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Contents **CORPORATE COUNSEL** SPECIAL EDITION 2017

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Attorney-Client Privilege Considerations for **Private Equity Firm Counsel**

Private equity investments often present complicated questions concerning the attorney-client privilege, ranging from the interactions between a private equity firm and its portfolio companies to communications with the private equity fund's investors. It is important for in-house counsel at private equity firms to understand what communications likely will be protected and under what circumstances the privilege may be considered to have been waived.

THIS ARTICLE IS INTENDED TO PROVIDE A HIGH-LEVEL overview of the attorney-client privilege, identify issues that in-house counsel at private equity firms are likely to face, and provide practice tips for enhancing your chances of preserving the privilege.

Overview of the Attorney-Client Privilege

The attorney-client privilege is the oldest among the common law evidentiary privileges and protects confidential communications between a client and its attorney made for the purpose of obtaining or providing legal advice. (Courts' analyses of the attorney-client privilege vary according to state and there can be important, and outcome determinative, differences among states. This article is intended to provide a general overview of key principles associated with the privilege as well as those principles' application within the private equity context.) The purpose of the privilege is to encourage full and frank dialogue between lawyers and clients, and communications protected by the privilege need not be disclosed in litigation. Upjohn Co. v. United States, 449 U.S. 383, 389, 101 S. Ct. 677, 682, 66 L. Ed. 2d 584 (1981); Spectrum Sys. Int'l Corp. v. Chem. Bank, 78 N.Y.2d 371, 377, 581 N.E.2d 1055, 1059 (1991).

To be privileged, a communication essentially must be primarily or predominantly of a legal—rather than a business—character. The critical inquiry is whether the communication was made in order to render legal advice or services to the client. Spectrum Sys. Int'l, 581 N.E.2d at 1061. A communication will be protected where it concerns legal

WHERE TWO OR MORE CLIENTS SEPARATELY ENGAGE THEIR OWN COUNSEL TO ADVISE THEM ON MATTERS OF COMMON LEGAL INTEREST, THE COMMON INTEREST EXCEPTION ALLOWS THEM TO SHIELD FROM DISCLOSURE CERTAIN ATTORNEY-CLIENT COMMUNICATIONS THAT ARE REVEALED TO ONE ANOTHER FOR THE PURPOSE OF FURTHERING A COMMON LEGAL INTEREST.

rights and obligations and demonstrates other professional skills, such as a lawyer's judgment and recommended legal strategies. Rossi v. Blue Cross & Blue Shield of Greater N. Y., 73 N.Y.2d 588, 594, 540 N.E.2d 703, 706 (1989).

As a general matter, courts tend to scrutinize more closely communications with in-house counsel than outside counsel—guided by the principle that the privilege is not meant to be used as a shield to protect otherwise discoverable information. This is due primarily to the fact that in-house lawyers often have mixed legal and business responsibilities and can wear multiple hats, including serving as company officers. During their day-to-day interactions, in-house lawyers often walk the line between legal and non-legal involvement in company affairs—and that line can easily, and inadvertently, get blurred. Courts have warned that the mere participation of an in-house lawyer does not automatically protect communications from disclosure. Rossi, 540 N.E.2d at 705.

Privilege Challenges Facing In-House Counsel

In the private equity context, issues relating to the attorney-client privilege may arise in various scenarios, including when (1) a private equity firm's employee plays multiple roles, (2) one lawyer or law firm represents two clients, (3) clients share a common legal interest, and (4) there is a sale of a portfolio company.

Multiple Roles of Private Equity Professionals

Private equity firms commonly designate employees to serve as members of the boards of directors of portfolio companies. These designees wear two hats—one as employees of the private equity firm and the other as members of portfolio companies' board of directors. If a portfolio company shares privileged information (e.g., advice provided by the portfolio company's outside or in-house counsel) with an individual in his capacity as a director, the attorney-client privilege should be preserved. However, if that individual subsequently shares the privileged communication with his private equity colleagues in his capacity as an employee of the private equity firm, there is a risk that the attorney-client privilege could be considered to have been waived. (Generally, when a client shares privileged information with a third party, the attorney-client privilege will be waived.) In addition to being trained with respect to fiduciary duties owed to portfolio companies, private equity director designees should be sensitized to the issue of preserving portfolio companies' privilege.

Joint-Client Theory

The joint-client or co-client theory applies when one attorney represents the interests of two or more entities on the same matter, including where a parent corporation and one of its subsidiaries consult the same counsel with respect to a common legal cause. See, e.g., Bass Pub. Ltd. Co. v. Promus Cos. Inc., 868 F. Supp. 615 (S.D.N.Y. 1994) . Each respective joint client's communications with common counsel are protected by the attorney-client privilege, and if such communications are shared with another joint client, the privilege should be preserved. (Waiving the joint-client privilege typically requires the consent of all joint clients. A joint client may unilaterally waive the privilege as to its own attorney-client communications, so long as those communications concern only the waiving client. Such client may not unilaterally waive the privilege as to any of the other joint clients' communications or as to any of its communications that relate to other joint clients. In re Teleglobe Commc'ns Corp., 493 F.3d 345, 363 (3d Cir. 2007)). Whether two clients qualify as joint clients depends primarily on the understanding of the parties and the lawyer in light of the circumstances, including the details of the representations and the clients' interaction with the attorney and each other. In re Teleglobe Commc'ns, 493 F.3d at 363 (citing Sky Valley Ltd. P'ship v. ATX Sky Valley Ltd., 150 F.R.D. 648, 652–53 (N.D. Cal. 1993)).

There is not well-developed case law applying joint-client principles to the private equity context (i.e., to communications between a private equity firm and a portfolio company that shares the same lawyer). Accordingly, it is important to proceed with caution when relying on the joint-client theory and make clear in engagement letters with outside counsel that such representation will be on a joint-client basis.

. . . IN-HOUSE COUNSEL SHOULD KEEP THEIR LEGAL FILES AND BUSINESS FILES SEPARATE FROM ONE ANOTHER, AND UTILIZE CONFIDENTIALITY DESIGNATIONS TO MAKE CLEAR WHAT IS CONSIDERED LEGAL ADVICE VERSUS PURE BUSINESS ADVICE.

Common Interest Exception

Common interest is an exception to the general rule that the presence of a third party will destroy a claim of privilege. Where two or more clients separately engage their own counsel to advise them on matters of common legal interest, the common interest exception allows them to shield from disclosure certain attorney-client communications that are revealed to one another for the purpose of furthering a common legal interest. Ambac Assur. Corp. v. Countrywide Home Loans, Inc., 27 N.Y.3d 616 (N.Y. 2016). This exception historically has been applied in the merger context. For instance, where parties were represented by separate counsel and a merger agreement directed them to share privileged information relating to pre-closing legal issues, courts generally had found that such disclosure did not waive the privilege—reasoning that the parties shared a common legal interest and the communication was designed to further that interest. However, in a recent decision, the New York Court of Appeals made clear that such a fact pattern would waive the attorney-client privilege, unless the sharing of information was made in connection with pending or reasonably anticipated litigation. *Id.* Making matters even more complicated is that jurisdictions differ on whether litigation must be pending or reasonably anticipated—and it can be difficult to analyze which state's law should govern a particular transaction. Accordingly, in-house counsel should use caution and anticipate that the common interest exception may not apply to these types of communications (especially considering the recent uptick in merger-related lawsuits).

The common interest exception also may apply in the context of a communication between the private equity firm and its investors concerning a threatened or ongoing litigation or investigation. Much like communications including portfolio companies, these interactions require careful analysis due to the risk of waiver (i.e., the potential that the private equity firm loses the privilege by sharing privileged information with one or more limited partners).

Related Content

For assistance in drafting a side letter to be used when forming a private equity fund, see

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For an overview of the various remedies that investors typically negotiate for when investing in a private equity fund, see

> **INVESTOR REMEDIES**

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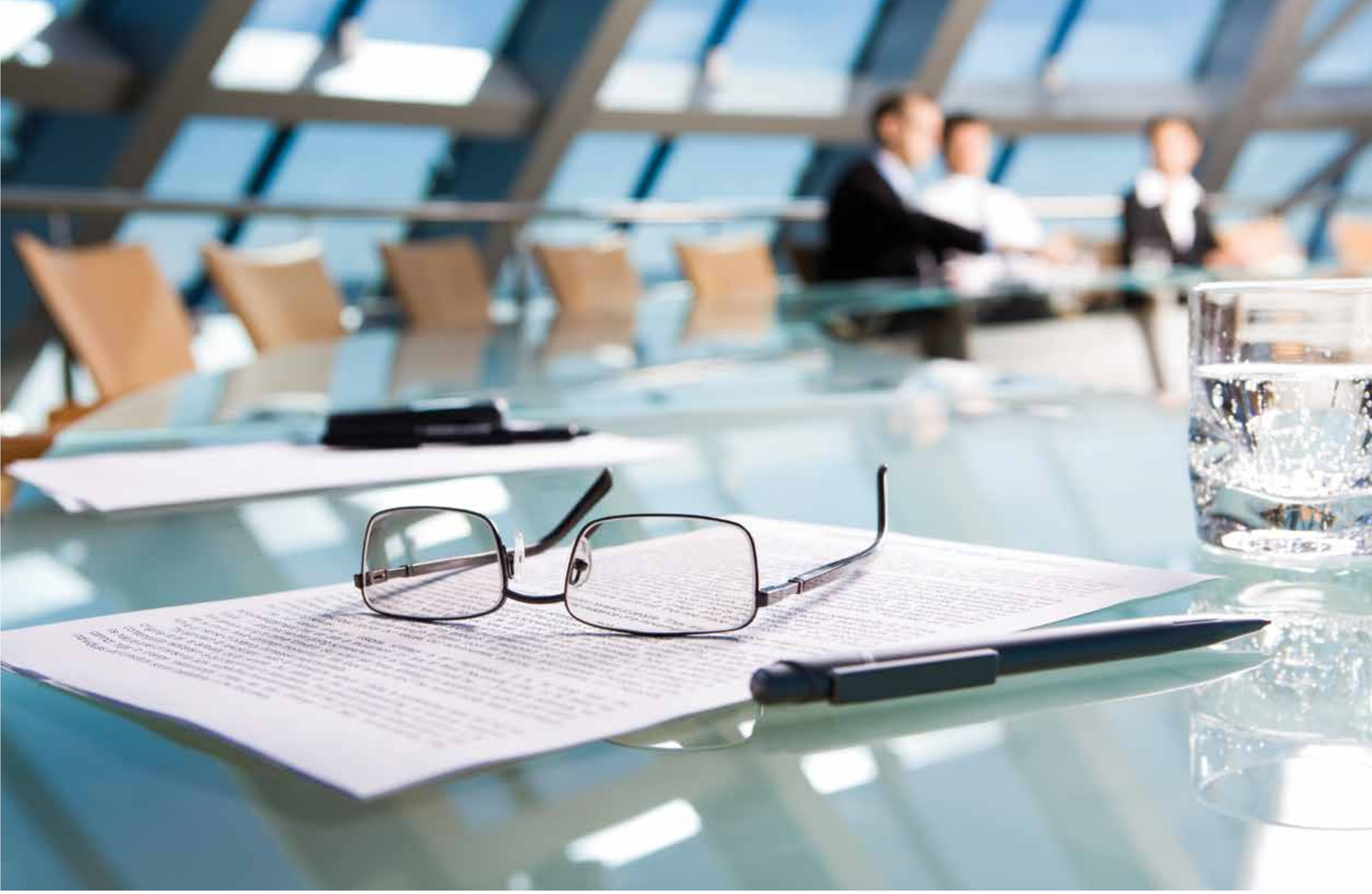
Sale of a Portfolio Company

When control of a company passes to new management, whether through a sale, merger, takeover, or normal succession, the authority to assert and waive the company's attorney-client privilege also passes to new management. Bass Pub. Ltd., 868 F. Supp. at 619 (citing Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 349, 105 S. Ct. 1986, 1991, 85 L.Ed.2d 372 (1985)). If a company that acquires a portfolio company from a private equity firm later sues the private equity firm, the acquirer may be able to access and use in the litigation legal advice that the private equity firm and its former portfolio company received jointly. Thus, it is important to limit the joint representation of a private equity firm and its portfolio companies to instances in which it is necessary. And, consideration should be given to whether it makes sense to retain separate counsel for purposes of any contemplated sales/purchases in an effort to limit the amount of privileged communication that can be passed to new management.

Practice Tips

Think ahead. While privileged communications are not likely to be challenged until litigation, it is important to follow best practices to ensure a private equity firm and its portfolio companies are in a strong position to defend the privileged status of its communications. Think about the extent to which the privilege may or may not apply to a particular communication with a portfolio company or investor in the fund.



Separate business from legal. To the extent possible, in-house counsel should keep their legal files and business files separate from one another and utilize confidentiality designations to make clear what is considered legal advice versus pure business advice. Be wary, however, of overuse of such confidentiality designations—a document that is labeled "privileged and confidential" may not be considered as such if there is no actual legal advice being sought or communicated.

Make your position clear. Make clear when in-house lawyers are acting in a legal versus business capacity. In meetings or conference calls, in-house counsel should announce their role as legal advisor when appropriate or document in minutes of meetings that the discussions were had for the purpose of providing legal advice. In-house counsel's presence on a call, a meeting, or e-mail chain, by itself, is not likely to establish that the communication is privileged.

Make any joint-client relationship clear in an engagement letter. When the joint-client theory is a portfolio company's basis for asserting that sharing privileged information with a private equity firm does not waive privilege, such expectation should be laid out in an engagement letter with the law firm that clearly sets out the scope of the joint representation. Further, agreements between the private equity firm and its portfolio company should provide that privileged information will be shared among the parties as co-clients and must be kept confidential and not shared with any third parties.

Keep those with multiple roles aware of the risk. Educate employees who serve as designees on boards of portfolio companies of the risks associated with sharing privileged information belonging to the portfolio company with others at the private equity firm.

Take steps to maintain privilege. When possible, disseminate privileged information only to those who need to know, (i.e., those who need to know the content of the communication to perform their job effectively or to make informed decisions concerning the subject matter of the legal communication). Instruct those with access to privileged information to avoid disclosing such information to others.

Tailor inspection rights. Consider tailoring inspection rights to permit a portfolio company to withhold privileged information from the private equity firm where no joint-client or other shared privilege applies.

Maintain confidentiality. Take steps to ensure that portfolio companies' privileged information shared with the private equity firm as co-client is kept confidential.

Use separate counsel when concerned about potential post-sale litigation by purchasers. If concerned about the possibility of post-sale litigation, be wary of relying upon the joint-client theory to protect privileged communications from disclosure to the acquirer. Consult separate legal counsel for issues the firm does not want a potential acquirer to learn about or communicate with the portfolio company's outside counsel separately, as a separate client, to ensure it receives its own legal advice. For added security, consider including in sale/merger agreements a provision that expressly addresses the transfer of ownership of privileged communications.

By taking care to properly identify privileged communications and implement thoughtful policies and procedures, private equity firms should be able to successfully balance minimizing the risk of waiver with the commercial goal of effectively managing its investments.

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