

MULTI-ENTITY ENTERPRISES: ETHICAL CHALLENGES FOR IN-HOUSE COUNSEL (AND ENVIRONMENTAL SELF- EVALUATION PRIVILEGE)

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Considerations When Entities Do Or May Separate

A. Joint Representation

1. A “common legal cause or identity of interest” infers joint representation. In re Mirant Corp., 326 B.R. 646 (Bankr. N.D. Tex. 2005).
2. But courts will dig into whether the legal communication was “exclusively for the benefit of one” rather than both
3. Consider non-representation of some entities (v. joint representation)
 - a. parent may still have access to subsidiary’s privileged communications where there is dual representation.
 - b. subsidiary may still be able to invoke privileges against former parent. See, e.g., In re Fin. Corp. of Am., 119 B.R. 728 (Bankr. C.D. Cal 1990).



Are Your Interests Really “In Common”



“I wish I had known you when you had money.”

Considerations When Entities Do Or May Separate

- B. Common Interest Doctrine: “where an attorney represents more than one client in the same transaction or a matter of common interest, neither the attorney nor the recipient of the advice can withhold documents relating to the same subject matter from the other client”
- C. Limit Scope of Representation
 - 1. Unilateral is good; bilateral is better
 - 2. Terminate a joint representation before any material legal work relating to a separation begins, and have no common counsel on any separation related matter. In re Teleglobe Communications Corp., 2006 WL 2568371 aff’d 2006 WL 2567880 (D. Del. 2006).



The Perception of the Client, Not the Lawyer, Matters



Considerations When Entities Do Or May Separate

D. Consider Privilege.

1. The privilege belongs to the entity and the holder changes when ownership changes. *Polycast Tech. Corp. v. Uniroyal, Inc.*, 125 F.R.D. 47 (SDNY 1989) (after a subsidiary is sold, both prior parent and current owner entitled to entire file from the period of dual representation).
2. What about a contract provision that says purchaser is not entitled to joint attorney-client files?
 - a. Most courts find enforceable, especially if subsidiary is independently represented on contract terms. *Tekni-Plex, Inc. v. Meyner & Landis*, 674 N.E. 2d 663 (N.Y. 1996).



Considerations When Entities Do Or May Separate

E. Sale of Assets (v. stock sale)

1. General rule: mere sale of some of a corporation's assets (including reference to "privileges") does not transfer the corporations' A/C privilege. *FDIC v. Admundson*, 682 F.Supp. 981 (D.Minn. 1988).
2. Can the privilege be sold as an asset? Although some doubt, the answer is generally "no." *Zenith Electronics Corp. v. WH-TV Broadcasting Corp.*, 2003 WL 21911066 (N.D. Ill. 2003) ("not a property right that can be sold). Thus, sale of assets (v. stock) may be easier to protect privilege.



Self-Evaluation Privilege

- A. General Development
- B. Environmental Self-Evaluation
 - 1. EPA Policies
 - a. EPA's 1995 (revised in 2000) Audit Policy
 - (1) Reduce/eliminate gravity (v. economic benefit) penalties
 - (2) Recommends DOJ not prosecute
 - (3) But 9 conditions:
 - b. EPA's 2007 Approach to Applying Audit Policy to New Owners
 - (1) Incent new owners to take close look
 - (2) Economic benefit also reduced/eliminated
 - (3) Waters down the 9 conditions
 - (4) Audit agreement w/ EPA or quick disclosure



Self-Evaluation Privilege

2. Environmental Self-Evaluation Acts
 - a. Purpose: Encourage voluntary identification/remediation
 - b. Privilege & Rule of Evidence
 - c. Protected from FOIA-esque laws
 - d. Definitions
 - (1) “Self-initiated” & “not otherwise required”
 - (2) By employee or outside consultant
 - e. Penalty Waiver Incentive, IF:
 - (1) Discovered through an environmental self-evaluation;
 - (2) Corrected within 60 days (or within reasonable period);
 - (3) BUT, penalty not waived under certain circumstances.



No Penalty Waiver if Non-Compliance Resulted from Lack of Due Diligence, Willful Disregard



"Why wasn't a list of these sins made available to me, and why wasn't I allowed to have it examined by my own experts?"

*Cartoons property of The New Yorker

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