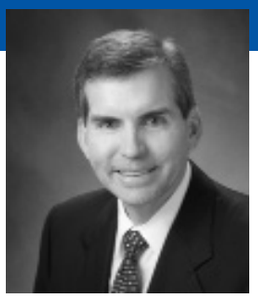
Can an Employee Use Privileged Communication Made to Employer's Counsel to Assert an 'Advice-of-Counsel' Defense?

Avoiding Liability



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Case law and the Pennsylvania Rules of Professional Conduct provide that counsel to a corporate entity (which can include a law firm partnership) is not automatically counsel to the entity's board members, officers, employees, partners, shareholders or members. Therefore, the attorney/client privilege does not apply in regards to confidential communications by anyone holding such status relative to the corporate entity's counsel. This arrangement can become problematic when the individual wants to assert the "advice-of-counsel" defense based upon such communications and the corporate entity does not want to waive the privilege. The arrangement becomes even more problematic when the individual wants to assert the "advice-of-counsel" defense in a criminal prosecution. Since the corporate entity "owns" the privilege, can the individual still testify as to these privileged communications as a defense when the corporate entity refuses to waive the privilege? This issue was recently revisited by a federal district court.

In *United States of America v. Wells Fargo Bank, N.A.*, 2015 U.S. Dist. LEXIS 126881 (S.D.N.Y.), the government asserted claims, all civil in nature, against both an employee of Wells Fargo and the bank itself under the False Claims Act, 31 U.S.C. §§ 3729 *et seq.,* among other statutes, for alleged "misconduct with respect to residential mortgage loans insured by the Government." The employee wished to defend himself based upon the proposition that the conduct in which he had engaged resulted from advice he had received from the bank's corporate counsel. But the bank, although it "vigorously dispute[d] the Government's claims," refused to waive the attorney/client privilege. This presented the question of whether the employee could testify as to these privileged communications to defend himself, notwithstanding his employer's refusal to waive the privilege. The district court judge ruled that the employee could not testify as to such privileged communication over the bank's objection.

The court recognized that this ruling was "arguably harsh" because it deprived the individual of "his best defense to liability for tens of millions of dollars," while "[a]ll parties agree[d] that, if successfully pursued, the advice-of-counsel defense would be a complete defense to the Government's claims against [him]." But, in the court's view, this is "the price that must be paid for society's commitment to the values underlying the attorney[/]client privilege." In support of this ruling, the court quoted another court ruling "that the value of introducing such evidence is outweighed by the harm inflicted upon other policies and values."

In its reasoning, the district court relied upon *Swidler & Berlin v. United States*, 524 U.S. 399, 403, 118 S.Ct. 2081, 141 L.Ed. 2d 379 (1998), which holds that the attorney/client privilege survives the death of a client. There the U.S. Supreme Court noted that "the attorney[/]client privilege is 'one of the oldest recognized privileges for confidential communications,' and 'promote[s] broader public interests in the observance of law and the administration of justice.' " Based upon this principle, the Supreme Court concluded that any rule that recognizes a waiver of this privilege or that has the "potential to weaken attorney[/]client trust should be formulated with caution." The court rejected the proposition that the right to assert every available defense "*automatically* trumps the attorney[/]client privilege"; this is so even in criminal cases, where the Sixth Amendment is implicated, where "the right is at its strongest" but is not "absolute."

Swidler & Berlin was a high-profile case wherein the question presented was whether communication involving a client, Vincent W. Foster Jr., who was deputy White House counsel, should survive Foster's death. The Supreme Court rejected the argument that a balancing test should be applied so that "there should be an exception where maintaining the privilege would result in 'extreme injustice' or where the privileged information is 'of substantial importance.' " In so holding, the Supreme Court reasoned that "a client may not know at the time he discloses information to his attorney whether it will later be relevant to a civil or criminal matter, let alone whether it will be of substantial importance." The Supreme Court, however, left the door open for the possibility of an exception to this rule where "a criminal defendant's constitutional rights might warrant breaching the privilege." Some lower courts have recognized such an exception, based upon application of the Sixth Amendment, which does not apply in civil litigation. *See*, *United States v. Grace*, 439 F. Supp. 2d 1125 (D. Mont. 2006).

In the district court's view in *United States of America v. Wells Fargo Bank, N.A*, allowing the bank employee to testify to privileged communication over the bank's objection would transform the corporate entity's attorney/client privilege from an absolute privilege to a qualified privilege. As the Supreme Court made clear, however, in *Swidler & Berlin*, the attorney/client privilege should not be qualified. Moreover, such an approach would "upend the carefully calibrated doctrine governing when the privilege exists and who has authority to waive it."

This case certainly recognizes a tension between two conflicting concepts — the application of the attorney/client privilege and the availability or unavailability of defenses to the perhaps-innocent employee depending on whether the employer will waive the privilege. The district court suggested that the result may be "less harsh than first appears because, in the absence of a robust commitment to the privilege, the communications at issue may never have been made — or the [defendant employee] might not have been made privy to them." The district court also attempted to minimize the impact of its ruling by suggesting that the bank "may choose to either waive the privilege or, if they choose not to do so for broader institutional reasons, indemnify their employees and pay the price themselves." But the court failed to note that there is no guarantee that the employer will do so, whether because it does not have the means (the corporate entity could be a "mom and pop" operation, unlike the mighty Wells Fargo, or be in bankruptcy, wherein it is now the trustee's prerogative to waive or not waive) or because, for whatever reason, the employer is content to refuse waiver.

This case clearly demonstrates that an employee could find him- or herself in a bind if the employer will not waive the privilege. It illustrates why many high-level employment agreements contain a provision that contractually obligates the employer to indemnify the employee under such circumstances. It also demonstrates why an employee may insist on the employer providing independent counsel to provide advice that the employee can rely upon and whose privileged communication is owned by the employee and, therefore, can be waived.