WILMERHALE

# Recent Case Developments Uphold the Attorney/Client Privilege in Grand Jury Investigations

2003-12-29

**A. The Attorney/Client Privilege: Purpose and Waiver**

The attorney/client privilege is the oldest testimonial privilege known to Anglo-American law. 8 Wigmore s. 2290 at 542. "Although the underlying rationale for the privilege has changed over time . . . courts long have viewed its central concern as one 'to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.'" *United States v. Zolin*, 491 U.S. 554, 562 (1988) (citations omitted).

The attorney/client privilege, like all other rules of law, relies for its protection in the first instance on the voluntary respect and obedience due from attorneys, as officers of the court. Every day, in thousands of depositions, interviews and negotiations between counsel across the United States, the attorney/client privilege is strengthened by the respect it is shown by zealous advocates who refuse to attempt to penetrate its protections for short-term gain, knowing that the privilege that protects their opponents equally protects their clients.

Nowhere is this voluntary respect for the attorney/client privilege more important than in the actions of attorneys for the government. Having a far greater power of compulsion than private lawyers, they have a higher obligation to restrain voluntarily their pursuit of privileged materials. However, in recent years, government attorneys have increasingly sought ways to get around the attorney/client privilege, for example, by asserting that some part of an attorney's actions in conducting a defense have facilitated the crime, or by claiming that a disclosure of the facts on which a defense will be based, as part of discussions with prosecutors, inadvertently waived the privilege with respect to all communications between the client and lawyer on the subject of the defense. In "white collar" crime cases, the government has gone so far as to offer corporations a means of avoiding prosecution by turning the results of internal investigations over to government attorneys and "voluntarily waiving" the attorney/client privilege, so that the government may charge individual directors, officers and employees as criminals. These recent attempts to undermine the attorney/client privilege have been widely criticized by practicing attorneys and legal scholars because of the threat they pose to one of the oldest and most important pillars of our legal system.

It has long been established that the attorney/client privilege may be expressly waived by the person for whose benefit it exists. But it has not been as clear under what circumstances the privilege will be regarded as waived by implication or forfeited. In two recent decisions, the First and Second Circuit Courts of Appeals have addressed this issue. The background facts to both cases were similar. In each case, during a federal grand jury investigation into whether a corporation had violated federal criminal laws, the corporation's attorneys had sent letters to the United States Attorney setting forth facts and legal arguments to show that the corporation had not violated the law. Each letter expressly stated that it was not intended to waive any privilege with respect to the subjects discussed. In the First Circuit case, the corporation's attorneys also met with government lawyers to discuss the facts and legal arguments, and expressly stated at the beginning of that meeting that all privileges were reserved. In both cases, although the government did not dispute the reservation of privilege at the time the letters were received or the discussion occurred, it later asserted that the disclosure of facts in those letters and that discussion amounted to a forfeiture or implied waiver of the attorney/client privilege with respect to other communications involving the corporation's attorneys on the same subjects.

In the First Circuit case, the government sought a disclosure of all past and future attorney/client communications on the subjects under investigation. In the Second Circuit case, the government sought the corporation's lawyers' notes of conversations with government agents who had told the corporation and its lawyers that the corporation was not violating any federal law. In both cases, the district courts agreed with the government, ruled that an implied waiver or forfeiture of the privilege had occurred as a result of the partial disclosure and ordered all additional privileged information to be produced. The corporations appealed, and in each case the appeals court reversed, holding that whether an implied waiver or forfeiture of privilege has occurred depends on the specific circumstances of each case, judged in light of principles of fairness.

**B. The First Circuit Case: XYZ Corporation**

The First Circuit case, *In Re Keeper of the Records (Grand Jury Subpoena Addressed to XYZ Corporation)*, was handled by members of Hale and Dorr LLP's Government Investigations and Litigation Practice Group. A corporation engaged in distributing medical devices encountered problems with one of its devices shortly after it was put on the market. The device was manufactured as part of a joint venture with another company. The corporation immediately "conducted an internal investigation and sought the advice of outside counsel to determine an appropriate course of action." *XYZ Corporation*, slip. op. at 2. The corporation decided to stop distribution of the device temporarily. Officers of the corporation and its co-venturer discussed that decision by telephone, with the corporation's outside regulatory counsel on the line. They decided to approach the FDA for guidance. The corporation informed the FDA of the problem and, after further communications, permanently ceased distribution of the device.

The Department of Justice opened an investigation and obtained a grand jury subpoena to the corporation for documents relating to the discontinued device. The corporation produced documents, along with a privilege log identifying documents falling within the terms of the subpoena but protected by the attorney/client privilege. The government raised no objection to that claim of

privilege at that time.

As it turned out, the corporation's co-venturer had secretly tape-recorded the telephone conversation between the companies' officers and the corporation's outside regulatory counsel, and had turned a copy of that tape over to the government. The government requested the corporation's consent to review the tape, and the corporation's attorneys replied that "it would not seek to prevent the government from listening," but "that this decision should not be viewed as a waiver of any privilege protecting other communications." The government lawyers accepted this condition, *in writing*.

Nearly a year passed. The prosecutors then asked the corporation's lawyers to meet and discuss the facts of the case. The government later sent a letter informing the corporation that it was a "target" of the investigation and stating a willingness to consider any argument or facts that the corporation wanted to submit. In response to that letter, the corporation's attorneys submitted two "proffer letters" to the government and also met with the prosecutors. The first page of both letters specifically stated that nothing in the letters should be taken as a waiver of the attorney/client privilege. The corporation's lawyers made the same statement at the beginning of the meeting. The government lawyers did not respond to any of these express reservations of rights.

Beginning shortly after the corporation first produced documents, and continuing for nearly two years, the government repeatedly asked the corporation to "waive" the attorney/client privilege and fully disclose all communications its officers had had with outside counsel in the course of obtaining legal advice on how to proceed. The corporation repeatedly declined.

Eventually, the government filed a motion to compel production of all documents listed on the privilege log, stating as the basis for that motion that the corporation "*already had waived* the attorney/client privilege as to the most important documents described in the subpoena." Id. (emphasis supplied) The prosecutors' claim of "waiver" was based on 1) the fact that the corporation's outside regulatory counsel had participated in the telephone conversation between the officers of the corporation and the co-venturer, and had discussed his past legal advice and given new legal advice, all in the presence of persons he did not represent, and 2) the assertion that, through its written and oral presentations, the corporation had raised an "advice of counsel" defense and that it was not fair to allow the corporation to disclose some, but not all, of its attorney/client communications on that subject.

The district court, without hearing, granted the government's motion to compel. When both sides requested clarification, the district court ruled, again without hearing, that the corporation had waived the attorney/client privilege with respect to *all* discussions or conversations, both past and future, relating to any of the issues in the investigation. The corporation appealed to the First Circuit in Boston.

The questions for the appeals court were whether the statements made on the taped call waived the privilege and whether the government-after attempting to obtain the corporation's agreement to waive the privilege, and after sitting silent in the face of repeated reservations of the privilege-could brush the privilege aside with a claim of implied "waiver." The First Circuit determined that it could not.

After noting that the purpose and extent of the attorney/client privilege is well-settled and that the grand jury "must . . . respect a valid claim of privilege," the First Circuit conceded that it had not yet fully defined how, and under what circumstances, the attorney/client privilege could be waived *by implication* rather than by express consent of the client. The parties agreed that the corporation had not expressly waived the privilege in this case, despite repeated requests by the government that it do so, and that the government's claim to pierce the protection of the privilege relied entirely on its claim that a waiver could be implied from the circumstances.

The court began its analysis by noting "the unarguable proposition that the attorney/client privilege is highly valued" and that "courts should be cautious about finding implied waiver." Id. at 6. The court first held that the presence of the corporation's outside regulatory counsel on the telephone conference between officers of both companies-and his discussion of legal advice during that call-was not confidential, that the statements made during the call were not privileged, and that any disclosure of confidential communications during that discussion waived the attorney/client privilege, but *only* with respect to those specific statements. This point had been conceded by the corporation; the thrust of its argument was that any waiver of attorney/client privilege that resulted from disclosure of privileged communications during that telephone conversation could not act as an implied waiver of *all other* attorney/client communications on the same subject *at other times*. The court agreed.

The court next considered the government's claim that the corporation's counsel's written and oral presentations had advanced an "advice of counsel" defense and thereby implicitly waived the privilege with respect to all attorney/client communications, at any time, on the subjects discussed. The court found that "the circumstances, and particularly the government's own conduct, belie that claim." Id. at 11. The court noted that the corporation:

> was careful to condition each and every disclosure on a clearly stated privilege reservation. The government did not raise the slightest question when these reservations were stated, but, rather, kept the dialogue going and invited additional disclosures. In the circumstances of this case, we think that XYZ reasonably interpreted the government's silence as an acceptance of the reservation. Id.

The court concluded:

> Arm's-length negotiations between the government and private parties, in advance of an indictment, aid the truth-seeking process. Such negotiations are to everybody's advantage. They give potential defendants an opportunity to explain away suspicious circumstances, give the government an opportunity to avoid embarrassing and wasteful mistakes, and give the public a greater likelihood of a just result. Requiring the government to turn square corners in such negotiations will make potential defendants more willing to deal with government in the future. Conversely, refusing to hold the government to such a standard would send a signal to future litigators to negotiate with the government only at their peril. That is not a message that we wish to send-nor is it one that would serve the government's interests. Id. at 12.

**C. The Second Circuit Case: John Doe Corp.**

Within a week of the decision in *XYZ Corporation*, the Court of Appeals for the Second Circuit issued a similar ruling in *John Doe Corp. v. USA*. In that case, the corporation's lawyers had sent the United States Attorney a 46-page letter attempting to rebut possible charges that John Doe Corp. had violated federal firearms laws. The letter included representations that John Doe Corp. had sought the advice of the ATF and had even been assured by ATF's senior counsel that it did not need a license to conduct the business in which it was engaged. The letter also gave names and contact information for the people at ATF who had given John Doe Corp. this advice, and suggested that the government attorneys contact them directly to check the story. The government responded, instead, by obtaining a grand jury subpoena for all of John Doe Corp.'s lawyers' notes of meetings with ATF agents and officials. When John Doe Corp.'s attorneys refused to turn those materials over, the district court issued an order compelling disclosure.

The district court ruled that, if John Doe Corp. intended to rely on statements by ATF officials, it should be required to turn over all information it had regarding those statements. It also ruled that, if John Doe Corp. intended to claim that it had a good faith belief that it was complying with the firearms laws, it was required to disclose all privileged discussions with its lawyers that might support or disprove that claim. Although John Doe Corp. made its claims in a confidential letter addressed solely to the United States Attorney and, in that letter, expressly reserved all privileges, the district court held that it would be unfair for the government to be required to weigh claims to a good faith belief that the corporation was in compliance with law without having access to all related information.

The appeals court disagreed and drew a bright line around at least some types of partial disclosures that will not be regarded as implied waivers or forfeitures of the attorney/client privilege. The Second Circuit pointed out that John Doe Corp.'s attorneys' letter was addressed and delivered in confidence to the United States Attorney and that it specifically reserved all privileges with respect to information not contained therein. The court noted that an implied waiver or a forfeiture of the attorney/client privilege may occur if a party tries to rely on a partial disclosure of privileged information that would place the receiving party in an unfair position before a judge or jury. If the receiving party cannot see all related, though privileged, information that might refute the disclosing party's claims, the partial disclosure could result in an unfair disadvantage to the receiving party. Thus, a party in a civil or criminal case may not assert in court that he or she acted in reliance on his or her attorneys' advice without thereby forfeiting any privilege that he or she has in all communications with his or her attorney on that subject and allowing his or her opponent to review the full details of those discussions. But, as the Second Circuit observed in *John Doe Corp.*, the United States Attorney was not subjected to any unfairness by John Doe Corp.'s lawyers asserting that the company relied on statements by specific, identified ATF personnel (with whom the United States Attorney could presumably check) or by John Doe Corp.'s claims that it believed in good faith that it was complying with the law-a claim frequently made by persons involved in a government investigation. The United States Attorney may believe or disbelieve all or part of John Doe Corp.'s attorneys' letter, but he is not thereby placed in any unfair position with respect to any case pending

in court. On this basis, the Second Circuit reversed.

**D. Conclusion**

The First Circuit's decision in *XYZ Corporation* and the Second Circuit's decision in *John Doe Corp.* mark a strong line of defense against attempts to get around the attorney/client privilege by government attorneys. These decisions recognize the need for all defense counsel and their clients to be able to negotiate with the government without fear of opening up their privileged communications to involuntary government scrutiny.

Stephen A Jonas

stephen.jonas@haledorr.com

Robert D. Keefe

robert.keefe@haledorr.com

## *Authors*

### Stephen A. Jonas

RETIRED PARTNER

+1 617 526 6000

### Robert D. Keefe

SENIOR COUNSEL

robert.keefe@wilmerhale.com

+1 617 526 6334