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A Primer on the Collisions Between Corporate Attorney-Client Privilege and Executives Who Want to Rely on Legal Advice Received from the Corporation to Defend Against Criminal Charges

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After describing the advice of counsel and good faith defenses, the authors explore how the collision between the right of executives to present a defense and the company's interest in protecting its attorney-client privilege has been addressed in the few reported cases in which the issue has been presented. With the case law suggesting a balancing of interests, this article then describes the confines of a proper balancing exercise.

Since the financial crisis and announced changes in U.S. Department of Justice prosecution policies, there has been an increased focus on investigations of corporate executives.[1] At the same time, as businesses face often-complicated regulation, they and their executives are relying increasingly on legal advice. One result of these two developments is that more and more executives in corporate investigations are seeking to defend their conduct based on what company counsel advised. Because the privilege protecting that advice belongs to the corporation, the number of collisions between corporations seeking to protect the privilege and executives seeking to use the privileged advice is trending up.

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Although these collisions are occurring with increased frequency, few of them have proceeded all the way to reported decisions and the law governing these collisions is relatively undeveloped. For executives who seek to assert a traditional defense of reliance on the advice of counsel, there is law establishing that, at least in criminal cases, a balancing of interests should be conducted in a way that would permit the executives to get access to the privileged advice even if the corporation does not consent. But the confines of that balance have not been fleshed out, and no reported case has actually performed such a balance.

In addition, given the strictures of an advice of counsel defense, many executives have opted instead to use corporate counsel's advice as part of a defense of good faith, or as part of contesting the government's proof of criminal intent. There are even fewer cases addressing whether a good faith defense based in part on legal advice requires access to privileged communications, or whether executives should be permitted that access.

This article considers the issues that the case law has not yet had a chance to address.

After describing the advice of counsel and good faith defenses, it explores how the collision between the right of executives to present a defense and the company's interest in protecting its attorney-client privilege has been addressed in the few reported cases in which the issue has been presented. With the case law suggesting a balancing of interests, the article then describes the confines of a proper balancing exercise.

Finally, it explores the extent to which the same principles applicable to advice of counsel cases should be applied to a good faith defense.

THE INCREASE IN COLLISIONS BETWEEN CORPORATE PROTECTION OF PRIVILEGED ADVICE AND EXECUTIVES SEEKING TO USE THE ADVICE TO DEFEND THEMSELVES

Corporate employees and officers consult a wide variety of experts while performing their day to day responsibilities. These experts range from accountants, to tax advisers, engineers, and importantly, legal counsel. Indeed, many decisions cannot responsibly be made without consulting legal counsel. As the U.S. Court of Appeals for the Second Circuit noted with respect to the securities laws back in 1973, "[t]he legal profession plays a unique and pivotal role in the effective implementation of the securities laws. Questions of compliance with the intricate provisions of these statutes are ever present and the smooth functioning of the securities markets will be seriously disturbed if the public cannot rely on the expertise proffered by an attorney when he renders an opinion on such matters."[2] The regulatory environment has become more stringent since that time, with the financial crisis issuing in a complex web of rules and regulations that necessitate companies and their employees receiving advice on challenging questions.

At the same time, prosecutors have been increasingly targeting corporate misconduct under statutes such as the Securities Act of 1933, the Securities Exchange Act of 1934, The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), the False Claims Act ("FCA"), and the Foreign Corrupt Practices Act ("FCPA"). While the consequences of violating these laws were once largely reserved for corporations, recent years have seen the focus redirected to individual misconduct. The Department of Justice's U.S. Attorney's Manual makes clear that the prosecution of individuals is a priority, stating, "Prosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals within or without the corporation. . . . Provable individual culpability should be pursued, particularly if it relates to high-level corporate officers."[3]

Under many of the civil and criminal statutes that corporations and their employees may face, intent to commit the offense or knowledge of wrongful conduct are key elements that the government must demonstrate to prove liability. Given how frequently employees and officers consult lawyers, they may reasonably want to argue as part of their defense that they relied on the advice of counsel to prove lack of intent to commit the alleged offense. Indeed, the fact that a defendant sought legal advice before acting could demonstrate that the defendant was attempting to comply with the law, especially if used in conjunction with other available evidence about the defendant's good faith or lack of knowledge.

If successful, an advice of counsel defense will exculpate the defendant. Of course, the complication from relying on advice of counsel in presenting a defense, including as part of a good faith defense, is that it may necessitate breaking the privilege around the communications at issue. The company, as the holder of the privilege, is usually reluctant to waive and without the company's consent or a court order, the employee is left without the ability to raise the defense.

In many situations, the interests of the company and the individuals align because the employees accused of misconduct were acting in their corporate capacity for the benefit of the company. But not always. A divergence between the interest of the individual and the company can occur for several reasons. Principal among them is that an advice of counsel defense is difficult to prove. Defendants must demonstrate that they:

- Sought the advice of counsel in good faith;
- Made complete disclosure to counsel of all relevant facts; and
- Reasonably relied upon and followed counsel's advice.[4]

Factors such as complete disclosure of all relevant facts and following advice given by counsel are hard to prove for a company that must

answer for the actions of many individuals. This makes it less likely that the company would support executives seeking to raise this defense on their own behalf.

The tension between the interests of the company and the individual also exists when an individual is asserting a good faith defense that may rely on advice received from company counsel (or at least the fact that the individual received advice before proceeding). A good faith defense is generally used for fraud-based crimes to negate the element of intent. With respect to mail and wire fraud, to assert a good-faith defense defendants must generally show that they in good faith believed that the plan would succeed, that the promises made would be kept and the representations carried out.[5] Part of that defense could rely on the fact that the defendant acted after receiving advice from counsel. In that situation, a defendant will want to have the ability to disclose the privileged advice.

However, the company and the individual may assess the benefits and risks of disclosure differently. For example, the company may not be as concerned about the impact of disclosure in a criminal case against the individual, but more concerned about the scope of waiver such disclosure could have in subsequent civil litigation with third parties. An individual facing jail is more likely to put the defense of the criminal case above other interests, especially if other defenses are unavailable. The company's risk assessment also may be influenced by the fear of licensing a court to determine the scope of communications that are deemed waived, and by the impact of other company officials who may not have followed counsel's advice consistently or disclosed all relevant facts.

In addition, the company, unlike an individual, has the benefit of visibility into all relevant facts and may be able to better assess whether an advice of counsel defense would be successful.

CASES ADDRESSING THE COLLISION BETWEEN PROTECTING THE PRIVILEGE AND EXECUTIVES PRESENTING A DEFENSE

When the presentation of a defense by an individual clashes with the company's assertion of the attorney-client privilege, a court must reconcile two interests, both of which are usually protected. The privilege recognizes that sound legal advice and advocacy "depends on the lawyer's being fully informed by the client"[6] and "rules which result in the waiver of this privilege," or that "possess the potential to weaken attorney-client trust, should be formulated with caution."[7] And yet, at least in criminal cases, the Constitution guarantees defendants "a meaningful opportunity to present a complete defense."[8] Faced with a company that will not waive its privilege, an individual defendant is left without the ability to assert an advice of counsel defense – and potentially a key component of a good faith defense as well. Absent judicial intervention, a company's right to fully control its privilege allows it to withhold communications

that could exculpate an employee, a result that some courts have recognized as unfair.

Indeed, as recognized by the Supreme Court, a criminal defendant's constitutional right to present evidence can trump evidentiary rules in certain circumstances, most notably, when such rules prevent a defendant from presenting exculpatory evidence. For example, in *Washington v. Texas*,[9] an evidentiary rule prevented coparticipants in a crime from testifying for one another. This rule precluded the defendant from introducing his accomplice's testimony that the accomplice had in fact committed the crime. The Supreme Court reversed the defendant's conviction and held that the Sixth Amendment was violated because "the State arbitrarily denied [the defendant] the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed."[10]

A series of subsequent cases elaborated on this principle.

In *Chambers v. Mississippi*,[11] the Supreme Court found a constitutional due process violation in the state's common-law "voucher rule," which prevented the accused from cross-examining a witness who previously confessed to the crime, and its hearsay rule, which kept out the testimony of others to whom the witness had confessed.

In *Davis v. Alaska*,[12] a state rule protecting the anonymity of juvenile offenders prevented the defendant from questioning a key prosecution witness. The Court held that a defendant's Sixth Amendment right to cross-examination must prevail over the state's legitimate policy interest in keeping juvenile adjudications confidential.[13] The Federal Rules of Evidence also expressly declare that privileges can be overridden by constitutional rights.[14]

Although the Supreme Court has not directly taken on the issue of whether due process considerations could trump the attorney client privilege in a criminal case, it did so in a civil case – but in a way that left undecided the resolution of the issue when the person seeking to use privileged information is defending against criminal charges.[15] *Swidler & Berlin v. United States*[16] involved the efforts of a prosecutor to gain access to notes taken by an attorney of a meeting with his client shortly before the client's death. In holding against the government, the Court underscored the importance of the attorney-client privilege, stating that it is "one of the oldest recognized privileges for confidential communications" and is intended to "encourage 'full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.'"[17] Even the privilege holder conceded that "exceptional circumstances implicating a criminal defendant's constitutional rights might warrant breaching the privilege," but the Court expressly reserved this question[18] because that situation was not presented.[19]

Relying on the principle that a defendant's constitutional rights can in certain circumstances trump evidentiary rules, several appellate and district courts have reasoned that the attorney client privilege is not absolute and must be balanced against those constitutional rights. For

example, the U.S. Courts of Appeals for the Ninth and Seventh Circuits have acknowledged that the privilege would have to yield if a defendant's right of confrontation would be violated.

In *Murdoch v. Castro*,[20] the Ninth Circuit held that a defendant must be allowed to impeach the testimony of an alleged accomplice by introducing a letter, written by the accomplice to his attorney, in which the accomplice exonerated the petitioner. The court reasoned that the Supreme Court's precedents "clearly provide that evidentiary privileges or other state laws must yield if necessary to ensure the level of cross-examination demanded by the Sixth Amendment."[21]

Similarly, the Seventh Circuit has recognized that, "[e]ven the attorney-client privilege, therefore, hallowed as it is, yet not found in the Constitution, might have to yield in a particular case if the right of confrontation, whether in its aspect as the right of cross-examination or in some other aspect, would be violated by enforcing the privilege."[22]

In *United States v. W.R. Grace*,[23] the leading criminal case to have squarely considered whether an employee could assert an advice of counsel defense – namely, by introducing company documents – over the objection of the company, the district court in the District of Montana held that a balancing test was appropriate.

Specifically, it stated that courts should weigh the value of the exculpatory evidence against the company's right to assert the privilege, and to determine whether excluding such exculpatory evidence would amount to a denial of the individual defendant's constitutional right to present a defense. In the *Grace* case itself, the court found that the company's privileged documents were probative and exculpatory for the individual defendants, but deferred the decision on which documents would be admitted, pending a document-by-document review at trial. The court did not explain how it would weigh the competing interests of the defendant and the company when conducting its document-by-document review at trial, nor did it fully explain why its review could not be conducted before the trial began in order to give defendants some clarity about their potential defense.

The district court in *United States v. Mix*,[24] decided six years after *Grace*, adopted the *Grace* court's balancing test approach, as well as its conclusion that the balancing analysis must be done at trial, noting that it was impossible to conduct such an analysis without the context provided by other evidence. But in the end, neither the *Grace* court nor the *Mix* court ever engaged in a document-by-document review or balancing of interests, as none of the individuals seeking to rely on the advice of counsel defense in either case ultimately went to trial.

In the civil context, however, recent cases suggest it is less likely that courts would apply a similar balancing test – perhaps because the Sixth Amendment argument does not apply and the stakes are arguably lower for the individual defendant.[25]

In *United States v. Wells Fargo Bank, N.A.*,[26] the government brought claims under the FCA and FIRREA against Wells Fargo and a vice president

at the bank, alleging that they engaged in misconduct with respect to residential mortgage loans. The employee claimed that he sought advice from at least two Wells Fargo attorneys about the relevant legal requirements he was alleged to have violated and that he then acted in conformance with the advice that he received. Wells Fargo, however, objected to the employee's assertion of an advice of counsel defense and sought a protective order to protect its privilege.

While the district court acknowledged that "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,'" the court ultimately sided with Wells Fargo. In so doing, it reasoned that the balancing test articulated in the criminal cases described above was foreclosed by the Supreme Court's decision in *Swidler*, notwithstanding the fact that in *Swidler* it was the prosecution rather than the defense seeking to invade the privilege – an interest not supported by a constitutional right.

Continuing, the Court stated that the use of a balancing test would inject too much uncertainty into the privilege, and 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."[27] Notwithstanding its recognition that, in certain circumstances, a defendant's constitutional rights could warrant breaching the privilege, the court went so far as to suggest, in dicta, that the privilege is inviolate even in criminal cases and that *W.R. Grace* was wrongly decided.

Subsequently, the court in *SEC v. Present*[28] reached a similar conclusion. In that case, the corporation's former founder and CEO attempted to seek discovery of privileged information from the company to assert an advice of counsel defense in an action brought by the SEC. Persuaded by *Wells Fargo* and its reliance on *Swidler*, the district court rejected the use of a balancing test, and held that the privilege outweighed the defendant's interest in presenting an advice of counsel defense.

CONDUCTING A BALANCING OF INTERESTS BETWEEN THE CORPORATE PRIVILEGE AND THE EXECUTIVES' DEFENSES IN CRIMINAL CASES

While no reported case has laid out how to "balance" the individual's right to present a defense against the company's right in protecting its privilege, reading between the lines in the cases suggests that the balancing should consider the following factors:

(1) Whether the information is privileged;[29]

(2) The extent to which the company needs to protect its privilege (e.g., the effect of disclosure on potential criminal or (less important) civil litigation);[30]

(3) The value of the evidence to the defense;[31]

(4) The extent of the need for the evidence (i.e., whether there is any substitute for the evidence);[32] and

(5) Whether/how the scope of the waiver can be limited.[33]

Although no case has apparently yet done so, in evaluating some of these questions the trial court might, by analogy to other procedures, conduct an ex parte review – or perhaps even accept in camera submissions, to determine if the evidence is material, admissible and helpful.[34]

As courts have rightfully recognized, in the criminal context, where the evidence could have substantial value for the defense and where the stakes are high, individuals who assert an advice of counsel or good faith defense should be able to have access to such exculpatory information. The *Grace* court declared that "in weighing the competing interests it is the exculpatory value of the lost evidence to the accused that weighs most heavily on the scale of [a] fair trial,"[35] underscoring that the third and fourth factors merit the most weight. As a result, where an individual is facing criminal charges, the balance should weigh in favor of granting access to the privileged materials. However, if the privileged evidence is of limited utility and has a ready substitute, then the risks to the company of losing its privilege would come into play, at least if a court order could not limit those risks.

There are some cases in which providing the defendant access to privileged information can be even easier to justify, based on the ability of courts in those cases to limit the scope of the waiver. This option may be available under Federal Rule of Evidence 502(d) in cases in federal court involving a privilege holder with potential issues in the United States. Federal Rule of Evidence 502(d) permits the court to "order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court – in which event the disclosure is also not a waiver in any other federal or state proceeding."

Many federal courts have entered such orders,[36] but the issue has not yet arisen in a case in which individuals are seeking to access privileged information of their employers, and the cases in which such orders are typically entered address inadvertent disclosures of privileged information rather than the intentional disclosure (although not by the privilege holder) that would occur in an advice of counsel defense. Based on the legislative intent to deal with the increasing burdens associated with electronic discovery and the need to conduct exhaustive and costly document reviews to protect the privilege,[37] intentional, selective waiver has been deemed beyond the rule's aim.

For example, in *Potomac Elec. Power Co. & Subsidiaries v. United States*,[38] the defendant power company indicated that it may rely on an advice of counsel defense as the case progressed and sought a Rule 502(d) order that would prevent any disclosure, whether intentional or not, of privileged materials in the proceeding from operating as an

equivalent waiver in any other state or federal court proceeding. The court rejected the request that intentional disclosures be covered by the order, citing comments from Congress and the Advisory Committee that Rule 502(d) was meant to cover only inadvertent disclosures. Notably, the government in that case opposed the order.[39] Other courts have come to similar conclusions about using Rule 502(d) orders to protect intentional disclosures, albeit not in the context of the advice of counsel defense.[40]

In contrast with those cases, the disclosure of a company's privileged information pursuant to a court order for the benefit of an individual defendant could be treated similarly to inadvertent disclosures – after all, neither was intended by the company, nor necessarily in its interest. No case has gone down this path to date, although courts have at least allowed privilege waivers to be cabined when the information is disclosed as part of a government investigation.

In *SEC v. Bank of America*,[41] for example, the court entered a Rule 502(d) order to "allow the Bank of America to waive attorney-client privilege and work-product protection regarding certain categories of information material to [the government's] case (and seemingly also relevant to certain ongoing state and federal inquiries) without thereby waiving such privilege and protection regarding other information that may be of interest in related private lawsuits."[42] While not maintaining privilege over the information that the Bank agreed to reveal, the case at least provides support for ensuring that any privilege waiver should be no broader than what was actually revealed.

A Rule 502(d) order could be an attractive option for both individual defendants and the company because it allows the individual to mount a defense while minimizing harm to the company. While no court has entered such an order in this circumstance, no court has rejected one either, and the rule provides a basis to allow this win-win solution. But the rule does not provide a solution to the problem in every case.

State courts would be bound by a Rule 502(d) article from a federal court, but the rule does not give state courts the authority to enter or enforce such an order for cases brought in those courts. Many – but not all – states have adopted Rule 502(d) analogs, but the enforceability in other states of orders under those provisions may be limited or uncertain.[43]

And neither federal nor state courts have the authority to enter, or the power to enforce, the same kind of order outside the United States – a significant shortcoming in an economy in which many companies have a global reach.

THE EXTENT TO WHICH THESE PRINCIPLES APPLY TO GOOD FAITH AND RELATED DEFENSES

A defendant who seeks to assert an advice of counsel defense and who faces resistance from the company may attempt to avoid the issue

by merely asserting that he "sought legal advice" before acting. Or there may be some element of an advice of counsel defense that the defendant may have difficulty satisfying.

Disclosing the specific advice given may or may not be necessary to mount a good faith defense if, for example, the defendant can merely say that before making the decision or undertaking the activity charged in the indictment, the defendant consulted with the corporation's lawyers or reviewed their advice. But the defense would likely be more powerful if the executive can elicit the specific advice that shows how the executive acted in good faith. In either event, the evidence could be used – with varying degrees of impact – to undermine allegations of willful misconduct that are part of many of the criminal and civil statutes that executives face.

Although the case law is limited, courts may split on the question of whether the narrow assertion in which the defendant does not seek to admit the advice nonetheless puts the legal advice "at issue" and waives privilege – and, relatedly, whether defendants can rely on the fact that they sought legal advice without proving what that advice actually was.

While not exactly on point, the court in an analogous case, *In re Comverge, Inc. S'holders Litig.*,[44] determined that mere reference to seeking legal advice and acting upon that advice does not put the advice "at issue." As part of their defense against an alleged breach of fiduciary duty, the defendant Board members stated that they acted after receiving advice from counsel to demonstrate that they acted in due care consistent with their duties.

Specifically, the defendants made statements such as "[t]he Board discussed with its legal advisors what action, if any, it could and/or should take . . . the Committee, the full Board, and management, with the advice of outside counsel, actively considered the question . . . [the Board] sought legal advice from board and company counsel on multiple occasions."[45] The court determined that because the defendants did not state that they acted in accordance with legal advice or that they could not be liable because they relied on specific advice of counsel, these statements did not act as a waiver of the attorney client privilege. In that case, merely seeking the advice of counsel, without demonstrating that the Board relied on that advice, was enough to demonstrate that they were acting in due care.

In *Gruss v. Zwirn*,[46] however, the court held that the defendants waived the privilege when they asserted as part of their defense that they acted in good faith and that they sought the advice of counsel. There the defendants used the fact that they sought advice from counsel to argue that they did not act "in a grossly irresponsible manner." The court deemed that to be essentially an advice of counsel defense, stating that the "defense therefore places the validity of that reliance at issue, and operates as a waiver of privilege as to those materials."[47]

These holdings would suggest that as more cases address the collision between a good faith defense and the attorney-client privilege, a

consensus may develop about whether executives need to obtain the privileged information in order to refer to it as part of a good faith defense, and whether waiver of the privilege is required.[48] If waiver is required, no case appears to have yet addressed the issue of how to conduct a weighing of the competing interests of protecting the attorney-client privilege and upholding the right to present a defense – here a good faith defense, as distinguished from an advice of counsel defense. But the similarities between the two defenses would suggest that the same considerations used in the context of an advice of counsel defense should be used in cases in which defendants assert a good faith defense that depends at least in part on the fact of receiving advice from counsel.

CONCLUSION

With two important interests worthy of protection colliding, and with few cases progressing far enough to resolve the collision between a defendant's right to present a defense and a company's efforts to protect its attorney-client privilege, a judicial resolution or solution is unlikely to be immediate.

At this point, the weight of authority suggests that in criminal cases a defendant's constitutional right is likely to trump the privilege. But many of the specifics, processes, protections and limitations of that resolution remain to be determined.

NOTES

1. The U.S. Department of Justice's Fraud Section's "Year in Review" revealed that 478 individuals were charged and 256 individuals convicted in 2019 alone. Dep't of Justice, "Fraud Section Year in Review 2019," *https://www.justice.gov/criminal-fraud/file/1245236/download*. *See also* Memorandum from Deputy Attorney General Sally Q. Yates, "Individual Accountability for Corporate Wrongdoing," (Sept. 9, 2015), available at *https://www.justice.gov/archives/dag/file/769036/download* (it is necessary to "identify culpable individuals at all levels in corporate cases."); Deputy Attorney General Rod J. Rosenstein, "Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act," Dep't of Justice, Justice News (Updated Nov. 29, 2018), available at *https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0* ("If a corporation wants to earn maximum credit, it must identify every individual person who was substantially involved in or responsible for the misconduct.").

2. *Sec. & Exch. Comm'n v. Spectrum, Ltd.*, 489 F.2d 535, 541-42 (2d Cir. 1973).

3. U.S. Dep't of Justice Archives, U.S. Attorneys' Manual, "Title 9-28.000 Principles of Federal Prosecution of Business Organizations, Title 9-28.210 – Focus on Individual Wrongdoers," Department of Justice (Nov. 2015, Accessed June 30, 2021), *https://www.justice.gov/archives/usam/archives/usam-9-28000-principles-federal-prosecution-business-organizations*.

4. *Liss v. United States*, 915 F.2d 287, 291 (7th Cir. 1990).

5. *Steiger v. United States*, 373 F.2d 133, 135 (10th Cir. 1967).

6. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

7. *In re County of Erie*, 546 F.3d 222, 228 (2d Cir. 2008).

8. *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (citations, internal quotations omitted). The Supreme Court has repeatedly acknowledged that the right of criminal defendants to present evidence is protected by the Constitution. *See, e.g., Pennsylvania v. Ritchie*, 480 U.S. 39, 56, (1987) ("Our cases establish, at a minimum, that criminal defendants have the right . . . to put before a jury evidence that might influence the determination of guilt."); *Taylor v. Illinois*, 484 U.S. 400, 409 (1988) (holding that the Sixth Amendment protects "the right to present the defendant's version of the facts as well as the prosecution's").

9. *Washington v. Texas*, 388 U.S. 14 (1967).

10. *Id.* at 23.

11. *Chambers v. Mississippi*, 410 U.S. 284 (1973).

12. *Davis v. Alaska*, 415 U.S. 308 (1974).

13. *Id.* at 319; *see also Rock v. Arkansas*, 483 U.S. 44, 55–56 (1987) ("[R]estrictions of a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve. In applying its evidentiary rules, a State must evaluate whether the interests served by a rule justify the limitation imposed on the defendant's constitutional right to testify.").

14. *See* Fed. R. Evid. 501 ("The common law – as interpreted by United States courts in the light of reason and experience – governs a claim of privilege *unless any of the following provides otherwise: the United States Constitution;* a federal statute, or rules prescribed by the Supreme Court.") (emphasis added).

15. In *Washington v. Texas*, the court explicitly reserved the applicability of privileges, stating that "[n]othing in this opinion should be construed as disapproving testimonial privileges, such as the . . . lawyer-client . . . privilege[], which are based on entirely different considerations." 388 U.S. 14, 23 (1967).

16. *Swidler & Berlin v. United States*, 524 U.S. 399 (1998).

17. *Id.* at 403.

18. *Id.* at 408 n.3.

19. *Id.* In holding that a prosecutor could not introduce incriminating privileged information because "balancing ex post the importance of the information against client interests, even limited to criminal cases, introduces substantial uncertainty into the privilege's application," the Court rejected a balancing test to define the contours of the privilege. *Id.* at 409. Despite the explicit language in n.3 of the Court's opinion, Justice O'Connor read the Court as suggesting that the attorney-client privilege could not be balanced against or overridden by a defendant's constitutional rights, and wrote a separate opinion declaring that "a criminal defendant's right to exculpatory evidence . . . may, where the testimony is not available from other sources, override a client's posthumous interest in confidentiality." *Id.* at 411.

20. *Murdoch v. Castro*, 365 F.3d 699 (9th Cir. 2004).

21. *Id.* at 701-02.

22. *United States v. Rainone*, 32 F.3d 1203, 1206 (7th Cir. 1994).

23. *United States v. W.R. Grace*, 439 F. Supp. 2d 1125 (D. Mont. 2006).

24. *United States v. Mix*, No. CRIM.A. 12-171, 2012 WL 2420016, at *1 (E.D. La. June 26, 2012).

25. Although an early case, *In re National Smelting of New Jersey, Inc. Bondholders' Litigation*, No. 84-3199, 1989 U.S. Dist. LEXIS 16962 (D.N.J. June 29, 1989), held that the defendant was permitted to use privileged information in mounting his defense (which relied in part on the advice of counsel) in a securities class action, it appears the court's decision was based in part on the fact that some of the attorney-client communications at issue had already been disclosed. The Court stated, "under these circumstances, the refusal of [the company's] current board to waive the corporation's attorney client privilege is overcome by the demands for fairness." *Id.* at *39-40.

26. *United States v. Wells Fargo Bank, N.A.*, 132 F. Supp. 3d 558, 559 (S.D.N.Y. 2015).

27. *Id.* at 564.

28. *SEC v. Present*, No. 14-14692-LTS, 2015 WL 9294164 (D. Mass. Dec. 21, 2015).

29. *See In re National Smelting of New Jersey, Inc. Bondholders' Litigation*, 1989 U.S. Dist. LEXIS 16962 (stating that one of the factors that the court considered in allowing corporate access to privileged information was that some of the information had already been disclosed).

30. "Grace noted that it is also involved in civil litigation and expressed a concern that it will be deemed to have waived its privilege with respect to any documents or communications that are admitted at this criminal trial." *United States v. W.R. Grace*, 439 F. Supp. 2d at 1143.

31. *Id.* at 1140 (stressing the importance of the "exculpatory value of the lost evidence"); *see also* (citing *Rock v. Arkansas*, 483 U.S. 44, 52 (1987) (admitting hypnosis-induced testimony because it was "material and favorable to [defendant's] defense").

32. *United States v. Wells Fargo Bank, N.A.*, 132 F. Supp. 3d at 564 (acknowledging that "there is no basis to believe that Lofrano can pursue his defense without the confidential communications at issue").

33. *Id.* at 564-65 ("[A]lthough the Court may possess some ability to prescribe the scope of any disclosure . . . there is no guarantee that all courts (including courts outside the United States, where Wells Fargo operates) would adhere to those limitations.").

34. For instance, courts routinely review defense applications for the issuance of Rule 17(c) subpoenas under seal and in camera. *See, e.g., United States v. Roscoe*, No. CR-07-00373 RMW, 2010 U.S. Dist. LEXIS 149186 at *11-13 (N.D. Cal. Dec. 21, 2010) (unpublished) (defendants have good cause to file ex parte motions for a Rule 17(c) subpoena under seal when doing so protects defendants from revealing trial strategy); *see also United States v. Tomison*, 969 F. Supp. 587, 595 (E.D. Cal. 1997) (holding that Rule 17(c) "should be interpreted to provide for ex-parte applications in situations, such as the matter at bar, where the defendant seeks to serve a subpoena duces tecum for the pretrial production of documents on a third party, and cannot make the required showing without revealing trial strategy").

35. *United States v. W.R. Grace*, 439 F. Supp. 2d at 1140.

36. *TracFone Wireless, Inc. v. Adams*, No. 1:14-CV-24680, 2015 WL 6437434, at *1 (S.D. Fla. Oct. 20, 2015) ("[D]istrict courts in this district and others routinely enter such orders."); *Green v. American Modern Home Ins. Co.*, No. 1:14–cv–04074, 2014 WL 6668422, at *5 (W.D. Ark. Nov. 24, 2014) (entering a Rule 502(d) order); *Fleisher v. Phoenix Life Ins. Co.*, No. 11 Civ. 8405(CM)(JCF), 2012 WL 6732905, at *4 (S.D.N.Y. Dec. 27, 2012) (entering "an order pursuant to Rule 502(d) of the Federal Rules of Evidence that will preclude the disclosure of privileged documents in this case from constituting a waiver of privilege or of work product protection in this or any other proceeding, state or federal").

37. "[I]n an age of litigation that, increasingly, involves the exchange of large amounts of ESI during the discovery process, the risk that inheres in these rules – namely, that 'any disclosure (however innocent or minimal) [would] operate as a subject matter waiver of all protected communications or information" – began to engender "widespread complaint[s]' that the 'litigation costs necessary to protect against waiver of . . . privilege . . . ha[d] become prohibitive[.]' FRE 502 advisory committee's note. In direct response to these concerns, therefore, Congress enacted FRE 502 in 2008. The rule puts in place certain safeguards respecting the inadvertent disclosure of privileged information." *Potomac Elec. Power Co. & Subsidiaries v. United States*, 107 Fed. Cl. 725, 728 (2012).

38. *Potomac Elec. Power Co. & Subsidiaries v. United States*, 107 Fed. Cl. 725, 728 (2012).

39. "The Court agrees with the Government that this reading of FRE 502(d) finds no support in the Rule's plain language, purpose, or any relevant case law." *Id.* at 731.

40. *See, e.g.*, *Smith v. Best Buy Stores, L.P.*, No. 4:16-CV-00296-BLW, 2017 WL 3484158, at *4 (D. Idaho Aug. 14, 2017) (rejecting Rule 502(d) order and stating that "intentional disclosure would not be entitled to protection.").

41. *SEC v. Bank of America*, No. 09 CIV. 6829 (JSR), 2009 WL 3297493 (S.D.N.Y. Oct. 14, 2009).

42. *SEC v. Bank of America*, 2009 WL 3297493, at *1.

43. *See, e.g.*, Ala. R. Evid. 510(b)(4) ("An Alabama court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court-in which event the disclosure is also not a waiver in any other Alabama proceeding."), Ariz. R. Evid. 502(d) ("An Arizona court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court – in which event the disclosure is also not a waiver in any other proceeding."). Other states that have Rule 502(d) analogs are Colorado, Delaware, Illinois, Indiana, Iowa, Kansas, Vermont, Washington, and West Virginia.

44. *In re Comverge, Inc. Shareholders Litig.*, No. CIV.A. 7368-VCP, 2013 WL 1455827 (Del. Ch. Apr. 10, 2013).

45. *Id.* at 2.

46. *Gruss v. Zwirn*, 276 F.R.D. 115, 135 (S.D.N.Y. 2011), rev'd in part, No. 09 Civ. 6441 (PGG)(MHD), 2013 WL 3481350 (S.D.N.Y. July 10, 2013). The decision was made on a motion to compel production before trial, as opposed to a determination at trial based on how a defense was presented.

47. *See also In re Cty. of Erie*, 546 F.3d at 228-29 ("[T]he assertion of a good-faith defense involves an inquiry into state of mind, which typically calls forth the possibility of implied waiver of the attorney-client privilege."); *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991) ("This waiver principle is applicable here for Bilzerian's testimony that he

thought his actions were legal would have put his knowledge of the law and the basis for his understanding of what the law required in issue.") In *Mackey v. United States*, No. 1:10-CR-0310-WSD-JFK-1, and No. 1:16-CV-3777-WSD-JFK, 2017 WL 10088189, at *10 (N.D. Ga. Sept. 14, 2017), report and recommendation adopted, No. 1:10-CR-310-ELR-JFK and No. 1:16-CV-3777-ELR, 2018 WL 3966265 (N.D. Ga. Aug. 17, 2018), the court described what the defendant offered as a good-faith defense based on advice of counsel, and ruled that the defendant had waived his attorney-client privilege by doing so. But what the defendant in fact did in his opening statement was not just reference his obtaining of legal advice; he also relied on the substance of the advice received: "And most of these deals, if not all of them, had one thing in common, and that is that they all either had a lawyer or a Ph.D. who was involved in the transaction and who was, you know, explaining to [the defendant] how this was fine and how this was going to work." In essence, while described as a good faith defense, the defendant in fact relied on the substance of the advice received.

48. Courts have similarly held that a corporation's attempt to assert a good faith defense premised on legal advice puts the advice at issue and risks waiver. For example, in *Scott v. Chipotle Mexican Grill, Inc.*, 67 F. Supp. 3d 607, 612 (S.D.N.Y. 2014), an employment case, Chipotle attempted to use good faith in defense of alleged FLSA violations. The Court found waiver because it was clear that Chipotle had consulted counsel about the relevant FLSA regulations, so the advice was "at issue." *Id*. at 618. In a similar case regarding FLSA, the court also found waiver and stated that "I find it difficult to imagine that a good faith defense regarding the FLSA raised by a corporation as large and as sophisticated as Hearst would not involve the advice of its legal department." *Xuedan Wang v. Hearst Corp.*, No. 12 CV 793(HB), 2012 WL 6621717, at *2 (S.D.N.Y. Dec. 19, 2012).