Texas A&M Law Review

Volume 1 | Issue 1 Article 5

2013

# Identifying the Client in a Corporate Family: The Overreliance on Corporate Affiliation in Attorney-Client Privilege

Anthony Cuesta

## COMMENTS

# IDENTIFYING THE CLIENT IN A CORPORATE FAMILY: THE OVERRELIANCE ON CORPORATE AFFILIATION IN ATTORNEY-CLIENT PRIVILEGE

*By: Anthony Cuesta*

### Abstract

*The attorney-client privilege is a well-established tenet of law that balances two competing interests—the need for a disclosure of facts that could lead to an equitable conclusion in litigation, and the need to protect communications between counsel and client to promote candid and comprehensive discourse that could lead to an equitable conclusion in litigation. The attorney-client privilege has evolved in time to evade obsolescence. This Comment discusses the evolution of the attorney-client privilege in the context of modern corporate law.*

*This Comment addresses when it becomes appropriate to extend the privilege between separate corporations that are affiliated by ownership. Many courts focus the analysis on the degree of ownership, whether wholly owned, majority owned, or merely affiliated. Although the degree of affiliation carries pronounced import in the analysis, it alone should not be dispositive. A proper determination cannot be reached without consideration of other essential factors and the underlying policy.*

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## I. Introduction

At the turn of the millennium, a revolutionary method for amassing a music collection swept across the virtual landscape. Person-to-person file sharing allowed individuals to exchange digital music files and increase their own personal collections exponentially and for free. One name became synonymous with the forum that made this file sharing all possible: Napster. It did not take long for the music industry to attack the file-sharing network for copyright infringement. Numerous members of the music industry participated in the suits against Napster,[1] including music giant BMG.

In the heat of litigation (approximately September 2000), another music giant, Bertelsmann AG, invested millions in Napster believing person-to-person file sharing to be the new direction for music distribution.[2] About one year later, the court enjoined Napster from "operating its file-sharing network in a manner that enabled its users to engage in copyright infringement."[3] Soon afterwards, Napster filed for bankruptcy; however, litigation did not end with Napster's demise. Plaintiffs who could no longer collect from Napster then turned their sights onto investors, such as Bertelsmann AG, who remained solvent.[4]

In 2005, plaintiffs sought to compel Bertelsmann AG to release documents relating to its decision to invest in Napster.[5] Among the documents requested were communications between Bertelsmann AG and BMG, which Bertelsmann claimed were protected under the attorney-client privilege.[6] Interestingly, although BMG was an active participant in the litigation that ultimately drove Napster into bankruptcy, BMG was also a wholly owned subsidiary of Bertelsmann AG, which also owned a significant interest in Napster.[7]

The issue before the court was whether to treat the affiliated corporations as one entity for purposes of the attorney-client privilege notwithstanding the apparent conflict of interest.[8] Many courts have extended the intra-corporate attorney-client privilege to communications between affiliated companies, viewing related companies to be one entity.[9] This practice presents several questions: What precise affiliation is required for the privilege to apply? Should the privilege be limited to wholly owned subsidiaries? Should the privilege be available between corporations with less than a controlling share? Is the percentage of ownership dispositive in determining whether to extend the privilege?

This Comment examines the degree of affiliation that is required between related corporations to prevent disclosure from becoming a waiver of the attorney-client privilege. Some courts hold that the subsidiary must be wholly owned by the parent company in order to pre-

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1. *In re* Napster, Inc. Copyright Litig., 2005 WL 6569723 (N.D. Cal. Apr. 12, 2005).
2. *Napster, BMG in Music Pact*, CNNMoney (Oct. 31, 2000 4:49 PM), http://money.cnn.com/2000/10/31/bizbuzz/napster/index.htm.
3. *In re Napster*, 2005 WL 6569723, at *1.
4. *Id.*
5. *Id.* at *2.
6. *Id.*
7. *Id.* at *1–3.
8. *Id.* at *3.
9. *See* discussion *infra* Part III.B.

serve the privilege. Other courts have lowered the standard of ownership to majority owned or a controlling share. And other courts are willing to preserve the privilege to merely any affiliated corporations.

The decision in *Napster* acknowledged that there exists a "weight of authority" to support extending the privilege to wholly owned subsidiaries.[10] Nonetheless, the *Napster* court opined that doing so under the facts of the current case would be absurd because although related by complete ownership, each company was seeking a contradictory interest.[11] This decision may provide an exception to the trend or perhaps highlight a flaw in the legal analysis that placed too much emphasis on the ownership interest between corporations.

This Comment will begin with a brief discussion about the history of the attorney-client privilege and its adaptation to the corporate setting. This history is presented through three landmark cases that track the evolution of the privilege. This Comment will then provide examples of courts narrowing the analysis of whether or not to extend the privilege solely on the degree of affiliation between corporations. Next, the Comment will discuss a United States Third Circuit Court of Appeals opinion that did not dispose of the issue through mere affiliation, but instead, the court resorted to an extensive analysis via several related doctrines. Finally, this Comment concludes that a thorough examination considers *all* relevant factors, and degree of affiliation is but one of these factors.

## II. Brief History

The attorney-client privilege is one of the oldest recognized privileges in Anglo-American jurisprudence.[12] "Dean Wigmore teaches that the history of the attorney-client privilege finds its origin in the reign of Elizabeth I, 'where the privilege already appears as unquestioned.'"[13] The rule "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure."[14]

Courts recognize that the attorney-client privilege presents a compromise between two competing interests: (1) the need for full disclosure as a truth finding mechanism, and (2) the need to protect the relationship between clients and their counsel to foster uninhibited communications, which furthers the administration of justice.[15] "The

10. *In re Napster*, 2005 WL 6569723, at *5.
11. *Id.* at *4.
12. Radiant Burners, Inc. v. Am. Gas Ass'n, 320 F.2d 314, 318 (7th Cir. 1963).
13. *Id.*
14. Hunt v. Blackburn, 128 U.S. 464, 470 (1888).
15. *See generally id.*

social good derived from the proper performance of the functions of lawyers acting for their clients is believed to outweigh the harm that may come from the suppression of the evidence in specific cases."[16]

### A. *United States v. United Shoe Machinery Corp.*

In *United States v. United Shoe Machinery Corp.*, the United States filed an anti-trust action against the United Shoe Machinery Corp. (United Shoe).[17] The government sought to compel discovery of certain documents that United Shoe claimed were protected under the attorney-client privilege. The documents at issue included letters that were sent to attorneys for the corporation or sent by attorneys for the corporation.[18] Through these letters, the attorneys were not only communicating with direct employees but also with employees of the corporation's subsidiary and affiliate companies.[19] The purpose of these communications was primarily to solicit legal advice or provide legal services.[20]

Other documents at issue were circulated through the corporation's patent department.[21] Some employees in the patent department were members of the bar, but not all of these attorneys were licensed to practice in Massachusetts.[22] Other employees assigned to the patent department and included in the chain of communications were not attorneys.[23] Many of the actual attorneys were found to be functioning more as business managers than as legal advisors.[24]

The U.S. District Court of Massachusetts laid out the elements that must be satisfied for the attorney-client privilege to apply:

> The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.[25]

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16. United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358 (D. Mass. 1950).
17. *Id.*
18. *Id.* at 359.
19. *Id.*
20. *Id.*
21. *Id.* at 361.
22. *Id.*
23. *Id.*
24. *Id.* at 360.
25. *Id.* at 358–59.

The district court then extended the attorney-client privilege to the corporate setting while emphasizing that the issue might turn on identifying the "client."[26]

Identifying the "client" is an essential step in every attorney-client privilege analysis. The district court held that United Shoe and *all its subsidiaries and affiliates*, were clients for purposes of the attorney-client privilege.[27] In reaching this conclusion, the court observed that each entity shared the same legal counsel and that their legal affairs were closely related.[28]

The court then separated the communications at issue into four classes: "(1) those to or from independent lawyers; (2) those to or from defendant's legal department; (3) those to or from defendant's patent department; and (4) working papers of persons in the patent department."[29] First, the court found a significant distinction between in-house counsel and contracted law firms and extended the privilege since the communications at issue met the privilege requirements.[30] Next, the court held that the communications involving the patent office were primarily for business purposes rather than legal purposes and therefore failed to satisfy the privilege qualifications.[31]

The court gave little consideration to the precise degree of affiliation between corporations for the purpose of extending the privilege. Instead, the court acknowledged that affiliation by ownership and a common legal interest was enough to prevent shared communications from becoming *per se* waivers. The court focused its analysis on the purpose of the communications to determine whether the privilege should apply and reaffirmed that the privilege applies only to legal communications and not business communications. It is not entirely clear whether the court held that affiliation was a requisite in extending the privilege across related companies. But affiliation between companies did appear to support a finding that the affiliated companies were essentially a single client.

### B. *Radiant Burners, Inc. v. American Gas Association*

Some courts resisted extending the attorney-client privilege to the corporate setting. In *Radiant Burners, Inc. v. American Gas Association*,[32] protracted anti-trust litigation prompted the district court to establish a pretrial discovery schedule.[33] This schedule allowed the

26. *Id.* at 360–61.
27. *Id.* at 359.
28. *Id.*
29. *Id.*
30. *Id*. at 360.
31. *Id.*
32. Radiant Burners, Inc. v. Am. Gas Ass'n, 207 F. Supp. 771, 772 (N.D. Ill.), *adhered to*, 209 F. Supp. 321 (N.D. Ill. 1962), *rev'd*, 320 F.2d 314 (7th Cir. 1963).
33. *Radiant Burners*, 207 F. Supp. at 772.

court to review documents sought by one party but claimed as protected under the attorney-client privilege by the other party.[34] The district court reviewed a flood of documents in deciding which were protected and which should be disclosed, but then stopped eight letters short of completion.[35] The district court noted that "[c]onsideration of these documents has provided a welcome opportunity to research and reconsider the general field of attorney-client privilege."[36] The district court held that the attorney-client privilege could only be claimed by natural persons, and that corporations were not entitled to the privilege.[37]

The district court found support for its holding in two principles. First, "The attorney-client privilege, analogous to the privilege against self-incrimination, is historically and fundamentally personal in nature."[38] In other words, just as with the privilege against self-incrimination, only natural persons (and not corporations) could invoke the attorney-client privilege.[39] Second, the corporate structure would broaden the scope of the privilege to an impermissible level.[40] Potentially, every member of the company (including shareholders) could invoke the privilege and conceal all corporate activity in a veil of secrecy.[41] Specifically, the court stated:

> If an individual is not permitted to make an agent of still another individual, or more accurately of large groups of individuals, and thus increase the scope of the protection afforded to him through the attorney-client privilege and 'profane' its confidence why permit a corporation to do the same thing through normal corporate operations?[42]

Subsequently, the Seventh Circuit Court of Appeals overruled the lower court's opinion that corporations could not claim the attorney-client privilege.[43] The court of appeals acknowledged the lower court's admonition but rejected these principles, emphasizing that "the privilege would never be available to allow a corporation to funnel its papers and documents into the hands of its lawyers for custodial purposes and thereby avoid disclosure."[44] Similar to the opinion in *United Shoe Machinery Corp.*, the court here further stressed that the intra-corporate privilege was available to prevent disclosure of le-

34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* at 773.
38. *Id.*
39. *Id.*
40. *Id*.
41. *Id.* at 774.
42. *Id.*
43. *Radiant Burners,* 320 F.2d at 324 (7th Cir. 1963).
44. *Id.*

gal matters, not business matters.[45] The court was clear not to create a blanket privilege and emphasized that confidentiality would be determined on a case-by-case basis.[46] In a sense, the court acknowledged that proper analysis of the communications at issue takes priority over the particulars of a company's affiliation with another company.

### C. *Upjohn Co. v. United States*

Concern that the complicated corporate structure would permit all employees to avail themselves of the intra-corporate attorney-client privilege on behalf of the corporation led to the "control group test" as a means to narrow the privilege.[47] In *City of Philadelphia v. Westinghouse Electric Corp.*, plaintiffs filed a motion for sanctions against the defendant for withholding communications requested through interrogatories.[48] The communications under debate were between an employee and in-house counsel.[49] A key fact that guided the court's ruling was that in communicating with the employee, the in-house attorney informed the employee that their communication might have to be disclosed to company management.[50] The court used this statement to differentiate the employee's role with the corporation to a position strictly outside of management, or rather, outside of a position of control.[51]

In analyzing the argument, the district court first acknowledged that for the privilege to attach, the employee must embody the corporation:[52]

> [W]as he at the time, in contemplation of law, the corporation seeking advice? If not, then he was giving the lawyer information in order that the latter could advise a client other than himself. In such case the employee is merely a witness and I think that Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451, settles the question that a statement given by a witness to a lawyer who is collecting information in order to prepare for litigation pending against the lawyer's client is not privileged.[53]

In other words, an employee speaking to her employer's counsel on legal matters who is not representative of the corporation is merely a witness, not a client.[54]

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45. *Id.*
46. *Id.*
47. City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483, 485 (E.D. Pa. 1962).
48. *Id.* at 484.
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*

The *Westinghouse* court held that employees who are "in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney" or are members of the group which has that authority, in essence, personify the corporation.[55] The control group test rejected the broad view proposed in *United Shoe* and limited the attorney-client privilege to a small controlling class of employees within the corporation.[56]

In *Upjohn Co. v. United States*, Upjohn was a pharmaceutical manufacturer operating internationally.[57] In-house counsel for the corporation learned that one of Upjohn's foreign subsidiaries made potentially illegal payments to foreign government officials in exchange for government business.[58] Upjohn's attorneys quickly initiated an internal investigation to ascertain the company's involvement in bribing the foreign bureaucrats.[59] As part of the investigation, in-house counsel sent a questionnaire to all managers of Upjohn's foreign subsidiaries requesting information about these possible payments.[60] The managers completed the questionnaires and returned them to Upjohn's in-house counsel.[61]

Upjohn's attorneys prepared a report based partly on the questionnaires, and partly on interviews of the foreign subsidiary managers conducted by both in-house and outside counsel.[62] This report was released voluntarily and utilized by the United States Internal Revenue Service to instigate another investigation into the matter, this time regarding the tax consequences of bribing foreign officials.[63] The Internal Revenue Service filed a motion to compel discovery of the actual questionnaires that were only used to generate the report, but not included in the report.[64] Upjohn refused to disclose the questionnaires, claiming that the communications were protected by the attorney-client privilege.[65]

The district court held that the attorney-client privilege had been waived and ordered production of the questionnaires.[66] On appeal, the Sixth Circuit Court of Appeals held that Upjohn never waived the privilege, but nonetheless it could not avail itself of the privilege because of its failure to satisfy the control group test.[67] The Sixth Circuit

55. *Id.*
56. *Id.* at 485.
57. Upjohn Co. v. United States, 449 U.S. 383, 386 (1981).
58. *Id.* at 386.
59. *Id.*
60. *Id.* at 386–87.
61. *Id.* at 387.
62. *Id.*
63. *Id.*
64. *Id.* at 387–88.
65. *Id.* at 388.
66. *Id.*
67. *Id.* at 388–89.

ruled that the attorney-client privilege did not apply "[t]o the extent that the communications were made by officers and agents not responsible for directing [petitioner's] actions in response to legal advice . . . for the simple reason that the communications were not the 'client's.'"[68]

The U.S. Supreme Court granted certiorari to address the scope of the well-established attorney-client privilege and its freshly avowed role in the corporate setting.[69] Specifically, the U.S. Supreme Court rejected the control group test on two grounds. First, the Court used the following language to lay out the first ground:

> The control group test adopted by the court below thus frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation. The attorney's advice will also frequently be more significant to noncontrol group members than to those who officially sanction the advice, and the control group test makes it more difficult to convey full and frank legal advice to the employees who will put into effect the client corporation's policy.[70]

Second, the Court noted that the control group test is difficult to apply in practice and would yield varying results across the lower courts.[71] The Supreme Court went on to note that managers, assistant managers, vice presidents, and members of different departments within a corporation have received different treatment among the courts.[72] The impact of this uncertainty directly affects the nature of the relationship the privilege was designed to champion.[73] The administration of justice is severely weakened when attorneys and their clients cannot predict what communications will be privileged.[74]

In conclusion, the Court observed that Federal Rule of Evidence 501 requires reverence to common law[75] and that determinations be made on a case-by-case basis.[76] Nonetheless, the Court held that the control group test was impermissibly narrow and inconsistent with the principals of the common law attorney-client privilege.[77]

## III. Discussion

The courts have long accepted the attorney-client privilege as a necessary compromise in our legal system, with candid discourse between

68. *Id.* at 383.
69. *Id.* at 386.
70. *Id*. at 392.
71. *Id.*
72. *Id.* at 393.
73. *See generally id.* at 392–93.
74. *Id.* at 393.
75. Fed. R. Evid. 501.
76. *See Upjohn*, 449 U.S. at 396.
77. *Id.* at 397.

client and counsel on one side and freedom of information on the opposing side. After a brief period of deliberation, the doctrine was officially made available to corporations to the same extent it was available to individuals, "no more and no less."[78] Courts also agree that disclosure of confidential information to non-privileged third parties constitutes a waiver of the privilege.[79] Such disclosure led to the intra-corporate decisions regarding the control group test and its subsequent rejection by the U.S. Supreme Court. The *Upjohn* decision reinforced the sanctity of intra-corporate confidentiality but left intact the qualifications for privilege that prevented the feared "'zone of silence' over corporate affairs."[80]

### A. *Exceptions to Waiver by Third Party Disclosure:* In re Teleglobe Communications Corp.

A brief synopsis of what constitutes a waiver and exceptions to such a waiver will facilitate a discussion regarding the tendency in some courts to decide intra-corporate waiver issues based on degrees of affiliation. The concept of waiver applies when a communication is intentionally disclosed to a third party who does not share in the confidential relationship.[81] Such disclosure is said to constitute a waiver of the attorney-client privilege because if a communication was intended to be confidential it would not be disclosed so liberally.[82] Following this logic, communications between members of the same client group are not waivers. Therefore, it becomes essential to distinguish between clients and third parties. Three theories dominate in the analysis of determining who qualifies as a client: (1) Related Companies Theory, (2) Community of Interest Theory, and (3) Common Defense Theory.[83]

The Related Companies Theory states that affiliated companies are essentially one client.[84] As such, communications between counsel and affiliated companies are tantamount to communications directly between counsel and client. Under this theory, as long as the other elements of confidentiality are satisfied, the privilege may cross corporate lines. Pairing the Related Companies Theory with the *Upjohn*

78. Radiant Burners, Inc. v. Am. Gas Ass'n, 320 F.2d 314, 324 (7th Cir. 1963).

79. United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358 (D. Mass. 1950) ("without the presence of strangers"); *see also In re* Teleglobe Commc'ns Corp., 493 F.3d 345, 361 (3d Cir. 2007) ("[I]f persons other than the client, its attorney, or their agents are present, the communication is not made in confidence, and the privilege does not attach.").

80. *Upjohn*, 449 U.S. at 395 ("zone of silence" referred to a belief that corporations could use the attorney-client privilege to protect most or all communications from discovery).

81. *In re Teleglobe*, 493 F.3d at 361.

82. *Id.*

83. *See infra* Part III.B, The Focus on Related Companies.

84. *See infra* Part III.B, The Focus on Related Companies.

decision (nullifying the control group test) creates an extremely broad category that cloaks several types of communication under the attorney-client privilege that would otherwise require production. Under this concept, application of the privilege would turn on the definition of "affiliated companies" or the *degree* of affiliation between companies. The following case demonstrates the two other dominant theories that preserve the privilege when communications are disclosed between affiliated companies.

In *In re Teleglobe Communications*, Bell Canada Enterprises (BCE) owned a 23% share in Teleglobe.[85] In 2000, BCE purchased all remaining shares of Teleglobe, anticipating the development of a fiber optic network called GlobeSystem.[86] Under the direction of BCE, Teleglobe and its subsidiaries borrowed $2.4 billion in furtherance of the GlobeSystem project.[87] One year later the funds were exhausted.[88] In April 2001, BCE publicized its lack of confidence in GlobeSystem by cutting off funding to Teleglobe, sending Teleglobe into bankruptcy.[89]

Teleglobe's subsidiaries and creditors filed suit against BCE and sought the release of communications between BCE and Teleglobe.[90] BCE argued that these communications were privileged because they occurred between BCE attorneys and pertinent employees of Teleglobe and its subsidiaries regarding a *common legal interest*.[91]

In analyzing the claim, the Third Circuit Court of Appeals drew a sharp distinction between the *joint-client privilege* and the *common-interest privilege*.[92] The joint-client (or co-client) privilege holds that an attorney may serve multiple clients on the same matter as long as the attorney can fulfill his duty to each joint client.[93] Communications between joint-clients and their common counsel are privileged, so long as the other elements of the privilege are satisfied.[94]

The common-interest (or community of interest) privilege developed in criminal law as courts recognized that it was sounder to allow co-defendants with separate counsel to coordinate their defenses.[95] This doctrine expanded into civil law allowing protection of communications within a "community of interest."[96] The court noted two key features of the privilege. First, it is the *attorneys* within the commu-

85. *In re Teleglobe*, 493 F.3d at 353.
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.* at 354.
90. *Id.*
91. *Id.*
92. *Id.* at 359.
93. *Id.* at 362.
94. *Id.* at 363.
95. *Id.* at 363–64.
96. *Id.*

nity of interest who must share the communication.[97] Communication between *members* might not be privileged.[98] Second, all members of the community must share a common legal interest in the communication.[99] The key distinction between the two doctrines is that joint-clients share the same legal counsel while parties invoking a community of interest privilege each have separate counsel.[100]

The Third Circuit observed that although courts generally agree that communications between affiliated companies should be treated as intra-corporate communications, they do so for varying reasons.[101] The court noted three arguments commonly put forth: "(1) the members of the corporate family comprise one client, (2) the members of the corporate family are joint clients, and (3) the members of the corporate family are in a community of interest with one another."[102]

The court preferred founding its analysis on the view that corporate families are joint clients because "[t]his reflects both the separateness of each entity and the reality that they are all represented by the same in-house counsel."[103] The court held that treating affiliated companies as one client is most conceivable when the subsidiary is wholly owned by the parent.[104] But even then, doing so fails to observe the "bedrock principle of corporate law . . . that courts must respect entity separateness unless doing so would work inordinate inequity."[105]

The court rejected the Community of Interest Doctrine because it "only comes into play when parties are represented by separate counsel, which is often not the case for parents and subsidiaries."[106] Furthermore, "it assumes too much to think that members of a corporate family necessarily have a substantially similar *legal* interest . . . in *all* of each other's communications."[107]

### B. *The Focus on Related Companies*

Although early decisions about the attorney-client privilege and its application to the corporate setting paid little consideration to the degree of affiliation between related companies, many modern courts seem to hinge their decisions on the parent corporation's ownership interest in the subsidiary. Many of these decisions appear to turn on whether the subsidiaries were wholly owned by the parent corpora-

97. *Id.* at 364.
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.* at 370.
102. *Id.*
103. *Id.* at 372.
104. *Id.* at 370.
105. *Id.* at 371.
106. *Id.* at 372.
107. *Id.*

tions. This hefty reliance on ownership interest can be misleading in light of the early cases.

In *Fox v. Massey-Ferguson*, *Inc*.,[108] the district court ruled that disclosure of confidential communications between affiliated companies did not constitute a waiver of the attorney-client privilege.[109] Massey-Ferguson (MF) was an agriculture equipment manufacturer with international reach and over 150 years of being in business.[110] In the 1960s, MF was the third largest farm machinery company in the United States and the largest across the rest of the world.[111] In 1964, MF implemented a free health care insurance benefit to retired employees via a collective bargaining agreement with the United Auto Workers Association.[112]

MF was subsequently purchased by Varity Corporation ("Varity").[113] In 1993, Varity unilaterally modified the retirement health care benefit, which prompted a law suit seeking injunction of the modification.[114] Prior to annulling the health care benefit, MF's counsel prepared a Litigation Risk Analysis that contained (1) confidential communications between Varity and its counsel; (2) legal advice to Varity, MF, and Kelsey-Hayes[115] regarding possible modifications to retirement benefits; (3) advice on legal strategies for anticipated legislation; and (4) "a numerical evaluation (1 to 5) of the probability of success in litigation brought by various groups of former employees."[116]

During litigation, MF produced documents in response to a discovery request by the plaintiffs.[117] The Litigation Risk Analysis was inadvertently included among those documents.[118] Upon realizing the mistake, MF filed a motion to have the Litigation Risk Analysis returned.[119] The plaintiffs resisted the motion, arguing that disclosure of the Litigation Risk Analysis to Varity and Kelsey-Hayes constituted a waiver of the privilege.[120] The court rejected this argument:

> The Plaintiffs contend that privilege was waived when the documents were shared between Kelsey-Hayes, Massey-Ferguson, and

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108. Fox v. Massey-Ferguson, Inc., 172 F.R.D. 653 (E.D. Mich. 1995).
109. *Id.* at 670.
110. *Massey Ferguson, Our Heritage, Overview*, MASSEYFERGUSON, http://www.masseyferguson.us/about_us/mf-history/ (last visited Oct. 11, 2013).
111. *Massey Ferguson, Our Heritage, 60s*, MASSEYFERGUSON, http://www.masseyferguson.us/about%5Fus/mf%2Dhistory/60s/ (last visited Oct. 11, 2013).
112. Fox v. Varity Corp., 91 F.3d 143 (6th Cir. 1996) (not designated for publication).
113. *Fox*, 172 F.R.D. at 657.
114. *Id.*
115. *Id.* at 668 (Kelsey-Hayes is another subsidiary of Varity).
116. *Id.* at 670.
117. *Id.* at 668.
118. *Id.*
119. *Id.* at 669.
120. *Id.* at 670.

> Towers Perrin.[121] They claim . . . that "the very fact that these legal opinions were shared between the two separate corporations constitutes a waiver of the privilege." This argument has no merit and is problematic for several reasons. First, Massey-Ferguson and Kelsey-Hayes are not two separate corporations. Massey-Ferguson is a division of Varity, which fully owns Kelsey-Hayes. It is well settled that a privilege is not waived by communications which extend throughout a corporate structure that encompasses a parent corporation, subsidiaries, and affiliates.[122]

The *Fox* court concluded that MF, Varity, and Kelsey-Hayes were all part of one corporate entity and therefore, one client.[123] The court also mentioned that privilege in this matter would have been preserved by the common-interest exception to waiver.[124] But this exception did not appear to influence the court's initial ruling, which was based solely on affiliation.[125]

In *Weil Ceramics & Glass, Inc. v. Work*,[126] the district court decided an issue of confidentiality based on alternate theories of exceptions to waiver including the related companies' exception.[127] Lladro S.A. was a Spanish company that manufactured porcelain figurines according to design specifications provided by Disenos Artisticos E Industriales S.A. (DAISA), another Spanish corporation.[128] Weil Ceramics & Glass, Inc. (Weil) was a New Jersey-based importer and distributor of these figurines.[129] All three corporations were wholly owned by a Spanish corporation, Sodigei S.A.[130]

In 1983, DAISA filed suit against the defendants claiming copyright infringement.[131] The defendants filed a counterclaim alleging antitrust violations for restricting the sale of Lladro figurines.[132] During litigation, defendants sought documents including communications between the related corporations.[133] The court acknowledged privilege between the corporations named in the litigation, and as such the common-interest and joint-defense theories protected the communication. Going one step further, the court also addressed the Related Companies Theory as a "factual matter."[134]

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121. *Id*. (Towers Perrin was the consulting firm).
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. Weil Ceramics & Glass, Inc. v. Work, 110 F.R.D. 500 (E.D.N.Y. 1986).
127. *Id.*
128. *Id.* at 501.
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.* at 502.
134. *Id.* at 503.

The court noted that the three corporations, which exchanged documents, shared common ownership and were therefore related companies.[135] "[T]he attorney-client protection provided for corporate clients includes, the corporation who retained an attorney, its parent, and its *wholly owned and majority owned subsidiaries* considered collectively."[136] This statement implies that less than majority owned subsidiaries may not fall under the umbrella of related companies.

The court in *Crabb v. KFC National Management Co*.,[137] seems to take the most liberal approach to treating intra-corporate communications as inter-corporate communications. Wetonah Crabb worked in KFC's payroll department.[138] Crabb was a section leader tasked with identifying and correcting mistakes made by other payroll employees.[139] Crabb believed that management had targeted another payroll employee (Betty Roush, 62 years of age) for termination, partly based on her age.[140]

Rather than follow management's course, Crabb refused to document Roush's performance deficiencies; instead, she notified Roush of management's intent and advised her to take sick leave until her pension vested.[141] Roush took Crabb's advice and allowed her pension to vest while on sick leave.[142] Upon Roush's return, she resigned at the recommendation of management.[143]

During this time, Crabb had difficulties of her own. Crabb depleted all of her preapproved leave time to care for her sick daughter and, as a result, attempted to negotiate with management for more time off.[144] After Crabb declined to accept a leave of absence with no guaranty of a job upon her return, she was given more time off with the stipulation that she return by a certain date or her employment would be terminated.[145] Crabb did not return by that date and she was fired.[146]

Crabb and Roush each filed lawsuits against KFC.[147] Roush filed suit for violation of the Age Discrimination in Employment Act (ADEA), and Crabb claimed that she was terminated in retaliation for assisting Roush, which is also an ADEA violation.[148] The trial

135. *Id.*
136. *Id.* (emphasis added).
137. Crabb v. KFC Nat'l Mgmt. Co., No. 91-5474, 1992 WL 1321 (6th Cir. Jan. 6, 1992) (per curiam, not designated for publication).
138. *Id.* at *1.
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.* at *2.
148. *Id.*

court awarded Roush $150,000 but gave Crabb nothing.[149] Crabb appealed, claiming that the trial court erred by not admitting a document ruled to be confidential.[150]

Crabb sought admission of a memorandum created by KFC's legal department.[151] Intended for supervisory personnel, this memo indicated a need for proper documentation of performance faults for employees who were slated to be terminated.[152] The document contained a notation made by KFC's legal counsel recommending that a copy of the document should be delivered to Zantigo, an affiliated company of KFC.[153] Crabb argued that disclosure of the document to Zantigo, an outside corporation, constituted a waiver of the attorney-client privilege.[154] The Sixth Circuit used the language from the district court in its analysis:

> [T]he simple distribution of legal advice to similarly-situated decision makers at affiliated companies would not constitute a waiver of the confidentiality of the document. It is well settled that attorney-client privilege is not waived merely because the communications involved extend across corporate structures to encompass parent corporations, subsidiary corporations, and affiliated corporations. . . . ("Although an interest of a third party corporation from a commercial standpoint would not establish a sufficient community of interest, the fact that the communications are among formally different corporate entities which are under common ownership or control leads this court to treat such inter-related corporate communications in the same manner as intra-corporate communications."). . . .[155]

Even though a community of interest did not exist, because Zantigo was not a party to this litigation the Sixth Circuit Court of Appeals affirmed the district court's ruling that such communication between affiliated companies did not constitute disclosure.[156] The Sixth Circuit joined the *Fox* court and the *Weil Ceramics* courts in relying heavily on mere corporate affiliation to determine whether the attorney-client privilege should apply. This shallow analysis fails to consider the import of other factors that arguably outweigh affiliation between corporations. In spite of this hefty reliance on affiliation, none of these courts addressed the issue of, specifically, what minimum degree of affiliation would condone extending the attorney-client privilege. The following case explored this issue.

149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.* at *3 (Zantigo and KFC were sister corporations, as each was wholly owned by the same parent corporation).
154. *Id.*
155. *Id*. (citing Admiral Ins. Co. v. U.S. Dist. Ct. for the Dist. of Ariz., 881 F.2d 1486, 1493 n.6 (9th Cir. 1989) (citations omitted).
156. *Id.*

### C. *United States v. American Telephone and Telegraph Co.*

In an extremely complex antitrust action involving numerous facets of law, the district court for the District of Columbia adopted guidelines regarding the law of privilege.[157] In Guideline Number Eight, the court ruled that for the purpose of the attorney-client privilege, the "client" included the named defendants and all wholly owned subsidiaries as well as majority owned subsidiaries.[158] Minority owned subsidiaries and formerly affiliated companies were expressly excluded from status as "clients" for privilege purposes.[159] However, the court acknowledged that "[t]he privilege also applies when an attorney provides legal advice or assistance to another agency if the advice or assistance is on a basis that is confidential among the clients and relates to a matter in which the agencies have a substantial identity of legal interest."[160]

In the comment to Guideline Number Eight, the court elaborated on its ruling. First, the court recognized that a great weight of authority holds that a corporate client includes "not only the corporation by whom the attorney is employed or retained, but also parent, subsidiary, and affiliate corporations."[161] Second, the court stated that it could find no cases where the degree of affiliation was a requirement in assessing the parent, subsidiary, or affiliate corporate relationship.[162] Third, the court noted that in all the cases where the identity of the "client" was at issue, the related corporations shared a substantial common legal interest in the matter in controversy.[163] In these cases, even though the corporations were separate entities, the legal representation was common or joint and therefore still covered by the attorney-client privilege.[164]

The court held that the degree of affiliation between the corporations becomes irrelevant when the claimant can establish that the distinct entities had a significant common legal interest. But when this common legal interest is lacking, then the privilege may turn on the degree of affiliation.[165]

The court applied these guidelines to the facts of the case and held that the wholly owned and majority owned subsidiaries "have close and long-standing relationships with each other, although they differ as to the legal significance of that intimacy."[166] As such, those entities

157. United States v. AT&T, 86 F.R.D. 603 (D.D.C. 1979).
158. *Id.* at 616 (named defendants were American Telephone & Telegraph Co., Western Electric Co., and Bell Telephone Laboratories, Inc.).
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.*

should be considered as a single client for the purposes of the attorney-client privilege.

Regarding the companies in which the American Telephone and Telegraph Corp. (AT&T) owned a minority interest, the court held that since "AT&T's interest in no case exceeds 30 percent, a position that has been virtually unchanged for at least 20 years. . . . These companies appear to have an autonomous corporate life of their own and, therefore, should be treated as independent of AT&T."[167] However, the attorney-client privilege may still apply where legal representation was shared with respect to a substantial common legal interest.[168]

The court went on to say that in deciding whether disclosure to an affiliated company constitutes a waiver, it is proper to consider the percentage of ownership:[169]

> The cases referring to parent, subsidiary, and affiliate corporations in regard to the attorney-client privilege simply reach the conclusion that there was a single client without examining this question. Perhaps the conclusion to be reached may well depend on where one begins. If analysis begins with the proposition that corporations under unified control are "one" even though comprised of components held in varying degrees of ownership, then a minority owned company can be assimilated to one in which substantial, although not majority, ownership is held. On the other hand, if analysis begins with the proposition that formerly distinct corporations are separate persons except as specific legal purpose warrants treating them as one, then a different conclusion is reached.[170]

## IV. Conclusion

From the inception of the attorney-client privilege, courts have recognized the logical tenet that only those communications intended to be confidential are eligible for protection under the privilege. From this tenet comes the rational deduction that disclosure to parties outside of the confidential relationship presents a waiver, since a communication intended to be confidential would not be disseminated to non-privileged parties. This led to the debate over which parties are non-privileged. The early cases first acknowledged that communications within the same corporation could remain confidential if they were intended to be confidential. The emphasis was on the communication, not the relationship. A communication between attorney and client is not *per se* confidential. Only those communications that are legal in nature and otherwise satisfy the conditions of the privilege are protected from forced disclosure.

167. *Id.* at 616–17.
168. *Id.* at 617.
169. *Id*.
170. *Id.*

As courts made more and more references to "wholly owned" subsidiaries, the focus seemed to shift from the communication to the relationship. The relationship aspect of the analysis is essential but only because it helps distinguish between who is a client and who is a third party. Blindly extending the attorney-client privilege to related corporations merely because they are affiliated not only transcends the boundary of the underlying policy but also violates the theory of entity separateness.

The concept of entity separateness requires that individual corporations be treated as individual corporations. After all, creating subsidiaries is a strategic business decision that carries many benefits that extend beyond limiting liability. Relying on mere affiliation to guard communications as confidential creates a benefit that was not intended in the corporate structure and in fact, expressly condemned. The *Upjohn* trial court warned of creating a "zone of silence" where corporations could conceal virtually any communication. Although the U.S. Supreme Court eventually reversed the trial court's ruling, the Supreme Court recognized the admonition against the corporate "zone of silence."

The Third Circuit in *Teleglobe* provided an extraordinary analysis relative to the process employed by previous courts that settled the privilege issue without delving into the intricacies of the communications at issue. Notably, the Third Circuit conceded that in most cases where the subsidiary corporation is wholly owned or majority owned by the parent, the requisite factors will weigh in favor of extending the privilege. But this alone is not dispositive of the issue:

> [Although] parent companies often centralize the provision of legal services to the entire corporate group in one in-house legal department, it is important to consider how the disclosure rule affects the sharing of information among corporate affiliates. Recognizing that any other result would wreak havoc on corporate counsel offices, courts almost universally hold that intra-group information sharing does not implicate the disclosure rule. This result is unquestionably correct. The cases, however, vary in how they reach the result.[171]

Although the Third Circuit in *Teleglobe* expressed its preference to analyze privilege issues between affiliated companies as if they were joint clients, a more precise framework can be extracted from the rationale behind the decision.

First, communications between wholly owned subsidiaries and their parents should be treated as one client unless doing so will violate the principle of separateness. This inverts the principle that separate companies should be treated as separate entities unless doing so would work an inequity. But in matters of attorney-client privilege, an overwhelming number of courts already treat these communications as in-

171. *In re* Teleglobe Commc'ns Corp., 493 F.3d 345, 369 (3d Cir. 2007).

tra-corporate. Creating a *per se* rule to this effect would violate the bedrock principle of separateness. Inverting the doctrine as suggested gives the courts leeway to decide issues on a case-by-case basis and allows courts to make equitable decisions such as in *Napster*.

The Third Circuit grounded its decision on the notion that most affiliated companies share common legal counsel and should therefore be treated as joint clients in determining if the privilege extends. Instead of making this assumption and creating a blanket rule that would consume all privilege analysis between related companies, courts should allow for two more rules that turn on legal representation.

If the affiliated companies share the same legal counsel, then courts should apply the joint-client doctrine to determine if communications between companies constituted a waiver of the privilege. If the affiliated companies each have separate counsel, then courts should apply the community of interest doctrine to determine if communications between companies constituted a waiver.

Applying this framework, it becomes apparent that any percentage of ownership between corporations may give rise to the attorney-client privilege, so long as the other elements of privilege are met. The policy that supports treating wholly owned subsidiaries and parent corporations as one entity applies with any percentage of ownership entailing a controlling share.

Evaluating inter-corporate communications for attorney-client privilege is grounded in two related doctrines: (1) the nature of the intra-corporate attorney-client privilege, and (2) the relationship between the companies as it pertains to a common legal defense. Both doctrines are employed when courts open the door to the attorney-client privilege based on any level of affiliation and then analyze the communications under the prescribed framework.

The *Napster* court reached an equitable decision without having to rely on such shrewd legal analysis. The *Napster* court simply found that corporations should not be entitled to the benefits of separateness when playing on both sides of litigation. Bertelsmann AG had a financial stake in Napster and wholly owned BMG, which was involved in the litigation against Napster. The court acknowledged that under normal circumstances the communications between Bertelsmann AG and BMG would be privileged, but to allow such a result under these circumstances would result in injustice. The *Napster* court found support in the doctrine of separateness without need for a lengthy *Teleglobe*-style analysis. Whichever approach is utilized, the degree of affiliation between corporations should not be viewed as a secure gateway to the attorney-client privilege.