ATTORNEY-CLIENT PRIVILEGE UPDATE

As a service to Jenner & Block’s clients and the greater legal community, the firm’s Complex Commercial Litigation practice maintains this online resource center that offers the latest case law and other developments in attorney-client privilege.

In addition, Jenner & Block publishes the “Protecting Confidential Legal Information: A Handbook for Analyzing Issues Under the Attorney-Client Privilege and the Work Product Doctrine,” which is available by clicking here.

Jenner & Block will update this web page with new developments and items of interest as they become available. For further information, please contact Partner David M. Greenwald.

Privilege Analyzed Re Inside Counsel Representing Parent And Subsidiary.

In Teleglobe USA Inc. v. BCE Inc. (In re Teleglobe Commc’ns Corp.) No. 06-2915, 2007 WL 2034156 (3d Cir. July 17, 2007), the court issued a 93-page opinion addressing several issues of first impression under Delaware law. The court’s analysis provides a detailed roadmap for corporate counsel in connection with a number of thorny joint-client, common-interest, and community-of-interest privilege issues. In late 2000, BCE directed its wholly owned subsidiary, Teleglobe, to borrow $2.4 billion, but in early April 2001, ceased funding Teleglobe, leaving the company without the means to repay its substantial debt. Teleglobe and several of its subsidiaries filed for bankruptcy and brought an adversary proceeding against BCE. Pre-bankruptcy, Teleglobe had consulted with BCE’s in-house attorneys on various matters. In the adversary proceeding, Teleglobe sought discovery of BCE’s counsel’s files, and BCE asserted privilege. The Special Master ordered that all documents disclosed to in-house counsel, even documents produced by outside counsel hired only to represent BCE, be produced, and the district court affirmed. The appellate court reversed in part and remanded the case, holding that the district court may only compel BCE to produce disputed documents pursuant to the adverse-litigation exception to the co-client privilege if it finds that BCE and the Debtors were jointly represented by the same attorneys on a matter of common interest that is the subject-matter of those documents. The court provided the following guidance:

<blockquote dir="ltr" style="MARGIN-RIGHT: 0px">(1) When in-house counsel represents both the parent and a subsidiary, the privilege is governed by the joint defense/co-client doctrine, not the common interest doctrine. When co-clients become adversaries, the majority rule is that all communications made in the course of the joint representation are discoverable. The court predicted that the Delaware courts would apply the adverse litigation exception to render joint-privileged documents discoverable in all
situations, even where one co-client is wholly owned by the other.

(2) Despite imprecise application by other courts, the community-of-interest/common interest privilege applies only to communications between attorneys who separately represent different clients, but who share a common legal interest in the shared communication. It does not apply where clients are jointly represented by a shared attorney.

(3) Courts often find that information sharing within a corporate family does not waive the attorney-client privilege, but they diverge on how they reach this result. The court warned that if the rationale is that a corporate family constitutes one client, or that there is a community of interest, a former subsidiary could access all of its former parent’s privileged communications in litigation in which they are adverse. The better rationale is that members of a corporate family are joint clients, and only communications involving specific representations are at risk.

(4) When the interests of a parent and subsidiary begin to become adverse, any joint representation on the adverse matter should end, both to prevent the subsidiary from being able to invade the parent’s privilege in any litigation that ensues, and to protect the interests of the subsidiary. This does not mean, however, that the parent’s in-house counsel must cease representing the subsidiary on all other matters, because spin-off transactions can be in the works for months or even years, and continuing to share representation on other matters is both proper and efficient.

The court summarized its guidance for in-house counsel: “By taking care not to begin joint representations except when necessary, to limit the scope of joint representations, and seasonably to separate counsel on matters in which subsidiaries are adverse to the parent, in-house counsel can maintain sufficient control over the parent’s privileged communications.”

Facilitator Of Attorney-Client Communications Does Not Destroy Privilege.

In Jenkins v. Bartlett, 487 F.3d 482 (7th Cir. Apr. 23, 2007), the court held that the presence of a police liaison officer during a meeting between a police officer and his attorney did not destroy the attorney-client privilege, because the liaison officer was present solely to assist the attorney in providing legal services to his client. Plaintiff Jenkins sued defendant Officer Bartlett on behalf of her son, who was fatally shot by Bartlett. Immediately after the shooting, the police department began an
investigation. Following a long established custom, the police liaison officer for the City, who also was the president of the Milwaukee Police Association, accompanied an attorney appointed by the Association in a lengthy meeting with Bartlett. Jenkins contended that the presence of the liaison officer destroyed the confidentiality necessary for the attorney-client privilege. The court disagreed. While noting that an independent privilege does not exist between an individual and his union representative, and the presence of a union official may in certain circumstances abrogate the privilege, it did not do so here. Here, the court found the liaison officer was serving in a role akin to an outside expert who assists the attorney by transmitting or interpreting client communications for the attorney, and thus, the privilege remained.

Common Interest Exists For Legal Advice Although Litigation Not Anticipated.

In *US v. BDO Seidman*, No. 05-3260, 2007 WL 1880208 (7th Cir. July 2, 2007), the court held that a privileged document shared by joint venturers to ensure compliance with new regulations was protected by the common interest doctrine even though there was no anticipation of litigation. The IRS sought to compel the production of certain documents in connection with its investigation of BDO Seidman for allegedly promoting abusive tax shelters. One of the documents was a memorandum written by a lawyer and partner at BDO, to BDO’s outside counsel, requesting legal advice on pending IRS regulations. Another BDO partner sent the memorandum to an attorney at the law firm of Jenkins & Gilchrist as part of their efforts to coordinate a common legal position to communicate to their common clients. The court held that the communication was clearly within the scope of the common interest doctrine.

No Privilege Waiver By Action For Indemnity For Legal Costs In Prior Suit.

In *Deutsche Bank Trust Co. of the Americas v. Tri-Links Inv. Trust* 837 N.Y.S.2d 15 (N.Y. App. Div. (1st Dept.) May 15, 2007), the court held that a party suing to enforce its right to indemnification for the costs of a prior lawsuit does not necessarily place at issue the party’s privileged communications and does not waive the attorney-client privilege or work product protection with regard to the prior lawsuit. The indemnitor in the case, the DIP lending group in a bankruptcy, argued that the indemnified party waived the privilege by commencing the indemnity action for legal costs from the indemnitor. The DIP lender argued that the indemnity action placed the reasonableness of the amounts expended to defend and settle the prior lawsuit at issue and, consequently, the privilege was waived as to the indemnitee’s admittedly privileged communications from the prior lawsuit. The court held, however, that the test for whether a party has placed privileged communications at issue is whether the party has asserted a claim or defense it is attempting to prove by the use of privileged materials. In this case, although the privileged communications were relevant to issues raised by the DIP lender, the indemnified party intended to prove the reasonableness of the amounts expended based on
non-privileged documents. Therefore, the court upheld the privilege.