Is it Possible to Gain the Advantage of an "Advice of Counsel" Defense Without Suffering the Waiver Consequences?

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In his May 7, 2014 “Privilege Points” release, Tom Spahn discusses waiver of privilege and “advice of counsel”:

The logistics of privileged communications generally do not deserve protection – so a company executive can testify that she obtained a lawyer's advice without risking a waiver. See, e.g., Mendillo v. Prudential Ins. Co. of Am., Civ. No. 3:12CV1383 (WWE), 2014 U.S. Dist. LEXIS 22451, at *17 (D. Conn. Feb. 20, 2014) (finding that a plaintiff had not waived privilege protection by testifying at a deposition that "she had conversations with" her lawyer). However, a company would clearly waive privilege protection by affirmatively asserting an "advice of counsel" defense. Can a company "thread the needle" by presenting the logistical facts to the jury with the hope that it will essentially give the company the advantage of the defense – without its cost?

In DeWitt v. Southwestern Bell Telephone Co., plaintiff argued that Southwestern waived its privilege when employees testified that "they took certain actions after they 'cleared it with legal' or 'got approval from legal.'" Case No. 12-2605-SAC, 2014 U.S. Dist. LEXIS 22760, at *17 (D. Kan. Feb. 24, 2014) (internal citation omitted). The court rejected plaintiff's argument, concluding that "a deponent does not waive the attorney-client privilege when, in response to questions, the deponent references its interactions with the legal department." Id. The court also rejected plaintiff's argument that Southwestern Bell waived its privilege by filing defenses pointing to the company's "good faith" handling of plaintiff's disability. The court noted that Southwestern pledged "that at trial it 'does not intend to offer or rely on evidence of the substance of any legal advice it received concerning the disciplinary actions taken against Plaintiff.'" Id. at *19 (internal citation omitted). This promise pointedly dealt only with the "substance of" legal advice, not the logistics of company executives' interactions with the law department.

Some courts would expect companies hoping to avoid a waiver to explicitly disclaim any intent to affirmatively introduce at trial either the "substance" or the fact of such privileged communications.