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When legal privilege clashes with the Sixth Amendment

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Steven Glaser, a white-collar defence partner with Skadden Arps Slate Meagher & Flom, argues that, when they conflict, a company's right to legal privilege protections should be sacrificed to uphold an individual's rights under the Sixth Amendment.

The Department of Justice has indicted your client, a retired corporate director, on fraud charges. You believe your client has a viable good-faith defence based on advice of counsel. The advice, however, was rendered by in-house counsel of the client's former employer, and the former employer refuses to waive its attorney-client privilege. As a result, your client is unable to mount what may be her best – or even her only – defence. Can a viable argument be made that the corporation should be required to divulge those otherwise privileged communications?

The law on this issue is currently unsettled. On the one hand, the attorney-client privilege is typically inviolate. On the other, an accused's right to mount a defence is considered sacrosanct. This article addresses this apparent stalemate, and concludes that a corporation's attorney-client privilege should yield when a former employee of that corporation seeks to raise an advice-of-counsel defence in response to criminal charges.

What the law says

The Supreme Court has never addressed whether a criminal defendant's right to present a defence trumps the attorney-client privilege. The court has, however, carefully guarded the privilege, hailing it as "the oldest of the recognised privileges for confidential communications" (*Upjohn Co v United States*). The privilege, according to the court, exists to encourage "full and frank communication between attorneys and their clients" and to promote "public interests... and the administration of justice."

More recently, in *Swidler & Berlin v United States*, the court suggested that limiting the privilege's scope in any manner would gravely undercut its purpose. There, the court held that the privilege survives even a client's death. In considering the issue, the court expressly rejected the use of a balancing test to weigh competing interests to determine whether the privilege should continue to exist. *The Swidler & Berlin* court did, however, without deciding the issue, expressly acknowledge that "exceptional circumstances implicating a criminal defendant's constitutional rights might warrant breaching the privilege".

Subsequent lower court decisions have not resolved the issue identified by *Swidler & Berlin*. While courts are split on whether litigants can pierce the privilege in civil cases (In *Ross v City of Memphis* the court held that

the privilege did not yield to a civil defendant's right to present his defence; while in *United States v Wells Fargo Bank*, for example, the court ruled that a criminal defendant could pierce the privilege), the only court to have considered a criminal defendant's ability to do so held in favour of the defendant.

Why the Sixth Amendment trumps privilege

While the law is unsettled, it seems that when a criminal defendant needs access to privileged communications to mount a defence, that defendant's Sixth Amendment right should trump the attorney-client privilege, regardless of the purportedly sacrosanct nature of the latter. Indeed, in a clash between a constitutional right and a common-law privilege, one would expect the former to prevail without question.

The Supreme Court has long read into the Sixth Amendment a defendant's right to present evidence in her defence. In *Pennsylvania v Ritchie*, the court said: "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." And in *United States v Nixon*, the court said: "Our historic commitment to the rule of law... is nowhere more profoundly manifest than in our view that the twofold aim of criminal justice is that guilt shall not escape or innocence suffer". For this reason, the Sixth Amendment requires rules of evidence to yield when enforcing them would "significantly undermine fundamental elements of the accused's defence" (*United States v Scheffer*).

In *Washington v Texas*, for example, the court struck down a Texas statute that prohibited defendants charged as co-participants from testifying for one another at trial. The court reasoned that the Sixth Amendment was "designed in part to make the testimony of a defendant's witnesses admissible on his behalf in court". The court did make clear that its opinion was limited to evidentiary rules that conflict with the Sixth Amendment, and indeed expressly noted that its opinion did not address the attorney-client privilege. Nevertheless, it is difficult to see why the two should be treated differently; indeed, given that the rules of evidence are endorsed by elected officials and the attorney-client privilege is a common-law creature of the judiciary, one would expect that latter to yield more readily to the dictates of the Constitution.

To be clear, the *Swidler & Berlin* court did reject the use of a balancing test in examining whether the privilege can be overcome. But it also left open the possibility of an express exception to the application of the attorney-client privilege when it conflicts directly with an accused's Sixth Amendment right. As the Seventh Circuit put it, "Even the attorney-client privilege... hallowed as it is, yet not found in the Constitution, might have to yield in a particular case if the right of confrontation... would be violated by enforcing the privilege" (*United States v Rainone*).

Crucially, this result comports with the reasoning underlying the privilege in the first place. In rejecting a posthumous exception to the privilege, the *Swidler & Berlin* court noted that exceptions "consistent with the purposes of the privilege" were perfectly permissible. Such is the case here. Preventing criminal defendants from raising the advice-of-counsel defence "could result in reticence to seek advice from company counsel or to disclose potential issues to counsel, which is clearly harmful to a company from both a legal and a business standpoint", according to Emily Harlan, a partner with Nixon Peabody. In that way, an unyielding privilege might very well lead to the exact "erosion" the *Swidler & Berlin* court was trying to avoid.

Were the attorney-client privilege to nevertheless remain inviolate under all circumstances, it could pervert the justice system by significantly undermining the "fundamental elements" of an individual's defence (*United States v WR Grace*). There can thus be little doubt that, if the *Swidler & Berlin* ruling is interpreted as an exception, as we believe it should be, a criminal defendant's constitutional rights should overcome the assertion of the attorney-client privilege. As Justice O'Connor noted in her *Swidler & Berlin* dissent, "the paramount value [the] criminal justice system places on protecting an innocent defendant should outweigh a [third party's] interest in preserving confidences."

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Conclusion

While the attorney-client privilege serves a critical role in ensuring that clients obtain the best advice possible, and has therefore been justifiably afforded special status by the courts, there is at least one, unique situation where it should not be considered inviolate: where the assertion of the privilege precludes a criminal defendant from proffering a defence. While it is unclear how courts will rule, we suggest that practitioner's faced with this dilemma pursue the privileged communications and be prepared to litigate if necessary. One way to put the issue squarely before the court is to issue a subpoena *duces tecum* or *ad testificandum* to the former employer or directly to corporate counsel; assuming that the privileged communications are not forthcoming, counsel can move to compel, or respond to a motion to quash. Body text