Does Asserting a "Good Faith" Defense Trigger a Privilege Waiver?

In his February 20, 2013 “Privilege Points” release, Tom Spahn discusses implied waivers of privilege:

In contrast to express waivers (which involve the disclosure of privileged communications), implied waivers can occur without such disclosure. The most common type of implied waiver involves the client's explicit reliance on the fact of a privileged communication – such as filing an "advice of counsel" affirmative defense.

The most extreme form of implied waiver is called an "at issue" waiver. This type of waiver can occur if the client affirmatively advances some position that justifies analyzing the client's mental state or motivation – including any legal input. In Wang v. Hearst Corp., No. 12 CV 793 (HB), 2012 U.S. Dist. LEXIS 179609, at *3 (S.D.N.Y. Dec. 19, 2012), defendant Hearst Corp. filed an affirmative defense that it had acted in "good faith" in trying to comply with the Fair Labor Standards Act and a parallel New York law. Plaintiff claimed that the defense triggered an "at issue" waiver. Hearst resisted, "citing court cases from other circuits for the proposition that '[t]here are many ways to establish good faith under the FLSA that do not involve the advice of counsel.'" Id. at *5. Judge Harold Baer rejected defendant's argument, citing an earlier Second Circuit case holding that "testimony that [a litigant] thought his actions were legal would have put his knowledge of the law and the basis of his understanding of what the law required in issue." Id. at *6 (citation omitted). The court did not order defendant to immediately produce the documents, instead directing an in camera review which presumably would use this unforgiving standard.

"At issue" waivers represent a real danger, because corporations can trigger such waivers without disclosing any privileged communications, or explicitly relying on or even referencing privileged communications.