

Business Litigation Session: Former Directors and Officers Now Adverse to Their Corporation Are Not Entitled to Privileged Communications Exchanged While They Were Still With the Corporation

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By Peabody & Arnold on September 7, 2017

Some of the thorniest problems encountered in corporate litigation concern discovery. Directors, officers, and shareholders — both current and former — often have colorable claims that they are entitled to corporate documents. Oftentimes, the corporation resists these discovery efforts, arguing that the corporation is a legally distinct entity with rights and interests that may not coincide with the discovery objectives of shareholders and management. These disputes give rise to a number of discovery issues in the corporate litigation context.

One issue not yet resolved by Massachusetts appellate courts is whether former directors or officers of a corporation who are now adverse to their former company are entitled to communications protected by the company's attorney-client privilege if those communications were made when they were still in the company's employ. Jurisdictions are divided on the issue. Some jurisdictions, most notably Delaware, follow the "collective-corporate-client" approach, under which former officers and directors are entitled to privileged communications exchanged during their tenures. The rationale is that then-current officers and directors were joint clients with the corporation when the communications occurred. Other jurisdictions follow "the entity is the client" approach and conclude that an attorney for a corporation has only one client: the company. Officers and directors are not considered "joint clients" with the corporation and are not entitled to confidential communications for use in litigation against the company.

The Business Litigation Session of the Massachusetts Superior Court (a session of the Suffolk Superior Court devoted to business litigation, run by judges experienced in complex business disputes) has recently weighed in on the issue, predicting that if the Supreme Judicial Court of Massachusetts were to consider the question, it would follow "the entity is the client" approach.

Mooney v. Wheelock v. Diversified Business Communications concerns claims by minority shareholders (and former officers) of Pri-Med LLC against Pri-Med's majority shareholders and others. The plaintiffs claim that the defendants artificially depressed Pri-Med's value so as to reduce the amount owed to the plaintiffs under a buy-out agreement. In the litigation, the plaintiffs sought communications that concerned Pri-Med's valuation in light of the buy-out of another member (who threatened to sue). Pri-Med asserted privilege.

The Court (Justice Janet Sanders) rejected the plaintiffs' claims for privileged communications, adopting "the entity is the client" approach. The Court observed that allowing an officer or director access to privileged communications after he or she has left the company and filed suit could result in a chilling effect on candid communications between counsel and corporate managers. Moreover, the Court determined that the alternative approach "conflates the director/officer's role as an individual and his role as a corporate representative." Finally, the alternative approach would allow the former corporate

manager to “weaponize” the fact that he or she was once a fiduciary of the corporation.

The Court’s ruling is consistent with the Supreme Judicial Court’s opinion in *Chambers v. Gold Metal Bakery, Inc.*, 464 Mass. 383 (2013), which held that current corporate officers are entitled to confidential communications unless their interests are adverse to the corporation regarding the matter that is the subject of the communication. It remains to be seen whether the Massachusetts appellate courts will ultimately endorse the approach taken by the Business Litigation Session to former corporate officers/directors’ access to privileged communications. On the one hand, the approach advanced by the Business Litigation Session is arguably more restrictive than that presented in *Chambers*: it encompasses all confidential communications and not just those communications relating to the subjects on which the corporate officers/directors are adverse to the corporation. On the other hand, *current* officers and directors (like those involved in *Chambers*) need access to confidential communications to perform their corporate roles, whereas *former* corporate officers and directors have no such need.