

The Attorney Client Privilege and Work Product - Navigating Recent Changes and How They Affect Your Technology Company¹

I. Introduction

This is an outline for ABA Roundtable discussions regarding changes to the Federal Rules relating to the attorney-client privilege and work product doctrine. This paper discusses the new Federal Rule of Civil Procedure 26's "clawback provision," the proposed amendments to Federal Rule of Evidence 502, the challenges of asserting privilege in the context of producing electronically stored information, and techniques to preserve the privilege such as protective orders, privilege logs, and joint defense agreements.

II. Overview of the Attorney Client Privilege and Work-Product Doctrine

A. Attorney Client Privilege

To invoke the attorney-client privilege, a party must demonstrate that there was: (1) a communication between client and counsel, which (2) was intended to be and was in fact kept confidential, and (3) made for the purpose of obtaining or providing legal advice.²

The party asserting the privilege must demonstrate each element of the privilege.³ California state courts, however, have shifted the burden of proof. California law *presumes* that communications between a client and attorney are made in confidence and that "the opponent has the claim of privilege has the burden of proving that the communication was not confidential."⁴

B. Work-Product Doctrine

The work product doctrine, as codified in Rule 26(b)(3), provides that a party may obtain discovery of documents and other tangible things prepared in anticipation of litigation only upon a showing that the party seeking discovery (1) has substantial need of the materials in the preparation of his case, and (2) the party is unable, without undue hardship, to obtain the substantial equivalent of the materials by other means.⁵

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² *Fisher v. United States*, 425 U.S. 391, 403 (1976); *United States v. Abrahams*, 905 F.2d 1276, 1283 (9th Cir. 1990).

³ *Ralls v. United States*, 52 F.3d 223, 225 (9th Cir. 1995) ("A party asserting the attorney-client privilege has the burden of establishing the relationship and the privileged nature of the communication.")

⁴ Cal. Evid. Code Ann. § 917.

⁵ *In re Cendant Corp. Sec. Litig.*, 343 F.3d 658, 663 (3d Cir. N.J. 2003) ("The work product doctrine is governed by a uniform federal standard set forth in *Fed. R. Civ. P. 26(b)(3)*."); Cal. Code Civ. Proc. § 2018(c).

Whereas factual work product can be discovered solely upon a showing of substantial need and undue hardship, mental process work product (impressions, conclusions, opinions or legal theories of an attorney) is afforded even greater, nearly absolute, protection.⁶

The work product doctrine is different than the attorney-client privilege. The purpose of the attorney-client privilege is "to encourage clients to make full disclosures to their attorneys."⁷ The purpose of the work product doctrine "is to establish a zone of privacy for strategic litigation planning and to prevent one party from piggybacking on the adversary's preparation."⁸ Unlike the attorney-client privilege, which provides absolute protection from disclosure, work product protection is qualified and may be overcome by need and undue hardship.⁹

III. New Rule 26(b)(5)(B): Clawback Provision

New Rule 26(b)(5)(B) provides a procedure for making a claim of privilege for information already produced in discovery. The Rule provides that the party making the claim may notify any party that received the information and the basis for it. The receiving party must promptly return or destroy the requested information until the claim is resolved. The Rule states:

(5) Claiming Privilege or Protecting Trial-Preparation Materials.

(B) Information Produced. If information produced in discovery is subject to a 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. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved. (Emphasis added.)

The Rule was added in response to complaints that the volume of electronically stored information has substantially increased the risk of privilege waiver. The commentary for the Rule notes the complaint that the delay and expense associated with privilege review for electronic records is excessive and the difficulty in ensuring that all information to be produced has in fact been reviewed.¹⁰

The following are discussion points regarding new Rule 26(b)(5)(B):

⁶ *In re Seagate Tech., LLC*, 497 F.3d 1360, 1375 (Fed. Cir. 2007); *In re Cendant Corp.*, 343 F.3d at 663 ("Rule 26(b)(3) establishes two tiers of protection: first, work prepared in anticipation of litigation by an attorney or his agent is discoverable only upon a showing of need and hardship; second, 'core' or 'opinion' work product that encompasses the 'mental impressions, conclusions, opinion, or legal theories of an attorney or other representative of a party concerning the litigation' is "generally afforded near absolute protection from discovery.").

⁷ *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

⁸ *United States v. Adlman*, 68 F.3d 1495, 1501 (2d Cir. 1995) (purpose of doctrine is to establish "zone of privacy").

⁹ *In re Seagate Tech., LLC*, 497 F.3d 1360, 1375 (Fed. Cir. 2007).

¹⁰ Rule 26(b)(5) advisory committee's note (2006).

- To what extent do you believe that the new rule will reduce the risk of waiver? Will companies be more inclined to produce information in light of the rule?
- Is it advisable to include a claw-back provision in a protective order to further guard against inadvertent waiver of the attorney-client privilege? What language should it include? Should the protective order reference Rule 26(b)(5)(B)?
- Rule 26(b)(5)(B) does not address the issue of whether the privilege is waived by the production of the material. It only provides a procedure for claiming privilege with respect to information already produced. Why? Is there a trend to make the law uniform? Will proposed Rule 502 fill in the gap?
- Does the Rule encourage parties not to assert waiver, especially in the context of electronic discovery?
- Is there a trend of making it more difficult to prove waiver with respect to electronically stored information?
- For further discussion points, see *Hopson v. Mayor & City Council of Baltimore*, 232 F.R.D. 228, 234 (D. Md. 2005) ("The changes recommended to Rules 16 and 26 encourage the party receiving the electronic discovery to agree not to assert waiver of privilege/work product protection against an opposing party that agrees to provide expedited production of electronically stored information without first doing a full-fledged privilege review.")

IV. Proposed Federal Rule Of Evidence 502

The House Judiciary Committee asked the Judicial Conference to promulgate a new rule that would, among other things, protect against inadvertent waiver of privilege.¹¹ On December 11, 2007, the proposal was introduced in the Senate Judiciary Committee as S. 2450. For the latest information concerning enactment of the rule, see <http://www.uscourts.gov/rules>. The new rule has two major purposes:

(1) It resolves longstanding disputes in the courts about the effect of certain disclosures of communications or information protected by the attorney-client privilege or as work product--specifically those disputes involving inadvertent disclosure and subject matter waiver.

(2) It responds to the widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product have become prohibitive due to the concern that any disclosure (however innocent or minimal) will operate as a subject matter waiver of all protected communications or information. This concern is especially troubling in cases involving electronic discovery.¹²

¹¹ Legislative Report from Administrative Office of the U.S. Courts to the Standing Committee, May 26, 2006.

¹² Explanatory Note on Rule 502 Prepared by the Judicial Conference Advisory Committee on Evidence Rules.

Proposed Rule 502 is provided below.

Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

(a) **Disclosure made in a federal proceeding or to a federal office or agency; scope of a waiver.**--When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if:

(1) the waiver is intentional;

(2) the disclosed and undisclosed communications or information concern the same subject matter; and

(3) they ought in fairness to be considered together.

(b) **Inadvertent disclosure.**--When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if:

(1) the disclosure is inadvertent;

(2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and

(3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following *Fed. R. Civ. P. 26(b)(5)(B)*.

(c) **Disclosure made in a state proceeding.** --When the disclosure is made in a state proceeding and is not the subject of a state-court order concerning waiver, the disclosure does not operate as a waiver in a federal proceeding if the disclosure:

(1) would not be a waiver under this rule 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.

(d) **Controlling effect of a court order.**--A federal court may order that the privilege or protection is not waived by disclosure connected with the

litigation pending before the court - in which event the disclosure is also not a waiver in any other federal or state proceeding.

(e) **Controlling effect of a party agreement.**--An agreement on the effect of disclosure in a federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(f) **Controlling effect of this rule.**--Notwithstanding *Rules 101* and *1101*, this rule applies to state proceedings and to federal court-annexed and federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding *Rule 501*, this rule applies even if state law provides the rule of decision.

(g) **Definitions** --In this rule:

(1) "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and

(2) "work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

Below are some discussion points with respect to proposed Rule 502:

- The rule seeks to provide a predictable, uniform set of standards under which parties can determine the consequences of a disclosure of a communication or information covered by the attorney-client privilege or work product protection. Do you agree?
- The advisory committee notes state that the rule makes no attempt to alter federal or state law on whether a communication or information is protected under the attorney-client privilege or work product immunity as an initial matter. Do you agree?
- Proposed Rule 502(a) limits subject matter waiver to situations in which a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner. The proposed rule appears to lessens the burdens and risk of a subject matter waiver. Under what circumstances can a party successfully assert a subject matter waiver in light of Rule 502(a)? Will the rule discourage litigants from arguing subject matter waiver?
- Proposed Rule 502(b) provides that a disclosure does not operate as a waiver if the disclosure is inadvertent, the holder of the privilege or protection took reasonable steps to prevent disclosure, and the holder promptly took reasonable steps to rectify the error. What constitutes reasonable steps with respect to electronically stored information in light of the volume of the information typically produced and difficulty in doing a full-fledged privilege review? Do reasonable steps include using advanced analytical software applications and linguistic tools in screening for privilege and work product?

- Proposed Rule 502(d) provides that when a confidentiality order governing the consequences of disclosure in one case is entered in a federal proceeding, its terms are enforceable against non-parties in any federal or state proceeding. There has been some dispute on whether a confidentiality order entered in one case is enforceable in other proceedings. The rule is designed to provide protection outside the particular litigation in which a confidentiality order is entered. To what extent will the language of confidentiality orders be modified to reflect proposed Rule 502(d)? To what extent will the proposed rule reduce the costs of pre-production review for privilege and work product, if the consequence of disclosure is that the communications or information could not be used by non-parties to the litigation?
- Proposed Rule 502(e) codifies the well-established proposition that parties can enter an agreement to limit the effect of waiver by disclosure between or among them. The rule makes clear that if parties want protection against non-parties from a finding of waiver by disclosure, the agreement must be made part of a court order. Will protective orders play a greater role in protecting confidential and privileged information? How will the language of such agreements reflect proposed Rule 502?
- For further discussions, *see Hopson v. City of Baltimore*, 232 F.R.D. 228, 244 (D.Md. 2005) (electronic discovery may encompass "millions of documents" and to insist upon "record-by-record pre-production privilege review, on pain of subject matter waiver, would impose upon parties costs of production that bear no proportionality to what is at stake in the litigation")

V. Techniques and Strategies for Preserving the Privilege and Confidential Information

A. Asserting Claims of Privilege: Privilege Logs in Electronic Discovery

Fed. R. Civ. Proc. 26(b)(5)(A) provides a procedure for asserting claims of privilege for information withheld in discovery. The Rule requires the party to make the claim expressly and describe the nature of the documents not produced in a manner that, without revealing the privileged information, enables opposing counsel to assess the applicability of the privilege. The Rule states:

(5) Claiming Privilege or Protecting Trial-Preparation Materials.

(A) Information Withheld. When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(i) expressly make the claim; and

(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed--and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

It is advisable for parties to maintain a privilege log that complies with Rule 26(b)(5)(A). For each document or communication, the log generally should contain: (1) a brief description or summary of the content of the document or communication; (2) the date the document was prepared; (3) the name(s) of the person(s) who prepared the document; (4) the person to whom the document was directed, or for whom it was prepared; (5) the purpose for preparing the document or communication; and (6) the privilege or privileges asserted for the document or communication.¹³

The large volume of electronically stored information in complex litigation often makes it unduly burdensome and costly to do a full fledged privilege review. It may not be practical to review and produce every piece of electronic information. This raises the question as to what courts will require in terms of a privilege log with respect to electronic information. Below are some discussion points regarding this evolving area of the law:

- How should a privilege review be conducted so that the parties comply with Rule 26(b)(5)(A) when faced with electronically stored information?
- To what extent will courts require detailed privilege logs for electronically stored information? Will the burdens and costs associated with drafting a privilege log outweigh its benefit? How useful is a several thousand page, computer generated privilege log?
- Will courts eventually do away with the traditional concept of a privilege log?
- Should parties agree to limit the scope of privilege log to a key players? Should the parties meet and confer early on this topic before the initial case management conference?
- If search terms are used to find, review and produced electronically stored information, does it make sense to provide a privilege log only with respect to the "hits" of running the search?
- What other solutions exist to satisfying Rule 26(b)(5)(A) with respect to privilege logs and electronically stored information?
- Can software tools be used to provide less detailed but acceptable privilege logs for electronically stored information?

B. Practical Ways for In-House Counsel To Preserve Privilege

¹³ 6-26 Moore's Federal Practice - Civil § 26.90; *United States v. Construction Prods. Research*, 73 F.3d 464, 473(2d Cir. Conn. 1996) ("To facilitate its determination of privilege, a court may require 'an adequately detailed privilege log in conjunction with evidentiary submissions to fill in any factual gaps.'"); *In re Imperial Corp. of America*, 174 F.R.D. 475, 477 (S.D. Cal. 1997) (failure to comply with Rule 26(b)(5) "may constitute an 'implied' waiver of the privilege or protection.").

In-house counsel often wears two hats – he or she may act in the capacity as legal counsel as well as a business advisor. Communications on purely business matters are not protected.¹⁴ Documents and e-mails addressed to and from in-house counsel are susceptible to challenge on the ground that the in-house attorney is giving business as opposed to legal advice.¹⁵ An attorney who merely acts as a conduit for documents cannot cloak them with privilege.¹⁶

As a result of the dual role played by in-house counsel, there are some basic strategies in-house counsel can employ to help preserve confidential and privileged information. Here are some discussion points along that line:

- When is it advisable to scrub metadata before transmitting documents?
- Should counsel avoid e-mail threads? Why? When?
- When counsel routinely add the following language to e-mail correspondence: "for the purpose of seeking, obtaining or providing legal advice" or "prepared at the request of or under the direction of counsel."
- Should counsel be careful about distribution of documents and e-mails to agents, foreign in-house attorneys and foreign patent agents? Does the privilege extend to such communications?
- What are the best practices for in-house counsel to limit distribution and restrict access to critical documents and e-mails?
- Should counsel opt for phone calls as opposed to e-mails for communicating sensitive or highly confidential matters?
- Does it make sense to identify participants (author, recipients, cc:, bcc:)?
- Always check to see if there is an attorney (legal capacity), client, absence of third party?
- For further discussion, *see Teleglobe Communs. Corp. v. BCE, Inc.* (In re Teleglobe Communs. Corp.), 493 F.3d 345 (3d Cir. Del. 2007) (District court ordered production of documents prepared by in-house counsel for parent where privilege

¹⁴ *United States Postal Serv. v. Phelps Dodge Ref. Corp.*, 852 F. Supp. 156, 163 (E.D.N.Y. 1994) ("A corporation cannot be permitted to insulate its files from discovery simply by sending a "cc" to in-house counsel.").

¹⁵ *Ames v. Black Entertainment TV*, 1998 U.S. Dist. LEXIS 18053 (S.D.N.Y. Nov. 17, 1998) ("Because an in-house attorney, particularly one who holds an executive position in the company, often is involved in business matters, in order to demonstrate that the communication in question is privileged, the company bears the burden of "clearly showing" that the in-house attorney gave advice in her legal capacity, not in her capacity as a business advisor.).

¹⁶ *Colton v. United States*, 306 F.2d 633, 639 (2d Cir. N.Y. 1962) ("Insofar as the papers include pre-existing documents and financial records not prepared by the Matters for the purpose of communicating with their lawyers in confidence, their contents have acquired no special protection from the simple fact of being turned over to an attorney.").

claim “eviscerated” because parent company’s in-house counsel jointly represented subsidiary and parent on matters related to subsidiary’s restructuring).

C. Protective Orders

Confidential and highly sensitive information is often produced in civil litigation. Technology companies are generally uncomfortable with disclosing critical confidential information to a competitor.¹⁷ To preserve the confidentiality status of information in litigation, parties enter into a protective order, which governs all discovery produced in the case. A protective order generally prohibits the litigation team from sharing certain documents with its client. A protective order should include at least the following provisions:

1. **Two tiers of confidentiality.** Documents marked "confidential" typically are used solely in connection with the action by outside counsel of record, one in-house lawyer for each party and a few select individuals at each company. Documents marked "Highly Confidential" may only be disclosed to outside counsel and experts.
2. **Prosecution bar.** A "prosecution bar" prohibiting any person receiving confidential information from a disclosing party from participating "patent prosecution activities" concerning the technology at issue for one to three years after conclusion of the lawsuit.
3. **Claw-back provision.** This provision presents waiver of the attorney-client privilege for inadvertently disclosed information.
4. **Source code.** A special provision governing the disclosure of the client's computer source code.
5. **Testifying Experts.** A provision governing the disclosure of information to experts or consultants. This is important, for example, where opposing counsel hires a technology expert who works for your client's competitor.

Below are some discussion points with respect to protective orders:

- What other provisions should be included in a protective order to guard against waiver of the attorney-client privilege and/or work product doctrine?
- To what extent does Rule 26(b)(5) impact clawback provisions of protective orders? How will the language of such agreements be drafted to reflect the new rule?
- What due diligence, in addition to obtaining a resume, should be undertaken with respect to opposing counsel's proposed expert witness?

¹⁷ *Silicon Graphics, Inc. v. ATI Techs., Inc.*, 2007 U.S. Dist. LEXIS 57960 at *1 (W.D. Wis. Aug. 8, 2007) ("the court entered a protective order to protect the confidentiality of trade secrets or other confidential commercial information that might be exchanged during discovery."); Fed. R. Civ. Proc. 26(c).

- Are prosecution bars successful in preventing disclosure of highly confidential information to individuals drafting patents with respect to the technology at issue?
- How will proposed Rule 502 impact protective orders? What additional language, if any, should be included?

D. **Disclosing Work Product To Non-Testifying Experts**

Civil and patent litigation often involves complex technology that requires the assistance of an expert to review technical information, patents-in-suit and prior art to assist in formulating the theories of the case and litigation strategies. It is generally advisable to retain an expert, who will not be called as a witness at trial, to probe and test the theories of the case.

Rule 26(b)(4)(B) allows for a party to retain a non-testifying expert without running a greater risk of waiving privileged communications. The Rule provides that a party can not discover facts known or opinions held by a non-testifying expert absent a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.¹⁸ The Rule states:

(4) *Trial Preparation: Experts.*

(B) Expert Employed Only for Trial Preparation. Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means. (Emphasis added).

The purpose of this Rule is prevent a party from replacing the work of its own experts with that of its opponent.¹⁹ The party seeking discovery has a heavy burden of proving that the required exceptional circumstances exist.²⁰ A non-testifying expert is not disclosed as an expert

¹⁸ *Plymovent Corp. v. Air Tech. Solutions, Inc.*, 243 F.R.D. 139, 143 (D.N.J. 2007) ("*Rule 26(b)(4)(B)* thus creates a safe harbor whereby facts and opinions of nontestifying, consulting experts are shielded from discovery, except upon a showing of exceptional circumstances. Indeed, some courts have construed *26(b)(4)(B)* as creating a privilege against disclosure.")

¹⁹ *Hartford Fire Ins. Co. v. Pure Air on the Lake Ltd. Partnership*, 154 F.R.D. 202, 207 (N.D. Ind. 1993) (parties failed to show exceptional circumstances necessary to justify disclosure of consulting expert's report).

²⁰ *Bank Brussels Lambert v. Chase Manhattan Bank*, 175 F.R.D. 34, 44 (S.D.N.Y. 1997) (party seeking discovery of non-testifying expert carries burden of showing exceptional circumstances); *In re Shell Oil Refinery*, 132 F.R.D. 437, 442, *clarified by*, 134 F.R.D. 148 (E.D. La. 1990) (plaintiff's could have obtained substantially equivalent test results by having their own experts conduct tests).

in the case and a report is not prepared.²¹ Below are some discussion points with respect to non-testifying experts:

- To what extent should counsel be circumspect in discussions with a non-testifying experts?
- When, if ever, are you required to disclose a non-testifying expert to opposing counsel?²²
- Can a non-testifying expert appear at technical depositions without running the risk of waiver?
- What type of agreement should a non-testify expert sign with trial counsel? What provisions should the agreement contain to protect confidential and work-product information?
- Should counsel consider entering into an agreement with opposing counsel that prohibits discovery of draft expert reports, notes and other communications with respect to testifying experts? What are the pros and cons of limiting discovery regarding testifying experts?

E. Common Interest Doctrine and Joint Defense Agreements

A joint defense agreement is a mechanism used to prevent waiver of the attorney-client privilege or work product in complex civil litigation. Co-defendants often enter into such agreements so that they may share information and discuss legal theories or strategies without waiving the privilege.²³ It is advisable for codefendants to enter into a joint defense agreement at the inception of the case before the initial case management conference.

The common interest doctrine is an exception to the general rule that the attorney-client privilege is waived upon disclosure of privileged information with a third party.²⁴ Pursuant to the doctrine, "parties with shared interest in actual or potential litigation against a common adversary may share privileged information without waiving their right to assert the privilege."²⁵ The nature of the interest, however, must be identical, not similar, and be legal, not solely commercial.²⁶ Below are some discussion points:

- Under what circumstances is it advisable not to enter into a joint defense agreement?

²¹ Fed. R. Civ. Proc. 26(a)(2)(B).

²² *Pipefitters Local No. 636 Pension Fund v. Mercer Human Res. Consulting, Inc.*, 2007 U.S. Dist. LEXIS 52169 at *5-6 (E.D. Mich. July 19, 2007) ("the order requiring plaintiffs to disclose the identity of the actuarial consultant they relied upon in anticipation of litigation, but who is not expected to be called as a witness, is overruled.").

²³ *Intex Recreation Corp. v. Team Worldwide Corp.*, 471 F. Supp. 2d 11, 16 (D.D.C. 2007) (written agreement is most effective, but oral agreement whose existence, terms, and scope are proved may provide requisite showing).

²⁴ *Katz v. AT&T Corp.*, 191 F.R.D. 433, 437 (E.D. Pa. 2000) (plaintiffs failed to meet their burden of showing requisite identity of interests).

²⁵ *Thompson v. Glenmede Trust Co.*, 1995 U.S. Dist. LEXIS 18780, at *4 (E.D. Pa. Dec. 19, 1995).

²⁶ *Katz*, 191 F.R.D. at 437 (E.D. Pa. 2000).

- What provisions should generally be included in a joint defense agreement?
- Will proposed Rule 502 impact joint defense agreements?
- If so, how will the language of such agreements be changed to reflect the new rule?