Attorney-Client Privilege Between Affiliated Entities: Who Owns the Privilege When Interests Diverge?
Navigating the Complexities of Joint Representations During Litigation, Spinoffs, Acquisitions or Insolvency

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Attorney–Client Privilege Between Affiliated Entities: Who Owns the Privilege When Interests Diverge?

Stephen A. Fogdall
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April 22, 2014
Concepts are simple on the surface, but complex and fact-specific in practice.

- Attorney-Client Privilege
- Work-Product Protection
- Waiver
- Joint Client Doctrine
- Common Interest Doctrine
Attorney–Client Privilege

Protects communication between a client and his or her attorney for the purpose of obtaining legal advice. It is a common law doctrine.

Privilege belongs to the client, not the attorney.
Communication is only protected if it is made in confidence. The privilege is waived if the communication is made in the presence of a third party or if the client subsequently shares a privileged communication with a third party.

While disclosure to a third party generally waives attorney–client privilege, in certain circumstances protected communications may involve third parties.
Protects documents prepared for, or in anticipation of, litigation.

Codified at FRCP 26(b)(3).
Disclosure of documents protected by the work–product doctrine to a non–adversary third party will usually not waive protection unless it “substantially increases the opportunity for potential adversaries to obtain the information.”
Policy Justifications

- Attorney–Client Privilege
  - Encourage clients to be truthful and open with their attorneys (“full and frank” disclosure).
  - Ensure that confidences revealed to an attorney will not be disclosed without consent.
  - Attorneys can be candid with clients about weaknesses and matters of uncertainty in the law.

- Work–Product Doctrine
  - Allow attorneys to prepare for trial without concern that other side might benefit or interfere.
  - Protects attorney mental processes.
Parties working under the supervision and control of an attorney to aid the attorney in providing legal advice are included within the scope of attorney–client privilege.

Fact-specific question, but privilege has been extended to parties, such as:

- Accountants
- Investigators
- Auditors
- Public–relations consultants
- Paralegals
- Translators
- Patent agents
Privilege Protections for Inter-Organization Communications:

- Joint Client Doctrine (also known as Co-Client Representation)
- Common Interest Doctrine (also known as Joint Defense, Community of Interest)
Joint Client Doctrine

- Protects communication between co-clients and their common counsel.

- Generally, when former joint clients sue each other, communications made in the course of joint representation are discoverable by the co-client, but remain privileged with respect to third parties.

- Attorney representing co-clients should terminate representation if the co-clients interests become adverse.
Exception: When an attorney improperly continues to represent joint clients whose interests have become adverse, their communications going forward are privileged against each other notwithstanding the lawyer’s misconduct. *Eureka Inv. Corp. v. Chicago Title Ins. Co.*, 743 F.2d 932 (D.C. Cir. 1984).

Attorney representing co-clients should terminate representation if the co-clients interests become adverse.
The common interest doctrine allows attorneys representing different clients with common legal interests to share information without waiving attorney–client privilege.

The common interest doctrine applies to maintain attorney–client privilege where the parties can show that: (1) they share a common legal interest with the party with whom the information was shared and (2) the statements for which protection is sought were designed to further that interest.
Common interest privilege should not be confused with the joint client privilege.

Common interest privilege applies only when the parties sharing the common interest have separate counsel.

Common interest privilege applies to communications between the parties’ attorneys, but not to communications shared directly between the represented parties.
II. INTER-ORGANIZATION PRIVILEGE ISSUES

Who Owns the Privilege When Interests Diverge?

- Can parent assert privilege against former affiliate?
- Can former affiliate waive the privilege?
Contexts

- Parent/Subsidiary
- New Management
- Bankruptcy
- Sale of Affiliated Company
- Post-Merger
- Board of Directors
A lawyer who represents a corporation does not automatically represent affiliated organization.

Whether a lawyer represents affiliated corporations depends on the particular circumstances (fact-specific inquiry).
Inter corporate communications (between parent and sub or two subs) can receive the same protection as comparable intra corporate communications.

Depends on:

- The relationship between the parent and subsidiary corporation (i.e. whether the parent owns a controlling interest in the subsidiary).
- The common interest that the parent and subsidiary may have in the subject of a particular communication.
Generally, counsel may advise an affiliate corporation without undermining attorney-client privilege (joint-client representation).

Issues arise, however, when the interests of the parent and subsidiary diverge.

- when parent releases control of subsidiary because of insolvency and bankruptcy (e.g. *Teleglobe*)
- sale of subsidiary
- Litigation between entities
In re Teleglobe Communications Corp.

Parties:

Bell Canada Enterprises, Inc. (“BCE”)
- Canada’s largest telecom company.
- Decides to stop funding subs, including Teleglobe.

Teleglobe, Inc.
- Canadian telecom company.
- Files for bankruptcy in Canada.

Subsidiaries (debtors)
- Wholly-owned U.S. subsidiaries of Teleglobe.
- File for bankruptcy in Delaware.
- Sue BCE and seeks discovery of documents.

Teleglobe USA Inc. v. BCE, Inc. (In re Teleglobe Comm’ns Corp.), 493 F.3d 345 (3d Cir. 2007)
Complaint alleges that BCE reneged on binding commitments to fund Teleglobe and negligently or fraudulently induced Teleglobe and subs to incur debt in reliance on commitments.

Subsidiary seeks production of privileged documents containing legal advice provided to BCE prior to termination of funding.

*Teleglobe USA Inc. v. BCE, Inc. (In re Teleglobe Comm’ns Corp.), 493 F.3d 345 (3d Cir. 2007)*
Debtors’ Discovery Arguments:

- In-house counsel represented all of the corporate family members in connection with the parent corporation’s funding decision.

- Alternatively, documents were subject to discovery under a “conflicted fiduciary” exception to attorney-client privilege.

Parent Corporation’s Response:

- No joint representation between parent and second-tier subs/debtors.

Teleglobe USA Inc. v. BCE, Inc. (In re Teleglobe Comm’ns Corp.), 493 F.3d 345 (3d Cir. 2007)
The Third Circuit’s Privilege Holdings:

- Subsidiaries are entitled to discover otherwise privileged information only if a joint-client relationship arose between the parent company and the second-tier subs/debtors.

- Question of fact: whether a parent and subsidiaries have jointly agreed to seek legal advice from counsel.

- “Conflicted fiduciary” exception may be applicable depending on when the debtors became insolvent.

- Remanded to District Court for further fact finding.
Lessons Learned:

- Be clear about the scope of parent–subsidiary joint representations before sharing information with counsel.
- Narrowly define the scope of representation.
- Obtain separate counsel on matters in which the parent and subsidiary are potentially adverse.
“When control of a corporation passes to new management, the authority to assert and waive the corporation’s attorney–client privilege passes as well. New managers installed as a result of takeover, merger, loss of confidence by shareholders, or simply normal succession, may waive the attorney–client privilege with respect to communications made by former officers and directors.” Commodity Futures Trading Comm’n v. Weintraub, 471 U.S. 343, 348 (1985).
In the absence of a trustee, the debtor in possession controls the corporation’s attorney-client privilege.

Where a trustee is appointed in a bankruptcy proceeding, the attorney-client privilege passes to that individual.

There is little case law that addresses the transfer of attorney-client privilege pursuant to a plan of reorganization or liquidation, accordingly it is best to identify who will control the privilege in a bankruptcy plan or liquidation trust agreement.
The buyer of a subsidiary corporation may have control to waive the privilege over pre-closing communications between the seller’s general counsel and the subsidiary’s officers concerning the sale negotiation.

Restatement rule regarding waiver of joint client privilege: Any co-client may invoke the privilege unless it has been waived by the client who made the communication. If a document embodies communications from two or more co-clients, all of those co-clients must join in the waiver. Restatement (Third) of the Law Governing Lawyers § 75 cmt. e.
Jurisdictional differences:

- Any attorney-client privilege attached to pre-merger communications pass to the acquirer in the merger, unless the parties agree otherwise in the merger agreement. *Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP*, 80 A.3d 155, 160 (Del. Ch. 2013).

- Seller transfers privilege to the buyer on most topics, except pre-merger privileged communication that relate to the merger. *Tekni-Plex, Inc. v. Meyner & Landis*, 674 N.E.2d 663, 671 (N.Y. Ct. App. 1996).
Facts:

- Buyers acquired the target company in a merger. The merger agreement provided that the merger shall have the effects set forth in the agreement and DGCL.
- DGCL provides that after a merger “all rights, privileges, powers and franchises” are vested in the surviving company.
- The merger agreement did not provide for any retention of privilege by the sellers.
- After the closing, the buyers sued the sellers alleging fraudulent concealment during the merger.
Holding:

- Chancellor Strine rejected *Tekni-Plex*, which held that the privilege remains with the seller for communications regarding the merger.

- DGCL’s provision that “all rights, privileges, powers and franchises” must be read broadly and includes attorney–client privilege.
Lessons Learned:

- Parties are free to vary by contract the automatic transfer of attorney-client privilege to the buyer.

- Sellers may want to negotiate a provision excluding privileged pre-merger negotiations from the assets transferred to the buyer.
Directors right to information includes privileged material.

Chancellor rejected defendants’ argument that a board majority can invoke attorney–client privilege against fellow director and deprive him of information.


- Treated director seeking privileged information as joint client of board’s counsel.

- Right of equal access to materials.

Recognized three limitations on a director’s ability to access privileged information:

1. Ex ante agreement
2. Special committee
3. Once sufficient adversity exists between the director and the corporation such that the director could not longer have a reasonable expectation that he was a client of the board’s counsel

Facts:

- Shareholders of Maxim Integrated Products, Inc., filed a derivative action naming several directors as defendants and alleging breach of fiduciary duty.
- Maxim’s Board formed a Special Committee to investigate the allegations. The Special Committee retained Orrick as outside counsel to assist in the investigation.
- Special Committee and counsel presented the findings to Maxim’s Board. Attorneys representing the director defendants were present at the meeting.
- Plaintiffs seek to discover communications from the investigation.

Maxim and Orrick assert attorney-client privilege. Orrick also asserts work product protection.

Court holds: Not protected!

- Plaintiffs had shown good cause under *Garner* framework to obtain discovery of communications.
- Even if Maxim and the Special Committee shared a joint privilege, they waived it when the Special Committee disclosed the report to the defendants and their attorneys. Presence of attorneys showed that defendants were attending the meeting in their personal (potentially adverse) capacities, not as fiduciaries.
- Maxim also waived the privilege by disclosing the reports conclusions to the public and NASDAQ.

Lessons Learned:

- Back to Basics: Disclosure to third parties (not for the purpose of legal advice) waives privilege.
- Absent waiver, communications between the Special Committee and its separately retained counsel probably would have been covered by attorney-client privilege.
- Refrain from disclosing the substance of investigation, except in general terms, in public statements or in submissions to government regulators.

III. PRACTICAL LESSONS

- Limit scope of engagement before sharing information.
- Be alert for potential conflicts after interests diverge.
Engagement letter for joint representation by outside counsel should contain:

- Scope of joint representation (limited to specific matters);
- Specify clients and note that representation is limited to those clients and not all affiliates;
- Note who controls the joint privilege in the event that the parties later become adverse.
- But lots of jurisdictional differences, must consult case law.

In-house counsel can also expressly limit the scope of representation for affiliate or subsidiary. Must be clearly stated in writing.

- Avoid disclosure of unrelated legal matters of the parent.
Be alert for potential conflicts issues during sale of subsidiary or transaction where the subsidiary may file for bankruptcy.

Retain separate counsel as soon as it appears that the parent and subsidiary’s interest may become adverse.

- If company is separating, end joint representation before any material legal work for the separation begins.
- If corporate affiliates need separate outside counsel, separate inside counsel should be assigned to monitor the firms.

Outline scope of joint representation in an engagement letter or sales agreement for spinoffs and acquisitions.
Questions?

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