner cartridges.
Inkjet cartridges are more moderately priced than laser toner cartridges, but inkjets usually printer significantly fewer copies and incur an overall higher per-printed-page cost.

How many copies per cartridge?
Find out how many copies you can make per cartridge. There is a big difference in output when you compare inkjet to laser cartridges. You will shell out more for the laser cartridge but you'll get a lot more copies, reducing your overall per-printed-page cost. You will have to ask yourself how many copies generally you are going to make. If it is a fairly high volume, a laser printer might be right for you.

Individual cartridge replacement vs. whole.
If you are buying an inkjet printer, find out whether each ink color has its own cartridge or whether you will have to replace the whole unit when a single color runs out. If you have to replace the whole cartridge, it is likely your overall ink costs will be higher.

Is it fast enough?
Test the printer to make sure it has enough speed for your needs.

Is the text quality high enough?
Run test copies and compare DPI (dots per inch) and how it affects the crispness of the text.

Don't forget to add in incidentals.
Know that you will probably have to purchase an accompanying cable separately.

What about all-in-ones?
If you are considering buying an all-in-one, you should know that you will lose some printer quality for the ability to access the many features. ■

the selective waiver concept. The corporation argues, in litigation with a private party, that any waiver of the attorney-client privilege occurring in a government investigation should not be viewed as a waiver for all subsequent proceedings involving other parties.

A Typical Case

A typical setting and a typical court treatment is *In re Qwest Communications International Inc.*[8] In 2001, Qwest shareholders filed a federal securities fraud class action against Qwest and other defendants. The shareholders claimed that Qwest and the other defendants made false statements about Qwest's finances. In 2002, the Securities and Exchange Commission (SEC) initiated an investigation of Qwest—the Department of Justice (DOJ) began its own investigation. The SEC and DOJ investigations covered many of the same issues as the shareholder suit. In the course of the government investigations, the government subpoenaed certain documents. Qwest initially refused to produce documents that were protected by the attorney-client privilege or work product doctrine. Qwest eventually produced 220,000 pages of privileged documents but declined to produce another 390,000 pages. Qwest produced the documents so as to be perceived as cooperating with the investigation. Before producing any documents, however, Qwest obtained confidentiality agreements from the SEC and the DOJ. The agreements stated that Qwest did not intend to waive the attorney-client privilege or the work product doctrine. In the shareholder action, Qwest refused to produce the documents it had furnished to the SEC and the DOJ, claiming that the documents were privileged.

The district court held that Qwest had waived the privilege for the disclosed documents. The Tenth Circuit Court of Appeals agreed and the United States Supreme Court denied certiorari.[9] The Tenth Circuit, in denying the selective waiver doctrine, began with the principle that the attorney-client privilege, because it is a doctrine that can thwart the discovery of truth, must be strictly and narrowly construed. Accepting the selective waiver doctrine would broaden the privilege. While doing nothing to further the rationale of the attorney-client, adoption of the selective waiver doctrine would lead to less disclosure by clients to attorneys because the likelihood of ultimate disclosure would be higher. Perhaps the government would have an easier time accessing information in investigations but adopting the selective waiver doctrine would, in effect, convert the attorney-client privilege into more of a strategic tool. The Tenth Circuit noted that refusing to adopt the selective waiver doctrine does not mean that targets of investigations will disclose less to the government in investigations. Qwest, after all, disclosed 220,000 pages of documents even with the knowledge that the documents might no longer enjoy privileged status. Finally, the court noted that the selective waiver issue might best be the subject of legislative or executive action.

A Modified Climate

As we now know, the suggestion that the selective waiver concept should be incorporated into the federal evidence rules has not been accepted. The arguments against selective waiver in *Qwest* were repeated in the context of comments about the proposed rule.[10]

In addition, government entities are rethinking policy regarding attorney-client privilege waiver. Quite a debate has raged over the propriety of the government's use of waiver of the attorney-client privilege as an indicator of cooperation. In December of 2006, Senator Arlen Specter introduced a bill, the Attorney-Client Protection Act of 2006, which, if enacted, would prohibit government prosecutors from using assertion of the privilege as an indicator of lack of cooperation.[11] Also, in December of 2006, the Department of Justice issued new guidance on the use of waiver in government investigations. This new guidance, known as the McNulty Memorandum, specifies that waivers can be sought only where there is a legitimate need and government lawyers must obtain approval from the local United States Attorney before seeking privileged matter.[12] Perhaps the selective waiver doctrine's best environment for adoption has passed.

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End Notes

[1] Only one court truly has embraced the doctrine. *See Diversified Indus., Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977). For cases critical of the doctrine see, for example, *In re* Qwest Communications Int'l Inc., 450 F.3d 1179 (10th Cir. 2006); *In re* Columbia/HCA Healthcare Corp. Billing Practices Litigation, 293 F.3d 289 (6th Cir. 2002); *United States v. Massachusetts Inst. of Tech.*, 129 F.3d 681 (1st Cir. 1997); *Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414 (3d Cir. 1991); *In re* Martin Marietta Corp., 856 F.2d 482 (2d Cir. 1982); *In re* John Doe Corp., 675 F.2d 482 (2d Cir. 1982); *Permian Corp. v. United States*, 665 F.2d 1214 (D.C. Cir. 1981).

[2] This proposed rule can be found at *www.lexisnexis.com/applieddiscovery/lawLibrary/Rule 502.pdf.*

[3] Report of the Advisory Committee on Evidence Rules, issued May 15, 2007, and found at *www.uscourts.gov/rules/Reports/EV05-2007.pdf.*

[4] Report of the Advisory Committee on Evidence Rules, issued May 15, 2007, and found at *www.uscourts.gov/rules/Reports/EV05-2007.pdf.*

[5] Judge Wyzanski stated in *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1050):

> The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

[6] 99 F.3d 1495, 1500 (9th Cir. 1996). In *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981), the Supreme Court stated that the attorney-client privilege's "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."

[7] For a discussion of this trend, referred to as a "culture of waiver," and its causes, see *In re* Qwest Communications Int'l Inc., 450 F.3d 1179, 1199 and n. 9 (10th Cir. 2006). *See also* Douglas R. Richmond, *The Case Against Selective Waiver of the Attorney-Client Privilege and Work Product Immunity,* 30 Am. J. Trial Advocacy 253, 254 (2006).

[8] 450 F.3d 1179 (10th Cir. 2006).

[9] *Qwest Communications v. New England Health Care Employees Pension Fund,* 127 S. Ct. 584 (2006).

[10] *See* Report of the Advisory Committee on Evidence Rules, issued May 15, 2007, and found at *www.uscourts.gov/rules/Reports/EV05-2007.pdf.*

[11] *Corporate Counsel: Senator Specter Files Bill to Reverse DOJ Policy Forcing Privilege Waivers,* 22 **Lawyers' Manual of Professional Conduct** 610 (December 13, 2006).

[12] *See Corporate Counsel: DOJ's McNulty: Level of Waiver Requests Doesn't Justify Bill to Limit Agency Discretion,* 23 **Lawyers' Manual of Professional Conduct** 225 (May 2, 2007).