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# PrivilEdge

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LEGAL DEVELOPMENTS OF RELEVANCE TO ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE –  
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## INTRODUCTION

*Much is going on in the world of the attorney-client privilege and the work product doctrine, with the pendulum on waiver swinging back toward the center, following several years of attacks on the privilege and work product protections from the government and class action counsel. Congress is currently considering legislation and rules changes which would strengthen the attorney-client privilege, and courts have been active as well, issuing several interesting and important cases for in-house counsel to consider in advising clients on protecting the confidentiality of attorney-client communications.*

## THE ATTORNEY-CLIENT PRIVILEGE PROTECTION ACT OF 2007

Passed in the House of Representatives (H.R. 3013) in November 2007, and pending in the Senate (S. 186), this proposed legislation is an attempt to counter the effects of years of enforcement policy at the Department of Justice that created incentives for corporations to waive the attorney-client privilege. If passed, the Act will prohibit prosecutors, in any federal investigation or criminal or civil enforcement matter, from demanding, requesting, or conditioning treatment on the disclosure by an organization of any communication protected by the attorney-client privilege or any attorney work product.

On June 20, 2008, a letter endorsed by a group of 32 former U.S. attorneys asked Sen. Patrick Leahy (D-Vt.)—the Senate Judiciary Committee chairman—for the Senate's support for this Act. The letter noted that the "widespread practice of requiring waiver has led to the erosion not only of the [attorney-client] privilege

itself, but also to the constitutional rights of the employees who are caught up, often tangentially, in business investigations."

On June 28, 2008, the legislation was reintroduced in the Senate by Sen. Arlen Specter (R-Pa.), with some additional changes (S. 3217). The revised legislation is named the "Attorney-Client Privilege Protection Act of 2008."

Should the legislation become law, it will remove a key tool prosecutors have used to force targets to waive the attorney-client privilege. Corporations that assert the privilege will have a lower risk of appearing uncooperative. Additionally, this Act will encourage employees of these corporations to seek counsel without the risk of such communications being revealed to federal prosecutors in the course of an investigation.

## PROPOSED RULE OF EVIDENCE 502 – INADVERTENT DISCLOSURE

Proposed Evidence Rule 502 "Attorney-Client Privilege and Work Product; Limitation on Waiver" (Proposed Rule 502) addresses the waiver of the attorney-client privilege in the context of disclosures to a federal agency or during a federal proceeding. On February 27, 2008, the Senate approved Senate bill S. 2450, an updated version of Proposed Rule 502 approved by the Judicial Conference. The last action taken by Congress was on February 20, 2008, when the bill was referred to the House Committee on the Judiciary. In order for the bill to take effect, the bill must pass the House and be signed into law by the President. If adopted, Proposed Rule 502's inadvertent waiver provision could signify lower litigation costs and a more accurate perception of the risks associated with waivers for corporations.

If enacted, subdivision (b) of Proposed Rule 502 would reconcile the various common law rules within the federal courts regarding the extent to which an inadvertent disclosure of privileged information constitutes a waiver. Federal courts currently take three positions regarding inadvertent disclosures of privileged information, each providing a different level of protection for corporations. A few courts find that only an intentional disclosure will act as a waiver, thus providing clients with the highest level of protection. On the other end of the spectrum, some courts find that any inadvertent disclosure of privileged information, regardless of a corporation's effort to avoid such a mistake, will act as a waiver. However, the majority of courts seek a balance between protecting a client's privilege while ensuring that corporations do not act haphazardly during disclosures. These courts find that an inadvertent disclosure

of privileged information will act as a waiver only if the disclosing party acted carelessly in disclosing privileged information and failed to request its return in a timely manner.

Subdivision (b) of Proposed Rule 502 follows the majority's position by taking the middle ground approach. Subdivision (b) provides that an inadvertent disclosure of privileged information, disclosed during a federal proceeding or to a federal office or agent, does not operate as a waiver if the holder of the privilege took reasonable steps to prevent the disclosure and employed reasonably prompt measures to retrieve the disclosed communication or information. If approved, Proposed Rule 502 may provide relief to corporations that retain an increasing amount of privileged documents, particularly in electronic form. Corporations can be confident that, if they take reasonable precautions to protect their privileged information, an inadvertent disclosure will not act as waiver.

## RECENT DECISIONS

### The “Joint Client” Exception

Courts are increasingly faced with claims that the “joint client” exception bars application of the attorney-client privilege. The joint client exception may come into play when an individual litigant, who was an officer or director of the



Matthew R. Sheldon  
Partner – Falls Church, Va.  
Commercial Litigation–Eastern

business to which he is adverse in litigation, demands production of privileged material that he reviewed or had access to while affiliated with the company. The exception is based on the theory that a corporation is, in fact, one collective client that includes the corporation and each individual member of the board of directors and each officer of the company. As evidenced by the three decisions described below, courts are surprisingly receptive to application of the joint client exception. The practical implication of greater acceptance of the exception is the need for businesses and in-house lawyers to be

particularly careful to limit access to privileged information only to those with a true need to know the information.

#### a. *Montgomery v. eTrepid Technologies, LLC*, 2008 U.S. Dist. LEXIS 35561

In this action, the individual plaintiff was a member and former manager of the defendant LLC, eTrepid. The plaintiff demanded production of relevant, but privileged, communications created during the time he was a manager and member of the LLC. The LLC argued that the client for purposes of determining who had authority to claim or waive the privilege was solely the LLC. The plaintiff countered that he, too, was the client, having been a member and a manager of the LLC, and claimed that eTrepid could therefore not assert the privilege against him.

The district court first determined that the LLC should be treated as a corporation, as opposed to a partnership, for purposes of the privilege. It then noted the split of authority regarding acceptance of the joint client exception and determined that the more persuasive view was that directors and officers are not joint clients with the corporation such that the plaintiff could discover privileged information merely on the basis that it was accessible to him when he was affiliated with the defendant LLC. The court observed: “It makes sense that the corporation is the sole client. While the corporation can only communicate with its attorneys through human representatives, those representatives are communicating on behalf of the corporation, not on behalf of themselves as corporate managers or directors.” Because the plaintiff brought suit to benefit himself individually, he was not entitled to discover the LLC’s privileged information. His prior access to such information took place as a consequence of his capacity as a member in the entity, not in an individual capacity.

eTrepid squarely adopts the “sole client,” as opposed to the joint client, approach to control over the attorney-client privilege.

#### b. *Barr v. Harrah's Entertainment, Inc.*, 2008 U.S. Dist. LEXIS 26018

Similar to *eTrepid*, the New Jersey district court in *Barr* faced a demand for access to privileged information by a plaintiff who previously served as CEO and board member of the defendant’s predecessor. The plaintiff, serving as the named representative in this class action suit, sought application of the joint client exception and discovery of communications between the defendant and its in-house and outside counsel during the time the plaintiff served as CEO.

The defendant argued that application of the joint client exception was inappropriate in the class action context. It maintained that disclosure of the privileged information to the plaintiff/class representative would inevitably result in disclosure of the privileged documents to the remaining class members, the majority of whom had never been officers or directors of the defendant and could not be said to be in a joint client relationship with the defendant.

Applying Delaware law and the substantial authority supporting application of the joint client exception, the court keyed its holding to the contemplated use of the privileged materials sought by the former director seeking application of the joint client exception. Unlike the Delaware cases that allow individual former officers and directors access to privileged information, the *Barr* court reasoned that the plaintiff/class representative actually asserted a right to discover the defendant’s privileged communications on behalf of a class of individuals who would not otherwise have access to the privileged information under Delaware law. Indeed, the plaintiff/class representative owed a fiduciary duty to the class he represented. Thus, the court acknowledged the vitality of the joint client exception, but simply declined to apply it in the class action setting.



Alexander Y. “Sandy” Thomas  
Partner – Falls Church, Va.  
Commercial Litigation–Eastern

#### c. *Rush v. Sunrise Senior Living*, 2008 Va. Cir. LEXIS 12

Again, in *Rush*, a court was confronted with the claim by a former officer of the defendant that he should have access in discovery to privileged information to which he was privy while employed by the defendant. The plaintiff claimed that his termination as CFO of defendant was retaliatory because of his disclosure of certain of defendant’s alleged accounting practices to the SEC. The defendant claimed the former CFO was terminated because of violation of company policies. The plaintiff sought disclosure of privileged information based on the joint client exception.

Rather than directly evaluating the merits of the joint client exception, the Virginia court applied a rigorous and narrow standard to the defendant’s threshold burden in claiming privilege over the disputed communications. The court determined that “the public policy of furthering [defendant’s] ‘full and frank communication’” with its counsel was outweighed by the plaintiff’s right of access to the privileged documents to which he was privy while employed with the defendant. The court simply declined to apply the attorney-client privilege to the withheld

communications between client and counsel, and did so on the basis that the disputed communications had not been “kept confidential in relation to [the plaintiff].”

The *Rush* court’s ruling amounts to a pragmatic acceptance of the joint client exception. The court ordered production of privileged material to which the plaintiff had access while in the defendant’s employ, based on the fact that such materials had not been kept confidential from the plaintiff. The court did not address the question of the capacity (individual, corporate, or both) in which the plaintiff had, or was given, access to the privileged materials at the time of disclosure. Thus, under *Rush*, the attorney-client privilege may in some circumstances simply not be applicable when privileged communications are made to an officer or director in that person’s capacity as such, and are later sought in discovery when the individual and corporation are adversaries.

### Work Product Protection for Tax Analysis

***Regions Financial Corp. v. U.S.*, 2008 U.S. Dist. LEXIS 41940** – In *Regions*, the court considered whether a legal analysis produced for Regions Financial (“Regions”) was protected as work product and, if so, whether Regions waived the privilege by transmitting that analysis to a third party.

In 2000, Regions entered into a transaction with the European Bank for Reconstruction and Development. Before doing so, Regions asked its outside counsel to analyze potential IRS attacks on its tax reporting for the transaction. It then transmitted counsel’s analysis to Regions’ accountants and asked them to evaluate the transaction. The accountants agreed to keep the analysis confidential. Years later, when the IRS initiated an investigation into Regions’ tax liability, Regions asserted the work product privilege with respect to outside counsel’s analysis, in addition to the accountants’ tax accrual workpapers discussing that analysis.

The work product privilege is codified in Federal Rule of Civil Procedure 26(b)(3), which provides that litigants ordinarily cannot discover documents “prepared in anticipation of litigation.” Different jurisdictions apply different tests to determine what constitutes “prepared in anticipation of litigation” in the context of IRS summonses. The Fifth Circuit asks whether “the primary motivating purpose behind the creation of the document was to aid in possible future litigation.” In contrast, the Second Circuit asks whether the document was prepared “because of the prospect of litigation,” providing broader work product protection.

Here, the court did not need to choose a test because it decided that *Regions* satisfied the stricter test. The IRS argued that Regions sought outside counsel’s analysis in order to create a sufficient tax reserve that accurately reflected its contingent liabilities, thereby allowing Regions to obtain an unqualified audit from its accountants. The court noted that, but for the prospect of litigation with the IRS, Regions would not have needed to create a tax reserve. Therefore, the withheld documents were produced primarily in anticipation of litigation with the IRS.

The court also determined that Regions did not waive work product protection by transmitting outside counsel’s analysis to the accountants. Work product

waiver occurs when the documents are transmitted to (1) an adversary, or (2) a third party that could serve as a conduit to an adversary. Here, the court held that “there is simply no conceivable scenario in which [the accountants] would file a lawsuit against Regions because of something [the accountants] learned from Regions’ disclosures.” It also held that the accountants could not serve as a conduit to an adversary because it entered into a confidentiality agreement with Regions.

### Who Can Waive the Privilege?

***Business Integration Services, Inc. v. AT&T Corp.*, 2008 U.S. Dist. LEXIS 33952** – In this federal court action, the court considered whether an employee’s disclosure of privileged information constituted a waiver of his company’s right to assert the attorney-client privilege.

Business Integration Services (“BIS”) contracted with AT&T to sell AT&T’s services to third parties. During the relationship, James Glackin, AT&T’s regional manager, worked with BIS on a daily basis. AT&T developed concerns about its relationship with BIS and eventually decided to terminate it. While communicating AT&T’s concerns to BIS, Glackin disclosed the thought processes of AT&T’s in-house counsel. About three years later, while in litigation with BIS, AT&T asserted attorney-client privilege over Glackin’s disclosures. The court decided that AT&T had waived the privilege.

When privileged information is voluntarily disclosed, courts usually find that the privilege has been waived. Normally, only a company’s officers, directors, and high-level managers can authorize disclosure of privileged information of the company. However, in the following three situations, a lower-level employee’s disclosure can be deemed a voluntary disclosure by the company: first, if the company authorized the employee to act on its behalf; second, if the company, before the disclosure, led others to believe the employee was so authorized; and third, if the company, after the disclosure, ratified the employee’s disclosure through its conduct. The court in *BIS* found that AT&T ratified Glackin’s disclosure. AT&T was aware of the disclosure for a long time, but made no effort to dissent from it. Glackin’s disclosure was deemed a voluntary disclosure by the company, and therefore a waiver of the privilege.

The court considered the following factors: (1) the reasonableness of any precautions taken to prevent disclosures, (2) time taken to rectify the error, (3) the extent of the disclosure, and (4) fairness. The court found that the first two factors weighed against AT&T. AT&T failed to instruct Glackin about privilege issues and allowed years to pass before asserting privilege. The last two factors were deemed irrelevant. Therefore, the court decided that, had AT&T not voluntarily disclosed the information, its disclosure would have nevertheless constituted a waiver of the privilege.

### Confidentiality of Internal Audits or Assessments

***In Re: Air Crash at Lexington*, 2008 U.S. Dist. LEXIS 3864** – Courts and litigants continue to grapple with the discoverability of materials and communications prepared in the course of internal audits. Three principal devices may provide a basis for withholding internal audit materials from

## Recent Decisions—continued from page 4

disclosure to third parties: the self-critical analysis privilege; the attorney-client privilege; and the work product doctrine. Each has real limitations in the internal audit context. Successful claims of confidentiality using these three devices often depend largely on the nature of the relationship and cooperation between internal audit and law departments.

The court in *In Re: Air Crash at Lexington* evaluated a claim by the defendant carrier, Comair, that its Aviation Safety Action Program (“ASAP”) reports were privileged from disclosure in discovery. ASAP reports result from a carrier’s voluntary participation in an FAA program that permits self-reporting of safety-related incidents. Plaintiffs sought disclosure of certain ASAP reports and served a corporate representative deposition notice for testimony from Comair on the content of the reports. The court rejected Comair’s claim that Congressional intent was that ASAP reports were not discoverable. It also refused to apply the self-critical analysis privilege to the reports, noting that applicable law (Kentucky) had not adopted the self-critical, or self-evaluative, privilege. Nor was such a privilege available under federal common law, which restricted the self-critical analysis privilege to reports prepared solely for internal review purposes. ASAP reports, by contrast, were intended to be disclosed externally.

*In Re: Air Crash at Lexington* highlights the exceptionally narrow circumstances in which internal audit materials, prepared independently of the corporate law department, can be protected from disclosure in litigation. Only with early and consistent cooperation between internal audit and legal departments is there any genuine opportunity to maintain the confidentiality of internal audit materials, and even then the bases for privilege protection are elusive. Companies should establish policies that encourage communication between internal audit and legal departments with the objective of positioning sensitive communications for legitimate privilege protection.

## CONTRIBUTORS TO THIS ISSUE

**Matthew R. Sheldon**

Falls Church  
+1 703 641 4334  
msheldon@reedsmith.com

**Alexander Y. "Sandy" Thomas**

Falls Church  
+1 703 641 4276  
athomas@reedsmith.com

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