WAIVING THE ATTORNEY-CLIENT PRIVILEGE BY PLACING ADVICE OF COUNSEL IN ISSUE

You have been the very picture of prudence. You run every important decision by your primo outside counsel so that, if anything goes wrong, you have a chip shot "advice of counsel" defense. Well, something has gone wrong. Your tax shelter goes awry. Your securities filings are attacked. Your internal investigation is challenged. Your interpretation of a contract is held in bad faith. Your lawyers send in the A-team litigators for your defense. So far, so good. But wait! The plaintiff has subpoenaed your trial lawyers' firm? What's this business about implied waiver?

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Most lawyers know or should know that expressly invoking advice of counsel as an element of their client's defense will be deemed at least a partial waiver of the attorney-client privilege.[1] The jurisprudential principle on which this rule is based, however, has been applied more broadly and inconsistently to situations in which the client has merely asserted an innocent state of mind. For example, the implied waiver theory has been applied in cases in which the client's position in practical effect relies upon the lawyer's advice even if the client expressly disavows reliance on counsel. Well-counseled corporations who run major matters by their lawyers and expect to rely upon the lawyers' advice must therefore consider the effect that this reliance may have on their ultimate ability to protect their lawyers' advice from prying eyes in the event of litigation over the propriety of the underlying corporate decision and the limitations that it may impose on their selection of trial counsel.

Any informed treatment of the general topic of waiver of privilege in the corporate context must also identify several other related risks that we will raise here but leave to another day for a more extensive analysis: the *Garner* doctrine, which can permit a shareholder in a derivative action, upon a showing of "good cause," to discover communications between a corporation's management and its counsel (both inside and outside); the new Department of Justice ("DOJ") guideline that may condition favorable treatment of the corporate client upon waiver of the attorney-client privilege;[2] and the prohibition in Model Rule 3.7 of a lawyer appearing as an advocate in a case in which the lawyer is likely to be a necessary witness.

Back to our basic point, the implied waiver of privilege that can result from a litigation position, this principle can be boiled down to a pithy slogan: the attorney-client privilege is not to be used as both a sword and a shield.[3] That is, a party cannot use the privilege to prejudice an opponent's case or to disclose selected communications for a self-serving purpose.[4] Accordingly, whenever a party asserts reliance on the advice of counsel as the basis for action or inaction in a particular matter or to rely upon the lawyer's interpretation of a legal standard of conduct, that party is deemed to have placed the attorney-client relationship "in" or "at" issue, thereby implicitly waiving the protections of the privilege[5] as to all communications pertaining to that matter.[6] Recognition of an implied waiver under these circumstances is grounded on principles of "forensic fairness."[7] By placing the advice of counsel in issue, "fairness requires examination of [the] protected communications."[8]

Not just any act or assertion, however, is sufficient to constitute a waiver of the privilege. Rather, establishing an implied waiver requires a showing that the party seeking the protections of the privilege has affirmatively injected an issue into the case that places the legal advice at issue.[9] Thus, the mere commencement[10] or defense of a lawsuit generally does not constitute a waiver of the privilege.[11] Simply denying an allegation in a complaint likewise does not waive the privilege.[12] On the other hand, when a party asserts an affirmative defense that relies on the advice of counsel, the general rule is that the party has sufficiently placed the advice at issue so as to waive the attorney-client privilege.[13] The Third Circuit explains:

> 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 manner. 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.[14]

If you are certain to litigate in the Third Circuit (and perhaps before the panel that decided this case), this distinction is helpful: waiver is not implied simply because the lawyer's advice is relevant to the inquiry; the client must attempt to use the lawyer's advice as evidence. Many courts, however, have drawn the line differently to include waiver in cases in which the client's state of mind becomes an issue in the case. According to the Second Circuit, for example, an investor's testimony that he thought his actions were legal would waive the privilege because it "would have put his knowledge of the law and the basis for his understanding of what the law required in issue[,]" and thereby make "conversations with counsel regarding the legality of his schemes . . . directly relevant in determining the extent of his knowledge and, as a result, his intent."[15] Similar assertions of good faith[16] or the reasonableness of a party's actions[17] have also been held to inject an issue into the case so as to constitute a waiver of the attorney-client privilege, even if reliance on the advice of counsel is expressly disclaimed.[18]

Although these decisions may be seen to test the limits of the implied waiver theory, the problem for litigants is that the application of the rule is a patchwork and the standards are applied inconsistently. So even if a corporation could be assured that it is in a jurisdiction where the implied waiver

theory is strictly construed, the modern corporation can find itself litigating in nearly any state. In keeping with one of what should be a basic precept of defensive counseling, in-house counsel should accept this lack of predictability and take into consideration the least favorable legal standard in deciding on the corporation's best course of action.

Does this precept mean not seeking legal advice for a securities disclosure or a tax-driven structure? Of course not. But in-house counsel should consider the effect that seeking such advice will have on the corporation's privilege and, therefore, from whom to seek the advice and how much must be disclosed. Too often, corporations are put in the unhappy position of having their principal counsel out of their defense because of a necessary and unanticipated reliance on that lawyer. As broad as the implied waiver doctrine has been interpreted by some courts, fairness is still the standard generally applied by the courts in determining the question of waiver. In the absence of a showing of manifest need[19] or prejudice,[20] therefore, the privilege remains intact.

GARNER DOCTRINE

Aside from the foregoing implied waiver theory, another omnipresent risk to the corporate attorney-client privilege is the exception spawned by the Fifth Circuit in *Garner v. Wolfinbarger*.[21] *Garner* arose out of a shareholder derivative suit charging management with fraud. The shareholders sought discovery of protected communications between corporate management and in-house counsel.[22] To keep the shareholders, as owners of the corporation, informed of matters affecting the corporation, the Fifth Circuit carved out an exception to the corporate attorney-client privilege, known now as the *Garner* doctrine. That rule requires a balancing of competing interests, such as comparing the harm from disclosure of privileged communications, with the benefit to be realized from "the correct disposal of litigation."[23] *Garner* identified a number of factors that should be taken into consideration by the court[24] and has become the rule in most jurisdictions.[25]

DOJ GUIDELINES

DOJ has recently revised its guidelines in determining whether to bring charges against business entities, and the new guidelines now may coerce waiver of attorney-client privileges.[26] According to the deputy attorney general, the primary focus of the revised guidelines is an "increased emphasis on and scrutiny of the authenticity of a corporation's cooperation [since] [t]oo often business organizations, while purporting to cooperate with a Department investigation, in fact take steps to impede the quick and effective exposure of the complete scope of wrongdoing under investigation."[27] Because two of the perceived impediments to governmental investigations into corporate wrongdoing are the attorney-client privilege and work product protection, the guidelines provide that the corporation's willingness to waive these protections constitutes a factor to consider in assessing the corporation's cooperation and, ultimately, the decision to prosecute.[28] Although waiver is not considered by the Department as "an absolute requirement," the guidelines strongly encourage prosecutors to "consider the willingness of a corporation to waive such protection when necessary to provide timely and complete information[.]"[29] Although the guidelines characterize the waiver as limited in scope, covering only "the factual internal investigation and any contemporaneous advice given to the corporation concerning the conduct at issue,"[30] few in the defense bar see it as so benign.

WITNESS-ADVOCATE AND MODEL RULE 3.7

Although the witness-advocate prohibitions have been relaxed in recent years, Model Rule 3.7 still generally prohibits a lawyer from acting as an advocate at a trial in which the lawyer is likely to be a necessary witness. There are exceptions, including the degree to which the issue on which the lawyer testifies is truly contested, the degree of hardship on the client, and, possibly, whether there will be a testimonial or other conflict between the lawyer and the client. Some testimonial problems can be solved by introducing another lawyer to try the case. Others, however, involve such profound conflicts that the entire firm may face disqualification under Model Rules 1.7 and 1.10.

WHAT IS IN-HOUSE COUNSEL TO DO?

- Remember that seeking advice from a lawyer who is trial-counsel-of-choice on an important issue may at some later date place the corporation in the unhappy position of having its trial lawyer disqualified (or constantly fending off disqualification) or foregoing important advice of counsel defense.
- With the increasing number of exceptions to the attorney-client privilege for corporations under scrutiny, in-house counsel must weigh whether any advice sought on high-risk conduct or transactions will remain confidential if the problem blows up. Prudence may dictate making an assumption that no attorney-client privileges will survive.

- The broadening reach of the "at" or "in" issue exception to the attorney-client privilege must be carefully considered in shaping litigation strategy to avoid inadvertently waiving privileges.

NOTES

1. *See, e.g.*, Chevron Corp. v. Pennzoil Co., 974 F.2d 1156, 1163 (9th Cir. 1992) (party puts advice in issue and waives attorney-client privilege where it claims that its tax position was reasonable because it was based on the advice of counsel); United States v. Mierzwicki, 500 F. Supp. 1331, 1335 (D. Md. 1980) (in a prosecution for tax evasion, the defendant waives privilege when he asserts as a defense that returns were amended because of counsel's advice).
2. *See* U.S. Department of Justice, Office of the Deputy Attorney General, *Principles of Federal Prosecution of Business Organizations*, § VI (Jan. 20, 2003) (stating that one factor to be considered in charging a corporation for wrongdoing is the corporation's willingness to cooperate, which includes the corporation's willingness to waive the corporate attorney-client and work product protections), available at www.usdoj.gov/dag/cftf/corporate_guidelines.pdf.
3. *See* Cox v. Adm'r U.S. Steel & Carnegie, 17 F.3d 1386, 1419 (11th Cir.), *modified on reh.*, 30 F.3d 1347 (11th Cir. 1994, *cert. denied*, 513 U.S. 1110 (1995); *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991); *Dion v. Nationwide Mut. Ins. Co.*, 185 F.R.D. 288, 295 (D. Mont. 1998). As stated by one district court, "[A] privilege is meant to be used defensively as a shield against divulging privileged information, rather than offensively as a sword." American Medical Systems, Inc. v. Union Fire Ins. Co. of Pittsburgh, Inc., 1999 WL 970341 at *2 (E.D. La. 1999), *aff'd*, 1999 WL 1138484 (E.D. La. 1999).
4. Bilzerian, 926 F.2d at 1292.
5. *See* JOHN K. VILLA, CORPORATE COUNSEL GUIDELINES § 1.25 (ACCA and West Group 2002 and annual updates).
6. Rhone-PoulencRorer, Inc. v. Home Indemnity Co., 32 F.3d 851, 863 (3d Cir. 1997) (placing counsel's advice in issue "opens to examination facts relating to that advice").
7. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 80, comment (b) (2000).
8. Bilzerian, 926 F.2d at 1292; *see also* Conkling v. Turner, 883 F.2d 431, 435 (5th Cir. 1989) (in such a situation, "fairness demands treating the [assertion] as a waiver of the privilege;" quoting United States v. Mierzwicki, 500 F. Supp. 1331, 1335 (D. Md. 1980)).
9. Cox v. Adm'r U.S. Steel & Carnegie, 17 F.3d at 1419. Under the RESTATEMENT view, "[t]he attorney-client privilege is waived for any relevant communication if the client asserts as to a material issue in a proceeding that: (a) the client acted upon the advice of a lawyer or that the advice was otherwise relevant to the legal significance of the client's conduct[.]"RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, *supra* note 7, § 80(1)(a).
10. IndustrialClearinghouse, Inc. v. Browning Manufacturing Div. of Emerson Elec. Co., 953 F.2d 1004, 1007 (5th Cir. 1992).
11. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, *supra* note 7, § 80(1)(a), Reporter's Note, comment (b).
12. Cox v. Adm'r U.S. Steel & Carnegie, 17 F.3d at 1419; Lorenz v. Valley Forge Ins. Co., 815 F.2d 1095, 1098 (7th Cir. 1987).
13. *See* Rhone-PoulencRorer, 32 F.3d at 863; Chevron Corp. v. Pennzoil Co., 974 F.2d at 1163.
14. Rhone-PoulencRorer, 32 F.3d at 863. *See, e.g.*, Chevron Corp, 974 F.2d at 1163 (legal advice asserted as basis for contention that tax statement was valid waived attorney-client privilege); Harding v. Dana Transport, Inc., 914 F. Supp. 1084, 1093 (D. N.J. 1996) (finding waiver where the defendant attempted to use an internal investigation as a defense in a discrimination action).
15. Bilzerian, 926 F.2d at 1292.
16. *See* Cox v. Adm'r U.S. Steel & Carnegie, 17 F.3d at 1419 (assertions as to the defendant's good faith are "inextricably intertwined" with his state of mind and require waiver of the privilege in order to determine the basis of his belief).
17. *See* State Farm Mut. Ins. Co. v. Lee, 199 Ariz. 52, 13 P.3d 1169, 1177 (2000) (an affirmative assertion by party that he acted reasonably and in good faith because he had evaluated and interpreted the policy and applicable law necessarily included the information received from counsel so as to waive the attorney-client privilege).
18. *Id.* (holding that an "affirmative disavowal of express reliance on the privileged communications is not enough to prevent a finding of waiver").
19. *See* VILLA, *supra* note 5.
20. *See* Cox v. Adm'r U.S. Steel & Carnegie, 17 F.3d at 1417-1418 (no waiver where party attacking the privilege has not been prejudiced).
21. 430 F.2d 1093 (5th Cir. 1970), *cert. denied*, 401 U.S. 974, 91 S. Ct. 1191, 28 L.Ed.2d 323 (1971).
22. *Id.* at 1103.
23. *Id.* at 1100.
24. These factors include the following: the number of shareholders and their percentage of stock ownership; the bona fides of the shareholders and the nature and colorability of their claim; legitimacy of their need for the information and its availability from other sources; existence of allegations of criminal or illegal behavior; the time frame of the communications—that is, whether they involve past or future actions—the relationship of the communications to the litigation at hand; evidence that the discovery is merely a fishing expedition; and the risk that discovery would divulge trade secrets. *Id.* at 1104. *See also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, *supra* note 7, § 85 (2000).
25. *See* In re Occidental Petroleum Corp., 217 F.3d 293 (5th Cir. 2000) (action under ERISA by employees of former subsidiary of defendant corporation); *see generally* VILLA, *supra* note 5, § 1.27.
26. U.S. Dept. of Justice, Office of the Deputy Attorney General, *Principles of Federal Prosecution of Business Organizations, supra* note 2, at 1 (noting that the revision is an attempt "to enhance [its] efforts against corporate fraud").
27. *Id.*
28. *Id.* at 7, § VI.
29. *Id.*
30. *Id.* at note 3.