



Alerts

Ninth Circuit Rejects Selective Waiver of Attorney-Client Privilege

May 9, 2012

Lawyers for the Profession® Alert

In re Pacific Pictures Corp., ___ F.3d ___, 2012 WL 1293534 (9th Cir. 2012)

Brief Summary

A lawyer disclosed attorney-client privileged documents to aid in a government investigation and then sought to enforce the privilege as to nongovernmental third parties (i.e., selective waiver). The U.S. Court of Appeals for the Ninth Circuit rejected the selective waiver doctrine because, *inter alia*, it is unnecessary to support the policy behind the privilege—namely, encouraging full and frank communication between attorney and client.

Complete Summary

Prior to the instant litigation, the Lawyer worked with a client to manage intellectual property rights related to a fictional character. An Attorney, the employee employed by the Lawyer absconded with copies of the attorney-client privileged information from the intellectual property matter(s). The attorney/Employee sent the documents to a rival company (“the Company”) that was competing for the same intellectual property rights, along with an unsigned cover letter from the Employee explaining the Lawyer’s alleged master plan to capture the intellectual property rights for himself. The Company entrusted the documents to another attorney and sought to obtain them through normal discovery—eventually obtaining some of them, including the cover letter, through court order. Only then did the Lawyer report the employee’s theft to the FBI.

The Company then brought the instant lawsuit against the Lawyer, among others, based primarily on information in the cover letter. Meanwhile, the Lawyer actively encouraged a government investigation of the Employee. The U.S. Attorney’s Office issued a subpoena for the documents, and the Lawyer turned them all over to the FBI without redaction, pursuant to an agreement that they would not be provided to third parties.

In the civil litigation, the Company argued that the Lawyer’s turning over the documents to the U.S. Attorney had waived privilege. The magistrate judge agreed, and the district court denied review. The Lawyer and the other defendants sought to overturn the magistrate’s order through writ of *mandamus*.

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The Ninth Circuit denied the petition for *mandamus*. The Court rejected a number of defendants' arguments, primarily based on the policy behind the privilege—namely, encouraging full and frank communication between attorney and client. Most significantly, the court rejected the Lawyers selective waiver argument, noting that allowing disclosure to the government, but not to the public at large would not encourage full and frank attorney-client communications. The court noted that adopting the theory of selective waiver also would be at odds with the policy of construing the privilege narrowly, and likely would amount to adopting an entirely new privilege, which is a function normally best left to the legislature.

Similarly, the court held that adhering to the confidentiality agreement did nothing to support the policy behind the attorney-client privilege. The court also rejected the Lawyer's theory that he had a common interest privilege with the government because he was a crime victim rather than a criminal suspect, because there was no evidence of an agreement between the government and defendants to pursue a joint strategy against the Employee. Moreover, the privileged statements at issue were not intended to facilitate representation of either the Lawyer or the government.

Finally, the court held that although the Lawyer's underlying intellectual property clients did not waive the privilege, his disclosure still amounted to a waiver because the clients had never disputed his authority to disclose the documents.

Significance of Opinion

In this opinion, the U.S. Court of Appeals for the Ninth Circuit joins a large majority of other federal jurisdictions, with the exception of the U.S. Court of Appeals for the Eighth Circuit, which have rejected the selective waiver doctrine.

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