Several Courts Deal with the "At Issue" Doctrine: Part I

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In his October 15, 2014 “Privilege Points” release, Tom Spahn discusses implied/at-issue waivers of attorney client privilege:

The "at issue" doctrine stands at the extreme end of the implied waiver spectrum. In courts recognizing the doctrine, litigants can trigger an attorney-client privilege waiver without disclosing, relying on, or even referring to privileged communications. The waiver instead results from the litigant's affirmative reliance on some argument that necessarily implicates privileged communications.

In United States v. Juan, Eastern District of Virginia Judge Robert Payne dealt with a criminal defendant who signed a statement indicating that he fully understood a plea agreement — but later argued (through counsel) that there was "utter confusion" about what he was admitting in his statement. Crim. No. 3:14cr25-2, 2014 U.S. Dist. LEXIS 121258, at *9 (E.D. Va. Aug. 29, 2014) (internal citation omitted). Although the defendant argued that "he has not challenged the effectiveness or the competency of his former counsel," Judge Payne found that defendant's arguments "necessarily mean that he is calling into question" his previous lawyer's competence and adequacy — thus entitling the government "to elicit testimony from [the defendant's ] former counsel on those issues." Id. at *13, *14. The court limited the discovery to the defendant's "claims of 'utter confusion' without any testimony about possible defenses or potential claims of innocence." Id. at *15.

"At issue" waivers can arise even if the privilege's owner disclaims any intent to disclose or rely on withheld communications. Although it can be risky to apply criminal privilege case law in the civil context, litigants should assess "at issue" waiver risks whenever they seek some advantage by claiming confusion or ignorance. Next week's Privilege Point will address another "at issue" decision decided the same day — which reached a different conclusion.