

Attorney - Client Privilege vs. Ineffective Assistance of Counsel

By: Brett A. Purtzer; March 2004

Whenever a client loses in trial, and an appeal is filed, one of the issues frequently raised is ineffective assistance of counsel. Recently, the Ninth Circuit Court of Appeals set forth some parameters regarding the scope of the waiver of the attorney/client privilege when a claim of ineffective assistance of counsel is raised. See Bittaker v. Woodford, 331 F.3d 715, (9th Cir. 2003).

In Bittaker, a federal habeas petition raised the issue of ineffective assistance of counsel after Bittaker was sentenced to death for multiple murders. The district court entered an order limiting the use of the privileged materials to only that of addressing the federal habeas petition. The long-standing rule was that the defendant, when raising such a claim, waives the attorney/client privilege as to all communications with his allegedly ineffective lawyer. The question presented to the Ninth Circuit was the scope of the waiver.

In reviewing the history of the attorney/client waiver surrounding an ineffective assistance of counsel claim, the court differentiated between implied and express waivers. In ineffective assistance of counsel claims, the implied waiver applies and the court presents the party holding the privilege with a choice. If the party wants to litigate the claim, they then must waive the privilege to the extent necessary to give the responding attorney a fair opportunity to defend against the claim.

The Bittaker court focused on three aspects surrounding the waiver. First, the court imposes a waiver no broader than that necessary to insure that the responding attorney is allowed sufficient opportunity to address the claim. Second, the holder of the privilege may preserve the confidentiality of the privileged communication by choosing to abandon the claim that gives rise to the waiver condition. Third, the court imposing the waiver can bind the party receiving the privileged materials pursuant to the court's limitations and conditions.

When a claim of ineffective assistance of counsel is raised, and the defendant waives the attorney/client privilege, the concern, as expressed in Bittaker, is the scope of the waiver. If the ineffective assistance of counsel claim is valid and the attorney responding to the claim provides more information than is required to address the claim, such information might be

used by the prosecution in a re-trial of the defendant. Thus, this may likely seal the defendant's fate, as opposed to restoring the defendant to his or her pre-trial position absent waiver of the privileged information.

Bittaker addresses the above concern by placing limitations on the scope of the waiver. Such limitation, however, does not preclude the responding lawyer in what is disclosed. Rather, it allows the defendant the opportunity to decide whether he or she wants to continue with the claim once the response to the claim is received. Accordingly, Bittaker maintains the attorney/client privilege with respect to all aspects of a defendant's right to counsel, but also provides a framework in which to deal with ineffective assistance of counsel claims.

End

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