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Expert Analysis

Employer's Privilege Trumps Employee's Advice-of-Counsel Defense

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Individuals accused of wrongdoing in their capacity as corporate employees often have previously consulted with company counsel related to some aspect of the conduct they are later called on to defend. Advice of counsel, if properly invoked and satisfactorily proven, can provide an affirmative defense where intent is an element of the offense or claim, showing that a defendant lacked improper intent or acted in good faith. However, invoking the advice-of-counsel defense puts "at issue" privileged communications, requiring waiver of the attorney-client privilege as to communications related to the attorney's advice, so as to establish the bona fides of the defense and prevent the privilege from being used both as a sword and a shield.

Deciding whether the benefits of waiving the privilege outweigh the risks of laying bare one's communications with counsel can be difficult and involves a careful considerations of the competing concerns. Where—as in the case of a corporate employee—the privilege is held and controlled by an entity other than the defendant seeking to invoke the defense, the privilege-holder may well have a different risk/benefit calculus than the defendant, and may resist or refuse to waive. U.S. District Judge Jesse M. Furman's decision this fall in *United States v. Wells Fargo Bank*,[1] explores this clash of interests between the privilege holder and the defendant, and holds, in a case of first impression in the U.S. Court of Appeals for the Second Circuit, that a corporation cannot be forced to disclose privileged communications, even if those communications would provide a complete defense to one of its employees—at least in the context of a civil dispute.

'Wells Fargo'

In *United States v. Wells Fargo*, the government brought civil claims against Wells Fargo and its employee, Kurt Lofrano, under the False Claims Act and the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA), alleging misconduct with respect to U.S. government-insured home mortgage loans. Lofrano, in his answer as well as in deposition testimony, asserted that he had sought to comply with the legal requirements the government alleged he violated, by following the advice of at least two Wells Fargo attorneys. The parties agreed that if successfully asserted, the advice-of-counsel defense provided a complete defense to the government's claims against Lofrano.[2]

> 'Wells Fargo' holds that a corporation cannot be forced to disclose privileged communications, even if those communications would provide a complete defense to one of its employees.

In response to Lofrano's assertion that he had consulted with and relied on Wells Fargo counsel, the government moved to reopen fact discovery to explore the communications between Lofrano and Wells Fargo's attorneys or, alternatively, to bar Lofrano from raising the advice-of-counsel defense entirely. In an earlier opinion, Judge Furman denied the government's motion, holding that an employee's "mere invocation" of an advice-of-counsel defense does not waive the attorney-client privilege held by his employer.[3] At the time, Wells Fargo had not objected to Lofrano's attempt to waive its privilege.

Wells Fargo subsequently made clear that it would object to any waiver of the privilege. The court then ordered briefing on the questions of whether (1) Lofrano should be precluded from asserting the advice-of-counsel defense and, (2) in the event he would be permitted to assert the defense, the scope of any potential, judicially compelled waiver of the privilege and the scope of discovery into privileged communications the government should be permitted to take. Lofrano then outlined the evidentiary basis for his advice-of-counsel defense in an ex parte submission. The government filed a letter outlining the scope of its requested discovery, and Wells Fargo moved for a protective order to prevent the disclosure of its privileged information.

Wells Fargo's motion thus squarely presented the question of "whether an employee can pursue an advice-of-counsel defense that requires disclosure of his employer's privileged communications where the employer will not waive the privilege." Judge Furman observed that the answer required him to resolve a "conflict between two indisputably weighty principles."[4] "On the one hand," he acknowledged, "fundamental fairness and due process generally require that a person accused of wrongdoing—whether criminally or civilly—have an opportunity to present every available defense. On the other hand, the attorney-client privilege is one of the oldest recognized privileges for confidential communications, and promotes broader public interests."[5]

Judge Furman began his analysis of Lofrano's assertion that his constitutional right to present a defense overrides Wells Fargo's right to protect its privilege, with the observation that the right to present a defense is not absolute. Citing a number of cases limiting a defendant's right to present evidence in his or her defense,[6] Furman concluded that Lofrano's argument "must be understood to be more nuanced and case-specific," requiring a balancing of the "probative and exculpatory value" of the evidence to his defense against Wells Fargo's need to keep the evidence confidential. Furman rejected this balancing approach, finding that it was foreclosed by the Supreme Court's 1998 decision in *Swidler & Berlin v. United States*.[7]

Balancing Test Foreclosed

In *Swidler*, the Office of the Independent Counsel sought an attorney's handwritten notes of a

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client meeting with Deputy White House Counsel Vincent Foster. Foster had consulted with the lawyer in connection with the Independent Counsel's criminal investigation into whether individuals lied or obstructed justice during investigations into the 1993 dismissal of employees from the White House Travel Office. Foster committed suicide nine days after the meeting.

Two years later, a federal grand jury, at the request of the Independent Counsel, subpoenaed the lawyer's handwritten notes. The Supreme Court held, as a threshold matter, that the attorney-client privilege survived Foster's death. It went on to reject the Independent Counsel's proposal of a limited exception to the privilege for information of substantial importance to a criminal case, holding that "[b]alancing ex post the importance of the information against client interests, even limited to criminal cases, introduces substantial uncertainty into the privilege's application. For just that reason, we have rejected use of a balancing test in defining the contours of the privilege."[8]

Finding *Swidler* dispositive, Judge Furman reasoned in *Wells Fargo* that a "balancing test to determine whether a company, through no fault of its own,[9] must forfeit its privilege based on an employee's later assertion of an advice-of-counsel defense would render the privilege no less uncertain than the use of such a test to determine whether the privilege applies in the first instance."[10] Invoking the Supreme Court's admonition in *Upjohn Co. v. United States*, that "[a]n uncertain privilege…is little better than no privilege at all,"[11] Judge Furman noted that the attorney-client privilege is distinct from other qualified privileges that "can…be overcome by a showing of sufficient need," including the journalist's privilege, the deliberative process privilege, and the work-product doctrine.[12]

Judge Furman cited with approval the only circuit court of appeals decision to address the issue—the Sixth Circuit's decision in *Ross v. City of Memphis*.[13] In *Ross*, a former City of Memphis employee claimed he was entitled to qualified immunity because he had relied on the advice of city attorneys. The city, however, maintained that it held the privilege over the conversations between its attorneys and the defendant and refused to waive.

The U.S. Court of Appeals for the Sixth Circuit agreed, holding that the individual defendant's "assertion of the advice of counsel defense does not require the City to relinquish the privilege it holds." Citing *Swidler*, the Sixth Circuit, like Judge Furman in *Wells Fargo*, found that balancing the privilege against the importance of the precluded evidence, "renders the privilege intolerably uncertain."[14]

Criminal Defendant

Judge Furman also distinguished or questioned the holdings of several cases from other jurisdictions where a corporation was judicially compelled to waive the privilege in order to afford an employee an advice-of-counsel defense. In a 2006 decision in *United States v. Grace*, the District Court of Montana allowed criminal defendants to assert the advice-of-counsel defense and introduce evidence that a co-defendant company claimed was covered by its attorney-client privilege.[15] The court applied the type of balancing test urged by Lofrano in *Wells Fargo*, finding that the exculpatory value of the evidence to the defendants outweighed the company's interest in preserving its privilege.

Judge Furman distinguished *Grace* as a criminal case and then questioned whether its approach, even in that context, was consistent with *Swidler*. First, he noted that *Grace's* reasoning, "based explicitly on a criminal defendant's rights under the Sixth Amendment," does not apply in the civil context.[16] Furman acknowledged that the Supreme Court had not entirely precluded the possibility that under some circumstances the privilege may have to yield to the constitutional rights of a criminal defendant. A footnote in the Swidler opinion notes that "exceptional circumstances implicating a criminal defendant's constitutional rights might warrant breaching the privilege."[17] Second, Furman found "reasons to doubt that *Grace* was correctly decided," noting that the court failed to include any analysis under *Swidler*, or address its "emphatic rejection of the use of a balancing test in defining the contours of the attorney-client privilege."[18]

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Judge Furman distinguished two civil, district court cases from Pennsylvania and New Jersey holding that the advice-of-counsel defense trumped a corporation's attorney-client privilege.[19] Both predated *Swidler*, and in one, the court found that the company's privilege had been waived by implication "given the individual defendants' high-level positions at the company and the fact that there had already been a partial actual disclosure of confidential attorney-client information"[20]—factors not present in *Wells Fargo*.

Less Harsh Than May Appear

Judge Furman acknowledged that the result of his decision "may seem harsh," since it precluded Lofrano from asserting what could be an absolute defense. However, he concluded that, "[the result] is the necessary consequence of commitment to the important policies and values underlying the attorney-client privilege."[21] Quoting *Swidler*, he observed that the attorney-client privilege "promotes broader public interests in the observance of law and the administration of justice."[22]

Indeed, while discussing the public policy implications of his decision, Furman concluded that the result in *Wells Fargo* "is less harsh than it may appear."[23] He observed that allowing an employee to waive the privilege held by his employer "would…create a perverse incentive for plaintiffs to pursue claims against individual employees in the hopes of forcing a waiver of the corporation's privilege."[24] "[W]ithout assurance that the privilege would apply without regard to an employee's ex post litigation choices, a company might very well not make disclosures in the first place (or severely limit the circle of employees privy to disclosures), so the loss of evidence is more apparent than real."[25] Additionally, Judge Furman reasoned, corporations will likely indemnify employees or support an advice-of-counsel defense if it is well-founded. "[I]f a corporation is known not to protect its employees in civil cases…it may generate negative publicity and lead to difficulty recruiting and retaining high-quality workers."[26]

Conclusion

The attorney-client privilege plays a critical role in our legal system. *Wells Fargo* recognizes this role by refusing to engage in a balancing of interests when assessing whether to permit invasion of the attorney-client privilege even where privileged information is essential to a civil defendant seeking to assert an advice-of-counsel defense.

1. 2015 WL 5582120 (S.D.N.Y. Sept. 22, 2015).
2. Id. at *1.
3. 2015 WL 3999074, at *2 (S.D.N.Y. June 30, 2015).
4. 2015 WL 5582120, at *3.
5. Id. (citation omitted) (quoting *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) and *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998)).
6. *Taylor v. Illinois*, 484 U.S. 400 (1988); *United States v. Serrano*, 406 F.3d 1208 (10th Cir. 2005); *Valdez v. Winans*, 738 F.2d 1087 (10th Cir. 1984).
7. 2015 WL 5582120, at *4.
8. 524 U.S. at 409 (citing *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981)).
9. Judge Furman's inclusion of the phrase "through no fault of its own," raises the interesting question of whether his analysis would change if it could be argued that the corporation was somehow at fault—such as, for example, if the corporation's in-house lawyer misled an employee about the scope of his legal obligations.
10. 2015 WL 5582120, at *4.
11. Id. at *4 (quoting *Upjohn*, 449 U.S. at 393).
12. Id. at *5.
13. 423 F.3d 596 (6th Cir. 2005).
14. Id. at 603-04.
15. 439 F.Supp.2d 1125 (D.Mont. 2006).
16. 2015 WL 5582120, at *7.
17. 524 U.S. at 408 n. 3.
18. 2015 WL 5582120, at *7 (quoting *Swidler*, 524 U.S. at 408-09).
19. *Moskowitz v. Lopp*, 128 F.R.D. 624 (E.D.Pa. 1989); *In re Nat'l Smelting of N.J., Inc. Bondholders' Litig.*, 1989 U.S. Dist. Lexis 16962 (D.N.J. June 29, 1989).
20. 2015 WL 5582120, at *7 n. 3 (quoting *Nat'l Smelting*, 1989 U.S. Dist. Lexis 16962 at *35-40).
21. Id. at *7.
22. Id. at *3 (quoting *Swidler*, 524 U.S. at 403).
23. Id. at *7.
24. Id. at *6 (quoting 2015 WL 3999074, at *2).
25. Id. at *7 (quoting *Swidler*, 524 U.S. at 408).
26. Id.