Third Circuit Clarifies Attorney-Client Privilege Rules for Jointly-Represented Corporate Entities

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Modern corporations often have complex structures in which they can take advantage of benefits the corporate form offers in tax and other areas. At the same time, there has been an increasing trend for corporations to have a single in-house legal department that will provide legal advice to both the parent corporation and its subsidiaries. That structure presents questions about the existence and preservation of the attorney-client privilege, particularly when the subsidiary corporation is later sold or spun-off. Under the law, the subsidiary is a separate legal entity. Does an in-house lawyer who shares the parent's confidences with employees of the subsidiary waive the privilege so as to expose the communication to the world? If not, does the subsidiary have the unilateral right to waive the privilege? And, what happens if the parent and the subsidiary end up in litigation with each other? There has been no clear answer to those questions, or even agreement on how to approach them, in the case law.

In an important ruling late last month, *In re Teleglobe Communications Corp.*, No. 06-2915, 2007 U.S. App. LEXIS 16942 (3d Cir. July 17, 2007), the U.S. Court of Appeals for the Third Circuit provided answers to some of those questions.[1] *Teleglobe* provides pointed guidance to in-house counsel both on how to maintain privilege when providing advice to both parent company and subsidiary employees and how to ensure, in an appropriate case, that the parent (and the parent alone) will be able to control the privilege and its waiver.

The dispute arose out of a pretrial document production in a lawsuit by wholly owned United States subsidiaries of a Canadian telecommunications company formerly known as Teleglobe, Inc., who had filed for protection under Chapter 11 of the Bankruptcy Code, against Teleglobe's former parent, Bell Canada Enterprises, Inc. ("BCE"). Prior to the bankruptcy filing, BCE's in-house counsel provided legal advice to both BCE and Teleglobe employees and also retained outside counsel to provide advice to BCE. After the filing, the debtors sought production of the communications of in-house

[1] The Court applied Delaware law to the dispute, but also recognized that other jurisdictions follow the same principles.

counsel – both the communications and advice provided to BCE and the subsidiaries, and the communications of outside counsel copied to BCE's in-house department – on theories that BCE had waived the privilege by providing the communications to Teleglobe or by providing advice to Teleglobe on a matter of common interest.[2]

The Third Circuit began its analysis by describing the different ways that the question could be analyzed. First, the Court noted that one could ignore the corporate form and assume that the privilege regarding all communications by in-house legal staff at the parent to employees of the subsidiary remained intact and belonged to the parent. Although such a ruling would conform with the general corporate law principle that a parent corporation can control the activities of its wholly-owned subsidiary, it would be inconsistent with the value attributed in American law to the existence of separate corporate form. The Court rejected this analysis. Second, the Court considered whether communications by in-house counsel to employees of the subsidiary were subject to the "community-of-interest" or "common interest" privilege. Under this doctrine, otherwise privileged communications that are shared between the lawyers for two parties that have a common legal interest retain their privileged nature against third parties and cannot be waived absent the consent of both parties. The Court ruled that parents and subsidiaries are not in a community of interest as a matter of law – in fact, there may be situations where they have distinct legal interests or where the communications are not shared between lawyers for both the parent and the subsidiary.

The Court ultimately decided that legal advice provided by in-house counsel at the parent level to employees of a subsidiary should be analyzed under the law applicable to the co-client or joint-client privilege. Under this doctrine, a lawyer can serve multiple clients on the same matter as long as all clients consent and there is no substantial risk of the lawyer being unable to fulfill her duties to them all. When co-clients and their common attorneys communicate with one another, those communications are in confidence for privilege purposes and are protected from disclosure to third parties. Moreover, a single party to the common representation (whether parent or subsidiary) can waive the privilege unilaterally only with respect to that client's own communications with the lawyer and only so long as the communication relates only to the communicating and waiving client. If the communication is also with the second party (*e.g.*, employees of the subsidiary) or if it relates to the subsidiary, then the subsidiary too must consent to the waiver before the parent can use the communications with a third party.

[2] Teleglobe also made arguments of less general significance including that BCE had made a binding commitment to share the documents and that BCE had engaged in discovery abuse and should be precluded from asserting the privilege as a sanction.

Finally, the co-client privilege is subject to the "adverse litigation" exception to the joint-client privilege: when former co-clients sue one another, all communications made in the course of the joint representation are discoverable. Notably, the Court ruled as a matter of first impression that this rule is also applicable between parents and subsidiaries. In other words, in situations where the interests of parties jointly represented by counsel become adverse, all communications made during the course of the joint representation are discoverable between the joint clients, even where the joint clients are or were owned, either wholly or partly, by the same entity. The Court justified this ruling by invoking the value of "clarity and certainty in privilege law," and "more predictable[] ground rules."

In the particular dispute before it, the Court remanded for the District Court to determine whether in-house counsel jointly represented both the parent and the subsidiary and the scope of that joint representation. If in-house counsel represented both parties, then the parent company's documents within the scope of that joint representation were discoverable by the subsidiary. The Court also ruled that if documents prepared by outside counsel but funneled through in-house counsel fell within the scope of the joint representation, those documents would also be discoverable by the subsidiary – even if they were never intended to be provided to the subsidiary.

Although the dispute before the Court was relatively fact-bound, the principles enunciated are not, as the Court itself recognized. They can be implicated whenever there is a divergence of interest between a parent and a former subsidiary – in situations where parent and subsidiary sue each other or one or the other sues a third party and the use of otherwise privileged documents becomes an issue. Thus, the Court provided important guidance for in-house counsel. The Court counseled that it did not intend in-house counsel to forego providing advice to the subsidiaries. To the contrary, it recognized that in-house counsel provide valuable advice to subsidiaries in many situations, and that if a corporation cut off that advice the subsidiaries would lose the benefit of the advisors who know the most about its legal health and would risk increased liability – even if the effect of providing that advice gave the subsidiary some control over the use of privileged materials. At the same time, however, it provided advice for when the corporation desires its in-house staff to have communications that are protected against a subsidiary. The Court stressed that: "it is important for in-house counsel in the first instance to be clear about the scope of parent-subsidiary joint representations," and added: "By properly defining the scope, they can leave themselves free to counsel the parent alone on the substance and ramifications of important transactions without risking giving up the privilege in subsequent adverse litigation."

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