

PUBLICATION

In-house Bout: Company Privilege Overshadows Advice-of-Counsel Defense

June 8, 2016

"Legal told me I could do that." This phrase is one of the more common get-out-of-jail-free cards for corporate employees whose actions subject them to civil liability. A recent shift in the law, however, has determined that employees relying upon the advice of their corporate counsel may not assert the advice-of-counsel defense in civil suits unless their employer agrees to waive the attorney-client privilege. In one of the few cases to address this issue, the court in *United States v. Wells Fargo Bank, N.A.* held that the attorney-client privilege is absolute and will not give way to the advice-of-counsel defense absent a waiver. The court also expressed doubt on the validity of cases holding that the advice-of-counsel defense can trump the attorney-client privilege in the criminal context, kick starting a jurisdictional split over this issue.

I. Conflict Between the Attorney-Client Privilege and Advice-of-Counsel Defense.

Interestingly, two doctrines that should work together appear to now be mutually exclusive. *U.S. v. Wells Fargo* revolved around the government's suit against Wells Fargo for alleged violations of the False Claims Act and the Financial Institutions Reform, Recovery, and Enforcement Act. The government later added Wells Fargo's Vice President of Quality Control as a defendant, citing the vice president's role in the bank's alleged violations. The vice president argued that he had relied upon the advice of Wells Fargo's attorneys concerning the statutory compliance. To support his defense, the vice president sought to reveal his specific communications with Wells Fargo's attorneys. Further, it was undisputed that the vice president lacked authority to waive the privilege, which belonged to Wells Fargo.

The government opposed a joint defense proposal that would sever the vice president, which the district court rejected as premature. Wells Fargo then filed for a protective order asserting that all communications between the vice president and the bank's attorneys were protected by the attorney-client privilege.

II. The Attorney-Client Privilege is Absolute and Not Subject to Balancing.

The district court granted the protective order, holding that the bank's assertion of the attorney-client privilege trumped the vice president's advice-of-counsel defense. The court reasoned that, because the attorney-client privilege is not qualified, a defendant does not have the absolute right to present privileged information, even in criminal cases. To hold otherwise would 1) render the privilege uncertain, 2) prejudice Wells Fargo, and 3) create a "perverse 'incentive for plaintiffs to pursue claims against individual employees in the hopes of forcing a waiver of the corporation's privilege.'"

The district court also refused to balance the interests of the vice president against the corporation's interests in asserting the privilege. It based its refusal on the Sixth Circuit's reasoning in *Ross v. City of Memphis*, the only appellate court to consider this issue. *Ross* held that the corporation's assertion of the attorney-client privilege precluded an employee's use of the advice-of-counsel defense in a civil discrimination case because the U.S. Supreme Court ruled that the attorney-client privilege is absolute and survives the death of the client, with no exceptions for cases of "extreme injustice" or where the information was "of substantial importance." In *Swindler & Berlin v. United States*, where the Supreme Court also rejected a balancing test as undermining the purpose behind the privilege, the court reasoned that the client may not know at the time of disclosure its relevance to future matters. Based on the *Ross* and *Swindler* decisions, the *Wells Fargo* court rejected arguments for a limited, judicially compelled disclosure as requiring the balancing test prohibited by *Swindler* and potentially opening the door to other privileged documents.

The *Wells Fargo* court also declined to follow *United States v. Grace* and its offspring, which were criminal cases holding that the attorney-client privilege yields to the advice-of-counsel defense where the privileged communications are "of such probative and exculpatory value as to compel admission of the evidence" over the objections of the defendant company holding the privilege. The district court noted that *Grace* had erred in failing to consider the Supreme Court's explicit rejection of a balancing test in *Swindler* and concluded that employer indemnification of the employee could mitigate the potentially harsh result for the employee.

III. Chilling Effect on Communications with Company Counsel.

There are situations where the attorney-client privilege and advice-of-counsel doctrines can work in harmony. In a case where the employer is willing to waive its attorney-client privilege, the advice-of-counsel doctrine can prove quite useful. For example, if you have an employee who truly acted in good faith and a company lawyer who provided good judgment, the employer can comfortably waive privilege and allow the employee to rely on the advice-of-counsel defense, assuming the documents that would be produced support the employer's case. While a seemingly uncomfortable situation, the employer will benefit by demonstrating loyalty and protection of its employees in the face of litigation.

On the other hand, if the employer is unwilling to waive its attorney-client privilege, how can an employee reconcile advice sought from company counsel with the fact that he or she could be criminally or civilly liable for the result? If the employer enforces its attorney-client privilege and disallows the employee from asserting the advice-of-counsel defense, the employer has effectively deserted its employee on an island of indefensible liability. This division would cause an employee's reluctance to even seek advice from company counsel or disclose potential issues to counsel, which is clearly harmful to a company from both a legal and business standpoint.

IV. Best Practices for Corporate Executives and In-house Counsels.

In order to first make the advice-of-counsel defense available, counsel should consider issues such as proper documentation and the intertwining relationship of the attorney-client privilege. Some tips include the following:

- Clarify the representation. The advice-of-counsel defense is not available to all employees of the company. Corporate counsel usually only represents the corporation, not each of its employees individually.
- Retain independent counsel. If an individual employee's obligation are different from the corporation's directions or obligations, the employee should retain his or her own counsel for advice regarding the matter in questions. That way, the individual can obtain an unbiased opinion unrelated to the company's interests as to the legality of a particular action. Doing so would provide the employee with greater confidence that he or she will be able to present the advice later if necessary to show that he or she acted in good faith.
- Discuss corporate waiver of the attorney-client privilege. An individual employee should not be afraid to ask corporate officers whether they would agree in advance to waive the privilege if the employee ever needed to assert an advice-of-counsel defense.
- Contract around the issue. While this scenario may be unlikely, perhaps an employer would be willing to include language in an employee's contract allowing the employee to control the privilege or, alternatively, indemnifying the employee from personal liability.