Attorney-Client Privilege and Work Product Protection 2008

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Privilege Developments 2008

By

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Federal Rule of Evidence 502 is the most significant development in the field of attorney-client privilege since *Upjohn v. United States*, 449 U.S. 383 (1981). It is not, however, the only significant development. This article explores other important recent developments in the law of privilege and work product protection.

**At-Issue Waiver.** In *In re County of Erie*, No. 07-5702, 2008 U.S. App. LEXIS 21496 (2d Cir. October 14, 2008), the Second Circuit rejected the *Hearn* test (*Hearn v. Rhay*, 68 F.R.D. 574 (E.D. Wash. 1975)) for determining at-issue waiver of the attorney-client privilege, under which a waiver was effected if the court found: (1) the assertion of the privilege was a result of some affirmative act, such as filing suit or pleading in response to a claim; (2) through the affirmative act, the asserting party has put the protected information at issue by making it relevant to the case; and (3) the application of the privilege would have denied the opposing party access to information vital to the defense. Although prior Second Circuit decisions had cited *Hearn*, the *Erie* Court rejected it, concluding that “*Hearn* test cuts too broadly” because:

According to *Hearn*, an assertion of privilege by one who pleads a claim or affirmative defense "put[s] the protected information at issue by making it relevant to the case." *Hearn*, 68 F.R.D. at 581. But privileged information may be in some sense relevant in any lawsuit. A mere indication of a claim or defense certainly is insufficient to place legal advice at issue.
Instead, the *Erie* Court held that “a party must rely on privileged advice from his counsel to make his claim or defense.” The Court reasoned that a party’s mere assertion of lawful behavior on its part does not place underlying advice of counsel as to lawfulness at issue, where the party is not asserting a state of mind defense. (“They [the defendants] maintain only that their actions were lawful or that any rights violated were not clearly established. In view of the litigation circumstances, any legal advice rendered by the County Attorney's Office is irrelevant to any defense so far raised by Petitioners.”) The Court also observed, in the context of qualified immunity, that where an operative legal test is objective, not subjective, counsel’s advice is irrelevant and, therefore, clearly not at issue. (“The question of whether a right is ‘clearly established’ ... is an objective, not a subjective, test, and reliance upon advice of counsel therefore cannot be used to support the defense of qualified immunity.”)

**The Blurt-Out.** Equally important, the Second Circuit in *Erie* made it clear that a client’s divulging privileged communications at a deposition does not effect a waiver if counsel intervenes to cut off the testimony and the testimony is not affirmatively put before a finder of fact to gain litigation advantage:

The deposition testimony identified by the District Court does not serve to waive the privilege. The Assistant County Attorney who was present at the deposition properly terminated the inquiries when Livingston began to elaborate on the specifics of the advice received by the Sheriff's Office, and the principal substance of the attorney-client communications was not revealed. Moreover, the fact that the deponent was not before a "decisionmaker or fact finder" when he made the statements claimed by Respondents to have triggered the waiver means that Respondents have not been placed in a disadvantaged position at trial. *See In re Sims*, 534 F.3d 117, 132 (2d Cir. 2008). Nothing in the record suggests that Petitioners have yet waived the privilege by "an assertion of fact to influence the decisionmaker." *John Doe Co.*, 350 F.3d at 306.

*See also Pinnacle Pizza Co. v. Little Caesar Enters.*, 2007 U.S. Dist. LEXIS 488845 (D. S.D. July 3, 2007) (corporate president testifies as to patent advice received at deposition; despite