Linklaters

Memorandum

To: Task Force and Executive Committee of the Southern Baptist Convention

From: Linklaters LLP | Date: October 1, 2021

Regarding: Analysis of Liability Associated with Waiver

On behalf of the Southern Baptist Convention ("**SBC**") Task Force established to investigate allegations against the SBC Executive Committee ("**EC**") of sexual abuse and mishandling of abuse claims ("**Task Force**" and the "**Investigation**"),[1] we address the potential liability, to both the EC and its Trustees and Officers, associated with (1) failing to waive the attorney-client privilege as the SBC Messengers explicitly directed; and (2) complying with the Messengers' request to waive that privilege.

1 Summary of analysis

As the Task Force has previously explained to the EC, courts almost universally hold that sharing privileged information between parent companies and wholly owned subsidiaries does not result in a waiver of privilege. As the EC's Sole Member, the SBC shares in the EC's privilege and is entitled to share such documents with another of its subsidiaries, the Task Force. Even if the EC claims that the privilege belongs exclusively to the EC, the SBC is *still* entitled to receive from the EC any documents the EC claims are privileged.

Further, if the EC Trustees claim otherwise and then refuse to waive privilege, the EC Trustees who support this position could face personal liability. This is true, for example, if an EC Trustee acts for the purpose of protecting himself or herself from individual liability.

On the other hand, EC Trustees' decision to waive privilege at the request of the SBC will not give rise to personal liability for EC Trustees, who are immune from liability for such actions.[2] At the same time, waiving privilege *could* limit the availability of insurance to satisfy claims for which the EC is liable. This is a fact-specific analysis that is not black-and-white; rather it requires a detailed review of (a) the terms of applicable insurance policies; (b) the nature of claims asserted against the EC; and (c) careful analysis of the purportedly privileged materials to be disclosed and the disclosure's impact on the ability to defend the EC against the claims asserted.

2 SBC is fully entitled to the privileged materials

If, notwithstanding what the Task Force has previously explained, the EC claims that the privilege belongs exclusively to the EC, the SBC is still entitled to receive from the EC any documents the EC claims are privileged. Indeed, where a single-member LLC (*i.e.*, the EC) is alleged to be

[1] This memorandum does not contain, and is not intended to contain, reference to any privileged communication between Linklaters LLP and the Task Force. To the extent it does contain such communications, that is inadvertent, and shall not constitute a waiver of any privileges.

[2] As discussed further below, while EC members are immune from suit for the decisions they make in their capacity as Trustees or Officers of the EC, this analysis does not extend to EC member liability for underlying misconduct.

acting in a manner inconsistent with the interest of its member (the SBC), the member is almost always entitled to demand production of the LLC's privileged documents.

In a seminal case on this issue, *Garner v. Wolfinbarger*, the Fifth Circuit explained that when "the client asserting the privilege is an entity which . . . acts wholly or partly in the interest of others, and those others . . . seek access to the subject matter of the communications," it is then "difficult to rationally defend the assertion of the privilege if all, or substantially all, stockholders desire to inquire into the attorney's communications with corporate representatives who have only nominal ownership interests, or even not at all."[3]

Following *Garner,* numerous other circuits have adopted the logic in assessing claims of privilege where "the corporation is in suit against its stockholders on charges of acting inimically to stockholder interests."[4] A federal court in sitting in Nashville, Tennessee explained in recent years that courts will consider, among others, the following factors to determine whether ostensibly privileged materials must be produced to a member or shareholder:

- the number of shareholders and the percentage of stock they represent;
- the Bona fides of the shareholders;
- the nature of the shareholders' claim and whether it is colorable;
- the apparent necessity or desirability of the shareholders having the information and the availability of it from other sources;
- whether, if the shareholders' claim is a wrongful action by the corporation, it is of action criminal, or "illegal but not criminal," or of doubtful legality;
- whether the communications related to past or to prospective actions (communications about past actions weigh in favor of disclosure);
- whether the communications involve advice concerning the litigation itself;
- the extent to which the communication is identified vs. the extent to which the shareholders are "blindly fishing;" and
- the risk of revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons.[5]

In that case, the non-managing member of a two-party LLC (Rock the Ocean) sought production of materials from attorney, Ms. Heller, who represented the managing party of the LLC (Huka), the LLC itself, and another defendant (H1).[6] During discovery, Heller refused to answer questions regarding her representation of the LLC due to attorney-client privilege.[7] The Tennessee district court reasoned that when "an entity bears a fiduciary duty to another party, the attorney-client privilege should not enable the entity to conceal the legal advice it obtained in carrying out its fiduciary duty 'behind an ironclad veil of secrecy which . . . preserves it from being questioned by those for whom it is, at least in part, exercised.'"[8]

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3 *Garner v. Wolfinbarger*, 430 F.2d 1093, 1101 (5th Cir. 1970).

4 *Id. at* 1103–04.

5 *Id.* at 1104. Note, this list of indicia is not enumerated, and courts can consider these among other factors.

6 *Rock the Ocean Productions v. Huka Productions, LLC*, 2017 WL 7036665, at *1–*2 (M.D. Tenn. Apr. 4, 2017).

7 *Id.* at *1.

8 *Id.* at *3 (quoting *Garner* 430 F.2d at 1101).

The court analyzed the facts using the *Garner* factors to determine whether there was a fiduciary duty exception—the "one exception to the attorney-client privilege"—between the LLC and its attorney.[9] It ultimately found that there was good cause to order disclosure based on the size of minority interest in the two-member LLC; relevance and lack of other available information elsewhere; the fact that the information related to actions occurring before the lawsuit; the information was specifically identified rather than being part of a fishing expedition by the party seeking production; and there were no concerns regarding trade secrets.[10]

Applying the factors to the case at hand, we reach a similar outcome. The EC is a single member organization; this supports a stronger finding for production than in *Rock the Ocean* which involved a two-member LLC. Here, the allegations involve misconduct by members of the EC, and there is no question as to the SBC's bona fides. The communications currently sought relate to prior conduct rather than the present dispute over the EC's obligation to turn over documents; and the communications relate to a discrete, identifiable category of documents and do not represent a "fishing expedition." Finally, there are no concerns regarding trade secrets or other proprietary concerns. In short, all factors weigh in favor of compelling production of the materials to the Task Force.

3 Potential liability for failure to comply with the Messengers' will

Willfully declining to carry out the explicit directive of the Messengers exposes some of the EC's Trustees to personal liability, which the SBC can enforce through a lawsuit. Further, the Tennessee AG is empowered to bring suit against any Trustee who subverts the SBC's mission for their own personal benefit (including to avoid personal loss).[11]

The Messengers, through their passage of the motion creating the Task Force (the "**Motion**"),[12] established a clear mandate empowering the Task Force to conduct the Investigation and included an explicit instruction that the "Executive Committee staff and members waiv[e] attorney client privilege in order to ensure full access to information and accuracy." The SBC's Constitution recognizes the Messengers as the SBC's ultimate constituent authority and their ability to establish the Convention's will by vote.[13] The SBC, in turn, is the EC's sole member, and the SBC's Bylaws explicitly state that the EC owes the SBC fiduciary duties in carrying out its mandates.[14] Members of the EC's Board are, therefore, duty-bound to advance the charitable mission of the SBC.[15]

In the *Summers v. Cherokee Children & Family Services, Inc.*, the Tennessee Court of Appeals articulated the fiduciary duties that directors and trustees of a nonprofit public benefit corporation

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[9] *Id.*

[10] *Rock the Ocean Productions*, 2017 WL 7036665, at *3.

[11] *See* Tenn. Code Ann. § 29-35-101, *et seq*.

[12] *See Motion Creating the Task Force*, available at https://static1.squarespace.com/static/6108172d83d55d3c9db4dd67/t/610adb3e2aa23f3149ca72ea/1628101439053/Motion.pdf

[13] *Constitution of the Southern Baptist Convention*, Art. III; *Bylaws of the Southern Baptist Convention*, § 10(F).

[14] *Bylaws of the Southern Baptist Convention*, § 18(E) (establishing that "[t]he Executive Committee shall be the fiduciary . . . of the Convention.").

[15] *See Summers v. Cherokee Child. & Fam. Servs.*, Inc., 112 S.W.3d 486, 503 (Tenn. Ct. App. 2002) (citing *State ex rel Oliver v. Soc'y for Pres. of Common Prayer*, 693 S.W.2d 340, 343 (Tenn.1985)) ("Directors and officers of nonprofit corporations also owe a fiduciary duty to the corporation.").

owe their nonprofit. The court explained that, as the mission of nonprofit corporations is different than those of for-profit corporations, so too are the duties of the nonprofit's fiduciaries. "A nonprofit public benefit corporation's reason for existence . . . is not to generate a profit," the Court explained; "[t]hus, a director's duty of loyalty lies in pursuing or ensuring pursuit of the charitable purpose or public benefit which is the mission of the corporation."[16] More fundamentally, Tennessee law has long held that directors and officers of a charitable organization owe a duty of loyalty to their organization, requiring them to "faithfully pursue the interest of the organization, and its nonprofit purpose, rather than [their] own . . . interests."[17]

Subverting the will of the Messengers constitutes a breach of this duty, leading to potential individual liability for Trustees.[18] Refusing to follow the Messengers' directive to investigate allegations of abuse and to waive privilege undermines the SBC's message and core purpose as the assembly of locally autonomous churches who express their will through the Messengers.[19] Under Tennessee law, as established by *Summers*, Trustees owe a fiduciary duty of loyalty to pursue this charitable purpose.

While some Trustees have appeared to suggest that their fiduciary duty requires safeguarding the organization's financial interest above all else, the law is clear that the primary fiduciary concern is the organization's core charitable mission. Here, Trustees have elected to substitute their own judgment for that of the Messengers and have subordinated the SBCs charitable mission to their concern over financial matters.

Indeed, the fiduciary duty—as the Messengers themselves have expressly made clear through the Motion—is much broader. The EC's refusal to follow the express directive of the Messengers risks the trust, integrity, and overall principles the SBC espouses as core values. The resulting loss of goodwill will continue to make it much more challenging for the SBC to advance the gospel and promote Christian education, benevolent enterprises, or social services (as is the SBC's stated purpose).[20]

The EC's focus on potential risk of losing insurance coverage is too narrow and myopic. For example, their inaction is already negatively impacting the SBC's finances, as member churches have begun announcing they may withhold contributions to the Cooperative Program.[21] The very real possibility of loss of contributions from member churches must be balanced against the uncertainty regarding loss of insurance, as discussed further in Section 4.2. The financial impact of a potential loss of insurance cover will only be felt if the EC, or those for whose conduct the EC is liable, have genuinely engaged in misconduct for which they are ultimately held

[16] *Id.* at 504.

[17] *Summers*, 112 S.W.3d at 504.

[18] *See* Tenn. Code Ann. § 48-56-401 (Derivative Suits—Generally).

[19] *See Constitution of the Southern Baptist Convention*, Art. III.

[20] *See id.*, Art. II.

[21] *See, e.g.*, Mark Wingfield, *New Details Emerge About how SBC Executive Committee Wants to Control the Sexual Abuse Investigation, as Outrage Mounts Among Other Southern Baptist Leaders*, BAPTIST NEWS GLOBAL, Sept. 29, 2021, available at https://baptistnews.com/article/new-details-emerge-about-how-sbc-executive-committee-wants-to-control-the-sexual-abuse-investigation-as-outrage-mounts-among-other-southern-baptist-leaders/#.YVY1ATHMI2w.

liable.[22] By contrast, the loss of financial support from member churches due to loss of goodwill and reputation for having failed to heed the Messengers' directive is increasingly imminent.

Breach of fiduciary duty in this manner leads to at least three potential repercussions for individual Trustees:

First, Trustees who fail to comply with the Messengers instruction may be subject to removal by the SBC.[23]

Second, a Trustee who refuses to comply with the Messengers' instruction for the purpose of protecting himself or herself from individual liability (*e.g.*, because they have personally been accused of misconduct), opens themselves to personal liability through a derivative suit.[24] If such a suit we're successful, the Trustee would not be entitled to the indemnification usually provided by the EC's Bylaws[25] because Tennessee law prohibits indemnification for breach of the duty of loyalty and where the Trustee's actions were in bad faith.[26] Further, while Tennessee law in the normal course provides immunity to officers of nonprofit organizations, such immunity would likely not be available as the Trustee could reasonably be viewed as acting in willful violation of their fiduciary duties.[27]

Third, failure to follow the directive of the Messengers to waive privilege risks intervention by the Tennessee AG, who is empowered to bring suit against individual board members who fail to carry out their duties. As *Summers* affirmed, nonprofit status (and the resulting tax benefits) is afforded to certain corporations in recognition of the public benefit those corporations serve.[28] Where nonprofits stray from their stated public benefit and the purpose of the organization is undermined, Tennessee law permits the AG to bring action against a nonprofit's corporate officers where the "public officer has done, or suffered to be done, any act which works a forfeiture of that officer's office."[29] The law permits the AG to "remove such officers or trustees on proof of misconduct" or "to compel faithful performance of duty."[30]

As such, failure to comply with the Messengers' mandate bears risk for both the EC and individual board members.

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[22] Additionally, depending on the nature of underlying charges, it is not certain the EC would be required to indemnify individual malfeasance. As discussed below, the EC's indemnification provisions do not cover actions in bad faith or in knowing violation of the law. *See* Footnote 26.

[23] *See Amended and Restated Charter of the Executive Committee of the Southern Baptist Convention*, § 8 ("The Member [*i.e.*, the SBC], shall have the right . . . to remove the trustees of the corporation.").

[24] *See* Tenn. Code Ann. § 48-56-401 (Derivative Suits—Generally).

[25] *Bylaws of the Executive Committee of the Southern Baptist Convention*, Art. VII.

[26] *See* Tenn. Code Ann. § 48-58-502(a)(1) ("a corporation may indemnify an individual made a party to a proceeding because the individual is or was a director against liability incurred in the proceeding if: (1) The individual's conduct was in good faith."); *id.* § 48-58-502(d) ("A corporation may not indemnify a director under this section: (1) In connection with a proceeding by or in the right of the corporation in which the director was adjudged liable to the corporation; . . . (3) For any breach of the director's duty of loyalty to the corporation or its members; [or] (4) For acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law[.]"); *see also Summers*, 112 S.W.3d at 524.

[27] *See* Tenn. Code Ann. § 48-58-601(c) ("Such immunity from suit shall be removed when such conduct amounts to willful, wanton or gross negligence.").

[28] *See Summers*, 112 S.W.3d at 499–503.

[29] Tenn. Code Ann. § 29-35-101(2).

[30] *Id.* § 29-35-102(2), (5).

4 Potential liability for waiving privilege

4.1 Waiver of privilege will not give rise to personal liability for EC members

While trustees may become personally liable for breaching of their fiduciary duties by failing to waive privilege, they will not be personally liable for potential loss of insurance cover (discussed in § 4.2 below) that arises from waiver.

As noted, Trustees are both immune from suit based on their conduct as Trustees, and indemnified by the EC Bylaws, so long as they are not acting out of personal interest or willful, wanton, or grossly negligent in carrying out their duties.[31] Of course, given that the Trustees, in waiving privilege, would be acting in compliance with their fiduciary's explicit instruction, there is no colorable argument that the Trustees are willfully acting against their fiduciary's interest.[32]

4.2 Depending on the facts and circumstances of any hypothetical claims asserted against the EC by third-party plaintiffs, waiver may reduce the availability of insurance cover.

Some EC members, and legal counsel for the EC, have raised concerns that liability insurance may not be available to protect the EC if it waives privilege. While it is conceivable, this risk is overstated and turns on a close reading of the applicable insurance agreements, the nature of any claims asserted against the EC, and whether disclosure of privileged materials undermines the defense of those particular claims.

At a recent special meeting of the EC, the EC's counsel represented that Brotherhood Mutual Insurance Company ("**Brotherhood**"), the EC's insurance provider, informed her it would consider potential waiver issues on a "case-by-case" basis, but that "there may be cases where Brotherhood Mutual would raise a duty to cooperate defense if the blanket waiver of privilege hurt the defense of a particular case."[33]

It is difficult, without benefit of the underlying contract and its terms, to assess the applicability of such an agreement in these circumstances. Generally, cooperation clauses—giving rise to duties to cooperate in insurance agreements—require an insured to provide whatever assistance the insurer requests, most often in the form of documentation or sworn statements, and not to undermine both parties' mutual interest in defending their claims. At this time, we cannot preclude the possibility that providing privileged, inculpatory legal analysis to a potential claimant (including by broadly publishing the materials) may breach such a clause, depending on the nature of the claims being asserted, the materiality of the underlying information, and the actual terms of the insurance agreement.[34]

At the same time, legal precedent holds that not every act potentially aiding an as-yet unidentified claimant constitutes a breach of a cooperation clause. To establish such a breach,

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[31] *See* Tenn. Code Ann. § 48-58-601(c); *Bylaws of the Executive Committee of the Southern Baptist Convention*, Art. VII.

[32] *See Urbanavage v. Cap. Bank*, No. M201601363COAR3CV, 2018 WL 3203100, at *6–*8 (Tenn. Ct. App. June 29, 2018) (summarily dismissing Breach of Duty claim on immunity grounds where no evidence of willful, wanton, or gross negligence conduct).

[33] *See* SBC Executive Committee, *Special Meeting Called*, available at https://www.sbc.net/ec0921/ (Part One beginning at 15:07).

[34] Note also that materials subject to the crime fraud exception are not privileged. Thus, to the extent ostensibly privileged materials are subject to the crime fraud exception, they would be discoverable by civil plaintiffs whether or not EC had previously provided those materials to the Task Force or some third party.

Brotherhood would be required to demonstrate that the information provided was "substantial and material" and that Brotherhood, and its defense of the EC, was actually harmed by the information.[35] Of course, facts themselves are not privileged. Thus, only where the disclosure of genuinely privileged materials that were created for the purpose of facilitating legal advice with respect to the claim now being asserted, would concern over failure to cooperate be relevant.

[35] *See Talley v. State Farm Fire & Cas. Co.*, 223 F.3d 323, 328 (6th Cir. 2000) ("a showing of prejudice is required . . . before [the insurance company] can deny [the insured's claim"); *Tennessee Farmers Mut. Ins. Co. v. Wood*, 277 F.2d 21, 37 (6th Cir. 1960) ("To constitute a breach of a cooperation clause by the insured, there must be a lack of cooperation in some substantial and material respect, a technical or inconsequential lack of cooperation . . . being immaterial in such respect.").