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News & Types: Client Advisories

Are Parent-Subsidiary Communications Regarding Legal Matters Protected by the Attorney-Client Privilege? (Part 1)

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Under Illinois law, communications between a subsidiary and its parent corporation, or between a subsidiary's counsel and its parent corporation, regarding pending or anticipated litigation are generally not protected by the attorney-client privilege or any other privilege. As discussed below, there may be limited circumstances where such communications may be protected. Therefore, such communications would be subject to disclosure if the parties were involved in litigation.

Wholly-owned subsidiaries of foreign corporations generally report matters of significance to their parent corporation. For example, assume a U.S. subsidiary distributes products manufactured by its parent corporation overseas. The U.S. subsidiary terminated one of its distributors, and the distributor asserted that the U.S. subsidiary breached the distributorship agreement. The U.S. subsidiary contacted its attorney for legal advice regarding the distributor's claims. The attorney emailed its client, the U.S. subsidiary, with an analysis of the U.S. subsidiary's potential liability and a strategy for defending against the distributor's claims. That evening, the U.S. subsidiary forwarded the attorney's email to the parent company.

This scenario is common. The attorney-client privilege protects the attorney's email to the subsidiary. The purpose of the attorney-client privilege under both federal and state law is to encourage and promote full and frank consultation between a client and legal advisors by removing the fear of compelled disclosure of information to other parties or the government. Therefore, attorney-client privilege attaches to any communication between an attorney and the client made in confidence to obtain or provide legal assistance.

Each of these elements must be met. If the communication was made orally at a golf tournament where other players were present and overheard the discussion between the attorney and client, there would be no privilege because the communication was not made confidentially. If the subsidiary's president asked his neighbor, who was an attorney but was not engaged to represent the subsidiary about the claim's validity, there would be no privilege because there is no attorney-client relationship. The attorney-client privilege will only apply if the communication is primarily or predominately of a legal character. When the communication

pertains to business, commercial, or personal advice, the communication will not be shielded by the attorney-client privilege.

Moreover, even if the communication is privileged, the subsidiary can waive the privilege, meaning that the communication would be discoverable by third parties. The most common instance of waiver is where an otherwise privileged communication is disclosed to a third party outside the scope of the privilege. The “common interest doctrine” is an exception to the general rule that a disclosure to or presence of a third party to an attorney-client communication destroys the privilege. This doctrine allows separately represented parties to share privileged information with one another and their respective attorneys to further a common legal goal. The common interest doctrine is not a separate privilege. It merely allows parties with a common interest to share privileged information. The underlying communication must still satisfy the attorney-client privilege elements for the doctrine to apply.

Under Illinois law, a "common interest" is a shared interest in pursuing the same legal goal in the litigation. It is not a shared business interest. The common interest must also be identical, although the parties themselves need not be perfectly aligned in the litigation. Where the common interest doctrine applies, parties to the common interest do not waive the attorney-client privilege for communications between:

- The attorneys for two or more common interest parties.
- One common interest party and the attorney for another common interest party.
- A common interest party and its attorney in the presence of the attorney for another common interest party.
- Two or more common interest parties in the presence of their attorneys.

It is important to note that the common interest doctrine does not apply to communications between the parties without the presence of their attorneys. What if the subsidiary forwards the attorney’s email to the parent company and includes the attorney as a cc recipient? While there is no bright-line rule regarding the application of the attorney-client privilege where the attorney is a cc recipient, in this case, the subsidiary’s email to its parent would not be privileged because it is not being sent to obtain legal advice.

If the attorney also represents the parent corporation and there is a common interest between the subsidiary and the parent, the attorney could send an email to the parent or both the parent and the subsidiary, and such communication would likely be protected by the attorney-client privilege.

In Part 2, we will discuss the scope of the attorney work product privilege and the joint defense doctrine and provide further suggestions to protect sensitive information from disclosure to adverse parties.