BNA's

Corporate Counsel Weekly

CORPORATE PRACTICE SERIES

VOL. 24, NO. 4 30-32 **JANUARY 28, 2009**

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Analysis

Attorney-Client Privilege

But I Was the Client: The Attorney-Client Privilege As Applied to Former Officers and Directors

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Imagine a situation where a corporation has terminated its CEO who was also a director and the disgruntled former CEO sues the corporation for wrongful termination. As discovery progresses, the former CEO requests the production of documents containing communications between the corporation and its counsel during his tenure. The corporation's current management withholds these communications on the grounds that they are protected from disclosure by the attorney-client privilege. But the former CEO claims that as a director and CEO, he was the client at the time the communications occurred and so the privilege cannot now be asserted against him. Will a corporation be forced to turn over privileged materials to a former officer and director against the will of current management, for use against the corporation in litigation?

Courts have struggled with this question and have not provided a uniform answer. Some courts view the former officer or director as a ''joint client'' with the corporation at the time the advice was given, and hold that the privilege cannot be asserted against him. Other courts have instead concluded that former officers and directors are outside the privilege and only a corporation's current management can determine whether to waive the corporation's privilege by disclosing the communications at issue. And still other courts have taken positions along this spectrum.

A review of caselaw on this topic will illustrate the various approaches used by courts and suggest possible means by which corporations can increase the likelihood that confidential communications with counsel will remain privileged as against former officers and directors.

'Joint Client' Approach

The leading case in support of the view that the corporate attorney-client privilege cannot be applied against former directors as to communications made during their tenure is the Delaware Chancery Court's decision in *Kirby v. Kirby*.[1] *Kirby* involved a dispute among siblings over the administration of a family-owned charitable foundation. The plaintiff siblings moved to compel production of documents that were withheld on the ground of attorney-client privilege, and which included communications between the foundation and its counsel. Some of these documents were prepared while the plaintiff siblings were undeniably directors of the foundation.

The court framed the issue as ''whether the directors, collectively, were the client at the time the legal advice was given,'' and answered in the affirmative. Reasoning that the directors had the joint responsibility for managing the foundation, the court held that the directors were ''joint clients'' when receiving legal advice directed to the foundation and granted access to documents created during their tenure as directors.

The Delaware Chancery Court reaffirmed *Kirby* nine years later in *Moore Business Forms, Inc. v. Cordant Holdings Corp*.[2] Moore Business Forms was the largest shareholder of defendant Cordant, whose board included a Moore designee and two independent directors. Moore brought this action after the two independent directors, having received legal advice in the absence of the Moore designee, decided to have Cordant repurchase Moore's ownership stake.

Moore sought discovery of communications between the two independent directors and the corporation's outside counsel, arguing that its designee was entitled to all advice rendered to the board during his tenure. Cordant resisted, arguing that there was a tacit understanding on the board, confirmed by the voluntary recusal of Moore's designee during certain discussions, that certain information was outside his purview.

The court began its privilege analysis by citing approvingly to *Kirby*, noting that Delaware case law supports the general proposition that ''a corporation cannot assert the privilege to deny a director access to legal advice furnished to the board during the director's tenure.''[3] This proposition is not weakened, held the *Moore* court, by the mere assertion of a conflict of interest. In fact, only an agreement reached prior to the communications between the now-former director and the board could have impaired that director's right to equal access to board information. The court summarized its analysis as follows:

> Because the attorney-client privilege belongs to the client, it would be perverse to allow the privilege to be asser-

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[1] C.A. No. 8604, 1987 WL 14862 (Del. Ch. July 29, 1987).

[2] C.A. Nos. 13911 & 14595, 1996 Del. Ch. LEXIS 56 (Del. Ch. June 4, 1996).

[3] *Id.* at *12. The *Moore* court did not, however, adopt *Kirby's* ''joint client'' language: ''Although the *Kirby* Court described the directors as a 'joint client,' a more accurate description of the relationship is that there was a single 'client,' namely, the entire board, which includes all its members.'' *Id.* at *12 n.4.

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> ted *against* the client. . . . The client in this case is the Holdings board. [The Moore designee] was a member of that board, having the same status as the other directors. No basis exists to assert the privilege against him or, by extension, against Moore.[4]

The Supreme Court of Montana applied a similar ''joint client'' approach to former director privilege issues in *Inter-Fluve v. Montana Eighteenth Judicial District Court*.[5] In this case, a former officer and director brought a wrongful discharge action against his old corporation, and sought to depose the other directors and the corporation's outside counsel concerning legal advice given to the corporation during his tenure. The court cited approvingly to *Kirby's* ''joint client'' approach and held that the communications at issue were not privileged as to the former officer and director.

Following similar reasoning, a New York court also recently granted former directors the right to view privileged documents created during their tenure.[6] In litigation between the New York Attorney General and former AIG CEO Maurice Greenberg and other directors, the former AIG directors sought discovery from AIG, including documents containing privileged legal advice to the company. Despite the fact that Greenberg had himself authored and received certain of the documents sought, AIG refused to produce any privileged documents on attorney-client privilege grounds.[7]

The court ruled that the former directors were still within the ''circle of persons entitled to view privileged materials without causing a waiver of the attorney-client privilege.'' The court then approached the issue in the context of former directors' rights to inspect the books and records of the company, holding that ''a former director [still has] a qualified right to inspect the books and records covering a period of his directorship whenever in the discretion of the trial court he can make a proper showing by appropriate evidence that such inspection is necessary to protect his personal responsibility interest as well as the interest of the stockholders.'' [8]

Finding that ''their conduct while directors has been called into question and the inspection is needed to prepare their defenses,'' the court granted the directors' motion to compel.[9] It is noteworthy that the directors had explicitly pled ''advice of counsel'' defenses in their answers to the charges against them, and argued that the privileged materials they sought were necessary to their defense.

An Alternate Approach

While the above cases provide support for a terminated officer or director who seeks to discover privileged communications to and from his former corporation, there are many cases which contradict that holding. A district court in Nebraska went so far as to deny a *current* director access to corporate attorney-client communications where a majority of the board resisted disclosure.[10]

In *Milroy*, a current director and minority shareholder of a closely-held corporation sued the corporation, seeking money damages and the liquidation of the corporation. The court held that since a majority of the current board sought to assert the privilege on behalf of the corporation against the plaintiff director, that director could not ''waive'' or ''frustrate'' that decision by discovering privileged documents.

The Nebraska court considered *Kirby*, but found that it rested on a ''fundamental error''—the assumption that a ''collective corporate client'' could take a position adverse to the current management of the corporation: ''A dissident director is by definition not 'management' and, accordingly, has no authority to pierce or otherwise frustrate the attorney-client privilege when such action conflicts with the will of management.'' [11] Further, it was important to the *Milroy* court that the plaintiff director was seeking privileged communications not in his capacity as a director and fiduciary of the corporation, but instead to further his personal goals in litigation against the corporation.

Similarly, the Supreme Court of Wisconsin refused to allow a former director to obtain privileged materials in litigation against his former corporation. In *Lane v. Sharp Packaging Systems*, a terminated director brought an action against his former firm and sought documents containing communications between the corporation and its counsel during the director-plaintiff's tenure on the board.[12] The Wisconsin Supreme Court concluded that since only the client (here the corporation) has the authority to waive the attorney-client privilege and a corporation can act only through its current management, ''a former director cannot act on behalf of the client corporation and waive the lawyer-client privilege.'' [13]

In *Genova v. Longs Peak Emergency Physicians*, the Colorado Court of Appeals followed the *Milroy-Lane* approach in denying a former director access to privileged communications between his former corporation and its counsel.[14] Of particular importance in *Genova* was that while a sitting director has access to privileged communications with his corporation, he is under a duty to keep such communications confidential, and is not able to assert or waive the privilege against the will of the majority of the board. In contrast, a former director who has brought litigation against the corporation is no longer duty-bound to keep such communications confidential, and in fact, ''his expressed intent is to vitiate the privilege and release the documents to a public forum.'' [15]

The following year the U.S. District Court for the Northern District of Illinois weighed in on this issue, and similarly concluded that former officers may not compel the disclosure of privileged documents prepared for the corporation during their tenure. In *Dexia Credit Local v. Rogan*, a corporation in bankruptcy brought an action against its former CEO to recover for fraud.[16] The former CEO sought privileged documents, arguing that they were not confidential as to him because many of them were accessible to him or even authored by him during his tenure.

Beginning with the proposition that the corporate attorney-client privilege belongs to the corporation itself rather than to its individual officers and directors, the *Dexia* court

[4] *Id.* at *18 (italics in original).
[5] No. 04-699, 2005 Mont. LEXIS 179 (Mont. April 26, 2005).
[6] Spitzer v. Greenberg, 851 N.Y.S.2d 196 (N.Y. App. Div. 2008).
[7] *Id.* at 201.
[8] *Id.* at 199.
[9] *Id.* at 201.
[10] Milroy v. Hanson, 875 F. Supp. 646 (D. Neb. 1995).
[11] *Id.* at 649–50.
[12] 640 N.W.2d 788 (Wisc. 2002).
[13] *Id.* at 802.
[14] 72 P.3d 454 (Colo. Ct. App. 2003).
[15] *Id.* at 463.
[16] 231 F.R.D. 268 (N.D. Ill. 2004).

held that former officers were ''outside'' the privilege:

> Although an agent may be on the ''inside'' at the time the confidential communications were made between the corporation (on whose behalf the agent was acting) and counsel, once this agent leaves the corporation's employ, the privilege, and the legal rights associated with it, do not leave with this agent. Rather, the privilege remains with the corporation, because it belongs to the corporation.[17]

The court further explained that a corporation has a ''legitimate expectation that a person who leaves the control group no longer will be privy to privileged information,'' and noted that any contrary rule would chill open communication between a corporation and its counsel for fear that one may later use such communication in litigation against the corporation.[18]

[17] *Id.* at 277.

[18] *Id. See also* Barr v. Harrah's Entertainment, Inc., Civ. No. 05-5056JEI, 2008 WL 906351 (D.N.J. March 31, 2008) (denying motion to compel privileged documents brought by former CEO and board member who was acting as named plaintiff in class action, because he owed a fiduciary duty to the class and therefore the disclosure of privileged material would constitute disclosure to the class and thereby affect a waiver of privilege).

Implications

The cases above demonstrate that while the ability of former officers or directors to compel disclosure of privileged communications between their former corporations and counsel is increasingly the subject of litigation, no consensus has yet been reached. Courts disagree on whether the relevant question is ''who has the right to waive the corporation's attorney-client privilege?'' or ''who is the 'client' for purposes of the earlier communication?'' This confusion creates a risk to corporations that advice provided by counsel may, in the future, be subject to disclosure to a former director in an adversary setting.

To illustrate this risk, consider legal advice to a board of directors regarding a matter which may lead to the termination of an officer/director. Such advice may well become the subject of a later lawsuit brought by the expelled individual. Corporations should be mindful of this risk and take steps, where possible, to reduce any exposure.

One such step might be the creation of a special committee which would hire its own counsel, separate from counsel to the board as a whole.[19] This approach may demonstrate to a court that the corporation intends advice given to the special committee, at least in the first instance, to be kept confidential from the remainder of the board. However, this approach is not guaranteed to be successful as it is unclear the extent to which a special committee may have an attorney-client relationship which excludes the rest of the board.

Another means to safeguard privileged communications would be to have board members agree that they would be precluded from having access to privileged information in the event they are no longer on the board.

As no black-letter law has emerged on this topic, corporations must face the risk that sensitive and confidential attorney-client communications may one day be forced out in the open by a former officer or director in litigation with the corporation. Corporations should therefore consider taking measures to reduce the likelihood that a former officer or director may later gain access to such communications.

[19] This approach was referenced in *Moore Business Forms* at *18–19: ''[T]he board could have acted, pursuant to 8 Del. C. 141(c) and openly with the knowledge of Moore and Rogers, to appoint a special committee empowered to address in confidence those same matters . . . the special committee would have been free to retain separate legal counsel, and its communications with that counsel would have been properly protected from disclosure to Moore and its director designee.''

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