ATTORNEY-CLIENT PRIVILEGE

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State Bar of Texas
7TH ANNUAL
ADVANCED IN-HOUSE COUNSEL COURSE
July 24-25, 2008
Dallas

CHAPTER 17

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I. THANKS

The Texas Bar CLE has a longstanding tradition of sharing of papers and thoughts among authors and presenters. This paper is no different. We thank several other authors, on whose shoulders we stand. Kim Askew of K&L Gates in Dallas, has written papers on privileges for the Advanced Evidence and Discovery Course for many years. She has also authored the same article in the Advanced Civil Trial Course. These updates are invaluable for lawyers engaged in trial practice. One of the best articles on joint defense agreements was written by Mike McKetta and Richard Yeomans of the Graves Dougherty Hearon & Moody firm in Austin. Mike was kind enough to let us borrow from his wisdom.

I would like to also thank Elizabeth Brummett and Adrienne Parham, both of whom did significant legal research for this paper. Both are third year students at the University of Texas Law School. Their help was crucial. They will be magnificent lawyers.

II. OVERVIEW OF THE ATTORNEY-CLIENT PRIVILEGE

A. Purpose:

The attorney-client privilege furthers and protects unrestrained communications between lawyers and clients so that a lawyer's professional advice can be sought and obtained without fear of disclosure. This is especially true when a client's full disclosure to the lawyer includes facts, which if disclosed, could have an adverse effect.

Originally a creature of common law, the attorney-client privilege is now codified. *See* TEX. R. EVID. 503; FED. R. EVID. 501.

B. What It Protects:

1. TEX. R. EVID. 503: A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services:

a. between the client or a representative of the client and the client's lawyer or a representative;
b. between the lawyer and the lawyer's representative;
c. by the client or a representative of the client, or the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
d. between representatives of the client or between the client and a representative of the client; or
e. among lawyers and their representatives representing the same client.

2. Federal Rule: The federal attorney-client privilege is addressed in an often cited case—*United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357 (D. Mass 1950). In that case, the Court held that the privilege applies only when:

a. A client is seeking legal advice or a lawyer's services;
b. The person to whom the communication is made is a lawyer or his or her representative;
c. The communication relates to a fact disclosed from a client (a representative) to a lawyer (a representative);
d. Strangers are not present;
e. A client requires confidentiality.

3. Loss of the Privilege

The attorney-client privilege, like all other privileges, can be lost. There are several ways in which the attorney-client privilege can be forfeited:

a. Selective disclosure:

Texas courts have recognized that the attorney-client privilege can be waived by disclosing all or any significant part of the confidential communication. *See Axelson, Inc. v. McIlhany*, 755 S.W.2d 170 (Tex. App.—Amarillo 1988, orig. proceeding) (a company revealed information relating to the company's internal investigation into kickbacks to federal law enforcement agencies as well as a national publication).

For better or worse, some of the most frequently encountered instances of losing the privilege through selective disclosure occur in:

- Responding to a government investigation
- Information supplied to a governmental agency
- Certain SEC/financial disclosure filings
- Under some circumstances, auditor or accountant responses
- Any disclosure to third-parties not affiliated with a lawyer

b. Waiver:

The Restatement (Third) of the Law Governing Lawyers provides that only an authorized agent of a corporation may waive the privilege of the corporation. In other words, privilege cannot be waived by unauthorized disclosure by either current or former employees.

In many instances, the presence of a third person eliminates the intent for confidentiality on which the privilege rests. *In re Auclair*, 961 F.2d 65, 69 (5th Cir. 1992). However, courts are reluctant to apply this rule too harshly. *National Converting & Fulfillment Corp. v. Bankers Trust Corp*,. 134 F. Supp. 2d. 804 (N.D. Tex. 2001). In *National Converting & Fulfillment Corp.*, the district court decided a matter of first impression—where the person who was not employed by the corporation, but who is a close relative of the owner and has the authority to speak on behalf of the corporation, is a representative of the client under TEX. R. EVID. 503(a)(2). The father, who owned the company, asked his son to talk to the corporation's legal counsel regarding a lawsuit. The son was not an employee of the corporation, but frequently acted as a business adviser. The court held that while the son was not an employee, he was, in effect, a member of the control group who could make decisions on behalf of the corporation. Therefore, no waiver occurred.

Waivers can happen in many ways. For example, inadvertent production of confidential information may, under some circumstances, constitute a waiver. Likewise, voluntary disclosure of part of a confidential communication can result in a full scale disclosure.

c. Offensive Use of the Privilege:

Privilege can be lost if the privilege is used as a "sword" rather than a "shield." In other words, if the person seeking affirmative relief brings a claim and then prohibits discovery into the claim by asserting the attorney-client privilege, the client may be forced to choose between the viability of the lawsuit and the privilege. *Republic Ins. Co. v. Davis*, 856 S.W.2d 158 (Tex. 1993).

4. Corporate Client

The attorney-client privilege is sometimes difficult to apply in a corporate context. When an individual is the client, it is obvious who the client is for purposes of making the communication, asserting the privilege and waiving the privilege. On the other hand, when the client is a business entity, the question of who can take legal advice, assert the privilege and waive it becomes more complex.

Control group v. Subject matter: Historically, there have been two theories advanced to resolve the question of which corporate representatives may engage in confidential communications with lawyers representing the business entity.

The first is the "control group" test where the communication will qualify for protection only if it involves people who are authorized by the business entity to seek, receive and act on legal advice. The "control group" test is discussed in detail in *National Tank Co. v. Brotherton*, 851 S.W.2d 193, 197 (Tex. 1993). The "control group" test is extremely narrow and protects only communications made to or authorized by high level executives.

In 1998, the Texas Supreme Court rejected the "control group" test in favor of the much more liberal "subject matter" test. In doing so, Texas joined the United States Supreme Court, which rejected the "control group" test in 1981. *Upjohn Co. v. United States*, 449 U.S. 383 (1981). Both courts held that a lawyer-client communication might be protected if a communication of the corporate employees and the lawyer were about matters within the scope of the corporate employee's employment and "made for the purpose of enabling counsel to provide legal advice to the corporation."

III. PARENT-SUBSIDIARY REPRESENTATION: EXTENDING THE ATTORNEY-CLIENT PRIVILEGE

Sometimes the rules of evidences and the cases interpreting them do not keep track with the business practices. At the same time, the business community often takes steps without considering the logic and reasons behind the rules of evidence. This is especially true when it comes to the representation of business entities and their affiliates or parents. This section reviews the various vehicles for extending the attorney-client privileges to those situations.

A. In-house Counsel May Render Legal Services to Third Parties in Narrow Circumstances.

In a recent case, the Texas Supreme Court ruled that an insurance company may use lawyer/employees to defend claims against policyholders if the insurance company's and the policyholder's interests are *congruent*. Importantly, if the interests are not congruent, the insurance company's use of lawyer/employees is the unauthorized practice of law. *Unauthorized Practice of Law Committee v. American Home Assur. Co., Inc.*, No. 04-0138, 2008 WL 821034 (Tex. March 28, 2008).

In reaching this decision, the Court made a number of rulings:

- "A company does not engage in the practice of law by employing attorneys on its salaried staff to represent its own interests."
- In 1968, the Committee on Interpretation of the Canons of Ethics concluded, "that a lawyer employed by a corporation does not aid in the unauthorized practice of law by representing the corporation's parents or subsidiary because, '[t]here is obviously *common interest* and there is for all practical purposes *only one client involved*.'", citing State Bar of Texas, Comm. on Interpretation of the Canons of Ethics, Op. 343 (1968).
- "[A] company does not avoid engaging in the unauthorized practice of law merely because it provides legal services out of contractual obligation. A second factor is whether the company has a *direct, substantial financial interest* in the matter for which it provides legal services….

  [A] third factor: whether the company's interest *is aligned* with that of the person to whom the company is providing legal services."
- "[W]e conclude that a liability insurer does not engage in the practice of law by providing staff attorneys to defend claims against insureds provided that the insurer's interest and the insured's interests in the defense in the particular case are *congruent. In such cases, a staff attorney's representation of the insurer and the insured is indistinguishable*."

As of this writing, a motion for rehearing is pending with a number of amicus briefs filed. The decision is a split opinion with Justices Johnson and Green dissenting. Both would hold that a literal reading of Texas statutes would prohibit a corporation from hiring lawyers to render legal services to third parties.

B. Common Interest Privilege/ Joint Interest Privilege

1. Purpose:

The common interest privilege applies where two or more parties, having a common interest, retain separate counsel and then share information and strategies with lawyers to design a consistent and collaborative position. In many instances, an agreement is reduced to writing which includes the parties commitments to one another to ensure the terms of the confidentiality of the information exchanged.

The common interest privilege varies by jurisdiction and source. For example, the common interest privilege in Texas is different than defined in New York. The Texas privilege is also different from the Restatement (Third) of the Law Governing Lawyers .

In both Texas and federal courts, the common interest doctrine is not a privilege. Instead, it is a part of the attorney-client privilege. *See In re Auclair*, 961 F.2d. 65, 69-70 (5th Cir. 1992); *In re JDN Real Estate-McKinney, L.P.*, 211 S.W.3d. 907, 922 (Tex. App.—Dallas 2006, orig. proceeding). In *JDN*, the court went so far as to hold that the common interest privilege need not be specifically asserted as an objection or in a privilege log. The assertion of the attorney-client privilege is enough.

a. TEX. R. EVID. 503(b)(1)(C):

(B)(1) "*General rule of privilege*. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client…

(C) by the client or a representative of the client, or a client's lawyer or a representative of the lawyer, *to a lawyer or representative of a lawyer representing another party* in a *pending action* and concerning a matter of *common interest* therein."

b. Uniqueness of Texas Rule:

- A communication to a *lawyer* or representative of a *lawyer*
- In a *pending action*
- Concerning a matter of *common interest*

c. Restatement Rule:

The restatement rule is different in several specific respects. The Restatement (Third) of the Law Governing Lawyer ("Restatement") § 76 provides:

> "(1) if two or more clients with a *common interest* in a litigated or nonlitigated matter are represented by *separate lawyers* and *they* agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged under §§ 68–72 that relates to the matter is privileged as against third persons. Any such client may invoke the privilege

> unless it has been waived by the client who made the communication.
>
> (2) Unless the clients have agreed otherwise, a communication described in Subsection (1) is not privileged as between clients described in Subsection (1) in a subsequent adverse proceeding between them."

2. Elements of the Privilege:

a. Pending action

1. Texas Rule:

The literal reading of the Texas rule requires the existence of a "pending action." See TEX. R. EVID. 503(b)(1)(C) ("…in a pending action…").However, a number of cases have applied the rule to potential litigation. For example, the Texas Supreme Court discussed a common interest privilege ("joint defense agreement") and assumed that it was valid even though the person seeking protection was never party to "a pending action." See *National Medical Enterprises, Inc. v. Godbey*, 924 S.W.2d 123 (Tex. 1996). However, it does not appear that any party raised that issue.

The Dallas Court of Appeals indulged in the same assumption and relied on federal case law which allows the common interest privilege to "parties who are about to be in the same lawsuit, making their communications in anticipation of litigation…" *Ryals v. Canales*, 767 S.W.2d 226, 228–29 (Tex. App.—Dallas 1989, no writ.).

More recently, the Dallas Court of Appeals expressly held that Rule 503(b)(1)(c) may apply to documents created not only in the anticipation of litigation, but documents which predate anticipation of litigation. *In re JDN*, 211 S.W.3d. at 922. (However, the parties in *JDN* seemed to have misconstrued the privilege. Although they claimed a "common interest" privilege, the situation presented dealt with one lawyer with multiple clients. In most jurisdictions, the is referred to as the "joint client" privilege.)

The Beaumont Court of Appeals specifically disagrees with the Dallas Court and held that if the confidential communication did not occur during a "pending action," it was not protected by the common interest privilege. *In re Dalco*, 186 S.W.3d. 660, 667 (Tex. App.—Beaumont 2006, orig. proceeding). It is important to note the Dallas Court of Appeals in *JDN* specifically disagreed with the Beaumont Court's opinion in *Dalco*.

2. Restatement:

Restatement § 76 is much broader than the Texas rule. It provides protection for confidential communications, "in a litigated or non-litigated matter."

As authority for this broader proposition, the restatement cites two cases—one involving parallel litigation and one involving non-litigation matters. *See* Restatement cmt.e. However, in both those suits, litigation was anticipated. The Restatement also refers to Comment d and cites the *Schachar* case to support ALI's conclusion that the doctrine applies "to non-litigation situations." *See* Restatement cmt.d; *Schachar v. American Academy of Ophthalmology, Inc.*, 106 F.R.D. 187, 191–92 (N.D. Ill. 1985) (dicta). However, the dictum is not persuasive. The cases cited in *Schachar* involve pending/anticipated litigation. The attempt to extend the doctrine to non-litigation matters is not recognized by Texas case law and precious little non-Texas case law exists.

3. Anticipation of Litigation:

Does the joint interest privilege apply in anticipation of litigation. The plain reading of the rule indicates it does not. However, both Texas and non-Texas cases indicate that it might. There is no principled reason not to apply the common interest doctrine to matters involving the anticipation of litigation except for the language of the rule does not allow it. The *Ryals* case, cited above, stands for the proposition that the Texas rule applies to anticipation of litigation.

The express language of the Restatement would apply the common interest doctrine to anticipation of litigation.

4. Parallel Proceedings:

In many situations, cases are filed in different jurisdictions and proceed as parallel proceedings. The Texas rule does not specifically address this issue. However, non-Texas law has applied the joint interest privilege where there is separate parallel lawsuits brought by the same plaintiff. *See Transmirra Prods. Corp. v. Monsanto Chem. Co.*, 26 F.R.D. 572, 579 (S.D.N.Y. 1960).

b. Co-Party to Co-Party Communication:

1. Texas Rule:

A literal reading of the Texas rule does not protect the communication between two

co-parties. Instead, a lawyer must be involved. *See* TEX. R. EVID. 503(b)(1)(C).

2. Restatement:

Restatement § 76 is less clear, but seems to limit the common interest privilege to communications in which a lawyer is involved, because it refers to other portions of the Restatement (§§ 68–72) that deal with attorney-client communications. As a result, federal courts have generally found that the common interest privilege does not apply to communications made directly between two separately represented parties. *U.S. v. Gotti*, 771 F. Supp. 535, 545 (E.D.N.Y. 1991). On the other hand, when a disclosure to another client is necessary for the client to obtain informed legal advice, some courts have applied the common interest doctrine. *See Westinghouse Elec. Corp. v. Republic of the Philippines*, 915 F.2d 1414 (3rd Cir. 1991). Additionally, some federal courts have held that a client may disclose legal communications to co-defendants without waiving the privilege. *Hunyndee v. U.S.*, 355 F.2d. 183, 184–85 (9th Cir. 1965).

In a celebrated 3rd Circuit case, the court held that the common interest doctrine requires a lawyer communication and therefore would not extend the doctrine to conversations between individual defendants. *In re: Teleglobe Communications Corp.*, 493 F.3d. 345, 364–65 (3rd Cir. 2007). (The 3rd Circuit case applied Delaware law—which, on this issue, is similar to Texas law.)

c. Common Interests:

1. Texas Rule:

Rule 503(b)(1)(C) merely requires a communication "concerning a matter of common interest…" As a result, Texas cases have held that the interest need not be identical.

However, the question of how common the interest must be is factually intensive. For example, a group of oil companies, being sued concerning royalty claims, were determined not to have a common interest because the potential adversity between them. *Gulf Oil Corp. v. Fuller*, 695 S.W.2d 769, 774 (Tex. App.—El Paso 1985, no writ). On the other hand, in securities litigation, a federal court held that the privilege extends to defendants whose liability might arise from different acts or omissions. It even extended the doctrine to parties who have cross-claims against each other. *In re: LTV Securities Litigation*, 89 F.R.D. 595, 604–05 (N.D. Tex. 1981).

2. Restatement:

Section 76 and its commentary is more helpful than the Texas rule. The commentary provides that the common interest may be "legal, factual or strategic." Likewise, the common interest need not be entirely congruent. Restatement § 76 cmt.e.

Nonetheless, at least one case has held that the interest must be almost identical. *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1172 (D.S.C. 1947). (This case has been criticized by commentators and the Restatement is obviously a significant retreat from the necessity for absolute identity of interests.)

d. The Power to Waive:

1. Texas Rule:

TEX. R. EVID. 503(c) and 511 deal with the issue of waiver. Both rules anticipate that the holder of the privilege is the only one who can affect a waiver.

2. Restatement:

The Restatement is more specific than the Texas rule. The Restatement provides that "any client" in a common interest arrangement "may invoke the privilege, unless it has been waived by the client who made the communication." Comment g to the rule makes the following observations:

- Any member of a common-interest arrangement may invoke the privilege against third-persons even if the communication was not originally made by or addressed to the objecting member.
- Any member may waive the privilege with respect to that persons own communications. (This can be altered by agreement.)
- A member is *not authorized* to waive the privilege for another member's communication.
- If a document or other recording embodies communication from two or more members, a waiver is effective only if concurred in by all members whose communications are involved.

3. Subsequent Litigation Between Members of a Common Interest Agreement:

The Texas rule does not speak to the issue of subsequent litigation between the parties. On the other hand, Restatement § 76 provides that unless the members have agreed otherwise, communication otherwise privileged by the common interest doctrine is not privileged in a subsequent adverse proceeding between the members.

4. Consequences:

a. **Duties to Another Lawyer's Clients:**

It is clear, in both state and federal courts in Texas that a joint defense agreement/common interest agreement has consequences that survive the litigation. The most important is in the area of conflicts.

Both the 5th Circuit and the Texas Supreme Court have determined that a lawyer's participation in a joint defense/common interest agreement which allows the unfettered communications of confidential information creates a confidential relationship between all the lawyers and clients unless the agreement states otherwise. *See Wilson P. Abraham Const. Corp. v. Armco Steel Corp.*, 559 F.2d. 250, 253 (5th Cir. 1977); *Godbey*, 924 S.W.2d at 129–132 (holding that the relationship between the lawyer and the non-client is not an attorney-client relationship, but a fiduciary relationship, creating a duty to preserve confidences).

In *Godbey*, the Court implied a fiduciary duty on behalf of the lawyer to the non-client. Interestingly, an ABA formal opinion 95-395 (1995) says that a lawyer does not have any ethical duties to the non-client, but has a fiduciary duty.

b. Limitations on Representation:

For better or worse, the common interest privilege is often reduced to a written agreement. These written agreements can constrain a lawyer's representation of his or her client. For example, some joint defense agreements contain limitations on the right to settle, limitations on the right to cross examination and limitation of use of evidence communicated during the period that the common interest exists.

One of the more troubling cases in this area is the 9th Circuit opinion in *U.S. v. Henke*, 222 F.3d. 663, 637 (9th Cir. 2000). In that case, three criminal defendants had three separate lawyers who agreed to exchange and discuss confidential information. One of the defendants entered into a plea agreement and agreed to testify for the government. The lawyers for the remaining two defendants sought to withdraw because their agreement prohibited cross examination of any of the defendants.

The trial court denied the motion and the 9th Circuit reversed, holding that the joint defense agreement created an attorney-client relationship between all three lawyers and their clients. *Id.*

C. Joint-Client Privilege

1. Definition:

In many instances, two or more people or entities consult a single lawyer. The rules of professional conduct allow a lawyer to serve multiple clients on the same matter so long as all the clients consent and there is no substantial risk of the lawyer being able to fulfill his or her duties to all the clients.

The Restatement § 75 has the best definition of the joint-client doctrine. (Nonetheless, it refers to the doctrine as the "privilege of co-clients"). It provides that in a situation where two or more persons/entities are jointly represented by the same lawyer, a communication of any co-client, that would otherwise be protected by the attorney-client privilege, and relates to matters of common interest, is privileged as against third-parties. Any co-client may invoke the privilege unless it has been waived by the client who originally made the communication.

Only one case arguably addresses the joint-client privilege. *See In re JDN*, 211 S.W.3d. 907. Unfortunately, the parties did not present their case as a joint-client privilege. Instead, the parties characterized the privilege as the "common interest." *Id*. at 922. Justice Lang, in addressing the issue, correctly pointed out that the common interest privilege did not apply in a situation where multiple clients communicate with one lawyer. As he pointed out, communications made to a single lawyer for the purpose of facilitating the rendition of legal services to clients are privileged except in a subject of controversy between the clients. *Id*. (citing *Harris v. Daugherty*, 11 S.W. 921, 923 (Tex. 1889).

2. Elements:

a. Multiple clients
b. The same lawyer
c. Representation relates to matters of common interest

It is clear that the interests of joint clients must be common and the key to deciding the scope of the joint representations are the parties' intent and expectations.

It is important to make sure that all of the multiple clients share the same belief that a joint representation is in place on a common matter. *Neighborhood Dev. Collaborative v. Murphy*, 233 F.R.D. 436, 441– 42 (D. Md. 2005).

Likewise, it is common in co-client situations to limit the scope of the representation because of the necessity that the common interests are congruent. As Comment C to § 75 of the Restatement provides, the co-client representation is limited by the extent of the legal matter of common interest.

3. Common Interests:

a. Corporate Parents and Subsidiaries

- Delaware courts have recognized that parents and their wholly owned subsidiaries have the same interests because all of the duties owed to the subsidiaries flow back to the parent. *Trenwick Am. Litig. Trust v. Ernst & Young, LLP*, 906 A.2d. 168, 192 (Del. Ch. 2006). There are obviously differences between a solvent and an insolvent subsidiary. An insolvent subsidiary might own obligations to its creditors to the extent that the creditors have standing to maintain derivative claims against directors on behalf of the corporation for breach of fiduciary duty. On the other hand, a parent owes no obligations to a solvent subsidiary and "the only interest of a wholly owned subsidiary is in serving its parent."
- On the other hand, if a subsidiary is not wholly owned, there may not be a common interest and whoever controls the subsidiary must seek to maximize its economic value for the requisite care and loyalty. *Id*.

4. From Whom are Disclosures Protected:

Section 75 of the Restatement provides that the joint-client privilege only protects communications from compelled disclosure to parties *outside* the joint representation.

5. Default Rule for Subsequent Adverse Proceedings:

When the former co-clients sue one another, the default rule is that all communications made in the course of the joint representation are discoverable. Restatement § 75(2). According to Comment D of § 75, there are two bases for this default rule: (1) it is the presumed intent of the parties; and (2) the lawyer's fiduciary duty of candor to both parties requires disclosure of all he or she knows.

However, § 75(d) provides that the co-clients may agree to alter this default provision by contract. However, it does not appear that any modification has ever been upheld.

6. Duration of Joint Representation:

Section 121 of the Restatement provides that when a joint attorney sees the co-clients' interests diverging to a degree that the interests are no longer congruent—the proper course is to end the joint representation.

The problem is that in-house/outside counsel sometimes do not appreciate the degree to which the joint clients' interests diverge. As a result, when a joint attorney fails to end the joint representation, the default provisions of § 75(2) are not tenable. In such situations, the D.C. Circuit and 3rd Circuit have held the communications are privileged against the joint clients notwithstanding the lawyer's misconduct. *Eureka Inv. Corp. v. Chicago Title Ins. Co.*, 743 F.2d. 932 (D.C. Cir. 1984) (per curiam).

D. Choices for Parents of Subsidiaries:

1. Shared Representation:

Parent companies frequently centralize the rendition of legal services to all affiliates and subsidiaries from one in-house legal department.

For the most part, courts hold that the disclosure of a subsidiary to its parent's lawyer generally does not result in a waiver of the privilege. *See Glidden Co. v. Jandernoa*, 173 F.R.D. 459, 472–73 (W.D. Mich. 1997).

However, in doing so, courts apply a variety of different theories. It is important to find the right theory to fully protect the corporation against inadvertent disclosure.

2. Choices of Theories Preventing Waiver for the Sharing of Information within the Corporate Family as a Waiver:

a. Single Client:

A corporate structure of parent, subsidiaries and affiliates are treated as one client. See *Glidden*, 173 F.R.D. at 472.

This theory makes some sense because, in other contexts, parents and their wholly owned subsidiaries are treated as one. For example, for purposes of a "conspiracy" cause of action under the Sherman Act, parents and subsidiaries are treated as one and therefore incapable of conspiring with one another. *See Copperweld Corp. v. Independence Tube Corp*., 467 U.S. 752, 772 (1984); *In re Teleglobe Comm. Corp*., 493 F.3d. 345, 370 (3rd Cir. 2007). Likewise, both Texas and federal courts have held that a parent cannot tortiously interfere with a subsidiary's contracts absent specific motivations. *See, e.g., Swank v. Sverdlin*, 121 S.W.3d. 785, 800–01 (Tex. App.—Houston [1st Dist.] 2003, pet. denied.) (In *Sverdlin*, the defendants were actually individuals and not subsidiaries. Nonetheless, the language of the opinion is broad enough to include subsidiaries.); *In re Teleglobe*, 493 F.3d at 370.

On the other hand, treating a parent and its subsidiaries and affiliates as the same entity, or client, ignores the basic principle that courts must respect the separateness of legal entities. *In re Teleglobe*, 493 F.3d. at 370. As a result, treating the parents and subsidiaries as one is in direct contravention of laws which require the separateness of business entities.

Indeed, in *In re Teleglobe*, the 3rd Circuit criticized a corporation for attempting to use the single client theory:

> By structuring its various activities by forming separate corporations, a parent company realizes numerous benefits, not the least of which are the liability shield. With that structure comes responsibility to treat the various corporations as separate entities. In a tort suit, for example, it is doubtful we would treat the debtors, Teleglobe, and BCE as one entity.

In re Teleglobe, 493 F.3d. at 371.

b. The members of the corporate family enjoy a common interest privilege:

This rationale works in only a few settings. The common interest privilege only comes into play when parties are represented by *separate* counsel, which is often not the case for in-house legal staff representing parents and subsidiaries. *In re Teleglobe*, 493 F.3d. at 372.

Likewise, the common interest privilege applies only when the separate lawyers disclose information to one another or their clients—not when parties communicate directly with each other. As a result, the common interest privilege would not protect many communications that occur at the direction of corporate counsel.

c. Joint Client:

The joint client rationale protects the separateness of each entity. The use of this doctrine recognizes that each of the subsidiaries and parent may have separate needs but an overarching community of interests on some matters.

3. Corporate Diverging Interests

No joint representation is appropriate in the face of corporate spin-offs or defunding. In these circumstances it is necessary for the parents and subsidiaries to obtain separate counsel for the purpose of transactions which include a diverging of interests.

E. 625 Milwaukee, LLC v. Switch & Data Facilities Co., No. 06-C-0727, 2008 WL 582564 (E.D. Wis. February 29, 2008) (slip copy).

This case demonstrates the potential problems with the joint client and common defense privilege.

- S&D incorporated WI One, as a wholly owned subsidiary.
- WI One was a shell entity, with no employees or assets.
- The intent of S&D was to take title of real property in WI One.
- S&D and WI One are represented in the purchases of real property by an outside law firm.
- S&D decides to sell the property to a purchaser, Aviad.
- S&D agreed that WI One would buy the property and, in turn, Aviad would purchase WI One.

- Then, WI One, to be owned by Aviad (as landlord), would execute a lease in favor of a new S&D subsidiary, WI Two.

The timing of the transactions was important.

- WI One and WI Two signed a lease term sheet (at this point WI One was still owned by S&D)(the same corporate officer signed on behalf of both WI One and WI Two).
- Only after the lease term sheet was signed S&D did sell WI One to Aviad.
- Thereafter, WI One purchased the property from S&D.

Litigation broke out among the parties and S&D withheld:

- Documents predating the sale of WI One concerning the negotiation of the lease.
- Documents predating the sale of WI Once concerning the assignment or sale of S&D's membership interest in WI One to Aviad.
- Documents postdating the sale of WI One to Aviad concerning presale legal services.

WI One, now owned by Aviad, claims it is entitled to the documents as part of its prior attorney's (Blank Rome) client file and that it is entitled to the documents under the common interest privilege.

Holdings:

- When control of a corporation passes to new management, the authority to assert and waive the corporation's attorney-client privilege passes as well.
- The lease term sheet must be turned over to WI One as part of its client file under the doctrine of joint client representation. (not common interest privilege).
- The documents predating the sale of WI One concerning the S&D sale of its interest to Aviad must be disclosed because of the joint client representation.
- The post-sale documents do not need to be turned over because as of the sale, the joint interest privilege terminated.

IV. CONCLUSION:

It is clear that in-house corporate counsel is free to represent the interests of his or her employer and any subsidiaries or parents as long as the interests of those parent and sister companies are congruent. For the most part, a general counsel's office is free to represent the interest of the parents and subsidiaries and protect communications with the subsidiaries and parent through the attorney-client privilege.

However, problems arise when corporate entities are split, spun off and when their interests diverge. In those situations, the protection of the attorney-client privilege can be an issue. For example, if an entity is spun off or sold to another—the attorney-client privilege goes with that entity. As a result, it may seek confidential information from the seller's in-house counsel staff that occurred prior to the sale. As a result, in preparations for sales or spin offs—it is wise to secure separate counsel or apportion general counsel to the company to be sold.

TABLE OF AUTHORITIES

CASES

625 Milwaukee, LLC v. Switch & Data Facilities Co., No. 06-C-0727, 2008 WL 582564 (E.D. Wis. February 29, 2008) (slip copy). 9

Axelson, Inc. v. McIlhany, 755 S.W.2d 170 (Tex. App.—Amarillo 1988, orig. proceeding) 1

Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 772 (1984); *In re Teleglobe Comm. Corp*., 493 F.3d. 345, 370 (3rd Cir. 2007). 8

Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1172 (D.S.C. 1947). 6

Eureka Inv. Corp. v. Chicago Title Ins. Co., 743 F.2d. 932 (D.C. Cir. 1984) (per curiam). 8

Glidden Co. v. Jandernoa, 173 F.R.D. 459, 472–73 (W.D. Mich. 1997). 8

Gulf Oil Corp. v. Fuller, 695 S.W.2d 769, 774 (Tex. App.—El Paso 1985, no writ). 5

Harris v. Daugherty, 11 S.W. 921, 923 (Tex. 1889). 7

Hunyndee v. U.S., 355 F.2d. 183, 184–85 (9th Cir. 1965) 5

In re Auclair, 961 F.2d 65, 69 (5th Cir. 1992) 2

In re Auclair, 961 F.2d. 65, 69-70 (5th Cir. 1992); *In re JDN Real Estate-McKinney, L.P.*, 211 S.W.3d. 907, 922 (Tex. App.—Dallas 2006, orig. proceeding) 3

In re Dalco, 186 S.W.3d. 660, 667 (Tex. App.—Beaumont 2006, orig. proceeding) 4

In re JDN, 211 S.W.3d. 907 7

In re JDN, 211 S.W.3d. at 922 4

In re Teleglobe, 493 F.3d at 370 9

In re Teleglobe, 493 F.3d. at 370 9

In re: LTV Securities Litigation, 89 F.R.D. 595, 604–05 (N.D. Tex. 1981) 5

In re: Teleglobe Communications Corp., 493 F.3d. 345, 364–65 (3rd Cir. 2007). 5

National Converting & Fulfillment Corp. v. Bankers Trust Corp,. 134 F. Supp. 2d. 804 (N.D. Tex. 2001) 2

National Medical Enterprises, Inc. v. Godbey, 924 S.W.2d 123 (Tex. 1996). 4

National Tank Co. v. Brotherton, 851 S.W.2d 193, 197 (Tex. 1993) 2

Neighborhood Dev. Collaborative v. Murphy, 233 F.R.D. 436, 441– 42 (D. Md. 2005). 7

Republic Ins. Co. v. Davis, 856 S.W.2d 158 (Tex. 1993). 2

Ryals v. Canales, 767 S.W.2d 226, 228–29 (Tex. App.—Dallas 1989, no writ.). 4

Schachar v. American Academy of Ophthalmology, Inc., 106 F.R.D. 187, 191–92 (N.D. Ill. 1985) (dicta) 4

Swank v. Sverdlin, 121 S.W.3d. 785, 800–01 (Tex. App.—Houston [1st Dist.] 2003, pet. denied.) 9

Transmirra Prods. Corp. v. Monsanto Chem. Co., 26 F.R.D. 572, 579 (S.D.N.Y. 1960) 5

Trenwick Am. Litig. Trust v. Ernst & Young, LLP, 906 A.2d. 168, 192 (Del. Ch. 2006). 7

U.S. v. Gotti, 771 F. Supp. 535, 545 (E.D.N.Y. 1991). 5

U.S. v. Henke, 222 F.3d. 663, 637 (9th Cir. 2000). 7

Unauthorized Practice of Law Committee v. American Home Assur. Co., Inc., No. 04-0138, 2008 WL 821034 (Tex.March 28, 2008) 3

United States v. United Shoe Machinery Corp., 89 F. Supp. 357 (D. Mass 1950) 1

Upjohn Co. v. United States, 449 U.S. 383 (1981) 2
Westinghouse Elec. Corp. v. Republic of the Philippines, 915 F.2d 1414 (3rd Cir. 1991) 5
Wilson P. Abraham Const. Corp. v. Armco Steel Corp., 559 F.2d. 250, 253 (5th Cir. 1977) 6