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Use of "Advice of Counsel" as a Defense by Reporters

By Dan Byron and Jonna McGinley

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Attorney-Client Privilege and Waiver

The question has arisen whether the use of "advice of counsel" as a defense by reporters in defamation and other cases constitutes a waiver of the attorney-client privilege between the reporters and their counsel. The attorney-client privilege "encourage[s] full and frank communication between attorneys and their clients" by protecting confidential communications made for the purpose of rendering legal services. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The basic elements required to establish a claim of the attorney-client privilege are:

(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.

United States v. United Shoe Machinery Corp., 89 F. Supp. 357 (D. Mass. 1950), *quoted in Handgards, Inc. v. Johnson & Johnson*, 413 F. Supp. 926, 929 n.1 (N.D. Cal. 1976).

The client, not the attorney, holds the privilege; therefore, an attorney may not waive the privilege on behalf of his or her client. *See, e.g., United States v. Walters*, 913 F.2d 388 (7th Cir. 1990). However, the privilege may be waived, either expressly or impliedly, under certain circumstances. *See, e.g., Kremer v. Cox*, 682 N.E.2d 1006, 1017 (Ohio Ct. App. 1996). Several courts have concluded that a litigant waives his attorney-client privilege by placing his attorney's advice directly at issue in the litigation. *See, e.g., Frontier Refining Inc. v. Gorman-Rupp Co., Inc.*, 136 F.3d 695, 699-700 (10th Cir. 1998); *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 486 (3rd Cir. 1995) ("Under such circumstances, the client has made a conscious decision to inject the advice of counsel as an issue in the litigation"); *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851, 863-64 (3rd Cir. 1994) (holding that where a party neither raises advice of counsel as an affirmative defense nor evinces a clear intent to waive the attorney-client privilege by placing at issue reliance on the advice of counsel, the party does not lose the protection of the privilege when his or her state of mind is placed at issue); *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156 (9th Cir. 1992).

We find no case law covering the "advice of counsel" issue with regard to the testimony of journalists or reporters specifically. There is a 1995 decision, however, which considers the issue of whether an attorney for a media entity can cause a waiver of the attorney-client privilege as a result of his disclosure to the plaintiff of a libel review report prepared for his client. *Abdullah v. Sheridan Square Press*, 1995 WL 413171 (S.D.N.Y. 1995). This case involved a claim for libel based upon the publication of a book. Plaintiff had moved to disqualify the attorney and his firm from continuing to represent a publisher on the basis that the attorney had provided his client with a libel review report of the challenged manuscript which had been given in discovery to the plaintiff. Plaintiff argued that the attorney could be compelled to testify with regard to any legal advice given in connection with the issuance of the disclosed report and he and his firm should therefore be disqualified. Plaintiff theorized that submission of the libel review report to the plaintiff waived the attorney-client privilege as to those discussions between the attorney and the publisher which were connected to his writing of the report.

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The court, however, disagreed and held that the attorney and his firm were not necessary witnesses, that any testimony of the lawyer was merely cumulative and that no material discrepancy existed between the attorney and his client's testimony. In conclusion the court stated that "the attorney's publication to the plaintiff of communications between himself and his clients, *i.e.*, [attorney's] alleged 'libel review,' does not result in the waiver of the attorney-client privilege as to any undisclosed portions of such communications, or as to any other related communications concerning the same subject matter." 1995 WL 413171, *2 (citing *In Re Von* Bulow, 828 F.2d 94, 102 (2d Cir. 1987)).

The important point to note is that in this instance the attorney's disclosure of advice to a plaintiff does not waive the attorney-client privilege. *See also* the cited case of *In Re Von Bulow*, 828 F2d 99, where it was held that because the attorney-client privilege belongs solely to the client and may only be waived by him, an attorney may not waive the privilege without his client's consent.

Non-Media Defendants, Implied Waiver

As for cases outside the media arena, there is abundant case law applicable to this issue in general. In cases where waiver of the attorney-client privilege is sought because a claim or defense based upon "advice of counsel" is asserted, "[c]ourts have found that by placing the advice in issue, the client has opened to examination facts relating to that advice." *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d at 863.

> Advice is not in issue merely because it is relevant, and does not necessarily become in issue merely because the attorney's advice might affect the client's state of mind in a relevant matter. The advice of counsel is placed in issue where the client asserts a claim or defense, and attempts to prove that claim or defense by disclosing or describing an attorney client communication.

Id. Additionally, finding a waiver in this situation is "consistent with the essential elements of the privilege." *Id*. In order for the privilege to be waived, the client must affirmatively place his attorney's advice at issue, providing predictability for the client with respect to the circumstances by which he waives his privilege. *Id*.

The federal standard for determining whether a client has impliedly waived the attorney-client privilege is generally stated as follows:

(1) assertion of the privilege was a result of some affirmative act, such as filing suit, by the asserting party;
(2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and
(3) application of the privilege would have denied the opposing party access to information *vital* to his defense.

Chase Manhattan Bank v. Drysdale Securities Corp., 587 F. Supp. 57, 58 (S.D.N.Y. 1984), *quoted in S. Cal. Gas Co. v. Pub. Util. Comm'n*, 784 P.2d 1373, 1379 n.11 (Cal. 1990). "Thus, where these three conditions exist, a court should find that the party asserting a privilege has impliedly waived it through his own affirmative conduct." *Id*.

Second Circuit

In the Second Circuit, pleading "advice of counsel" waives any privilege that formerly protected attorney-client communications. *See Trans World Airlines, Inc. v. Hughes*, 332 F.2d 602, 615 (2d Cir. 1964). In New York, a state subject to the Second Circuit's rulings, the waiver operates "with respect to

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all communications to or from counsel concerning the transactions for which counsel's advice was sought." *Village Bd. of the Village of Pleasantville v. Rattner*, 130 A.D.2d 654, 655 (N.Y. 1987) (emphasis added). In addition, "selective disclosure" of "self-serving communications" while reliance on the privilege for "damaging communications" is impermissible. *Id*; *see also United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991) ("the attorney-client privilege cannot at once be used as a shield and a sword").

The Second Circuit has recognized that implied waiver may be found where the privilege holder "asserts a claim that in fairness requires examination of protected communications." *Bilzerian*, 926 F.2d at 1292. In *Bilzerian*, the court found the waiver particularly applicable where a client "put his knowledge of the law and the basis for his understanding of what the law required in issue," yet attempted to shield himself from inquiry by pleading an advice of counsel defense. *Id*. "Whether fairness requires disclosure has been decided by the courts on a case-by-case basis, and depends primarily on the specific context in which the privilege is asserted." *In Re Grand Jury Proceedings; United States v. Doe*, 219 F.3d 175 (2d Cir. 2000).

DC Circuit

Similarly, the United States Court of Appeals for the District of Columbia Circuit relies on fairness considerations to determine when waiver is appropriate. In *United States v. White*, the D.C. Circuit refused to find a waiver of the attorney-client privilege based on "a general assertion lacking [any] substantive content that one's attorney has examined a certain matter." 887 F.2d 267, 271 (D.C. Cir. 1989). The court explained,

> "Where a defendant neither reveals substantive information, nor prejudices the government's case, nor misleads a court by relying on an incomplete disclosure, fairness and consistency do not require the inference of waiver." *Id*.

See also Chevron Corp. v. Pennzoil Co., 974 F.2d 1156 (9th Cir. 1992) (fair to find that party who put advice in issue waived privilege by claiming tax position stated in securities disclosure document was reasonable because it was based on advice of counsel); *see also Kremer v. Cox*, 682 N.E.2d 1006, 1023 (Ohio Ct. App. 1996) (Mahoney, J., concurring in judgment, "Fairness requires that the court not permit the attorney-client privilege…be used as [a] weapon instead of [a] shield."). Thus, in some jurisdictions, the existence of waiver and its scope may be influenced by overall fairness.

California

Consistent with jurisdictions nationwide, courts sitting in California have noted that, "[a]n important consideration in assessing the issue of waiver is fairness." *Handgards, Inc. v. Johnson & Johnson*, 413 F. Supp. at 929 (N.D. Cal. 1976) (citing *Bierman v. Marcus*, 122 F. Supp. 250 (D.N.J. 1954)); *see also So. Cal. Gas Co. v. Pub. Util. Comm'n*, 784 P.2d at 1378. A party may not selectively disclose communications while asserting the privilege in other, related communications about the same subject. *Handgards*, 413 F. Supp. 926 (citing *Int'l Telephone and Telegraph Corp. v. United Telephone Co. of Fla.*, 60 F.R.D. 177, 185-86 (M.D. Fla. 1973)). A voluntary waiver of the privilege in one circumstance acts as a waiver of the remainder of privileged communications about the same subject. *Id*. However, California courts generally limit implied waivers "to situations where the client has placed into issue the decisions, conclusions, and mental state of the attorney who will be called as a witness to prove such matters." *Transamerica Title Ins. Co. v. Superior Court of Santa Clara County*, 233 Cal. Rptr. 825, 829 (Cal. Ct. App. 1987).

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In California district court, "[t]he *deliberate injection* of the advice of counsel into a case waives the attorney-client privilege as to communications *and documents* relating to the advice." *Handgards*, 413 F. Supp. at 929 (emphasis added). In *Handgards*, the court held that a defendant impliedly waived his attorney-client privilege when he indicated his intent to call his attorneys as witnesses. *Id*. at 926. Where a party places into issue a matter that is normally privileged, California courts find that "the gravamen of the lawsuit is so inconsistent with the continued assertion of the privilege as to compel the conclusion that the privilege has in fact been waived." *Transamerica*, 233 Cal. Rptr. at 828. In addition, the court in *Handgards* expanded the waiver beyond the admissibility of evidence at trial and found the waiver operated as early as discovery. 413 F. Supp. at 929. Noting that "the same rules of privilege govern the scope of discovery as generally govern the admissibility of evidence at trial," the District Court found materials expected to fall under a waiver of the privilege at the time of trial were subject to pretrial discovery. *Id*. This expansive reading of the privilege waiver leaves little protection for the party asserting an "advice of counsel" defense.

Indiana

Likewise, in federal district court in Indiana it has been said, "[w]hen a party relies on advice of counsel…the general rule is that the party waives the attorney-client privilege regarding all otherwise privileged communications on the subject of the advice." *Eli Lilly and Co. v. Zenith Goldline Pharm., Inc.*, 149 F. Supp. 2d 659, 661 (S.D. Ind. 2001); *see also Lorenz v. Valley Forge Ins. Co.*, 815 F.2d 1095, 1098-99 (7th Cir. 1987) (applying Indiana privilege law and noting that disclosure applies only to communications on the *specific matter* at issue). In *Harter v. Univ. of Indianapolis*, the court explained:

> [W]hen a client files a lawsuit in which his or her state of mind (such as good faith or intent) may be relevant, the client does not implicitly waive the attorney-client privilege as to all *relevant* communications unless the client relies specifically on advice of counsel to support a claim or defense.

5 F. Supp. 2d 657, 664 (S.D. Ind. 1998) (emphasis added). Thus, reliance on "advice of counsel" erases the protection of the privilege from all related communications. Indiana courts also echo concerns regarding fairness and condone the use of the privilege as both a shield and a sword. *Eli Lilly*, 149 F. Supp. at 662. If a party claiming waiver of the privilege (plaintiff) can obtain the privileged material through lesser-intrusive means, the party claiming an advice of counsel defense (defendant) should not be compelled to disclose the privileged material. *Bartlett v. State Farm Mutual Auto. Ins. Co.*, 206 F.R.D. 623, 2002 U.S. Dist. LEXIS 9284, at *9 (S.D. Ind. May 22, 2002).

Scope of Waiver

The scope of the waiver is generally consistent across jurisdictions. The Third Circuit, which has developed an extensive body of law in this area, notes that in determining to what extent the privilege is waived, the party claiming the privilege "should not be permitted to define selectively the subject matter of the advice of couns el on which it relied in order to limit the scope of the waiver of the attorney-client privilege and therefore the scope of discovery." *Glenmede Trust Co. v. Thompson*, 56 F.3d at 486.

The court in *In re Pioneer Hi-Bred Int'l, Inc.*, held that the attorney-client privilege was waived "with respect to all documents which formed the basis for the advice, all documents considered by counsel in rendering that advice, and all reasonably contemporaneous documents reflecting discussions by counsel or others concerning that advice," to the extent the documents dealt with the merger advice at issue. 238 F.3d 1370, 1374-75 (Fed. Cir. 2001). *In re Pioneer* emphasized that establishing a connection

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between the communication or documents and the advice rendered was critical in finding a waiver. Generally speaking, the waiver operates with respect to all documents that relate to the subject matter of the advice provided by the attorney to his or her client.

Attorney vs. Client

An additional consideration with regard to waiver is the subsequent conflict that may arise between the client and his or her attorney, whose advice the client claims to have relied on, possibly to the client's detriment. Notably, under state rules of professional conduct, an attorney is instructed to avoid representation of a client "if the representation of that client may be materially limited…by the lawyer's own interests." MODEL RULES OF PROF'L CONDUCT R.1.7(b) (1995) The Model Rules of Professional Conduct provide paradigm rules, which states may choose to follow; Rule 1.7, addressing conflicts of interest, has been adopted by most states. However, under this conflict rule, an attorney may continue representation if the attorney "reasonably believes" his client would not be "adversely affected," *and* the client consents after consultation. MODEL RULES OF PROF'L CONDUCT R.1.7(b)(1) and (b)(2). Generally speaking, if an attorney feels he cannot adequately represent his client, he must refrain from representation. A disagreement over the "advice of counsel" provided might create a conflict that requires attorney disqualification.

Conclusion

While a detailed survey of how individual states treat the "advice of counsel" defense and what limits courts place around required disclosure may be useful, it does not appear to be particularly necessary. Generally speaking, jurisdictions nationwide treat a client's application of the "advice of counsel" defense consistently. Generally, courts will require disclosure of testimony, documents and materials related to the subject matter for which the client sought advice. In that connection, we who give advice to reporters or editors regarding the content of news stories should understand from the outset that such advice could someday be revealed to adverse parties and we should plan accordingly. If the advice is sound, however, it should serve to libel proof the news article and assist in eliminating the possibility of litigation or liabilities in connection therewith. Thus it may well be in our client's best interests to willingly assert the advice of counsel defense and provide to opposing counsel the conversations and documents related to same. Under such an analysis, we should see this defense as a useful tool and a help, not a hindrance.

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