

What's Mine Is Not Yours

Former Officers and Directors, and a Corporation's Attorney: Client Privilege

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An officer or director's company exit often feels like a divorce, with post-departure monetary payments and document-custody issues dominating the immediate aftermath. Companies are quick to enforce non-compete agreements and protect trade secrets as the divorce unravels, but often do not consider protection of legal communications in which the officer or director participated. And when it comes to discovery of a company's privileged communications in post-departure litigation, what's mine is not always yours.

Former officers and directors inherently maintain insider knowledge, including the contents of privileged e-mails and other communications that they created or received. The officer/director may personally possess these privileged documents because he extracted them prior to exiting the company, or he may request such documents during the discovery process.

The corporate attorney-client privilege belongs to the corporation, but corporations can only act and communicate through its officers, directors, and agents. In post-divorce litigation between the company and its former officer/director, the question arises whether the corporation may prevent use of privileged, officer/director-created communications or

whether the privilege equally belongs to the former officer/director turned adversary. Courts grappling with these issues take one of two positions — the collective-corporate-client approach, or the entity-as-client approach.

THE COLLECTIVE-CORPORATE-CLIENT APPROACH

The collective-corporate-client approach, first recognized in the Delaware Chancery Court, follows the legal rationale supporting the joint-client doctrine, and holds that former officer/directors may discover privileged documents in which they were involved. *Kirby v. Kirby*, 1987 WL 14862 (Del. Ch. July 29, 1987). Courts premise this approach on the theory that "there is one collective corporate client which includes the corporation and each individual member of the board of directors rather than just the corporation alone." *Montgomery v. eTreppid Techs., LLC*, 548 F. Supp. 2d 1175, 1183 (D. Nev. 2008).

Dissident former officers/directors turned adversaries assert that the collective-corporate-client approach entitles them to privileged documents. They argue that, at the time they communicated with corporate attorneys, the corporation was a client and the then-current officers/directors were also clients. Under this theory, they ask courts to consider the entity and the officer/director as joint clients and incapable of asserting the privilege against each other.

Where a former officer or director takes this approach, the entity's legal structure becomes important — with partnerships being more susceptible to the collective-corporate-client approach, and limited liability companies and corporations being less susceptible. *Montgomery*, 548 F. Supp. 2d at 1180–83. Courts also look closely at who stands to benefit from the litigation. If the former officer/director is suing in her capacity as an individual, then courts are less likely to apply the collective-corporate-client approach. *Milroy v. Hanson*, 875 F. Supp. 646, 650 (D. Neb. 1995). If the former officer/director is suing on behalf of the former company, or in her capacity as a former manager, then courts are more likely to accept the joint-client approach.

Montgomery, 548 F. Supp. 2d at 187.

Courts adopting the collective-corporate-client approach utilize a narrow application of the attorney-client privilege, and reason that the former officer/director may discover "documents which he received or reviewed, authored or reasonably had access to ... during his tenure." *Rush v. Sunrise Sr. Living, Inc.*, No. CL-07-11322, 2008 WL 1926766 (Va. Cir. Ct. Feb. 12, 2008). These courts sidestep the waiver question and hold that there is no privilege in the first instance for those communications in which the former officer/director participated because those documents were never confidential as to the officer/director.

THE ENTITY-AS-CLIENT APPROACH

The collective-corporate-client approach has three fundamental problems. First, the doctrine is inconsistent with the rationale behind the corporate attorney-client privilege, which belongs solely to the corporate entity. Second, the doctrine "ignores the unique and limited role of corporate representatives in communicating with counsel on behalf of the corporation." And third, the doctrine "allows the fiduciary's termination of his responsibilities to trigger his ability to use the access previously granted to him for fiduciary purposes as a weapon to advance his own interests at the expense of the corporation." *Fitzpatrick v. Am. Int'l Grp., Inc.*, 272 F.R.D. 100, 108–09 (S.D.N.Y. 2010).

Given these problems, the modern trend is to eschew the collective-corporate-client doctrine in favor of the entity-as-client approach. This approach prefers the here-and-now and "precludes a finding that there is a class of persons outside the corporation's current officers and directors who are entitled to access the client's confidential or privileged information over the client's objection for use in litigation." *Las Vegas Sands Corp. v. Eighth Jud. Dist. Ct.*, 331 P.3d 905, 914 (Nev. 2014). This trend relies on U.S. Supreme Court precedent noting, in a different context, that former corporate managers "may not assert the privilege over the wishes of current

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managers, even as to statements that the former might have made to counsel concerning matters within the scope of their corporate duties.” *Commodity Futures Trading Com’n v. Weintraub*, 471 U.S. 343, 349 (1985).

Several federal and state courts have adopted the entity-as-client approach. See, e.g., *Hustler Cincinnati, Inc. v. Cambria*, 2014 WL 347021, at *6 (S.D. Ohio Jan. 30, 2014); *Lane v. Sharp Packaging Sys., Inc.*, 640 N.W.2d 788, 802 (Wis. 2002). These courts recognize that former officers/directors do not have the same responsibilities to the company as they did when they were current officers/directors, and, consequently, do not have the same rights to access the corporation’s communications. *Fitzpatrick*, 272 F.R.D. at 108; *Davis v. PMA Cos., Inc.*, 2012 WL 3922967, at *5 (W.D. Okla. Sept. 7, 2012).

The entity-as-client approach is more like to apply in the class action context. *Barr v. Harrah’s Entm’t, Inc.*, 2008 WL 906351, at *6 (D.N.J. Mar. 31, 2008); *Davis*, 2012 WL 3922967, at *6. The *Barr* court recognized that a former officer/director acting as the putative class’s representative is not just fighting for access to a corporation’s privileged documents on his behalf. Instead, the former officer/director, acting as the class plaintiff, is effectively seeking access to privileged documents “on behalf of a class of individuals who would not themselves have access to such records under [the] law.” *Id.*

Courts distinguish and reject the collective-corporate-client approach and its joint-client footings on grounds that there were never two initial, independent clients as there are when dealing with joint defendants. *Hustler Cincinnati, Inc.*, 2014 WL 347021, at *7. As one court clarified, “the corporation can only communicate with its attorneys through human representatives, [but] those representatives [were] communicating on behalf of the corporation, not on behalf of themselves as corporate managers or directors.” *Montgomery*, 548 F. Supp. 2d at 1187. In other words, regardless of the former officer/director’s participating in the privileged communications, there was only ever one client — the corporation.

State rules of professional conduct lend support to the entity-as-client approach. Rule 4.2 of the Model Rules of Professional Conduct permits a lawyer to directly approach former employees of a represented organization, but simultaneously provides that the lawyer shall not solicit or assist in the breach of any duty of confidentiality owed by the former employee to the represented organization. See Cmt. 7. Thus, the professional-conduct rules implicitly acknowledge that the former officer/director does not control and cannot waive the attorney-client privilege for the former corporate employer.

The attorney-client privilege’s purpose further supports the trend toward the entity-as-client approach. The attorney-client privilege encourages “full and frank communication between attor-

neys and their clients and thereby promote[s] broader public interests in the observance of law and the administration of justice.” *Upjohn Co. v. United States*, 449 US 383, 389 (1981). The *Sands* court used this rationale to reject the collective-corporate-client approach, reasoning that “[a]llowing a former fiduciary of a corporation to access and use privileged information after he or she becomes adverse to the corporation solely based on his or her former fiduciary role is entirely inconsistent with the purpose of the attorney-client privilege.” *Las Vegas Sands Corp.*, 331 P.3d at 913.

WHAT THE ENTITY-AS-CLIENT APPROACH MEANS FOR YOU AND YOURS (AND THEIR EXES)

In-house and outside counsel obviously prefer the entity-as-client approach, but should fear application of the collective-corporate-client approach and take preventive steps to ensure application of the preferred standard.

Engagement Letters

Given the trend toward the entity-as-client approach, the scope of engagement letters becomes even more important. Outside counsel and their corporate contact must ensure that the engagement letter clearly identifies the corporation as the client and not the corporation along with its individual officers and directors.

Educate Current Management

In-house and corporate outside counsel should educate its officer/directors on the scope and contours of the corporate attorney-client privilege and how to establish and maintain the privilege. Without proper education, putatively privileged communications could later prove non-privileged rendering the entity-as-client approach moot. A complete list of privilege education tips surpasses this article’s scope, but includes restricting counsel communications to legal purposes, and limiting distribution and maintaining confidentiality.

Upjohn Warnings

If officers/directors approach the company’s in-house or outside counsel about a question pertaining to the officer/director in her individual capacity, then counsel should remind or inform the officer/director that she represents the corporation, not the officer/director, and that no personal attorney-client relationship exists. Otherwise, responding to the officer/director’s individual legal needs may create a situation where the joint-client approach could become viable. *Milroy*, 875 F. Supp. at 651.

LITIGATION HOLD NOTICES

Under the entity-as-client approach, the company’s current management acts as the privilege holder and has sole authority to preserve

or waive the privilege. *Las Vegas Sands Corp.*, 331 P.3d at 914. To ensure that current management does not waive the privilege, litigation hold notices should prohibit employees from sharing documents with former officers, directors, or employees even if they were involved in the matter giving rise to the litigation.

EXIT ASSESSMENTS FOR DEPARTING OFFICERS/DIRECTORS

Companies should carefully assess what departing officers or directors take with them on their way out the door. *Las Vegas Sands Corp.*, 331 P.3d at 906. Companies may accomplish this assessment through appropriate language in employment agreements, non-disclosure agreements, or confidentiality agreements; exit interviews; and computer forensic imaging of the departing officer’s computers and mobile devices.

Questions to Ask

When faced with a former officer/director’s lawsuit, in-house and outside corporate counsel should immediately ask and assess these pertinent questions. What privileged communications involved the former officer or director? Did the former officer/director take any documents with her upon exit? What is the client’s legal structure — partnership, LLC, or corporation? Does the relevant jurisdiction use a collective-corporate-client approach or an entity-as-client approach? Is the former officer/director suing on behalf of the company, suing in her capacity as a former director, or suing in her individual capacity? While employed, did the former officer/director communicate with counsel about legal issues in her individual capacity? Is the current management team educated on properly establishing and preserving the corporate attorney-client privilege? Is the former officer/director acting as a representative plaintiff in a class action? What does your engagement letter say regarding the client’s identity? Does the litigation hold instruct current management and employees not to provide documents to former employees? Did the company conduct an exit interview with the departing officer/director and/or conduct a forensic review of her computers and sensitive accounts (e-mail, cloud-based storage accounts, etc.)?

CONCLUSION

In sum, when a former officer or director makes a grab for your corporate client’s privileged communications, if the company and its counsel take the appropriate preventive steps, then it is okay to break up the hard way and claim, “Mine. All mine.”