THE PRESERVATION OF PRIVILEGE

Are Gaming Licensees Rolling the Dice by Disclosing Information to Gaming Regulators?

By Scott E. Andress and Tara P. Ellis

Due to their participation in such a highly regulated industry, casino operators, manufacturers and distributors of gaming equipment and other entities and individuals involved in the gaming industry are often required to provide regulators with highly confidential information. Some of this information may even be privileged, but applicants or licensees nonetheless submit it to gaming regulators, despite its privileged nature, for fear of adverse consequences (e.g., denial of an application) if they fail to provide it.

Further, in some jurisdictions, such as Mississippi and Indiana, applicants and licensees waive their right to any privileges (except certain Constitutional and statutory privileges) in hearings or meetings before the state gaming commission.[i] By providing otherwise privileged information to gaming regulators, has one waived the attorney-client privilege and/or the attorney work-product doctrine as to third parties, or in unrelated matters?

As a general rule, the attorney-client privilege is waived by disclosure of privileged communications to a third party.[ii] A number of cases address the issue of whether providing documents to a governmental entity effects a waiver of the attorney-client privilege and/or attorney work-product doctrine. Many of those cases concern information provided in the course of an investigation by the Department of Justice or the Securities and Exchange Commission ("SEC") of alleged wrongdoing by a company, where a third party subsequently requested the same information in separate litigation. In response to these types of cases, some courts have adopted the doctrine of "selective waiver" which provides that the waiver caused by providing documents to

a government authority only affects a "limited waiver" which does not extend to third parties. On the other hand, many courts have expressly rejected the selective waiver doctrine. A third category of courts has allowed the selective waiver doctrine to be used only under certain circumstances. More courts allow the use of the selective waiver doctrine for attorney work-product than for the attorney-client privilege since the two protections turn on different considerations.[iii]

The U.S. Court of Appeals for the Eighth Circuit created the concept of selective waiver in *Diversified Indus., Inc. v. Meredith*.[iv] In that case, a company defending a civil proceeding sought to protect a memorandum and a report prepared by its counsel that it had previously produced to the SEC in response to an agency subpoena. The court held that only a limited waiver of the privilege occurred, as the company disclosed these documents "in a separate and nonpublic" investigation, and "[t]o hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential shareholders and customers."[v]

After the selective waiver doctrine's creation, the U.S. Court of Appeals for the D.C. Circuit was the first appellate court to reject the doctrine, in *Permian Corp. v. U.S.*[vi] The court, finding that the corporation had destroyed the attorney-client privilege by providing documents to the SEC, reasoned that the availability of a "limited waiver" would not serve the interests underlying the common law privilege for confidential communications between attorney and client.[vii] The court stated, "If the client feels the need to keep his communications with his attorney confidential, he is free to do so under the traditional rule by consistently asserting the privilege, even when the discovery request comes from a 'friendly' agency."[viii]

The First,[ix] Third,[x] Fourth,[xi] Sixth,[xii] Seventh,[xiii] and Ninth[xiv] Circuits have all joined the D.C. Circuit[xv] in rejecting selective waiver.

Other courts, such as the Second Circuit,[xvi] have declined to adopt a *per se* rule against the selective waiver doctrine. The Tenth Circuit has rejected selective waiver in one case, emphasizing the record before it, but in that decision it did not expressly adopt a *per se* rejection of the selective waiver doctrine.[xvii] These courts have examined various factors in determining whether the selective waiver doctrine should be applied, including the nature of the relationship between the disclosing party and the governmental agency (i.e., whether it is "friendly" or "adversarial")[xviii] and whether they have entered into a confidentiality agreement.[xix]

As demonstrated by some of the cases referenced herein, a court could find that a licensee or applicant has waived the attorney-client privilege or the ability to assert the attorney work-product doctrine by disclosing information to a gaming regulatory body. However, in the context of gaming regulation, often applicable statutes and regulations protect certain information provided to gaming authorities as "confidential." While very few cases have examined whether confidentiality provisions of regulations or statutes afford protection to materials disclosed to governmental entities, there is an argument to be made that they should, as they evidence legislative or regulatory intent, and lend an expectation of privacy to gaming applicants or licensees.

In gaming jurisprudence, certain statutory provisions may be available that seek to maintain privilege despite disclosure to governmental agencies. For example, the Mississippi Gaming Control Act expressly protects privileged documents provided to the Mississippi Gaming Commission:

> (1) Any communication or document of an applicant or licensee which is required by:
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> (a) Law or the regulations of the commission; or
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> (b) A subpoena issued by the commission to be made or transmitted to the commission or the executive director or his employees, is absolutely privileged and does not impose liability for defamation or constitute a ground for recovery in any civil action.
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> (2) If such a document or communication contains any information which is privileged, that privilege is not waived or lost because the document or communication is disclosed to the commission or the executive director or his employees.

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(3) Notwithstanding the powers granted to the commission and the executive director by this chapter:

(a) The commission, the executive director and his employees shall not release or disclose any privileged information, documents or communication provided by an applicant without the prior written consent of the applicant or licensee or pursuant to a lawful court order after timely notice of the proceedings has been given to the applicant or licensee.

(b) The commission and the executive director shall maintain all privileged information, documents and communications in a secure place accessible only to members of the commission and the executive director and his employees.

(c) The commission shall adopt procedures and regulations to protect the privileged nature of information, documents and communications provided by an applicant or licensee.[xx]

The Nevada Gaming Control Act also contains similar explicit protection of privileged documents submitted to the Nevada State Gaming Commission or the Nevada Gaming Control Board.[xxi]

The trend among Circuits is seemingly the rejection of the selective waiver doctrine; however, the existence of some states' laws providing explicit protection for privileged documents disclosed to their respective gaming commissions may evidence legislative intent for an expectation of privacy in disclosure to government agencies. The dearth of case law on this pointed issue provides little guidance. If more jurisdictions were to endorse the selective waiver doctrine, its adoption would benefit gaming licensees and applicants, as well as regulators. Such would encourage effective communications between licensees or applicants and their attorneys, as well as between licensees or applicants and gaming regulators, and promote predictability and consistency in the treatment of information disclosed to gaming regulators.

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[i] 13 Mississippi Administrative Code Part 1, R. 3.9(b), and Part 2, R. 3.2; Indiana Administrative Code tit. 68, r. 1-6-4.

[ii] William Meade Fletcher, 9A *Fletcher Cyclopedia of the Law of Corporations* § 4670.35.

[iii] As one court explained, "Because work product protects against disclosure to potential adversaries and not the world in general, courts generally hold that the protection is not lost when work product is disclosed to a government agency." *Bickler v. Senior Lifestyle Corp.*, 266 F.R.D. 379, 384 (D.Ariz. 2010) (quoting *Shields & Strum, Ruger & Co.*, 864 F.2d 379, 382 (5th Cir. 1989); *Goff & Harrah's Operating Co.*, 240 F.R.D. 659, 661 (D.Nev. 2007); *Niagara Mohawk Power Corp. v. Stone & Webster Engineering Corp.*, 725 F.Supp. 656, 664 (N.D.N.Y. 1989)).

[iv] 572 F.2d 596, 611 (8th Cir. 1977).

[v] *Id.* at 611.

[vi] 665 F.2d 1214 (D.C. Cir. 1981).

[vii] *Id.* at 1220-21.

[viii] *Id.* at 1221.

[ix] *U.S. v. Mass. Institute of Technology*, 129 F.3d 681, 686 (1st Cir. 1997) ("Anyone who chooses to disclose a privileged document to a third party, or does so pursuant to a prior agreement or understanding, has an incentive to do so, whether for gain or to avoid disadvantage. It would be perfectly possible to carve out some of those disclosures and say that, although the disclosure itself is not necessary to foster attorney-client communications, neither does it forfeit the privilege. With rare exceptions, courts have been unwilling to start down this path – which has no logical terminus – and we join in this reluctance.").

[x] *Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414, 1425 (3rd Cir. 1991) ("[S]elective waiver does not serve the purpose of encouraging full disclosure to one's attorney in order to obtain informed legal assistance; it merely encourages voluntary disclosure to government agencies, thereby extending the privilege beyond its intended purpose.").

[xi] *In re Martin Marietta Corp.*, 856 F.2d 619, 623-26 (4th Cir. 1988) (the Fourth Circuit has not embraced the concept of limited waiver of the attorney-client privilege, although the doctrine may be used in relation to opinion work product due to the greater protection traditionally afforded thereto).

[xii] *In re Columbia/HCA Healthcare Corporation Billing Practices Litigation*, 293 F.3d 289, 302 (6th Cir. 2002) (rejecting "the concept of selective waiver, in any of its various forms").

[xiii] *Burden-Meeks v. Welch*, 319 F.3d 897, 899 (7th Cir. 2003) ("Knowing disclosure to a third party almost invariably surrenders the privilege with respect to the world at large; selective disclosure is not an option.").

[xiv] *In re Pacific Pictures Corp.*, 679 F.3d 1121, 1128 (9th Cir. 2012) ("Given that Congress has declined broadly to adopt a new privilege to protect disclosures of attorney-client privileged materials to the government, we will not do so here.").

[xv] Note, however, that in *In re Subpoena Duces Tecum*, 738 F.2d 1367, 1369-70 (D.C. Cir. 1984), the D.C. Circuit, with respect to its rejection of a claim for selective waiver for work-product material, did not definitively reject the selective wavier doctrine under all circumstances. Instead, the court based its decision in that case upon three factors: (1) the proposed use of the work-product doctrine was not consistent with the doctrine's purpose; (2) "appellants had no reasonable basis for believing that the disclosed materials would be kept confidential by the SEC"; and (3) applying waiver "would not trench on any policy elements now inherent in this [protection]." *Id.* at 1372. The court also noted that the decision to disclose to the SEC was motivated by self-interest. *Id.*

[xvi] *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 236 (2nd Cir. 1993) (declining to reject a *per se* rule against the selective waiver doctrine, as such would not account for situations where the governmental authority and the disclosing party have entered into a confidentiality agreement).

[xvii] *In re Qwest Communications International, Inc.*, 450 F.3d 1179 (10th Cir. 2006).

[xviii] *Id.* at 232. *See, e.g., Gruss v. Zwirn*, 2013 WL 3481350 at *8 (S.D.N.Y. 2013); *In re Stone Energy Corp.*, 2008 WL 4868086, at *5 (W.D.La. 2008) (protecting material provided to the SEC in response to a "benign request" to assist an agency "in performing its routine regulatory duties"); *In re Bank One Sec. Litig.*, 209 F.R.D. 418, 424 (N.D.Ill. 2002) (finding that a confidentiality agreement between the disclosing party and the Office of the Comptroller of the Currency did not "salvage the protection of the work-product doctrine due to the adversarial nature of this relationship").

[xix] *See, e.g., Police and Fire Retirement Sys. of the City of Detroit v. Safenet, Inc.*, 2010 WL 935317, at *2 (S.D.N.Y. 2010) (applying the selective waiver doctrine because disclosing party had expectation of privacy due to confidentiality agreements); *Lawrence E. Jaffe Pension Plan v. Household International*, 244 F.R.D. 412, 433 (N.D.Ill. 2006) ("selective waiver may be appropriate where the disclosing party took steps to preserve its privilege"); *In re Stone Energy Corp.*, 2008 WL 4868086 at * 6 ("the confidentiality agreement between Stone and the SEC gave the SEC broad discretion to disclose the documents 'in furtherance of the Commission[ ]'s discharge of its duties and responsibilities,' and therefore gave little expectation of privacy to Stone").

[xx] MISS. CODE ANN. § 75-76-133.

[xxi] NEV. REV. STAT. § 463.3407.