

Corporate Investigations Group Update: Can Parent Companies Share Attorney-Client Communications?

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When a corporate family breaks up and litigation ensues, can the parent company be compelled to share attorney communications discussing the subsidiary? The recent Third Circuit decision of *Teleglobe Commc'ns Corp. v. BCE, Inc.* says that when the relationship deteriorates and the former subsidiary sues the parent, the previous legal communications among the parties are discoverable by one another only if the parent and subsidiary were part of a joint representation and the communications pertain to a common interest of their joint representation. Similarly, a parent does not forfeit its attorney-client privilege by sharing communications with a director that serves both the parent and the subsidiary unless the recipient is acting on behalf of the subsidiary.

A group of subsidiary companies ("the debtors") filed for bankruptcy relief under Chapter 11. The debtors brought an adversary proceeding against BCE, which wholly owned the debtors' immediate corporate parent, Teleglobe, alleging various causes of action relating to BCE's decision to stop funding Teleglobe. At issue in this case was a pre-trial discovery motion to compel BCE to produce documents. Claiming attorney-client privilege, BCE had agreed to produce only the documents where its in-house counsel represented both BCE and Teleglobe in a "common interest."

The district court ordered production of all the disputed documents, holding that the in-house attorneys jointly represented Teleglobe and BCE, that the debtors were parties to the joint representation as wholly owned subsidiaries of Teleglobe and entitled to the disputed documents as a matter of law, and that the documents produced by outside counsel hired to work exclusively for BCE were discoverable because they were shared with BCE's in-house counsel, who in turn jointly represented Teleglobe.

On appeal, the Third Circuit vacated the order of the district court and remanded for further proceedings. The court decided that the order to produce the documents had to be predicated on a factual finding that the parties were represented by the same attorney in a joint representation and that the subject matter of the documents was of a common interest to the parties. In doing so, the Third Circuit analyzed various authorities and set forth numerous guidelines for the attorney-client privilege in the context of intra-corporate disputes.

The Third Circuit held that a corporate parent and its subsidiaries may be jointly represented by the same attorney in a matter of common interest. The joint representation is limited in scope by the extent of the common legal interest between the parties. The attorney-client privilege protects the legal communications among the parties to a joint representation as against those parties outside the joint representation. One party can not waive unilaterally the privilege of the other jointly represented clients' communications.

Furthermore, documents from outside counsel that are reviewed by in-house counsel are protected as against subsidiaries unless it can be shown that the communications pertain to a common interest among the parties as part of a joint representation.

In summary, the Third Circuit noted that in-house counsel can protect the attorney-client privilege by not entering joint representations unless absolutely necessary to preserve the privilege, by limiting the scope of the joint representation to the narrowest issue possible, and by timely separating legal representation of the parties when the interests become adverse to one another or if there is a strong possibility of conflict (e.g., spin-offs, sales, or insolvencies).

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If you would like to receive additional information regarding this legal update or would like to discuss any corporate investigations issues please contact Mike DeWine or Jim Burke, co-chairs of KMK's Corporate Investigations Group. For more information about KMK's Corporate Investigations Group, visit our website at www.kmklaw.com.

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