



IN RE TELEGLOBE:
THE ATTORNEY-CLIENT PRIVILEGE
AND IN-HOUSE COUNSEL

by

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A corporate in-house lawyer may have more clients than he or she realizes. When a parent corporation maintains a family of companies through subsidiaries and affiliates but has one centralized in-house legal department at the parent company level, those in-house lawyers frequently provide legal services for multiple members of the corporate family. That situation generally does not present any dilemmas when the interests of the parent company and its subsidiaries and affiliates are fully aligned. When those interests diverge, however, questions can arise about what duties and obligations the in-house lawyers owe to the now-squabbling constituent parts of the formerly harmonious family. In particular, the parent company's entitlement to the protection of the attorney-client privilege in litigation with a prodigal corporate offspring can fall into doubt when the parent's in-house legal department at one time provided services to both entities.

Background. In a recent decision, *In re Teleglobe Communications Corp.*, 493 F.3d 345 (3d Cir. 2007), the United States Court of Appeals for the Third Circuit addressed this issue at length, and has clarified how the attorney-client privilege generally applies in such a corporate setting. *Teleglobe* also supplies in-house corporate counsel with guidance on what to do when client interests diverge, and how to preserve the protection of the attorney-client privilege for the parent company.

Bell Canada Enterprises ("BCE"), the Canadian telephone giant, decided in the 1990s to establish a global network of fiber optic cables to accommodate the then-anticipated level of explosive growth in demand for high-speed digital services. *Id.* at 353. BCE acquired, and lavishly funded, a Canadian company, Teleglobe, which was to build, own, and operate the new fiber-optic network. Teleglobe had its own wholly-owned United States subsidiaries to build and operate the American portion of the network. *Id.* BCE had a centralized in-house legal department. Those attorneys provided legal services both to BCE and to Teleglobe, the Canadian first-tier subsidiary. *Id.* at 354.

Unfortunately for BCE and its Teleglobe affiliates, many other companies also decided in the late 1990s to build their own fiber-optic networks, and the anticipated explosion in demand for digital services did not materialize, creating a world-wide glut of fiber-optic lines without any hope for the owners of those lines to recoup the billions they expended. *Id.* at 354, n.4.

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As this problem began to take shape, BCE, along with Teleglobe, studied how best to respond to the dire situation. BCE dubbed those efforts “Project X.” *Id.* at 353-54. BCE’s in-house lawyers worked on Project X – an effort that stretched over several months – with representatives from BCE and also from Teleglobe. *Id.* BCE eventually concluded that the situation was hopeless and decided to cut off any further funding for Teleglobe. *Id.*

Teleglobe, saddled with billions in debt, filed for bankruptcy under the Canadian bankruptcy system. *Id.* Teleglobe’s U.S. subsidiaries (hereinafter “Debtors”) filed for bankruptcy in Delaware. *Id.* Once in bankruptcy court, control of the Debtors fell to their creditors. The Debtors, at the behest of those creditors, then filed an action against BCE for, *inter alia*, breaching alleged fiduciary obligations to the Debtors and causing the Debtors’ collapse. *Id.*

During that litigation, BCE withheld certain Project X-related documents from the Debtors on the basis of the attorney-client privilege. *Id.* The Debtors cried foul, arguing that BCE could not withhold documents from the Debtors given that, according to the Debtors, BCE’s in-house lawyers represented the entire corporate family, and that, therefore, BCE could not properly shield the Debtors from their own lawyers’ communications. *Id.* at 357.

The trial court reviewed the documents at issue and ultimately agreed with the Debtors. *Id.* at 357. The trial court found that:

1. BCE’s in-house lawyers provided legal services to both BCE and Teleglobe, the Canadian subsidiary,¹ regarding Project X;
2. BCE hired outside counsel to represent only BCE regarding Project X, but those outside lawyers funneled privileged information to the “conflicted” in-house legal department;
3. Teleglobe had waived the privilege with respect to BCE’s in-house legal department in favor of the Debtors;
4. Consequently, the trial court concluded that BCE had lost the protection of the privilege because of its conflicted in-house legal department.²

Joint Client Privilege Applies. On appeal, the Third Circuit held that the pertinent species of the attorney-client privilege, and the proper analytical point of departure, was the “joint client” privilege, and not the “common interest” privilege,³ as the trial court and the parties had assumed. *Id.* at 362. The joint client privilege applies when a single lawyer (or legal department, in this case) simultaneously represents more than one client on a matter of common interest. *Id.* When the parties and counsel establish a joint client relationship, the privilege protects the parties and their joint lawyer from any forced disclosure of their communications to persons outside of the joint representation. *Id.* at 363.

The joint client privilege differs from the common interest privilege. *Id.* at 365-66. The latter applies when multiple clients each have their own separate counsel, but those lawyers collaborate on a matter of common interest for their clients. *Id.* at 363-64. While similar, and often confused, the joint client privilege and the

¹The trial court made no finding that the in-house lawyers represented the Debtors, the U.S. Teleglobe subsidiaries. *Id.* at 357. As will become apparent, the lack of any such finding was crucial to the Third Circuit’s decision.

²The trial court also concluded that BCE was estopped from invoking the privilege because of a concession it made earlier in the proceedings. *Id.* The Third Circuit rejected that basis for denying BCE the protection of the privilege. *Id.* at 374-80.

³The “common interest” privilege is also called the “community of interest” privilege. *Id.* at 363, n.18.

common interest privilege are distinct and have certain unique characteristics.⁴ Consequently, the court cautioned against ignoring the distinctiveness of the two doctrines, and issued a mild rebuke to BCE’s lawyers for failing to do so. *Id.* at 365-66 n.22. (“Confusing as this area of the law is, parties asserting the privilege . . . are expected to explain themselves with more precision than BCE has throughout this litigation.”).

Divergence of Interests. The Third Circuit emphasized that lawyers should undertake and then maintain joint client relationships only when the clients’ “legal interests [are] identical (or nearly so) . . .” *Id.* at 366. The court recognized, however, that client interests, even if at one time perfectly aligned, can diverge over time. *Id.* at 373.⁵ The court thus turned its attention to what happens to the attorney-client privilege when the formerly aligned interests of joint clients diverge, and then drive the former allies into litigation with each other. *Id.* at 366-69.

The court held that, when joint clients’ interests begin to diverge, the joint attorney is under an *ethical* obligation to end the joint representation. *Id.* at 368.⁶ However, if the joint lawyer fails in that ethical obligation and continues representing both clients, the Third Circuit, relying on an earlier decision from the D.C. Circuit, *Eureka Inv. Corp. v. Chicago Title Ins. Co.*, 743 F.2d 932 (D.C. Cir. 1984), held that a client should not be penalized for the lawyer’s lapse, and the privilege remains intact, even in litigation between the two joint clients. *Teleglobe*, 493 F.3d at 368-69.⁷

In-House Lawyers, Corporate Families, and the Joint Client Privilege. The Third Circuit held that when a parent company’s in-house legal department represents both the parent and a subsidiary or subsidiaries on a matter of common interest, the corporate entities are in a joint client relationship with the legal department. *Id.* at 369-70.⁸ Consequently, the following characteristics of a joint client relationship apply to that circumstance:

1. “intra-group information sharing” does not amount to a waiver of the attorney-client privilege, *id.* at 369-70;
2. the joint client privilege is subject to bilateral, not unilateral, control. Therefore, one joint client cannot unilaterally strip the other of the protection of the privilege in disputes with third parties. Both joint clients must consent to a waiver of the privilege, *id.* at 363;
3. in the event of adverse litigation between the joint clients, the privilege generally is waived, *id.* at 366;

⁴For instance, the common interest privilege, according to the Third Circuit, protects only information that the lawyers share with each other, while the joint client privilege also applies to communications with the clients. *Id.* at 365.

⁵The interests of a parent company and a wholly-owned subsidiary can diverge, for example, in the contexts of a sale, a spin-off, or a bankruptcy. *Id.*

⁶The Third Circuit suggested that after ending the joint relationship concerning a particular matter where the entities’ interests had diverged, an in-house lawyer could “continue to represent the subsidiary (jointly or alone) on other matters.” *Id.* at 373.

⁷Thus, if L represents A and B jointly on a matter of common interest, but A and B’s interests on that matter later diverge, L has an ethical obligation to end the joint representation. However, if L does not do so, and continues to communicate with A on that matter, those communications remain privileged, even from B in B’s litigation with A. *Id.*

⁸The court rejected BCE’s and *amicus*’s argument that the court should treat the corporate family as one client, with control of the privilege in the parent’s hands. *Id.* at 371-72.

4. however, under the *Eureka* doctrine, if a joint lawyer fails in his or her ethical duty to end the joint representation once the clients' interests begin to diverge, the clients do not lose the protection of the privilege for communications that occur after the divergence, even in litigation with one another. *Id.* at 368-69.

“In sum,” the court declared:

in-house counsel have available numerous means to protect a parent company's privilege. 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 where subsidiaries are adverse to the parent, in-house counsel can maintain sufficient control over the parent's privileged communications. *Id.* at 374.

BCE Did Not Lose the Privilege. With all of that groundwork completed, the Third Circuit held that the trial court erred in concluding that BCE had lost the protection of the attorney-client privilege. The Third Circuit focused on the trial court's factual finding that BCE's in-house lawyers represented both BCE and Teleglobe (the Canadian subsidiary), and the absence of any finding that BCE's in-house lawyers had any joint client relationship with the Debtors (the U.S. Teleglobe subsidiaries). *Id.* at 374. In the absence of any finding of a joint client relationship between BCE and the Debtors, the court concluded that:

1. Teleglobe's attempted waiver of the joint client privilege in favor of the Debtors was ineffective because the joint client privilege requires a waiver from all joint clients, not just one, *id.* at 379-80; and
2. the funneling of documents generated by BCE's outside counsel through the arguably “conflicted” in-house legal department likewise did not amount to a waiver because, under the *Eureka* doctrine, clients are not penalized for their lawyer's ethical lapses. *Id.* at 381-83.

The Third Circuit remanded the case to the district court, and instructed the lower court to re-examine the matter in light of the Third Circuit's decision. *Id.* at 380. The Third Circuit directed the trial court to determine the existence of any joint representation between BCE and the Debtors, the scope of any such joint representation, and whether the documents at issue fell within the scope of any joint representation. *Id.* at 387.⁹

Conclusion. Following *Teleglobe*, in-house counsel serving in a centralized corporate legal department now know the nature of their relationship with the parent company and its subsidiaries. When an in-house lawyer provides legal services simultaneously to a parent and one or more of its subsidiaries or affiliates on a matter of common interest, the lawyer has a joint client relationship with those entities. Consequently, the joint client privilege will shield the joint clients' communications with their joint attorney from the prying eyes of third parties. Complications will arise when the interests of joint corporate clients diverge, but, if in-house lawyers take appropriate precautions, they can fulfill their ethical duties and also preserve the protection of the attorney-client privilege for the parent corporation.

⁹The court also left open the possibility that the Debtors could avail themselves of the “fiduciary exception” to the attorney-client privilege, an interesting and important issue, but one beyond the scope of this article. *Id.* at 383-87.