LOYALTY OR LIBERTY: DEFENDING THE GENERAL COUNSEL IN A CORPORATE CRIMINAL INVESTIGATION

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I. THE DILEMMA OF A GENERAL COUNSEL IN A CORPORATE CRIMINAL INVESTIGATION

A. Corporate Criminal Investigations

The benefits of joining the ranks of in-house counsel are easy to identify: the chance to confront diverse legal issues, enjoyment of a stable work-life balance, and the culture and success of a single company. But the issues confronted by general counsels are changing as federal investigations into corporations continue to grow. One of those issues is the personal risk of prosecution that comes with leading a corporate legal team, and the ethical traps that result when both a lawyer, and his or her client, are under investigation.

The possibility of criminal consequences looms large over day-to-day decision-making. A general counsel at a Fortune 500 company must master myriad legal issues including accounting, securities, and antitrust law and may be required to develop expertise in specific areas such as government contracts, trade controls, environmental regulation, or healthcare law. Any misstep can result in an investigation of the entire company with criminal exposure for the corporation, its employees, and its legal counsel.\(^2\) The 2015 Yates Memo\(^3\) sharpened prosecutors’ focus on identifying and prosecuting individuals in addition to investigating corporations. This article analyzes the general counsel’s legal rights and ethical obligations after a criminal investigation has been initiated and includes practice tips for making it out of an investigation with one’s liberty and law license intact.

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\(^2\) In-house attorneys have even faced criminal charges under the strict liability responsible corporate officer doctrine. See United States v. Purdue Frederick Co., 495 F. Supp. 2d 569, 570 n.2, 576-77 (W.D. Va. 2007) (accepting guilty plea from chief legal officer and others).

When a government investigation implicates the conduct of in-house attorneys, the general counsel’s loyalties—to him or herself and to the company—are necessarily divided. Protecting the company often means protecting the privileged nature of communications between the general counsel and other, non-lawyer executives. Protecting the general counsel as an individual typically means convincing investigators, prosecutors, or a jury that proper legal advice was given. Protecting the general counsel, therefore, frequently requires piercing the attorney-client privilege. When, how, and to what extent a general counsel may unilaterally waive the attorney-client privilege between him or herself and the company-client is not always clear, but the decision to do so can have significant effects on the prosecution of the general counsel, his or her colleagues, or the company itself.

B. Conflicting Interests

A general counsel or other in-house attorney owes a duty of loyalty to his or her client, i.e., the company, and not to any one executive, including him or herself.\textsuperscript{4} When the company is facing a criminal investigation, loyalty and zealous advocacy require the general counsel to seek the best result possible for the institutional client. The best result possible in a federal investigation of a corporation could be a declination, non-prosecution agreement, or civil resolution. Sometimes, the company can convince the government that no malfeasance occurred. In other instances, however, the organization’s best move is to cooperate with an investigation, admit wrongdoing, pay a fine, and identify employees or officers who committed misconduct, exposing those individuals to potential prosecution.\textsuperscript{5}

The company’s need to cooperate with the government’s prosecution of individuals may force the general counsel to act against his or her own interests. As one court observed, “[t]here will always be some suspicion that a client who engages in illegal activity in a heavily regulated industry may be aided and abetted by his attorney.”\textsuperscript{6} Heavily regulated industries like finance, healthcare, or energy create ample opportunity for legal gray areas. Shifting and complex legal landscapes lead companies to adopt aggressive strategies erroneously believed to be lawful. Executives often admit that conduct occurred but deny understanding that the conduct was illegal or even wrong. Reliance on formal legal advice from the general counsel’s office—or even tacit approval based on inaction by a company’s lawyers—is a frequent good-faith defense.

Claims of good faith by an individual under investigation require prosecutors to determine whether a person sincerely believed his or her conduct to be lawful or whether after-

\textsuperscript{4} Model Rules of Prof’l Conduct r. 1.7 cmt. 1; see also Model Rules of Prof’l Conduct r. 1.13 cmt. 10 (noting that should the organization’s interest become adverse with an officer’s interest, corporate counsel should advise the officer that counsel is there to represent the organization, not the officer).


the-fact excuse-making is hiding something more sinister. To figure out which claims are sincere, prosecutors look for corroborating evidence. Chief among this evidence is the involvement of corporate legal departments in the conduct under investigation. Facing a “vast and complicated array of regulatory legislation . . . , corporations . . . ‘constantly go to lawyers to find out how to obey the law.’” To determine whether a company or its individual employees have committed intent-based crimes, prosecutors need to know whether the company’s non-lawyer employees understood the law and whether the company’s lawyers were aware of all material facts when advising those employees. Figuring out whether a good-faith defense is valid often requires a prosecutor to examine that advice.

“The attorney-client privilege is strongest[, however,) where a client seeks counsel’s advice to determine the legality of conduct before taking action.” Depending on the general counsel’s duties, legal advice given to others at the company, as well as the communications to and from the general counsel that led to that advice, are likely privileged. This evidence remains—at least temporarily—out of prosecutors’ reach, leaving them only with unprovable (and un-disprovable) claims that employees acted in good-faith reliance on the advice of counsel. If prosecutors believe that the employees’ conduct violated the law, even if they individually

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9 71 A.L.R.6th 249 § 2; see also Upjohn, 449 U.S. at 394 (communications regarding legal advice are typically privileged).

10 The attorney-client privilege applies to communications to obtain legal advice. Communications to obtain business advice, however, are not privileged. For an excellent discussion of this complex area of law, see EDNA SELAN EPEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 443 (6th ed. 2017).

11 This article does not reach the issue of corporate waiver of attorney-client privilege. Although a prosecutor is instructed not to push for waivers of attorney-client privilege, see Mark Filip, Deputy Attorney General, Memorandum re Principles of Federal Prosecution of Business Organizations (Aug. 28, 2008), available at https://www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf, individuals’ claims of good faith combined with a company’s broad invocations of privilege may leave the prosecutor little choice. Prosecutors sometimes hint at their desire for a privilege waiver by stressing the importance of openness, transparency, and sharing information in obtaining a speedy and positive resolution for the company. The company—and specifically the general counsel—must evaluate whether the communications protected by the privilege should be disclosed or withheld. Furthermore, if a prosecutor has credible evidence that the legal advice provided by a general counsel was sought by non-lawyers in order to further the commission of a crime or other fraudulent conduct, he or she may seek a court order disclosing privileged communications or material related to that advice under the crime-fraud exception to the attorney-client privilege doctrine. See, e.g., United States v. Zolin, 491 U.S. 554, 556 (1989).
acted in good faith, the legal advice itself becomes suspect and the general counsel may become the new focus of the investigation.

Corporate counsel can and do face prosecution for participating in their employers’ unlawful schemes. But how can a general counsel who maintains his or her innocence prove it when the evidence that would show the lawyer gave the right advice or was not provided a material fact is protected by the company’s attorney client privilege? This article explains one option: the self-defense exception to the attorney-client privilege.

II. THE SELF-DEFENSE EXCEPTION

Although the exact standard may vary from case to case, the Model Rules of Professional Conduct permit an attorney to “reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client . . .” \(^{12}\) The self-defense exception dates back to the nineteenth century, \(^{13}\) but most courts trace the modern doctrine to *Meyerhofer v. Empire Fire & Marine Insurance Co.* \(^{14}\) In *Meyerhofer*, the Second Circuit held that consistent with New York’s code of ethics, an attorney had the right to reveal confidences or secrets necessary to defend himself against a civil suit in which he, his

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\(^{12}\) MODEL RULES OF PROF’L CONDUCT R. 1.6 (b)(5).

\(^{13}\) Mitchell v. Bromberger, 2 Nev. 345, 349 (1866) (holding that justice requires that “whenever in a suit between the attorney and client the disclosure of privileged communications becomes necessary to the protection of the attorney’s own rights, he is released from those obligations of secrecy which the law places upon him”); Nave v. Baird, 12 Ind. 318, 320 (1859) (holding that when a client sues his attorney for disloyalty or poor performance, the attorney may testify about the content of otherwise confidential communications); Rochester City Bank v. Suydam, Sage & Co., 3 Code Rep. 249, 254 (N.Y. Sup. Ct. 1851) (“Where an attorney or counsel has an interest in the facts communicated to him, and when their disclosure becomes necessary to protect his own personal rights he must of necessity be exempted from the obligation of secre[c]y.”).

\(^{14}\) 497 F.2d 1190, 1194-95 (2d Cir. 1974).
former employer, and his former client were named as co-defendants.\textsuperscript{15} Meyerhofer’s holding has since replayed itself in civil,\textsuperscript{16} criminal,\textsuperscript{17} and administrative\textsuperscript{18} contexts.

\textbf{A. When and How to Invoke the Self-Defense Exception}

When a general counsel’s conduct is under investigation and privileged materials may exonerate him or her, the question of breaking privilege can quickly go from “if” to “when.” For personal and reputational reasons, an attorney will likely wish to end his or her time in the government’s cross-hairs as soon as possible. The self-defense exception clearly permits disclosure of privileged communications to defend oneself at trial.\textsuperscript{19} But for many attorneys, trial is too late. Luckily, attorneys need not wait that long.

Courts have consistently held that no formal charges are necessary to invoke the self-defense exception.\textsuperscript{20} An attorney who learns of an investigation may use the self-defense

\textsuperscript{15} Id. at 1195-96 (noting that the civil suit’s allegations against the lawyer were “serious” and the costs of defending such an action would be “very substantial”).


\textsuperscript{19} See Amrep, 418 F. Supp. at 474 (general counsel could disclose exculpatory information in his own defense at trial despite privilege held by co-defendant corporation); MODEL RULES OF PROF’L CONDUCT r. 1.6 cmt. 10 (“Where a legal claim or disciplinary charge alleges . . . misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense.”). \textit{But see} United States v. Ross, 190 F.3d 446, 453 (6th Cir. 1999) (affirming attorney’s conviction despite trial court’s prohibition of certain privileged testimony without analyzing self-defense exception). In \textit{Amrep}, the court further noted that the self-defense exception may well become moot during the joint trial of a client and the client’s attorney. 418 F. Supp. at 474-75. To necessitate a defense case—and potential testimony from the attorney-defendant—the government must adduce sufficient evidence to survive a mid-trial Rule 29 motion. \textit{Id}. The government’s prima facie case of fraud involving both client and attorney will often suffice to dissolve the attorney-client privilege under the crime-fraud exception. \textit{See id}.

\textsuperscript{20} E.g., United States v. Schussel, 291 F. App’x 336, 346 (1st Cir. 2008) (“[A]n attorney need not wait to be indicted before making such disclosures.”); United States v. Weger, 709 F.2d 1151, 1157 (7th Cir. 1983) (“[I]t would be senseless to require the law firm to be stigmatized by an indictment prior to allowing them to invoke [the self-defense exception].”); \textit{Forma}, 117 F.R.D. at 524-25 (“[F]ormal charges need not have been issued for the self-defense exception to apply. . . . Requiring [an attorney] to wait until he was named as a defendant would have required him to expend substantial resources in his defense, tarnished his professional reputation, and threatened his livelihood as a securities lawyer.”); MODEL
exception to disclose privileged communications to the grand jury,\textsuperscript{21} the investigating prosecutors,\textsuperscript{22} an investigating agency,\textsuperscript{23} and civil counterparties in related litigation.\textsuperscript{24} There is no bright-line rule that dictates whether an investigation has proceeded far enough to merit invocation of the self-defense exception. A conservative interpretation of the case law,\textsuperscript{25} however, reflects two requirements that counsel should establish before disclosing privileged material.

First, the attorney should wait until an enforcement agency or prosecutor accuses the attorney of wrongdoing. The accusation requirement—although somewhat subjective—is frequently satisfied by inquiring about the attorney’s status in the investigation. A response that the attorney is a “potential target” or that the attorney is “not merely a fact witness and should assume the worst” is sufficient to satisfy the self-defense exception’s first requirement.\textsuperscript{26}

Second, the attorney should only disclose privileged material if there is an “objective factual basis for the allegation” sufficient to “support[] a reasonable suspicion” that the attorney committed a crime.\textsuperscript{27} Outside counsel is particularly useful at this point of analysis because

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\item \textsuperscript{21} In re Friend, 411 F. Supp. 776, 777 (S.D.N.Y. 1975).
\item \textsuperscript{22} \textit{Schussel}, 291 F. App’x at 346; \textit{Omni}, 634 F. Supp. at 1420-21.
\item \textsuperscript{23} \textit{Forma}, 117 F.R.D. at 521, 525-26; see Rosen v. N.L.R.B., 735 F.2d 564, 576 (D.C. Cir. 1984) (noting that an attorney could argue that the self-defense exception should apply to an administrative hearing where the attorney was found to have suborned his client’s perjury).
\item Grassmueck v. Ogden Murphy Wallace, P.L.L.C., 213 F.R.D. 567, 572 (W.D. Wash. 2003) (law firm facing ongoing lawsuit and impaneled grand jury sought permission to disclose documents to both civil counterparties and prosecutors).
\item At least one secondary source purports to require that the accusation against the lawyer “imminently threaten . . . serious consequences.” \textit{Restatement (Third) of the Law Governing Lawyers} § 64. No case appears to have applied this requirement. Nor should one. Adding an imminence requirement would burden the disclosing attorneys and prolong any investigation, adding expense for both the clients and investigating agencies.
\item See, e.g., \textit{Schussel}, 291 F. App’x at 346 (attorney was notified that he was a “potential target” of an ongoing tax fraud investigation); \textit{Forma}, 117 F.R.D. at 521 (SEC refused to answer whether outside counsel was a target, saying only “that he was not merely a fact witness and should assume the worst”). But see United States v. Weger, 709 F.2d 1151, 1156-57 (7th Cir. 1983) (noting in dicta that the court “would most likely hold” that an attorney could disclose at her client’s trial despite the lack of any showing that any enforcement was a real possibility because “there could have been a reasonable belief” that the attorney was involved in the client’s fraud).
\item See \textit{Forma}, 117 F.R.D. at 525-26 (analyzing which standard to apply); cf. \textit{Weger}, 709 F.2d at 1156-57 (7th Cir. 1983) (using a hypothetical “reasonable belief” standard in dicta). Other cases have required less. See, e.g., First Fed. Sav. & Loan Ass’n of Pittsburgh v. Oppenheim, Appel, Dixon & Co., 110 F.R.D. 557, 566 (S.D.N.Y. 1986) (requiring only that the accusation was” not pretextual”).
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general counsel may lack expertise in criminal law and may have their objectivity questioned due to their overriding interest in disclosing privileged exculpatory information.

Clients under investigation are often predictably unhappy to learn that their lawyer has disclosed privileged communications to prosecutors. One way to mitigate this unhappiness or any associated reputational harm may be to notify the client prior to disclosure. The only circuit court to rule directly on the issue, however, has held that a lawyer does not have a duty to notify the client before invoking the self-defense exception. The court implied that it would consider requiring notice if the disclosing attorney was being manipulated by an unethical prosecutor abusing the exception. Providing a warning may mitigate professional consequences, but it does not appear to be necessary.

B. What May Be Disclosed Under the Self-Defense Exception

The self-defense exception is not a license to become the government’s star witness. In Morin v. Trupin, the defendant’s former in-house counsel promised to testify and “cooperate fully with plaintiffs’ lawyers’ investigation” into his former employer. In return, the plaintiffs promised to dismiss the attorney from their civil suit against the employer. The court held that by promising to “cooperate fully,” the attorney went beyond the disclosure “necessary to establish his innocence” and therefore violated his ethical obligations.

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28 See, e.g., In re Nat’l Mortg. Equity Corp. Mortg. Pool Certificates Sec. Litig., 120 F.R.D. 687, 690 (C.D. Cal. 1988) (lawyer warned client, which allowed client to move for a protective order); Forma, 117 F.R.D. at 521, 522 (lawyer asked client for a waiver but claimed he would testify in self defense regardless of client’s answer); United States v. Omni Int’l Corp., 634 F. Supp. 1414, 1420 (D. Md. 1986) (lawyer filed application with the court allowing his client to object); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 64 (“Prior to making disclosure, a lawyer must if feasible inform the affected client that the lawyer contemplates doing so and call upon the client to authorize the disclosure or take other effective action to meet the charge.”).

29 Schussel, 291 F. App’x at 346. The prosecutor may also ask that lawyer to not to disclose to the client that they have invoked the self-defense exception. This request does not appear to have arisen in the case law.

30 Id. (“While we are mindful of Schussel's argument that notice is required due to the potential manipulation of an attorney by an overzealous or unethical prosecutor accusing the attorney of criminal wrongdoing in order to get access to documents that might be helpful in building a case against the client, Schussel has cited no evidence that such was the case here.”).


32 Id. at 953-54.

33 Id. at 956. No case appears to address whether signing a cooperation agreement could ever be reasonably necessary to an attorney’s defense. The plain language of the Model Rules implies, however, that this loophole would not work. The Model Rules do not empower an attorney to take any steps whatsoever in self-defense. Instead, they permit “reveal[ing] information.” See MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(5).
The prevailing rule is one of reasonable necessity. Disclosure of protected materials or testimony is permitted only to the extent reasonably necessary to exculpate the lawyer from threatened charges or defend the lawyer against pending charges. While most courts have applied the “reasonably necessary” standard without further discussion, the Southern District of New York has defined “reasonably necessary” as “likely to provide significant assistance to [the attorney’s] defense.” The court expanded on this definition, permitting a general counsel to explain what he knew about the issue in dispute, what he did about the issue, what he advised his client to do, and what he abstained from doing. Similarly, the First Circuit permitted a lawyer to tell the government the source of misstatements to the IRS and produce supporting documents because both disclosures constituted “information showing that [the lawyer] should not be charged.” In contrast, the Restatement of Law Governing Lawyers requires that disclosure be “a proportionate and restrained response to the charges” and that “options short of use or disclosure have been exhausted.” No case appears to have adopted this higher standard.

34 Although disclosure of documents is more typical, several cases have approved of providing testimony in self defense. See, e.g., In re Nat’l Mortg. Equity Corp. Mortg. Pool Certificates Sec. Litig., 120 F.R.D. 687, 692 (C.D. Cal. 1988) (permitting deposition testimony of attorneys to the extent reasonably necessary to defend themselves); S.E.C. v. Forma, 117 F.R.D. 516, 519 (S.D.N.Y. 1987) (denying motion to suppress deposition testimony); cf. Schussel, 291 F. App’x at 346 (holding that Massachusetts Rules of Professional Conduct permit an affidavit from counsel because it contained “information showing that he should not be charged”); United States v. Weger, 709 F.2d 1151, 1156-57 (7th Cir. 1983) (noting in dicta that the court “would most likely hold” that an attorney could testify in self defense even at his client’s trial where no charges were filed against the attorney because the government “could have [had] a reasonable belief” that the attorney had conspired in the fraud).

35 Grassmueck v. Ogden Murphy Wallace, P.L.L.C., 213 F.R.D. 567 (W.D. Wash. 2003) (authorizing disclosure if the law firm invoking the exception “determine[s] that documents . . . are ‘reasonably necessary’ to its defense”); National Mortgage, 120 F.R.D. at 690 (“[D]isclosure should be no greater than the lawyer reasonably believes necessary to vindicate innocence.”) (quoting ABA, THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT: THEIR DEVELOPMENT IN THE ABA HOUSE OF DELEGATES 54 (1987)); United States v. Amrep Corp., 418 F. Supp. 473 (S.D.N.Y. 1976) (authorizing disclosure of exculpatory information necessary to the lawyer’s defense); MODEL RULES OF PROF’L CONDUCT r. 1.6 cmt. 16 (permitting disclosure “only to the extent the lawyer reasonably believes necessary to accomplish one of the purposes specified”); see also Schussel, 291 F. App’x at 346 (approving of disclosing “information showing that [outside counsel] should not be charged,” specifically “a limited number of documents deemed necessary to prove [counsel]’s innocence, along with an affidavit by [counsel]”). In Schussel, the court emphasized that the lawyer had not turned over his entire client file, but only the information showing that he should not be charged. 291 F. App’x at 346.


37 Id.

38 Schussel, 291 F. App’x at 341.

39 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 64.
Several courts have established procedures to review proposed disclosures for reasonable necessity. In United States v. Omni International Corp., for example, a district court required extensive oversight for a proposed proffer by Omni’s general counsel. First, the court required that the government submit proposed questions and topics for judicial review. Second, the general counsel submitted responses to the questions for in camera judicial review. Third, the court ruled on which areas of inquiry were relevant and permitted by the self-defense exception. Fourth, the attorney proffered responses to the government only with a stenographer present. The resulting transcript remained under seal. The Fourth Circuit declined a motion to stay the court’s order and apparently “approved the procedures.” Although several other courts have applied similar in camera review procedures on a smaller scale, no court appears to have held that such review is required by law.

III. CONSEQUENCES

The reasonable necessity limitation means little if applying the self-defense exception effects a broad waiver of privilege. A broad waiver would also reward those who make bad-faith accusations of attorney misconduct. The very basis of attorney-client privilege—supporting client expectations that they can speak candidly—would be undermined by permitting an attorney to waive that privilege without the client’s consent. For these reasons, the Model Rules advise lawyers that they should seek “appropriate protective orders or other arrangements” in an effort to “limit[] access to the [privileged] information” when possible.

Several courts considering the self-defense exception’s consequences have held that even if the attorney-client privilege against disclosure is lost, the client retains a privilege against use

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40 See United States v. Omni Int’l Corp., 634 F. Supp. 1414, 1420 (D. Md. 1986) (noting the purpose of this oversight to “ensure that the rights of the attorney’s former clients are not compromised, or that, if they are compromised, the clients will be able to seek appropriate remedies”).

41 Id. at 1420-21. Despite these extensive procedures, the prosecutors ultimately found the general counsel incredible and he was indicted four days later.

42 Id. at 1421. The authors have been unable to locate a public written order from the Fourth Circuit denying the stay or approving the procedures.

43 In re Nat’l Mortg. Equity Corp. Mortg. Pool Certificates Sec. Litig., 120 F.R.D. 687, 692 (C.D. Cal. 1988) (undertaking in camera review and concluding that disclosure was reasonably necessary because the materials were “likely to provide significant assistance to the attorney’s defense”); First Fed. Savings & Loan Ass’n of Pitt. v. Oppenheim, Appel, Dixon & Co., 110 F.R.D. 557, 567 (S.D.N.Y. 1986) (reviewing in camera documents to be released to ensure that they were reasonably necessary to general counsel’s civil defense).

44 See, e.g., Upjohn v. United States, 449 U.S. 383, 389 (1981) (stating that the privilege’s purpose is to “encourage clients to make full disclosures to their attorneys”); Fisher v. United States, 425 U.S. 391, 403 (1976) (noting that clients “would be reluctant to confide” in lawyers if the privilege were not available); EPSTEIN, supra note 9, at 4-12.

45 MODEL RULES OF PROF’L CONDUCT r. 1.6 cmt. 16.
of the disclosed documents. This approach aligns with the self-defense exception’s purpose: lawyers should be able to protect themselves, not bolster the prosecution’s case against their clients. Several civil courts have applied the same subject-matter waiver that would result from a client deciding to waive privilege. At least one court has also staked out a middle ground, applying a “narrowly construed” subject matter waiver but prohibiting disclosure outside of the instant litigation.

The more likely consequence occurs outside the courtroom. A company may choose to terminate a general counsel who discloses privileged information to protect him or herself. A client seeing his or her attorney forced into cooperating will often feel “uncertain” or “suspicious” “that his legitimate trust in his attorney may be subject to betrayal.” Disclosure protected by the self-defense exception is not a step to be taken lightly. Professional and personal consequences are sure to follow. If forced to choose between loyalty and liberty, however, an

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46 See, e.g., United States v. Schussel, 291 F. App’x 336, 343 (noting that the lower court prohibited the government from using documents produced under the self-defense exception unless the government could pierce attorney-client privilege in another way); Omni, 634 F. Supp. at 1422 (prohibiting the government from using information proffered in the general counsel’s self defense against his corporate employer at trial); id. at 1421 (instructing that disclosures are to be used “to attempt to convince the government that [the general counsel] should not be indicted” and “for no other purpose”). Similarly, in In re Friend, the court noted “the continuing assertion by the corporation of its attorney-client privilege with respect to [the disclosed] documents.” 411 F. Supp. 776, 777 (S.D.N.Y. 1975). After the attorney’s and corporation’s indictment, the corporation moved to sever claiming that the attorney’s use of these documents would prejudice the corporation at trial. United States v. Amrep Corp., 418 F. Supp. 473, 474 (S.D.N.Y. 1976). Although the district court denied the motion to sever because the corporation failed to offer “anything concrete to show prejudice,” the court acknowledged that prejudice justifying severance remained a possibility. Id. at 475. Such prejudice could come to fruition if the corporation retained privilege despite the attorney’s disclosure in self-defense.


48 In re Nat’l Mortg. Equity Corp. Mortg. Pool Certificates Sec. Litig., 120 F.R.D. 687, 692 (C.D. Cal. 1988) (reasoning that such a result was necessary to prevent unfairness); cf. United States v. Ballard, 779 F.2d 287, 292 (5th Cir. 1986) (client’s lawsuit against attorney effected subject-matter waiver in civil litigation but did not waive privilege in subsequent, unrelated proceedings).

49 United States v. Edgar, 82 F.3d 499, 507 (1st Cir. 1996).

50 An attorney considering unilaterally breaching attorney-client privilege should also consider potential malpractice liability. While strict adherence to ethical rules is often a strong defense against a malpractice claim, no defense is bulletproof, especially in an area so fraught with danger.
attorney may be comforted by the fact that his or her law license will not be a necessary sacrifice to obtain exoneration.