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COMMUNICATIONS WITH LOWER-LEVEL MANAGERS AND EMPLOYEES, FORMER EMPLOYEES, AND AFFILIATES: WHEN DOES THE ATTORNEY-CLIENT PRIVILEGE APPLY?

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A claim of attorney-client privilege ("privilege") must satisfy three elements in West Virginia. In the seminal United States Supreme Court case, the Court found that communications with lower-level employees may be privileged in certain circumstances. While some courts have determined that the attorney-client privilege extends to lower-level managers and employees, former employees, and affiliates, other courts have reached the opposite conclusion. One court held that a subsidiary employee cannot assert the parent's privilege.

Analysis

A general overview of the policy behind the attorney-client privilege.

The attorney-client privilege protects both corporations and individuals.[1] The privilege "serves the function of promoting full and franks communications between attorneys and their clients. It thereby encourages observance of the law and aids in the administration of justice."[2] Corporations are unique because a corporation is "an inanimate entity" and therefore "must act through agents."[3] In that instance, the privilege covers "communications between counsel and top management [and], under certain circumstances, communications between counsel and lower-level employees."[4] "Like all privileges, the attorney-client privilege 'interferes with the truth seeking mission of the legal process,' and therefore is not 'favored.'"[5] However, "if a paty demonstrates that attorney-client privilege applies, the privilege affords all communications between attorney and client absolute and complete protection from disclosure."[6]

[1] *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348, 105 S. Ct. 1986, 1990 (1985).
[2] *Id.* (citations omitted).
[3] *Id.*
[4] *Id.* at 348, 105 S. Ct. at 1991.
[5] *In re Allen*, 106 F.3d 582, 600 (4th Cir. 1997) (citing *United States v. Aramony*, 88 F.3d 1369, 1389 (4th Cir. 1996)).
[6] *Id.* (citation omitted).

The West Virginia attorney-client privilege test has three elements.

Under West Virginia law, there are

> three elements necessary to determine whether the attorney-client privilege exists: (1) both parties must contemplate that the attorney-client relationship does or will exist; (2) the advice must be sought by the client from that attorney in his capacity as a legal adviser; (3) the communication between the attorney and client must be intended to be confidential.[7]

A significant number of cases concerning the privilege arise in the area of insurance law. These cases are instructive, but not entirely illustrative, of the issues concerning the applicability of the privilege to lower-level and former employees.

In *State ex rel. Allstate Ins. Co. v. Gaughan*, a bad faith settlement practices case, the Supreme Court of Appeals of West Virginia stated that the insurance company had a quasi attorney-client privilege that only it could waive despite an insured's signed release regarding their claim file.[8] This was based in part on the fact that the attorney representing the insured is in actuality "representing both the insurer and the insured."[9] Documents "in the insured's claim file that were generated prior to the filing date" of the bad faith claim might be protected by the work product doctrine.[10] However, the majority of the file documents could not "fulfill the elements required to gain protection under the attorney-client privilege" prior to suit being filed.[11] In *State ex rel. Med. Assurance of West Virginia, Inc. v. Recht*, a case concerning medical malpractice, the court found that communications that were made between a doctor and his attorney, and which were then shared with the doctor's insurer, did not lose their privileged status.[12] The Court stated that the privilege extended to third parties that were "advised of the confidential

[7] *Mordesovitch v. Westfiled Ins. Co.*, 244 F. Supp. 2d 636, 641 (S.D.W. Va. 2003) (citation omitted) (internal quotation omitted).
[8] Syl. pt. 7, *State ex rel. Allstate Ins. Co. v. Gaughan*, 203 W. Va. 358, 508 S.E.2d 75 (1998).
[9] *Id.* at 371, 508 S.E.2d at 88.
[10] *Id.* at Syl. pt. 11.
[11] *Id.* at 373, 508 S.E.2d at 90.
[12] *State ex rel. Med. Assurance of West Virginia, Inc. v. Recht*, 213 W. Va. 457, 583 S.E.2d 80 (2003).

information at the direction of the attorney."[13] The court also stated that an attorney's opinion work product "enjoy[ed] a near absolute immunity and [could] be discovered in only very rare and extraordinary circumstances."[14]

***Upjohn*, the seminal United States Supreme Court case in the area, states that communications with lower-level employees may be privileged in certain circumstances.**

The seminal case applying the privilege to lower-level employees and mangers is *Upjohn Co. v. United States*. In *Upjohn*, an independent audit uncovered suspicious payments made by a foreign subsidiary to obtain government business.[15] The company subsequently conducted an internal investigation.[16] As part of the investigation, the company's general counsel prepared and sent a letter and questionnaire regarding the payments.[17] "The questionnaire sought detailed information concerning such payments" and those lower-level managers receiving the questionnaire were informed that the investigation was "highly confidential" and should not be discussed "with anyone other than Upjohn employees who might be helpful in providing the requested information."[18] Interviews by general and outside counsel were also conducted.[19] The company subsequently submitted reports concerning the payments to both the SEC and the IRS, which "began an investigation to determine the tax consequences."[20] The IRS then requested the questionnaires and any notes taken during the interviews.[21] The company claimed the attorney-client privilege and refused to produce the documents.[22]

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[13] *Id.* at 466, 583 S.E.2d at 88 (citation omitted).
[14] *Id.* at 467, 583 S.E.2d at 90 (citation omitted); *see also State ex. rel. Erie Ins. Co. v. Mazzone*, 218 W. Va. 593, 599, 625 S.E.2d 355, 361 (2005).
[15] *Upjohn Co. v. United States*, 449 U.S. 383, 386, 101 S.Ct. 677, 681 (1981).
[16] *Id.* at 386-87, 101 S. Ct. at 681.
[17] *Id.*
[18] *Id.* at 387, 101 S. Ct. at 681.
[19] *Id.*
[20] *Id.*
[21] *Id.* at 387-88, 101 S. Ct. at 681-82.
[22] *Id.* at 388, 101 S. Ct. 682.

The Sixth Circuit applied the "control group test," essentially indicating that only those officers with the ability to bind the corporation were covered by the privilege.[23] However, the Supreme Court stated that the control group test "overlooks the fact that the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice."[24] The Supreme Court ultimately held that the communications were protected, in part because the employees communications were made to the company's counsel "at the direction of corporate superiors in order to secure legal advice from counsel."[25] The Supreme Court stated:

> Information, not available from upper-echelon management, was needed to supply a basis for legal advice concerning compliance with securities and tax laws, foreign laws, currency regulations, duties to shareholders, and potential litigation in each of these areas. The communications concerned matters within the scope of the employees' corporate duties, and the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice.[26]

However, the Court cautioned that this would not allow a corporation to assert the privilege carte blanche to "create a broad 'zone of silence' over corporate affairs."[27] While the privilege could be invoked to prevent disclosure of communications, it could not be invoked to prevent "disclosure of the underlying facts."[28] Although this case is the seminal United States Supreme Court case, some state courts have not followed the *Upjohn* reasoning and have continued to apply the control-group test in state decisions. Other courts have expansively interpreted the meaning of "control group" to include lower-level employees and managers.

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[23] *Id.* at 390, 101 S. Ct. at 683.
[24] *Id.*
[25] *Id.* at 394, 101 S. Ct. at 685.
[26] *Id.*
[27] *Id.* at 395, 101 S. Ct. at 685.
[28] *Id.*

Courts have interpreted the *Upjohn* case or resolved the corporate privilege issue in various ways.

(1) Lower-Level Managers/ Employees

Some courts have determined that the attorney-client privilege extends to those beyond the upper echelons of management by stretching the definition of "control group." Other courts have determined that the attorney-client privilege does not extend to lower-level managers or employees.

a. Cases in which lower-level managers/ employees have been protected

In *Re Quantum Chem./Lummus Crest*, the Northern District of Illinois protected communications with accounting and administration managers, finding that they were both members of the company's control group for purposes of the attorney-client privilege as it related to various documents that they had received.[29] This holding was based in part of the fact both individuals were managers of their divisions, the corporation stated both were key personnel, and that both provided advice and opinions on the documents that the corporation would rely on during litigation.[30]

A leading scholar, discussing *Commonwealth Edison Co. v. Allied-General Nuclear Servs.*, has stated that:

> [t]he court held a substantial number of corporate employees, including the senior marketing manager, manager—safeguards technology, and regional marketing manager, to be members of the corporate control group because the documents in question showed them to be among those who would substantially participate in a decision regarding action to be taken on advice of counsel or those with authority to act on advice of counsel, in Commonwealth Edison Co v Allied-General Nuclear Servs (Aug 24, 1983, F ND Ill) No. 79 C 2866, slip op. (available on LEXIS(R)) (applying Illinois law).[31]

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[29] *Re Quantum Chem./Lummus Crest*, 1992 WL 71782, at **2-3 (N.D. Ill. Apr. 1, 1992.)
[30] *Id.* at **3-4.
[31] Alexander C. Black, *Determination of whether a communication is from a corporate client for purposes of the attorney-client privilege—modern cases*, 26 A.L.R.5th 628 (1995).

In *Midwesco-Paschen Joint Venture for the Viking Projects v. IMO Indus.*, communications with a field service manager were protected based upon affidavits from the corporation which indicated the manager had "direct managerial responsibility over the field service department" and was involved in determining the corporation's potential liability during the company's investigation and analysis of the claims in the case.[32] Also significant was the fact that the decisions were normally made with the manager's involvement and that the manager had attended settlement meetings.[33]

In both *Baxter Travenol Lab. v Lemay* and *Admiral Ins. Co. v. United States Dist. Court* communications between counsel and employees were held privileged based upon the fact that the employees were aware that the communications were sought in order for the corporation to obtain legal advice and that the communications had legal ramifications when made.[34]

b. Cases in which lower-level managers/ employees have not been protected

The Eastern District of Virginia refused to apply the attorney-client privilege questionnaires that employees had completed.[35] Although the questionnaires sought information regarding the company's compliance with the Fair Labor Standards Act, the company failed to "clarify to the employees completing the questionnaire that it needed the information to obtain legal advice."[36] The questionnaires indicated that the information would be used to make a business decision and, the bank also failed to inform employees that the matter was

[32] *Midwesco-Paschen Joint Venture for the Viking Projects v. IMO Indus.*, 265 Ill.App.3d 654, 663-64 638 N.E.2d 322 (Ill. App. Ct. 1994).
[33] *Id.*
[34] *See Baxter Travenol Lab. v Lemay*, 89 F.R.D. 410 (S.D. Ohio 1981); *Admiral Ins. Co. v. United States Dist. Court*, 881 F.2d 1486 (9th Cir. 1989).
[35] *Deel v. Bank of America, N.A.*, 227 F.R.D. 456 (W.D. Va. 2005).
[36] *Id.* at 461.

confidential.[37] By failing to "provide proper notice," the bank was estopped from "prevent[ing] the plaintiff from discovering the questionnaires based on the attorney-client privilege."[38]

In *Knief v. Sotos*, a bar manager's and head waitress' statements to the company's attorney were not privileged because there was no evidence presented concerning the conditions under which the statements were made.[39] The evidence did not show that "the head manager or the head waitress was normally consulted for his or her opinion as to what legal action the corporation should pursue."[40] Thus, the company could not claim the attorney-client privilege for these statements. In *National Tank Co. v. Brotherton*, a case involving an explosion at a plant, the court stated that communications between an employee-witness and company counsel were not privileged because the there was no evidence that the employee had the "authority to obtain professional legal services, or to act on advice rendered pursuant thereto."[41]

(2) Former Employees

While some courts have determined that the attorney-client privilege extends to former employees, other courts have reached the opposite conclusion.

a. Cases in which former employees have been protected by the privilege

Based upon the rationale in *Upjohn*, the District Court of Massachusetts found that communications between an attorney and a former employee regarding an allegedly defamatory letter that had been written by the former employee while he was employed was covered by the attorney-client privilege.[42] The letter was critical to the litigation and the communications would impact the defense of the case.[43] The court reasoned that protecting the communication would

[37] *Id.* at 461-62.
[38] *Id.* at 462.
[39] *Knief v. Sotos*, 181 Ill.App.3d 959, 537 N.E.2d 832, 835 (Ill. App. Ct. 1989).
[40] *Id.*
[41] *Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193, 197 (Tex. 1993).
[42] *Command Transp., Inc. v Y. S. Line (USA) Corp.*, 116 F.R.D. 94 (D. Mass. 1987).
[43] *Id.* at 95.

"foster the flow of information to corporate counsel regarding issues" the corporation was seeking advice because the communications between counsel and the former employee concerned the former employee's action and were treated as confidential.[44]

The District Court of Massachusetts also found the privilege covered communications between corporate counsel and a company's former president.[45] The former employee and counsel strategized regarding the litigation approach and had exchanged correspondence and draft statements.[46] Additionally, the opposing party stipulated that "[c]ommunications between a retired employee and his former employer's counsel, the purpose of which are to give the former employer legal advice as to a course of action, may be privileged."[47] In *In Re Coordinated Pretrial Proceedings in Petro. Products Antitrust Litig.*, in a case regarding the disqualification of counsel, the Ninth Circuit extended the *Upjohn* rationale to include former employees when overturning the disqualification of counsel in the case.[48]

b. Cases in which former employees have not been protected by the privilege

In *Barrett Indus. Trucks, Inc. v Old Republic Ins. Co.*, the former vice president of finance was retained four years after retiring as a "litigation consultant" as the litigation involved the same area that he used to manage.[49] While consulting, the former employee was privy to the identity of those individuals counsel spoke with, documents that had been collected, and discovery preparation.[50] During the former employee's deposition, opposing counsel inquired into the conversations the former employee had with counsel.[51] The Northern District of Illinois,

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[44] *Id.*

[45] *Amarin Plastics, Inc. v Maryland Cup Corp.*, 116 F.R.D. 36 (D. Mass. 1987).
[46] *Id.* at 41-42.
[47] *Id.* at 41 (citation omitted).
[48] *In Re Coordinated Pretrial Proceedings in Petro. Products Antitrust Litig.*, 658 F.2d 1355, 1361 (9th Cir. 1981).
[49] *Barrett Indus. Trucks, Inc. v Old Republic Ins. Co.*, 129 F.R.D. 515, 516 (N.D. Ill. 1990).
[50] *Id.*
[51] *Id.*

applying the control group test, held that "attorney-client privilege, as applied by the courts of Illinois, [did] not extend to communications with former employees of a client corporation now employed as 'litigation consultants' and thus could not be used to protect communications between the former employee and counsel."[52]

In *Clark Equip. Co. v. Lift Parts Mfg. Co.*, a party appealed a magistrate's order refusing to compel testimony of two former employees.[53] During the depositions of the two former employees, the party made inquires regarding communications between the former employees and counsel regarding their employment that had occurred post-employment but prior to the deposition.[54] Reviewing the reasoning the Supreme Court used in *Upjohn*, the Northern District of Illinois stated:

> The reasoning of *Upjohn* does not support extension of the attorney-client privilege to cover post-employment communications with former employees of a corporate party. Former employees are not the client. They share no identity of interest in the outcome of the litigation. Their willingness to provide information is unrelated to the directions of their former corporate superiors, and they have no duty to their former employer to provide such information. It is virtually impossible to distinguish the position of a former employee from any other third party who might have pertinent information about one or more corporate parties to a lawsuit.[55]

The Court then held that "post-employment communications with former employees are not within the scope of the attorney-client privilege."[56]

An American Law Reports article summarizes the Restatement position as follows:

> The Restatement (Third) of the Law Governing Lawyers § 123, Comment e, observes that the attorney-client privilege would not normally attach to communications between former employees and counsel. The comment reaches this conclusion because the Restatement applies agency principles to the question of who may claim the corporate attorney-client privilege . . . and accordingly it

[52] *Id.* at 518.
[53] *Clark Equip. Co. v. Lift Parts Mfg. Co.*, 1985 WL 2917, at *5 (N.D. Ill. 1985).
[54] *Id.*
[55] *Id.*
[56] *Id.*

> requires that a principal-agent relationship be in existence at the time of the communication with counsel. Nevertheless, Comment e permits a broad exception for former employees who have a continuing legal obligation, under agency principles or pursuant to a contract of employment, to furnish information to corporate counsel. The comment suggests that communications between counsel and former senior officers regarding matters within the scope of the former officer's duties would qualify under this exception. The comment also notes that communications with former officers or employees who are retained under a consulting arrangement would also qualify for the privilege, as long as the former officer or employee was not retained only for the purpose of making communications with counsel for which privilege is desired. It should be noted that the discussion of privilege in the context of former employees occurs in the comments but is not explicitly reflected in § 123 itself.[57]

(3) Affiliates

While some courts have determined that the attorney-client privilege extends to subsidiaries and affiliated corporations, other courts have reached the opposite conclusion.

a. Situations in which subsidiaries/ affiliates have been protected by the privilege

In *United States v. United Shoe Mach. Corp.*, a parent company and its subsidiaries used the same corporate and external counsel.[58] The company objected on attorney-client privilege grounds to the introduction of 800 documents as exhibits.[59] The Court stated that the privilege would only apply if "the asserted holder of the privilege is or sought to become a 'client.'"[60] The Court stated that the "legal affairs of these corporations were closely related. Except for convenience in billing and formal accounting there was no attempt to regard one particular corporation as 'the client.'"[61] The privilege covered the company, its subsidiaries, and affiliates because the attorneys were "giving legal advice" and "not acting as business advisers."[62]

[57] Black, *supra* n.26, p. 5.
[58] *United States v. United Shoe Mach. Corp.*, 89 F.Supp. 357, 358 (D. Mass. 1950).
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.*

In *United States v. AT&T*, a pre-*Upjohn* antitrust case, the District Court for the District of Columbia wrote a *fifty-seven* page opinion that was almost entirely devoted to explaining the court's guidelines regarding application of the privileges in the case.[63] As part of its opinion, the District Court stated that the privilege applied to AT&T and its "wholly owned subsidiaries and majority-owned subsidiaries . . . but not the minority-owned companies . . . and formerly affiliated companies."[64] As a basis for this opinion, the Court stated:

> The cases clearly hold that a corporate "client" includes not only the corporation by whom the attorney is employed or retained, but also parent, subsidiary, and affiliate corporations. We found no cases in which there was a consideration of the degree of ownership required to give rise to the parent, subsidiary, or affiliate relationship. The cases in which the issue has arisen as to the identity of the client also involved facts in which the two related corporations had a substantial identity of legal interest in the matter in controversy. In such circumstances, notwithstanding that the corporations were distinct, the representation by the attorney was common or joint representation and hence the communications among them were still covered by the attorney-client privilege. If the claimant of the privilege can show a substantial identity of legal interest in the specific matter, it therefore makes no difference whether the two corporations were so affiliated as to be a single "client." But if there is no such community of interest in seeking advice, for example when the matter is transmitted simply for information, the question of closeness of affiliation may arise.
>
> In the facts of this case, both parties contend that the wholly-owned and majority-owned affiliates of AT&T have close and long-standing relationships with each other, although they differ as to the legal significance of that intimacy. For purposes of the attorney-client privilege rule, however, the positions of both parties imply that these affiliates be considered part of AT& T as a single client.
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> As for the companies in which AT&T owns a minority interest, apparently 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. However, these companies may have been involved in joint or common representation in particular matters with respect to which they had a substantial identity of legal interest with AT&T.
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> Despite the fact that the minority-owned companies affiliated with AT&T and involved in this action will most likely have had a "substantial identity of legal

[63] *United States v. AT&T*, 86 F.R.D. 603, 603-51 (D.C.D.C. 1979).
[64] *Id.* at 616.

interest" with the AT&T system in the matters that will be brought into question (and hence the communications will be privileged under the "joint" representation rule stated in the second section of paragraph (a)), the defendants still insist that AT&T as "client" should include collectively all member corporations of the Bell system. Defendants contend that to distinguish between member corporations on the basis of percentage of ownership exalts form over substance. We do not agree.

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.

A minority-owned company by hypothesis has independent stockholders, and those stockholders, by our analysis, will have some added protection in the fact that an attorney serving their corporation is bound to regard that company as being distinct from an individual corporate stockholder that, for practical purposes, may control the company but not own a majority of the stock. Hence, we conclude that the legal form should be given effect in such a context. To pose an illustration, suppose payments were being made by the minority-owned company which that company contended were an inappropriate diversion of revenues that would otherwise go into profits and hence be available for distribution to the stockholders of the minority-owned company. In such a situation, it would be novel to say that lawyers for AT&T were representing a single client. And if that were said, it is difficult to see why a "single client" situation would not exist whenever one corporation owned more than a nominal fraction of the stock of another.

We also found no cases dealing with the identity of the client in respect to the Government. Indeed, the ruling in this case by Judge Greene that the independent regulatory agencies are not part of the Government for purposes of discovery appears to be one of few decisions recognizing the formal divisibility of the Government for purposes of trial court litigation. The rationale of that ruling would seem to imply that the Government is a cluster of "clients" for purposes of the attorney-client privilege. In some situations, it would be evident that the Government is not a single client. For example, if the Justice Department and the enforcement bureau of FCC took opposite positions before the FCC, it would be absurd to say that their exchange of briefs involved an attorney-client communication. A less extreme case, but one in which the agencies would still not have a sufficient identity of interest to justify the exchange of information by

> the attorneys and still maintain the attorney-client privilege, would arise when the FCC is engaged in regulatory matters that are not within the jurisdiction of the Justice Department. The Justice Department's interest in the outcome with regard to a particular related industry, because of its future implications in actions which may be instituted, would not constitute a community of legal interest with the FCC in that particular proceeding. The problem, therefore, is to determine the criteria by which the identity of a Government attorney's "client" is defined. The client clearly includes the attorney's own agency. On the other hand, it would not include some other agency under all circumstances, because any two agencies can have compatible or conflicting positions depending on the matter involved. The situation can be analogized to that of separate corporations having connections to each other. On that analogy, if the two agencies have a substantial identity of legal interest in a particular matter, the attorneys for each agency can be treated as representing both agencies jointly; if the agencies are in conflict, communications between counsel for the agencies are not within the attorney-client privilege.[65]

Although lengthy, the opinion provides a well-reasoned roadmap that may be invoked when attempting to determine which communications with affiliates may be claimed as privileged.

b. Situations in which affiliates have not been protected by the privilege

In *McCullough Tool Co. v. Pan Geo Atlas Corp.*, a complex patent case that was decided prior to *Upjohn*, the plaintiff attempted to invoke the privilege against the defendant based upon the fact that the defendant had once been "an officer and director of a wholly-owned subsidiary of plaintiff."[66] The court found that this reason alone was insufficient because the "business association between plaintiff and [defendant] does not of itself establish an attorney-client relationship between [defendant] and plaintiff's attorneys."[67] Citing *United Shoe*, the Court found that the privilege did not apply because the defendant "[a]t all times . . . retained his own counsel and dealt with plaintiff at arm's length" and thus there was "nothing to indicate that he ever sought to become a client of plaintiff's attorneys."[68]

[65] *Id.* at 616-17.
[66] *McCullough Tool Co. v. Pan Geo Atlas Corp.*, 40 F.R.D. 490, 493 (S.D. Tex. 1966).
[67] *Id.*
[68] *Id.*

(4) Subsidiary Employees

In *Hohenwater v. Roberts Pharm. Corp.*, a company moved to quash a subpoena to prevent production of a four-page document prepared by the parent company's counsel that had been referenced in the deposition of a wholly-owned subsidiary's employee.[69] The Court relied on the control group test to determine that the employee was "not a party to this litigation, nor [was] he employed by a party."[70] Although the actual document was protected by the work-product doctrine, the court found that the parent company had "waived the right to claim protection" for the document when it had "revealed the substance of its communications underlying the making of [the] document to an individual not a party (or client) in [the] litigation."[71]

In *Valassis v. Samelson*, a company moved for a protective order based upon ethical rules to prevent the opposing party from interviewing a former employee.[72] The employee had been promoted within the company to the position of Controller over a six year period.[73] Although the ethical rules did "not directly address the propriety of contact between an attorney and a former employee of the opposing corporate party," an on-point formal opinion from an ABA Committee stated that the rule did "not extend to former employees, including former managerial employees."[74] The Court stated that:

> the first level of inquiry is whether the person in question is an agent of that organization. If he is not, then he cannot be a party because he lacks any relevant connection to the organization which could reasonably place him in the role of a party. Only if a person is an agent of the organization need a court advance to the

[69] *Hohenwater v. Roberts Pharm. Corp.*, 152 F.R.D. 513, 515 (D.C.S.C. 1994).
[70] *Id.* at n.4.
[71] *Id.* at 517.
[72] *Valassis v. Samelson*, 143 F.R.D. 118, 119 (E.D. Mich. 1992).
[73] *Id.* at 120.
[74] *Id.* at 121.

> next level to determine whether that agent fits within the specific category of organizational agents to which [the ethical rule] is applicable.[75]

However, the court did find that the former employee could not testify about privileged matters, so long as the company sufficiently demonstrated that the information was privileged.[76]

Conclusion

The law regarding communications with lower-level managers and employees, former employees, and affiliates is unsettled. Various courts have concluded that in some instances communications are privileged while in others they are not. Given the arguments and rationales, it appears that asserting privilege for communications with these types of individuals will necessitate intensive factual arguments to support whether the privilege does apply.

[75] *Id.* at 123.
[76] *Id.* at 125.