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Can Pandora's Box Be Closed?

Asserting a corporation's attorney-client privilege against its former leaders.

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By Hon. Ethan Greenberg and Ronald G. Blum

Lifetime contracts are rare in the business world. Eventually, corporations part ways with their leaders, sometimes on friendly terms, but often not.

A lawsuit between the company and its former leaders may follow. Other parties, including government agencies, may commence related litigation (or investigations). That litigation often focuses on controversial decisions during former management's time in office. Advice of the company's lawyers may have guided those decisions.

Discovery begins. The company's former officers or directors may want to prove that their decisions were the result of (or consistent with) counsel's advice. Do they have a right to attorney-client communications generated during their tenure? Or can the company resist disclosure on the ground of privilege?

For example, suppose that the company's former CEO wrote an important memo to (or received an important memo from) the company's lawyer. Can the company now assert privilege to refuse to provide the memo to the former CEO, even though the former CEO wrote or read the memo in the first place?

In other words, once the CEO vacates the executive suite and turns in her keys, does she have no more right than the general public to see privileged corporate documents generated on her watch?

These questions arise with some frequency, and have great practical importance. One might expect the law would be settled, especially because attorney-client privilege and corporate governance are among the most well-worn subjects in American law.

However, the law is far from settled. Courts have issued conflicting decisions, from which at least three different rules emerge. Some courts grant former management complete access to such documents. Some courts grant only limited access; and some deny access altogether.[1]

Moreover, even among courts that appear to agree on the scope of access, sharp differences exist as to the reason behind the rule. Those differences make it difficult to predict results in future cases.

This article surveys the case law and summarizes the logic behind the different rules. We also point out strengths and weaknesses of the approaches, and offer cautious advice on some steps that may better position clients to deal with these issues.

Access Denied

A number of courts have held that former officers and directors have no right of access to attorney-client materials generated during their tenure. Indeed, this is viewed (at least in some quarters) as the emerging majority rule. See Epstein, "The Attorney Client Privilege and the Work Product Doctrine," Vol. 1, pp. 174-75 (5th Ed., American Bar Ass'n Litigation Section, 2007).

The chief reason for the "no access" rule is that the privilege belongs to the corporation, and that the decision to assert privilege (like other corporate decisions) should be made by current management. See, e.g., *Dexia Credit Local v. Rogan*, 231 F.R.D. 268, 277 (N.D. Ill. 2004) ("…[T]he privilege remains with the corporation, because it belongs to the corporation.")

In addition, some courts deny access to former management to prevent dissemination of proprietary or sensitive materials, fearing that former management is no longer "duty bound to keep such information confidential." *Genova v. Longs Peak Emergency Physicians*, 72 P.3d 454, 463 (Colo. App. 2003); *Barr v. Harrah's Entertainment Inc.*, 2008 WL 906351 (D.N.J. 2008) (citing cases and denying access because plaintiff/former CEO sought documents as class representative).

Other courts conceptualize the issue differently, but reach the same result. *Milroy v. Hanson*, 875 F.Supp. 646, 649-50 (D. Neb. 1995), and *Lane v. Sharp Packaging Sys. Inc.*, 251 Wis. 68 (Wis. 2002), for example, deny access because former management lacks authority to waive the company's privilege.

A number of readily apparent logical and practical problems exist with the rule denying all access to former management. First, the concern about dissemination of confidential information should carry little weight. A confidentiality stipulation can meet that concern.

More important, decisions denying access to privileged materials, even those already seen by former management, do not sufficiently recognize the extent to which business decisions rely on, and are intertwined with, legal advice.

Few major corporate decisions are made without considering legal ramifications. If those decisions are at issue in subsequent litigation, denying access to privileged communications means that relevant, and quite significant, facts will not be aired. It is difficult to see why such a result is desirable.

Full Access

A significant number of courts have held that former management is entitled to discovery of attorney-client materials generated during its time in office. These decisions flatly disagree with decisions like *Dexia* and *Genova*.

The leading cases supporting full access come from Delaware.

In *Kirby v. Kirby*, 1987 WL 14862, 1987 Del. Ch. LEXIS 463 (1987), *Moore Business Forms Inc. v. Cordant Holdings*, 1996 WL 307444, 1996 Del. Ch. LEXIS 56, appeal refused, 682 A.2d 625 (Del. 1996), and recently *Teachers' Retirement Sys. of La. v. Greenberg, et al.*, CA. No. 20106 (Del. Ch. 2007), Delaware's Chancery Court held that Delaware law entitles former directors and officers to discovery of privileged documents generated during their tenure.

See, e.g., *Moore*, 1996 WL 307444, *4: ("[A] corporation cannot assert privilege to deny a director access to legal advice furnished to the board during the director's tenure"); accord, *Glidden Co. v. Jandernoa*, 173 F.R.D. 459, 473-74 (W.D. Mich. 1997); *Wechsler v. Squadron, Ellenoff, Plesent & Sheinfeld, LLP*, 994 F.Supp. 202, 211-12 (S.D.N.Y. 1998).[2]

The basis for this Delaware rule is that former management was, with the corporation, a "joint client" of company counsel:

"[T]he client is the corporate entity; the corporate entity can act only through people; the directors are the collective body that has the responsibility to manage the corporation; and consistent with their joint obligations, the directors are the joint clients when legal advice is given to the corporation through one of its officers or directors…" When Miller was a part of the collective body of Inter-Fluve's Board of Directors, he was entitled to access the attorney-client communications occurring between corporate counsel and the other directors. The fact that Miller is no longer a director is not sufficient cause to render these communications privileged as against him.

Lane v. Sharp Packaging Systems, 251 Wis.2d 68 (Wis. 2002) (Abrahmson, J., dissenting) (quoted in *Inter-Fluve v. Montana District Court*, 327 Mont. 14, 23-24 (2005)).

At times, courts have cited Delaware's Corporation Law §220, which guarantees directors the right to inspect corporate records, as supporting full access. (Section 220(d) provides that "Any director shall have the right to examine the corporation's…books and records for a purpose reasonably related to the director's position as a director.")

The full access rule certainly promotes a complete record in litigation, but it has drawbacks. In particular, critics point out that candor between attorney and a corporate client (and, as a result, the quality of corporate decision-making) may be impaired if a company becomes concerned that a disgruntled former officer may someday access privileged documents generated during his tenure.

Qualified Access

A number of courts have tried a middle ground between full and no access. *In re Braniff*, 153 B.R. 941 (Bankr. M.D. Fla. 1993), rejects *Kirby*'s full access and "joint client" rationales, and holds that fundamental fairness requires that former officers and directors be granted discovery of privileged documents that were either written by or addressed to them.

New York has adopted a different qualified access rule; *People v. Greenberg*, 50 A.D.3d 195 (1st Dept. 2008) demonstrates some of the complexity and unpredictability of the New York rule.

Greenberg, like the *Teachers' Retirement* case from Delaware noted above, grew out of high-profile difficulties of American International Group (AIG) and its former CEO Maurice Greenberg. New York's Attorney General, then Elliot Spitzer, filed a complaint alleging that under Greenberg's leadership AIG had engaged in sham insurance transactions designed to deceive potential investors.

Greenberg (and CFO Howard Smith) resigned from AIG under pressure. As the litigation proceeded, Greenberg and Smith asserted that the transactions were consistent with advice of AIG's counsel, and they demanded discovery of attorney-client communications. AIG opposed, and the trial court denied discovery on the ground of privilege.

On appeal, the First Department reversed. Noting that AIG is a Delaware corporation headquartered in New York, the majority reasoned that the law of the forum state, New York, should govern, but that under either state's law, discovery should be allowed.

New York common law, the *Greenberg* majority explained, gives a former director or officer a qualified right to inspect corporate records generated during their tenure, provided that inspection is necessary to protect his "personal responsibility interest" and the interest of the board. *Greenberg*, 50 A.D.3d at 201; see also *Tekni-Plex Inc. v. Meyner & Landis*, 89 N.Y.2d 123 (1996); *Matter of Murphy v. Fiduciary Counsel*, 40 A.D.2d 668, 669 (1st Dept. 1972), aff'd, 32 N.Y.2d 892 (1973); *Matter of Cohen v. CocoLine Products Inc.*, 309 N.Y.2d 119, 124(1955).

The majority found that because Greenberg and Smith were accused of unlawful conduct, New York's "personal responsibility interest" test was easily met,[3] and that discovery was appropriate:

"[T]he fact that Greenberg and Smith are no longer directors is not fatal to their motion to compel where their conduct while directors has been called into question and the inspection is needed to prepare their defenses." *Greenberg*, 50 A.D.3d at 202.[4]

New York's qualified access attempts to balance former management's legitimate need to defend itself when accused of wrongdoing and the corporation's need for privacy in deliberations (and current management's right to control corporate affairs).

However, New York's rule leaves difficult questions unanswered: Not only is "protecting the personal responsibility interest" of former management a somewhat awkward phrase, it is also a somewhat vague concept, at least at the margins.

Consider the following example. A corporation is accused of misconduct that may result in prosecution. The corporation fires its CEO, who sues for breach of contract, wrongful discharge and the like. The corporation (now under new management eager to appease authorities) asserts that the decision to terminate the former CEO was proper because the CEO had breached his employment contract by leading the corporation into unlawful conduct.

The former CEO contends that the challenged conduct was lawful and approved by the corporation's lawyers. She demands discovery of attorney-client memoranda. The corporation asserts privilege.

What should be the result under the New York rule? The answer is not clear. On the one hand, the former CEO is responding to a claim of misconduct. So perhaps discovery would be granted on the theory that she is "protecting her personal responsibility interest."

On the other hand, the former CEO in this example is the plaintiff, and she seeks money damages from the corporation. Given that offensive posture, it becomes more difficult to say that the former CEO is merely "protecting" her responsibility interests, or acting in the interests of the corporation's board or stockholders.

Indeed, she is directly adverse to the stockholders' interests since they will ultimately pay any damage award she might win. So a court might well deny discovery.

Other considerations further complicate the analysis. Has the corporation waived the privilege by placing at issue the legality of the former CEO's challenged conduct? Does it matter whether the crimes with which the former CEO might be charged require scienter, that is, proof that the CEO understood her conduct was illegal at the time it was undertaken? (In such a case, attorney-client communications might constitute especially important evidence.)

Does it matter whether the corporation, although headquartered in New York, is incorporated in a state that denies former management all access to privileged corporate documents?

Qualified access may sound Solomonic, but what principles guide it? Does it make sense to say that the corporation and its executives hold the privilege jointly, but that former executives can waive it only in part?

Conclusions

No settled rule answers the questions under what circumstances and to what degree a corporation's former leaders are entitled to access to privileged attorney-client communications generated during their tenure.

Obviously, it would be preferable for some relatively uniform national rule to emerge. A uniform rule would (presumably) promote predictability, reduce litigation over the issue, and enable both corporations and their leaders to conform their conduct to a known and clear standard.

It is, of course, more difficult to say just what such a uniform rule ought to provide. The case law in this article sets out valid considerations, pro and con, concerning very different approaches to these issues. Each approach has obvious merits and drawbacks.

Frankly speaking, the law as it now stands is confusing. Counsel must be mindful of these issues and prepared to meet them to the extent the confused state of the law permits. In certain situations, lawyer and client may be able to reduce uncertainty, and best position the client in the event of future litigation.

For example, a corporation and an executive might bargain over and draft an employment contract clause that sets forth whether the corporation will waive the privilege in post-employment litigation with the executive, or whether the executive will forego her right to such documents. This same result might instead be achieved less directly by adding to the employment contract a choice-of-law clause pointing to a jurisdiction (such as Delaware) with a clear rule of disclosure, or non-disclosure.

For another example, where a corporation sees an approaching issue that may put it at odds with members of current management, it may be advisable (as suggested by the *Moore's Business Forms* decision) for the corporation to form a special committee to deal with this issue, and for the committee in turn to engage separate counsel so as to better preserve the corporation's claim to privilege in the event of future litigation.

This approach is particularly useful if the corporation wishes to solicit confidential legal advice about whether to fire members of management. Certainly, a corporation would not want to have to disclose in a wrongful termination lawsuit the legal analysis that led up to the decision to terminate.

Lawyers with extraordinary foresight might also use corporate bylaws to address former leadership's access to corporate records. But apparently no case law has evaluated the effectiveness of that approach. And why would current management, however well-intentioned, adopt that unusual provision?

In Greek mythology, Zeus gave Pandora a precious box, but solemnly instructed that it never be opened. Pandora disobeyed. She opened the box, and all of mankind's ills and sorrows escaped into the world, from which they can never be recalled.

A corporation must necessarily entrust its secrets to its human leaders. When the corporation lets those leaders go, they take the corporation's secrets with them into the world. As both a practical and legal matter, the question whether the corporation can ever effectively recall, or protect, those secrets from that point forward is problematic, at best.

Ethan Greenberg, *Acting Supreme Court justice sitting in the Bronx, is also an adjunct professor at Fordham and Cardozo Law Schools.* **Ronald G. Blum** *is a partner in the New York office of Manatt Phelps & Phillips and an adjunct professor at Fordham Law School.* **Rebecca Freedman***, a 2009 graduate of Washington University in St. Louis School of Law, assisted in the preparation of this article.*

Endnotes:

1. Several useful surveys address this topic. See Schachter and Scarola, "But I Was the Client: The Attorney-Client Privilege as Applied to Former Officers and Directors," Corporate Counsel Weekly, Jan. 28, 2009; 28 A.L.R.5th 2, "What Persons or Entities May Assert or Waive Corporation's Attorney-Client Privilege," §§8,9,10; Sher and Dely, "When Former Director Battles Company," New York Law Journal, Dec. 2, 2002 (S 1, col. 2).

2. *Kirby* seemed to suggest that access is appropriate only when the action is in the nature of a shareholder derivative action, intended to promote the interests of the corporation. *Teachers' Retirement System*, by plain implication, drops that seeming requirement.

3. Notably, *CocoLine* establishes a two-part test: the former officer/director must need discovery to protect both 1) a "personal responsibility interest," and 2) the interests of stockholders. *Greenberg* (and other recent New York cases) recite this two-part test, but focus exclusively on the "personal responsibility interest." New York cases thus closely parallel Delaware law. See Note 2 above.

4. The concurring opinions in *Greenberg* took issue with the majority concerning choice of law. Justice James McGuire opined that Delaware law governed, and that the majority's discussion of New York law was irrelevant. Justice David Friedman more cautiously declined to endorse the majority's assertion that New York law would necessarily trump Delaware law if conflict existed between the two.