SAILING ON CONFUSED SEAS: PRIVILEGE WAIVER AND THE NEW FEDERAL RULES OF CIVIL PROCEDURE

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Abstract

Because so much information can be stored in a computer's memory, a review of a client's electronic records for discovery purposes can result in staggering costs and the inadvertent disclosure of privileged material. While lawyers have created two kinds of agreements they hope will reduce the costs of such review and prevent any claim that their actions constitute a waiver of any privilege by their clients, the new Federal Rules of Civil Procedure neither prohibit nor authorize such agreements and grant only limited relief to the party who has produced privileged material and seeks its return. Moreover, agreements between counsel as to privilege waiver cannot bind third parties. In one significant decision, a magistrate judge concluded that, in certain circumstances, parties to such a court-approved agreement will be protected from claims by third parties that the agreement constitutes a waiver of any privilege. That decision generated a proposal to enact a new Federal Rule of Evidence that achieves the same result. Without such a rule, the costs of privilege review will remain high, unless there is either new technology that could segregate privileged material from other information at its creation or American businesses adopt and enforce reasonable and well-articulated policies requiring their employees to maintain privileged material separate from all other electronic records.

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I. INTRODUCTION

Imagine on a beautiful Saturday morning in spring, an associate in a large Washington law firm has been invited to go sailing on the Chesapeake Bay. The telephone rings. A partner calls to say that the firm will be entering its appearance in a complicated case in federal court and the judge has indicated that she will allow no extensions of the discovery deadlines. Predecessor counsel has done little or nothing and the associate will have to get to the office as quickly as she can and begin reviewing information subject to an outstanding discovery request to make sure that none of it is privileged from disclosure. The problem is that, as is now true of all American corporations, the information to be reviewed is in computer form. The partner knows only that the client has made available the information to be reviewed in an electronic format. The partner warns the associate to be very careful since the client, a Fortune 500 company, had a large general counsel's office and retained outside counsel for many matters. The client's business is intensely regulated and its officers and employees consulted with its lawyers every day. Indeed, an officer of the client has told the partner that the litigation involves several transactions as to which the client's officers sought legal advice.

The associate cancels her sailing trip and arrives at the office where she is met by one of the client's employees who explains how to access the client's information. She does so and within an hour realizes that the information is collected in no principled order within the computer. First, everyone who created the information had a personal, idiosyncratic way of saving it within the computer system; the client certainly did not provide its employees with any guidance as to what to keep and where to keep it. She also remembers reading an article somewhere that pointed out how, as server size diminishes and the capacity of computers to retain information grows, the incentive to organize information efficiently and to delete what is no longer needed evaporates. Hard drives and computer networks now contain mountains of useless and disorganized "junk" that should have been deleted years ago. She remembers receiving emails from her firm's IT administrator begging everyone to delete what they no longer needed because the network server was reaching its capacity. She now realizes that she no longer gets those emails. Looking at her client's system, she knows why. Nobody throws anything out any more. She is finding useful information that she must review, but it is buried in a mountain of junk, including recipes, sign-up lists for the softball team, and her personal favorite, all the entries in the office NCAA Final Four pool.

She looks at the clock and realizes that she has been working for four hours and has hardly started. Her firm bills her time at $250 per hour, and she realizes that her first day of work has not been all that productive and will cost the client $2,000. Given the disorganized mess she has found, she is certain that it will take several persons to finish the task and the cost will be staggering.

On Monday morning, she tells the partner what she has found, and he tells her that things may be getting worse. It appears that the opposition will ask the judge to be permitted to have a computer forensic technologist examine the client's computer system itself. If that happens, the associate will have to examine what the partner thinks is called the "slack"[1] space to see if

[1] Defined as: "[t]he unused space on a cluster that exists when the logical file space is less than the physical file

contains segments or portions of privileged documents from documents that were thought to be deleted but may still be in the computer's memory. The associate returns to her office, wondering where she can find an application for dental school.

The story is not apocryphal. With some literary license, it is based on the experience of a young friend of mine who actually spent time examining the slack space of a computer for privileged documents. More to the point, as the associate in my hypothetical found, few, if any, American corporations even have a records management policy, let alone an effective means of enforcing it. Few, to my knowledge, segregate privileged information as it is being created. Thus, the cost of a "privilege review" in the electronic discovery phase of a case is immense. From my perspective as a magistrate judge who presides over discovery in a federal court, the cost threatens to permit one party to extort a settlement from the other out of all proportion to the case's merit. Worse, federal courts try preciously few cases now[2] and will try fewer if the cost of a privilege review cannot be reined in. Indeed, I wonder if the high cost may lead to the federal courts becoming the exclusive litigation playground of the super rich who may be the only ones who can afford a privilege review of their computer systems.

II. WAIVER

The associate has to cancel her sailing trip because of the principle that a privilege is forfeited (or "waived") by disclosure of the information claimed to be privileged. The attorney-client privilege protects confidential communications made by a client to a lawyer for the purpose of securing legal advice or services,[3] while the work product privilege protects a lawyer's mental processes while that lawyer is preparing for trial or working in anticipation of it.[4] Although the former is said to advance the crucial societal interest in clients being candid with their lawyers,[5] and the latter the equally important value in zealous advocacy,[6] both evaporate and are forfeited when either the client or the client's agent, the lawyer, fails to protect them. The law pertaining to such "forfeitures" or "waivers" is muddled and differs radically from jurisdiction to jurisdiction. However, it can be said to fall along a continuum from the rigid or "hawkish" view that any inadvertent waiver is a complete waiver of the privilege to the more flexible or "liberal" view that no waiver occurs when the client or the lawyer were diligent and took all reasonable efforts to prevent disclosure.[7]

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space. . . . Slack space can contain information soft-deleted from the record, information from prior records stored at the same physical location as current records, metadata fragments, and other information useful for forensic analysis of computer systems." SHARON D. NELSON, BRUCE A. OLSON & JOHN W. SIMEK, THE ELECTRONIC EVIDENCE AND DISCOVERY HANDBOOK, FORMS, CHECKLISTS, AND GUIDELINES, 289 (2006).

2 *See* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEG. STUD. 459 (2004).

3 Banks v. Office of the Senate Sergeant at Arms, 236 F.R.D. 16, 19-20 (D.D.C. 2006).

4 FED. R. CIV. P. 26(b)(3).

5 Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

6 Hickman v. Taylor, 329 U.S. 495, 510-11 (1947).

7 Dennis R. Kiker, *Waiving the Privilege in a Storm of Data: An Argument for Uniformity and Rationality in Dealing with the Inadvertent Production of Privileged Materials in the Age of Electronically Stored Information*, 12 RICH. J.L. TECH. 15 (2006).

Another factor leading to the cancellation of the associate's sailing trip was the notion that if a privilege is waived as to document A, then it may operate as a waiver as to document B, if, for example, document A is incomprehensible without document B or fairness requires document B to be disclosed once document A is disclosed.[8] Lawyers' fear that any waiver will lead to this often unpredictable result also drives the depth and expense of a privilege review.

III. WAIVER AGREEMENTS

A. "Sneak a Peek"

Nature and lawyers abhorring a vacuum, one of two kinds of an agreement may emerge that will permit our associate to go sailing. The first is based on a shared understanding that no one wants to waste time going through the junk to find the good stuff and it makes sense to eliminate the junk in order to limit the privilege review to the good stuff. Under such an arrangement, called "sneak a peek," the lawyers for the opposing sides review the collected information by general categories in the hopes of eliminating the useless ones.

If that review goes deeper and leads to the opening of files for a joint examination of their contents, the lawyers agree that their doing so is not a waiver of the privilege even if the review does disclose a privileged document to opposing counsel.

B. "Claw back"

The second type of agreement permits the lawyer for the producing party to demand that she be given back electronic information inadvertently produced because it is privileged. This may occur in two situations. Lawyers may be so certain that their clients have no privileged information in their electronic files that they turn them over without reviewing them. They may then agree that, if otherwise privileged information is contained within the files, the producing party will be permitted to demand its return, to, as they say, "claw it back" once the producing party becomes aware of its existence.

A more likely scenario would follow a privilege review. In that situation, the lawyer for the producing party, wanting to wear both a belt and suspenders, reaches an agreement with opposing counsel that if, despite the review, privileged information is found within the produced files, the producing lawyer will be permitted to claw it back.

IV. THE NEW FEDERAL RULES

Understandably, the Advisory Committee on the Federal Rules, creating new rules of civil procedure, adjured any intention to deal with the evidentiary or other substantive issues involved in the inadvertent or advertent disclosure of information subject to a claim of privilege.[9]

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[8] EDNA SELAN EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORD-PRODUCT DOCTRINE, 378-391 (4th ed. 2001).

[9] Report to the Standing Committee on Rules of Practice and Procedure, Judicial Conference of the United States

Instead, the new rules require counsel to discuss these issues and determine whether to ask the court to incorporate into an order an agreement they reach "on a procedure to assert such claims [of privilege as attorney-client or work product] of production." Proposed Rule 26(f)(4).

Notably, the new rule does not speak to a "sneak and peek" agreement but speaks only to a post-production claim of privilege and creates a new form of protection. If the producing party produced information, subject to a claim of either attorney-client or work product protection, then that party, having realized that some of the information is privileged, may try to "claw it back" by notifying her opponent to the specific information subject to the asserted privileged. Once notified, the other party may either return it or challenge the claim. In the latter event, the receiving party must sequester the information and submit it to the court under seal for resolution of whether the information is privileged and whether that privilege has been claimed. Proposed Rule 26(b)(5)(B).

V. AGREEMENTS POST NEW RULES

The rules leave counsel where they found them. No new rules pertaining to electronic discovery would provide any relief from performing the privilege review. The only relief is to assert the limited "claw back" provision once the privilege review is done or even if one has not been done. Thus, our associate still cannot go sailing and must do the privilege review unless her client and its opponent can arrive at some other agreement. But any other agreement encounters another road block, namely that it can only bind the parties to it and cannot possibly bind unknown persons who may someday sue the client and want access to the documents that are being disclosed. That unknown person would be well within his or her rights to claim that the disclosure made pursuant to any such agreement is an advertent, intentional waiver of any attorney-client or work product privilege that could be claimed.[10]

VI. AVOIDING A "HOPSON'S" CHOICE

In a remarkably creative decision,[11] one magistrate judge has determined that parties to such an agreement will be protected against any claim of waiver by a third party if their agreement in incorporated into a judicial order under certain limited circumstances.[12] He reasoned that, although Congress did not enact what would have been Rule 512 of the Federal Rules of Evidence, the principle of that rule—a compelled disclosure does not waive a privilege—should be applied to permit a court to find that a disclosure made in accordance with

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by the Advisory Committee on the Federal Rules of Civil Procedure, Sept. 2005, at 29, available at http://www.uscourts.gov/rules/Reports/ST09-2005.pdf.

[10] For a recent and dramatic example of how such an agreement failed to protect a party from a claim by a third party that the privilege had been waived, see *In re Qwest Comm. Int'l, Inc.*, 450 F.3d 1179 (10th Cir. 2006).

[11] Hopson v. Mayor and City Council of Baltimore, 232 F.R.D. 228 (D. Md. 2005).

[12] Magistrate Judge Grimm insisted that he would issue such an order only after he had determined the scope of the electronic discovery he would permit, whether less than a full privilege review was reasonable given the extent of electronic discovery he would permit and the time within which to complete it and the reasonableness of the procedures counsel were agreeing to, if a full privilege review was not feasible. *Id.* at 246.

a court order cannot be deemed a waiver of any privilege pertaining to the information being disclosed pursuant to that order.

This imaginative decision has now generated a new Proposed Federal Rule of Evidence, Rule 502, that accomplishes the same result. It provides that neither the attorney-client privilege nor the work product protection is waived in either a federal or state proceeding[13] "as a result of the disclosure in connection with litigation pending before the court . . . if the order incorporates the agreement of the parties before the court."[14] Note that the proposed rule does not speak to the circumstances under which the court will enter such an order. As just explained, Magistrate Judge Grimm indicated in *Hopson* that his entering such orders will certainly not be a matter of course.[15]

VII. THE FUTURE

Lawyers and judges face a difficult future in dealing with privileged information stored in a computer's memory. As server space increases and the cost of memory decreases, the tendency of computer users to save everything and organize none of it will increase. As noted earlier, the new Federal Rules justify extremely limited relief in one situation, the "claw back," and leave other solutions, including "sneaking a peek" or agreements as to waiver, where it found them. Furthermore, waiver agreements cannot bind the rights of strangers to the litigation and, therefore, are full of peril where third-person litigation against one of the parties to the agreement is even a remote possibility. Indeed, the Tenth Circuit recently rejected a 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.[16] That result is sobering not only for its rejection of any notion of the legitimacy of any kind of "selective waiver," but also for its insistence that the attorney-client privilege not be extended an inch further than necessary to accomplish its purposes and its niggardly reading of the circumstances under which waiving it can be avoided. Thus, it can be said that, without the dramatic intervention of a new rule adopted by Congress providing that disclosure pursuant to court-ordered agreements is not a waiver, lawyers will have to confront the reality that their clients either (1) authorize what may be a king's ransom to do a full-scale privilege review or (2) permit them to enter into an agreement that eliminates the need for such a detailed review and take the risk that the agreement will not prevent a third party from seeing privileged information.

Perhaps an answer may lie in the technology. Word processing is now dominated by two companies and one wonders why they have not sought to market a program that would prevent a user from saving a document unless the user indicated that it was privileged. Electronic marking

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13 The Advisory Committee is "well aware that a privilege rule proposed through the rulemaking process cannot bind state courts" if adopted through the rule making process. It therefore anticipates Congressional action that adopts the rule directly by Congress asserting its power under the Commerce Clause. Committee Note, Advisory Committee on Evidence Rules Proposed Amendment: Rule 502, available at http://www.lexisnexis.com/applieddiscovery/lawlibrary/Rule502.pdf.

14 *Id*.

15 *Hopson*, 232 F.R.D. at 246.

16 In re Qwest Comm. Int'l, Inc., 450 F.3d 1179 (10th Cir. 2006).

of such documents and their segregation into a privileged file would, at least, narrow what must be reviewed.

Absent the technology, one wonders when American corporations will adopt records retention policies that are reasonable, applicable without exception in all departments, and enforced by a corporate manager with real power to discipline those employees who refuse to follow them. It is hard to imagine a greater waste of money than paying a lawyer $250 an hour to look at recipes, notices of the holiday party, and NCAA Final Four pool entries while doing a privilege review. A company that permits that situation to occur is wasting its shareholders' money as surely as if it were burning it in the parking lot.

In the meantime, the staggering costs of a privilege review will grow, driving the costs of litigation ever upward and probably increasing the tendency of parties to avoid the federal courts for other *fora* to resolve their disputes. One thing is certain: without relief from somewhere, that associate will never sail on the Chesapeake Bay.