Second Circuit Clarifies At-Issue Waiver of the Attorney-Client Privilege

On October 14, 2008, the United States Court of Appeals for the Second Circuit addressed an important question of attorney-client privilege -- the concept of "at-issue" waiver.[1] The attorney-client privilege, which generally protects communications between client and counsel, can be deemed waived if a party puts privileged communication at issue in a case. After *In re Erie*, a finding of at-issue waiver requires that the privileged communication be *relied upon* in asserting a claim or defense.

I. Background

Written policy of the Erie County Sheriff's Office dictates that all detainees entering a County holding center must undergo a strip search. Regarding the legal aspects of this policy, the Sheriff's Office engaged in discussions with the Erie County Attorney who "reviewed the law concerning strip searches of detainees, assessed the County's current search policy, recommended alternative policies, and monitored the implementation of these policy changes."[2] Ten e-mail chains exchanged during the discussion were the focal point of the litigation.

Plaintiffs were strip searched pursuant to policy and thereafter sued Erie County and various employees. They claimed violation of their Fourth Amendment right to be free from unreasonable searches and seizures. During discovery, Defendants withheld the ten e-mails, identifying them as privileged attorney-client communications because they satisfied the three requirements for protection: they were between client and counsel, kept confidential, and made for the purpose of obtaining or providing legal advice.[3] However, Plaintiffs argued that the e-mails were not "legal advice," but rather policy recommendations, and moved to compel their production. The Magistrate Judge agreed with Plaintiffs that the e-mails were not privileged. He reasoned that they "propose[d] changes to existing policy to make it constitutional" and therefore, "no legal advice [was] rendered or rendered apart from policy recommendations."[4] The District Court upheld the Magistrate's decision. However, the Court of Appeals vacated, finding that the communications *were* privileged. The Court of Appeals reasoned that government officials should take the law into consideration when crafting and carrying out policy. Therefore, the court concluded that a lawyer's assessment of a policy's compliance with the law is indeed "legal advice."[5]

The Court of Appeals remanded, instructing the District Court to determine whether the privilege had nevertheless been waived. On remand the District Court decided that Defendants *had* waived their attorney-client privilege because they put the advice "at issue" by claiming that qualified immunity shielded them from suit.[6] However, the Court of Appeals again vacated the District Court's decision after granting a writ of mandamus and held that the privilege protected the e-mails.[7]

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1 See *In re County of Erie*, No. 07-5702 slip op. (2d Cir. 2008) ("*Erie II*").

2 Id. at *3.

3 See *In re County of Erie*, 473 F.3d 413, 416 (2d Cir. 2007) ("*Erie I*").

4 Id. at 422.

5 Id. at 418, 423.

6 Id. at *4-*5.

7 *Erie II*, at *15.

II. Reasoning

Defendants raised the defense of "qualified immunity." This defense "protects officials from liability . . . as long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[8]

The District Court concluded that an "at-issue" waiver had occurred when Defendants raised this defense. The Distinct Court reached this conclusion by applying the *Hearn* test.[9] Under *Hearn*, the attorney–client privilege is waived when "(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."[10] Here, the District Court reasoned that Defendants had affirmatively responded to a claim by raising the qualified immunity defense and in doing so made privileged communications relevant to the case.[11]

The District Court's strict reliance on the *Hearn* test led the Court of Appeals to grant the Defendants' request for a writ of mandamus.[12] A writ will be granted if "(A) the petition raises an important issue of first impression; (B) the privilege will be lost if review must await final judgment; and (C) immediate resolution will avoid the development of discovery practices or doctrine that undermine the privilege."[13] The Court of Appeals decided that this was an important issue of first impression because, the strict reliance on *Hearn* by the District Court, joined by academic and judicial criticism of the test, raised a need for the court to "clarif[y . . .] the scope of the at-issue waiver and the circumstances under which is should be applied."[14]

Turning to the substance of the matter, the Court of Appeals vacated the District Court's order to produce the e-mails.[15] The Court observed that "[n]owhere in the *Hearn* test is found the essential element of reliance on privileged advice in the assertion of the claim or defense."[16] Reliance could be found, for example, where a party asserts a "good faith" defense. There, the defense's success would rely on the party's lack of knowledge of the illegality of his conduct. A lack of knowledge could be disproved by the content of privileged attorney-client communications. Therefore, the assertion of the defense would rely on the privileged information. The Court added this reliance requirement to the *Hearn* test.[17]

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8 Id. at *14 (citing *Gilles v. Repicky*, 511 F.3d 239, 243 (2d Cir. 2007)).

9 *Pritchard v. County of Erie*, No. 04-CV-00534C, 2007 WL 3232096, *2 (W.D.N.Y. Oct. 31, 2007).

10 *Hearn v. Rhay*, 68 F.R.D. 574, 581 (E.D. Wash. 1975).

11 *Pritchard*, 2007 WL 3232096, at *5.

12 *Erie II*, at *8-*10.

13 Id., at *8 (citing *Erie I*, 473 F.3d at 416-417).

14 Id., at *10.

15 Id., at *15.

16 Id., at *13.

17 Id.

Applying this clarified test to the Defendants' defense, the Court of Appeals found no reliance upon the advice of counsel.[18] The qualified immunity defense turns on whether conduct violated "clearly established statutory or constitutional rights of which a reasonable person would have known."[19] Since this is an objective test, the advice given by Defendants' counsel is irrelevant to establishing the defense. Therefore, *Hearn* should not have been applied.[20] Without applying *Hearn*, the Court of Appeals could not find that the communications were placed at issue. The District Court was directed to enter an order protecting the communications.[21]

III. Conclusion

Having held that at-issue waiver of the attorney-client privilege will not occur absent reliance, the Court of Appeals left open the question of what degree of reliance is necessary for waiver to be found.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Jon Mark at 212.701.3100 or jmark@cahill.com; or John Schuster at 212.701.3323 or jschuster@cahill.com.

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18 Id., at *14.

19 Id. (citing *Gilles v. Repicky*, 511 F.3d 239, 243 (2d Cir. 2007)).

20 Id., at *13.

21 Id., at *15.