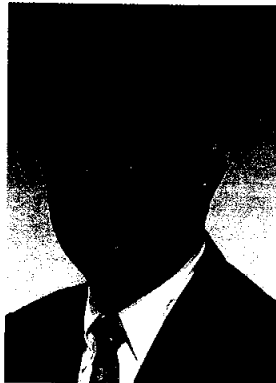


# Ethics Column

BY FRANCIS G.X. PILEGGI

## Ethics: Counsel For Corporation Need Not Disclose Privileged Documents To Director Suing Corporation



An appellate court in California recently provided guidance to lawyers who are requested to give privileged documents to a director of a corporation when the attorney represents that corporation, whom that director is suing, in light of the attorney/client privilege. In *Tritek Telecom Ins. v. Superior Court*, 2009 Cal. App. LEXIS 7 (Jan. 7, 2009), the Court of Appeals of California addressed a situation where one of the corporation's directors filed suit to enforce his inspection rights as a

director after he had already filed an action in his capacity as a shareholder against the corporation to vindicate his separate personal rights as a shareholder.

The California court held that, despite the generally broad right of a director to inspect books and records of a corporation, including documents protected by the attorney-client privilege, a "corporate director does not have the right to access documents covered by the attorney-client privilege that were generated in defense of a suit for damages that the director filed against the corporation" in his capacity as a shareholder.

### BACKGROUND

Tritek Telecom, Inc. is a California corporation with two equal shareholders. Tritek originally had three directors. The Appollo Law Firm was hired by Tritek in connection with the resignation of one of the three directors.

Chik-Lun Mak was one of the two remaining directors and he also, through his controlled entity, was one of the two shareholders.

Mak initially sued the other remaining director and the corporation, Tritek, seeking (in his capacity as a shareholder) among other things a return of his \$410,000 investment in Tritek, and the appointment of a provisional director. Thereafter, in his capacity as a director of Tritek, the instant suit by Mak was filed again against Tritek and the remaining director, seeking "to enforce his right as a director of Tritek to inspect Tritek's books and records."

### LEGAL ANALYSIS

The Court of Appeals of California recited the basic privilege of a client to "refuse to disclose, and to prevent another

from disclosing, a confidential communication between the client and his or her lawyer." The burden is on the party challenging the privilege to demonstrate that the privilege does not apply or that an exception or waiver applies.

Acknowledged at the outset was a director's fiduciary duty to act in the best interests of a corporation and its shareholders, in addition to the general right of a director to be given access to the corporation's books and records. The court balanced these competing rights and duties by observing first that Mak could not obtain via discovery in his separate lawsuit as a director. Moreover, the court emphasized that the filing of the shareholder action by Mak makes him an adversary to Tritek and that he "cannot take off his 'shareholder hat and swap it for his director's hat' and claim an absolute right to access all corporate documents. In this situation, a court may properly limit a director's inspection rights because the director's loyalties are divided and documents obtained by a director in his or her capacity as a director could be used to advance the director's personal interest in obtaining damages against the corporation." (citations omitted.)

Thus, the court concluded that "a corporate director does not have the right to access documents that are covered by the attorney-client privilege and were generated in defense of a suit for damages that the director filed against the corporation." *Id.* at \*10. See generally Section 220 of the Delaware General Corporation Law (providing for limitations on the otherwise broad scope of documents to which a director is entitled) and *Schoon v. Smith*, 953 A.2d 196 (Del. 2008) (Delaware Supreme Court decision which held that directors cannot sue a corporation derivatively). Compare *Ryan v. Gifford*, 935 A.2d 258 (Del. Ch., 2007) (Delaware Chancery Court decision ordering production of a report that a company's lawyers provided to a special committee of the board, finding that the privilege was waived when a copy was sent to the whole board, some of whose members were the subject of the derivative suit involved in the report.)★

---

Francis G.X. Pileggi is the founding partner of the Wilmington, Delaware, office of Fox Rothschild LLP, an AmLaw 200 firm. His blog, [www.delawarelitigation.com](http://www.delawarelitigation.com), summarizes all the key decisions on corporate and commercial law from the Delaware Court of Chancery and Delaware Supreme Court, and includes posts on legal ethics. His e-mail address is: [fpileggi@foxrothschild.com](mailto:fpileggi@foxrothschild.com).