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ATTORNEY-CLIENT PRIVILEGE: ISSUE-RELATED WAIVERS

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IN RECENT YEARS, legislatures, courts and commentators have debated the parameters of the attorney-client privilege.[1] The result of this debate is a close examination and refinement of the uses of the privilege. What has remained largely unnoticed, however, is a growing body of case law finding a waiver of attorney-client privilege in the context of litigation.[2] Lawyers who are unaware of these cases may inadvertently jeopardize their clients' privileged materials.

Courts have long held that the privilege is waived when the client attacks the attorney's advice.[3] Taking this one step further, cases have held that the attorney-client privilege is waived when a party to litigation explicitly relies on an attorney's advice.[4] Many litigants are unaware, however, that this principle can apply even when they do not mention the attorney-client communication itself. An increasing number of courts have held that whenever a

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[1] *See, e.g.*, FLA. STAT. ANN. § 90.502 (West 1976); Upjohn Co. v. United States, 449 U.S. 383 (1981); Diversified Indust., Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1978) (en banc); Hellerstein, *Current Problems about the Attorney-Client Privilege*, ALT-ABA COURSE OF STUDY 119 (1980); Kaminsky, *State Evidentiary Privileges in Federal Civil Litigation*, 43 FORDHAM L. REV. 923 (1975); Comment, *The Lawyer-Client Privilege*, 56 NW. U. L. REV. 235 (1961).

[2] *See infra* notes 33-54 and accompanying text.

[3] *See* Hunter v. Blackburn, 128 U.S. 464 (1888). *See also infra* notes 11-21 and accompanying text.

[4] *See infra* notes 22-31 and accompanying text.

party raises an issue that makes the privileged communication relevant, the privilege is waived.[5]

All of these forms of waiver are based on notions of fairness. Wigmore stated that in considering waiver issues "regard must be had to . . . the element of fairness and consistency."[6] Courts often echo this principle. In *Kelly v. Cummens*[7] the court held:

> [A] client who goes upon the stand in an attempt to secure some advantage by reason of transactions between himself and his counsel waives his right to object to the attorney's being called by the other side to give his account of the matter. Any other rule would subject the lawyer to any kind of scurrilous and unjust attack and convert the [privilege] from being a mere shield into a weapon of offense.[8]

The court in *Bierman v. Marcus*[9] specifically stated that in deciding whether a party had waived the attorney-client privilege, "the most important consideration is fairness."[10]

I. ATTORNEY'S ADVICE ATTACKED

The inequity involved in hiding behind the privilege is most obvious in cases where the client attacks an attorney's actions. In *Kelly v. Cummens*,[11] an attorney represented a defendant charged with the sale of liquor to a minor. The lawyer won postponements and continuances as often and as long as possible, but the case eventually

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[5] *See infra* notes 33-54 and accompanying text.

[6] 8 WIGMORE ON EVIDENCE § 1217 at 638 (McNaughton rev. 1961).

[7] 121 N.W. 540 (Iowa 1909).

[8] *Id.* This sword/shield analogy is frequently used by courts considering waiver issues. *See* ITT Corp. v. United Tel. Co., 60 F.R.D. 177, 185 (M.D. Fla. 1973); Independent Prod. Corp. v. Loew's, Inc., 22 F.R.D. 266 (S.D.N.Y. 1958) (first amendment privileges); Bradshaw v. Iowa Methodist Hosp., 253 Iowa 360, 115 N.W.2d 816 (1962) (physician-patient privilege); Koump v. Smith, 25 N.Y.2d 869, 250 N.E. 2d 857 (1969) (physician-patient privilege); WEINSTEIN ON EVIDENCE ¶. 511-17. *Cf.* San Francisco v. Super. Ct., 37 Cal. 2d 227, 231 P.2d 26 (1951) (en banc) ("He cannot have his cake and eat it too.")

[9] 122 F. Supp. 250 (D.N.J. 1954) (party asserting privilege in objection to depostion question).

[10] *Id.* at 252.

[11] 143 Iowa 152, 121 N.W. 540 (1909).

went to trial.[12] At that time the defendant told the attorney to let the plaintiff take a judgment against him, that "he had his property fixed so that the judgment would not harm him."[13] When the defendant later changed his mind and moved for a new trial, the court permitted the attorney to testify regarding his transactions with his client. By attacking the attorney, the court held, the client had waived the privilege.[14]

The client in *Farnsworth v. Sanford*[15] also criticized his attorney's advice. Farnsworth, the client, attempted to withdraw a guilty plea by alleging that his lawyers had exerted undue pressure on him. The court therefore allowed the attorneys to testify as to what they had done and said in a conference about the guilty pleas. The court asserted that: "a client [who] charges his counsel with misconduct . . . has no right to be free of contradiction in testifying about the misconduct." The court found that the client "waives the privilege of the communication by himself making it an issue to be tried."[16]

A defendant's claim that his attorney forced him to testify can also bring about a waiver of privilege. In *Tasby v. United States*,[17] Tasby alleged that his lawyer had rendered ineffective assistance of counsel in his advice regarding whether Tasby should testify. The trial court permitted the attorney to testify as to his actual advice given to Tasby.[18] The appellate court upheld this decision:

> Surely a client is not free to make various allegations of misconduct and incompetence while the attorney's lips are sealed by invocation of the attorney-client privilege. Such an incongruous result would be inconsistent with the ob-

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[12] *Id.* at 541.

[13] *Id.*

[14] *Id.* at 542 (waiver required "in the interest of truth and justice").

[15] 115 F.2d 375 (5th Cir. 1940).

[16] *Id.* at 377. *See also* Roberts v. Greenway, 233 Ga. 473, 476, 211 S.E.2d 764, 767 (1975) ("A petitioner for habeas corpus relief cannot allege that he was deprived of his constitutional rights and then invoke the shield of the attorney-client privilege to prevent an accurate determination of the merit of his claim").

[17] 504 F.2d 332 (8th Cir. 1974), *cert. denied*, 419 U.S. 1125 (1975).

[18] *Id.* at 335 (trial attorney's testimony set out at length).

ject and purpose of the attorney-client privilege and a patent perversion of the rule.[19]

The most vehement denunciation of attempts to assert the privilege while attacking the attorney's advice comes from the Fifth Circuit. In *United States v. Woodall*,[20] the defendant asserted that his guilty pleas were invalid since he lacked knowledge of the sentence consequences of the pleas. Woodall's objections to his attorney's testimony were overruled:

> Courts earnestly pursuing reality would be hard put to justify a rule that would allow a defendant circumstanced as Woodall here to assert that his solemn pleas of guilty were negated for lack of accurate information of sentence consequences, then permit him to run a procedural trap play that would block the development of the plain truth which shows his own attorney told him exactly what he could expect. Not only does this specious sophistry fail to protect confidential relationships, it trifles with the truth— it scoffs at justice— and we reject it flatly.[21]

An attack on the attorney's advice makes that advice relevant to the issues in the lawsuit. This relevance waives the privilege and makes the information discoverable and admissible.

II. Reliance Upon Attorney's Advice

Waiver also occurs when the client relies on the attorney's advice, not just when she attacks it. In cases in which the client relies on the attorney's advice, rather than attacking it, the focus shifts from fairness to the attorney to fairness to the opposing litigant. Where a party asserts reliance on advice of counsel as a defense, the attorney's advice again becomes relevant. The other party is therefore entitled to probe that attorney's advice.

This situation frequently arises in securities cases. In

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[19] *Id.* at 336.

[20] 438 F.2d 1317 (5th Cir. en banc), *cert. denied*, 403 U.S. 933 (1971).

[21] *Id.* at 1326.

Panter v. Marshall Field & Co.,[22] Carter Hawley Hale (CHH) made a tender offer for the purchase of Marshall Field. Marshall Field in turn resisted this offer, filing suit against CHH alleging antitrust violations. CHH ultimately withdrew its bid to acquire Marshall Field. Following the aborted takeover, some Marshall Field shareholders sued it for violations of the securities laws.[23] Marshall Field, in its defense, relied heavily on the advice of counsel as the basis for its opposition to the takeover, but resisted any attempt to allow CHH to discover that advice. The court held that "[w]here. . . a party asserts as an essential element of his defense reliance upon the advice of counsel, we believe the party waives the attorney-client privilege with respect to all communications. . . concerning the transactions for which counsel's advice was sought."[24] Similarly, in *Garfinkle v. Arcata National Corp.*,[25] Arcata claimed that the alleged securities violations[26] were based on the advice of counsel. This defense waived Arcata's attorney-client privilege, since "the privileged communication [was] injected as an issue in the case by the party which enjoy[ed] its protection."[27]

Antitrust suits can also give rise to explicit claims of reliance on counsel and hence to waivers of privilege. In *Handgards, Inc. v. Johnson & Johnson*,[28] one manufacturer of disposable plastic gloves brought suit against another such manufacturer claiming that the defendant brought a series of patent infringement suits against it in bad faith as a part of a conspiracy to restrain trade and monopolize the industry. In its defense, the company sued intended

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[22] 80 F.R.D. 718 (N.D. Ill. 1978).

[23] The plaintiffs alleged violations of 15 U.S.C. § 78n(e) (1983) and breach of fiduciary duty. *Panter*, 80 F.R.D. at 720.

[24] *Id.* at 721.

[25] 64 F.R.D. 688 (S.D.N.Y. 1974).

[26] The violation alleged was failure to register stock. *Id.* at 720.

[27] *Id.* at 689. *See also* Broad v. Rockwell International Corp., 1977 FED. SEC. L. REP. (CCH) ¶ 95,894 (N.D. Tex. 1977); Trans World Airlines, Inc. v. Hughes, 332 F.2d 602, 615 (2d Cir. 1964); *cf.* Smith v. Bentley, 9 F.R.D. 489 (S.D.N.Y. 1949) (dispute regarding payment of royalties).

[28] 413 F. Supp. 926 (N.D. Cal. 1976).

to call its patent attorneys as witnesses. The court held that if it relied on their testimony, the company would waive the attorney-client privilege as to the entire litigation files from the earlier suits:

> By putting their lawyers on the witness stand in order to demonstrate that the prior lawsuits were pursued on the basis of competent legal advice and were, therefore, brought in good faith, defendants will waive the attorney-client privilege as to communications relating to the issue of the good faith prosecution of the patent actions.[29]

Criminal cases also contain potential for issue-related privilege waivers. The defendant in *United States v. Miller*[30] was charged with transporting goods known to have been fraudulently obtained. He claimed in defense that he had acted in good faith, based on the advice of his lawyer. In so doing, he waived the attorney-client privilege.[31]

In short, specific reliance on advice of counsel makes that advice an issue to be tried. Having put the advice in issue, a party cannot hide behind the attorney-client privilege to conceal relevant facts. Explicit reliance on advice of counsel will waive the privilege as to all advice on that issue.

III. ATTORNEY'S ADVICE UNMENTIONED BUT RELEVANT

A. *The Justification for Issue-Related Waivers*

The findings of waiver in the above cases are natural extentions of the cases finding waiver when the attorney's advice is attacked. In both cases, the client himself brought the privilege issue into the lawsuit by either attacking or relying on his attorney's advice. Courts will take this logic one step further. Privilege may also be waived when the privileged communications become rele-

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[29] *Id.* at 929.

[30] 600 F.2d 498 (5th Cir. 1979).

[31] *Id.* at 501-02 (Miller's attorney had actually informed him that his project was illegal).

vant to an issue in the lawsuit without any explicit mention of them.

Such relevance generally arises when the substantive law in question makes a party's state of mind relevant. This can occur in a number of factual settings. A party may make her state of mind relevant by pleading matters explicitly involving her mental state such as duress, good faith and bad faith. Attorney-client communications may also become relevant even when the party's state of mind is not specifically mentioned. This often happens in patent litigation when the meaning of a licensing agreement or the validity or misuse of a patent is in issue. The communications may also become relevant in a fraud case; in states where a plaintiff must prove subjective reliance on defendant's representations,[32] all of the information on which the plaintiff acted, including advice of counsel, becomes relevant.

In these cases, the attorney's advice has not been relied on nor has it been attacked. Instead, the client's motives and knowledge of relevant facts are at the center of the dispute. Attorney-client communications become important because they are relevant to the client's state of mind. The communications are facts which, like other facts, tend to show the basis for the client's actions.

Courts often invoke these relevancy waivers by analogy to the physician-patient privilege. In cases where the patient places his physical condition in issue, he waives his physician-patient privilege. Courts will find the privilege to be waived in the interest of equity. "[I]t would be unfair and inconsistent to permit the retention of the privilege" when the patient has voluntarily made his doctor's testimony relevant.[33] Courts have repeatedly found a

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[32] A plaintiff must prove subjective reliance upon the defendants representations in Iowa, for example. *See* Lockard v. Carson, 387 N.W.2d 871, 878 (Iowa 1980).

[33] Lambdin v. Leopard, 251 N.E.2d 165, 167 (Ohio C. P. 1968) (personal injury case). *See also* 8 WIGMORE ON EVIDENCE 2389 (McNaughton rev. 1961) Wigmore notes, for example, that waiver is required to prevent a party from saying:

> I tender witnesses A, B and C, who will openly prove the severe na-

waiver of the physician-patient privilege in personal injury cases in which a party puts his physical condition in issue.[34] The privilege can also be waived when a party's mental capacity is relevant to the lawsuit.[35]

The court in *Hearn v. Rhay*[36] discussed at length the circumstances under which the attorney-client privilege is waived when the communication between attorney and client becomes relevant to an issue in the lawsuit. In *Hearn*, a prisoner's rights suit, defendant jailers asserted that they had acted in good faith.[37] Plaintiff sought to discover the legal advice that defendants received from the state attorney regarding their treatment of prisoners. The defendants claimed that this advice was privileged, but the

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> ture of my injury. But I object to the testimony of witness D, a physician called by the opponent to prove that my injury is not so severe as I claim, because it is extremely repugnant to me that my neighbors should learn the nature of my injury.

Id.

[34] *See* Collins v. Bair, 256 Ind. 230, 268 N.E.2d 95 (1971). *Collins* was a personal injury suit in which plaintiff called a physician to testify in his behalf. This waived his privilege as to other doctors treating the same condition. *See also* State ex rel. McNutt v. Keet, 432 S.W.2d 597 (Mo. 1968)(en banc) (bringing personal injury suit waives privilege when damages are in issue); Koump v. Smith, 25 N.Y. 2d 869, 873, 250 N.E.2d 857, 861 (1969)("A party should not be permitted to assert a mental or physical condition in seeking damages or in seeking to absolve himself from liability and at the same time assert the privilege in order to prevent the other party from ascertaining the truth of the claim and the nature and extent of the injury or condition.") Mattison v. Poulen, 134 Vt. 158, 353 A.2d 327 (1976)(bringing personal injury action waives privilege).

[35] *See* State v. Cole, 295 N.W.2d 29, 35 (Iowa 1980)(insanity); State v. Tensley, 249 N.W.2d 659 (Iowa 1977)(diminished capacity); State v. Berry, 324 So. 2d 822 (La. 1975)(insanity); Florida v. Axelson, 363 N.Y.S.2d 200 (N.Y.S. Ct. 1974) (insanity); Annot., 44 A.L.R.3d at 59-60, 104-115 (1972).

[36] 68 F.R.D. 574 (E.D. Wash. 1975).

[37] Plaintiff alleged that he had been repeatedly confined in the mental health unit without a hearing and that the mental health unit was in fact a euphemism for punitive isolation. 68 F.R.D. at 577. Defendant jailers asserted good faith as a defense. This defense has both subjective and objective requirements, because it is not available if the defendant acted with either actual malice or in disregard of clearly established constitutional rights. *See* Wood v. Strickland, 420 U.S. 308 (1975). The *Hearn* court concluded that since legal advice received by defendants is highly probative of whether they acted with malice, plaintiff was entitled to discover the advice to help in rebutting the good faith defense. This was true even though defendants' good faith defense was not based on advice of counsel. 68 F.R.D. at 581-82, n.5.

court found that any such privilege was waived by the good faith defense. As a general rule waiver occurs when:

> the party asserting the privilege placed information protected by it in issue through some affirmative act for his own benefit, and to allow the privilege to protect against disclosure of such information would have been manifestly unfair to the opposing party. The factors common to each exception may be summarized as follows: (1) assertion of the privilege as a result of some affirmative act, such as filing suit, by the asserting party; (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to his defense. Thus, where these three conditions exist, a court should find that the party asserting a privilege has impliedly waived it through his own affirmative conduct.[38]

When a litigant takes some affirmative action which makes her state of mind relevant, she may waive the attorney-client privilege in the interest of fairness to the opposing party. This may happen in any kind of case. It is most likely to occur, however, in certain kinds of cases. These are issues of intent, duress, estoppel, fraud, and good faith.[39] In each of these areas, substantive law makes a party's motives important.[40] Where advice from an attorney may be part of that motivation, it becomes relevant, discoverable, and admissible.

B. *Examples of Issue-Related Waivers*

A landmark case finding an issue-related waiver of the attorney-client privilege is *Jack Winter, Inc. v. Koratron Co.*[41] In that case, Koratron attempted to evade the provisions

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[38] *Id.* at 581. *See also* Haymes v. Smith, 73 F.R.D. 572 (W.D.N.Y. 1976)(action asserting right of inmates to organize for collective action).

[39] *See infra* notes 41-54 and accompanying text.

[40] In good faith cases, for example, motivation is an important factor in the issue of malice. *See supra* note 37. In fraud cases, the plaintiff may need to prove subjective reliance on the defendant's representations. *See supra* note 32.

[41] 50 F.R.D. 225 (N.D. Cal. 1970).

of an agreement by alleging that it had executed the agreement under duress. In making this claim, Koratron waived its privilege as to its attorney's advice regarding the agreement:

> [T]he content of statements by White [the attorney] to officers of Koratron with respect to the . . . [a]greement have clearly been placed in issue by Koratron's claim that the agreement was made under duress. Such a claim necessarily raises the issues of whether any advice was given as to the agreement, what the content of that advice was, the competence of the advice, and whether such advice was in fact relied upon by Koratron when it entered into the agreement.[42]

Thus, although Koratron never mentioned its attorney's advice and in fact denied the impact of such advice on its actions, the court allowed opposing counsel to discover the attorney-client communications in order to test Koratron's claim of duress.[43]

Matters arising in patent suits often place otherwise privileged communications in issue. For example, courts often find a waiver when the validity of the patent is relevant.[44] Patent licensing disputes have also made attorney-client communications discoverable. In *Pitney-Bowes Inc. v. Mestre*,[45] Pitney-Bowes (P-B) filed suit alleging that P-B had intended to enter into modifications of patent licensing agreements. The court held that this made intent an issue and that P-B had thereby waived its attorney-client privilege. "P-B has placed in issue the very soul of this litigation—the intent of the parties with regard to con-

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[42] *Id.* at 229.

[43] *Id.*

[44] Honeywell, Inc. v. Piper Aircraft Corp., 50 F.R.D. 117 (M.D. Pa. 1970)(patent infringement suit)("when a plaintiff in a patent infringement suit has put the validity of the patents directly in issue, he may have waived any claim of privilege."); United States Industries, Inc. v. Norton Co., 174 U.S.P.Q. 514 (N.D.N.Y. 1972); *But see* Burlington Indus. v. Exxon Corp., 65 F.R.D. 26, 35 (D. Md. 1974)(Patent infringement suit) ("This court does not find that plaintiff has waived these immunities merely by bringing a suit which places patent validity and enforceability in issue.")

[45] 86 F.R.D. 444 (S.D. Cal. 1980).

struction of certain terms of the Agreements."[46]

Issues concerning the tolling of limitations statutes have also created waivers of attorney-client privilege. In *Russell v. Curtin Matheson Scientific, Inc.*,[47] defendants alleged that plaintiffs' claims were barred by failure to file an administrative complaint within the time period applicable under the Age Discrimination in Employment Act (ADEA);[48] plaintiffs responded that defendants' actions had caused the delay, thus tolling the deadline. The court held that the plaintiffs' assertion waived the privilege, and defendants could discover any advice regarding filing suit that the plaintiffs had received from their attorneys. The court believed that "[t]o protect against disclosure of such information would be manifestly unfair to the defendants."[49]

Raising an estoppel claim can also cause a waiver of attorney-client privilege. In *Connell v. Bernstein-Macaulay, Inc.*,[50] the court held that a party claiming estoppel had to reveal its attorney's advice. The court reached this conclusion because the party was trying to avoid a statutory provision created for the benefit of its adversary by a claim of estoppel. The court further found it likely that invasion of the attorney-client privilege would shed light on the estoppel claim.[51]

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[46] *Id.* at 447. *See also* International Paper Co. v. Fibreboard Corp., 63 F.R.D. 88 (D.Del. 1974); Gorzegno v. Maguire, 62 F.R.D. 617 (S.D.N.Y. 1973)(By introducing a previous patent application as proof of plaintiff's knowledge of the information, defendants waived their right to claim privilege regarding the background of the application).

[47] 493 F. Supp. 456 (S.D. Tex. 1980).

[48] The Age Discrimination in Employment Act, 29 U.S.C. § 621 (1976), prohibits discrimination in employment on the basis of the employee's age. Under the act, an employee who believes that her rights have been violated must file a complaint with the Equal Employment Opportunity Commission within 180 days of the date of the violation (absent an applicable state statute) or she will forfeit her right to bring a lawsuit based on that violation. This time period can be tolled, however, if the employee delays filing because of the actions of the employer.

[49] 493 F. Supp. at 458.

[50] 407 F. Supp. 420 (S.D.N.Y. 1976).

[51] Before compelling disclosure, the *Connell* court required plaintiff to show a "good faith basis to believe" that the privileged material would be relevant to the estoppel issue. *See also* Hearn v. Rhay, 68 F.R.D. 574, 582 (E.D. Wash. 1975)("A

Waivers based on relevance can also arise in other factual circumstances. In suits against insurers for bad faith failure to settle, the theory of the lawsuit places in issue the conduct and state of mind of plaintiff's personal injury attorney in failing to propose a settlement.[52] In suits where plaintiff alleges fraud and must prove subjective reliance, his attorney's advice may also be relevant and the privilege thus waived.[53]

In none of these cases did the party asserting attorney-client privilege specifically allude to advice of counsel, either by attacking or relying on the advice given. Rather, substantive law created the possibility that the attorney's advice was relevant to the issue at hand. To prevent unfairness to the opposing party, the courts held the privilege to be waived.[54]

IV. CONCLUSION

Attorneys should be ever mindful of the possibility that otherwise privileged documents and conversations may become accessible during the process of litigation. Whether seeking or resisting discovery, lawyers must be

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substantial showing of merit to plaintiff's case must be made before a court should apply the exception to the attorney-client privilege defined herein.")

[52] *See, e.g.*, Merritt v. Superior Court, 88 Cal. Rptr. 337 (Cal. App. 1970). *See also* Scotstown Shipping Co. Ltd. v. Diplomatic Marine, Inc., No. 77 Civ. 5386 (MEL) (S.D.N.Y. March 5, 1980)(suit for indemnity in which defendants tried to discover the basis for plaintiff's settlement of its earlier case, including advice of counsel).

[53] Sedco International, S.A. v. Cory, 683 F.2d 1201 (8th Cir. 1982). (The plaintiff sued SEDCO for fraudulently inducing him into a Persian Gulf oil deal. SEDCO alleged that the plaintiff in fact relied on his own investigations and on his attorney's advice. The court held that, by asserting fraud, the plaintiff waived his right to assert a privilege to prevent disclosure of communications that might have proven he did not rely on SEDCO or that such reliance was unreasonable).

[54] Where the issue is work product protection rather than attorney-client privilege, the results are the same. The relevance of the attorney's advice meets the substantial need/good cause requirement and overcomes the work product barrier. *See* American Standard, Inc. v. Bendix Corp., 80 F.R.D. 706 (W.D. Mo. 1978); Bird v. Penn Central Co., 61 F.R.D. 43 (E.D. Pa. 1973); Bourget v. Government Employees Ins. Co., 48 F.R.D. 29 (D. Conn. 1969); Kirkland v. Morton Salt Co., 46 F.R.D. 28 (N.D. Ga. 1968); Shapiro v. Allstate Ins. Co., 44 F.R.D. 429, 430-31 (E.D. Pa. 1968); McCullough Tool Co. v. Pan Geo Atlas Corp., 40 F.R.D. 490, 494 (S.D. Tex. 1966); 4 MOORE'S FEDERAL PRACTICE ¶ 26.64[4] at 26-389.

aware that the legal relevance of attorney advice may make continued assertion of the privilege unsupportable. Courts, moved by considerations of fairness, may find that the privilege has been waived. A party should therefore carefully consider the issues that it wishes to raise, and one who affirmatively puts protected information at issue in a lawsuit should prepare to find that information in the hands of opposing counsel.