

# Exchange of Confidential Communications Between Sister Corporations: An Exception to Waiver of Privilege Under *Roberts v. Carrier Corp.*

## I. INTRODUCTION

This Casenote will examine a recent federal case construing Indiana law on attorney-client and work product privileges, *Roberts v. Carrier Corp.*<sup>1</sup> The tests set forth in *Roberts* for determining when there may be disclosure of confidential information to a third party without thereby subjecting the information to the discovery process will be compared and contrasted with functionally similar tests set forth in other federal and Indiana cases. The *Roberts* exception goes beyond the exception established in *Duplan v. Deering Milliken, Inc.*,<sup>2</sup> for exchange of communications between parent and subsidiary corporations because the *Roberts* court extended the exception to sister corporations that are not formally related to one another. The *Roberts* exception applies not only to the work product privilege, as was the case in *United States v. AT&T*,<sup>3</sup> but to attorney-client privilege as well. Procedural and practical implications for the attorney-client relationship resulting from these exceptions to waiver of privilege will be examined. Various advantages and difficulties which may be encountered in applying the *Roberts* exception in the modern corporate context will be considered.

## II. THE NATURE OF DISCOVERY AND PRIVILEGES IN INDIANA

In 1970, the Indiana Supreme Court adopted the Indiana discovery rules.<sup>4</sup> The source of those rules was the November 1967 Proposed Amendments to the Federal Rules of Civil Procedure.<sup>5</sup> However, the federal rules that were adopted in 1970 were not identical to the 1967 proposed rules,<sup>6</sup> resulting in textual differences between the Indiana and federal rules, despite the fact that the Indiana Civil Code Study Commission had intended to adopt rules identical to the federal rules.<sup>7</sup>

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<sup>1</sup>107 F.R.D. 678 (N.D. Ind. 1985).

<sup>2</sup>397 F. Supp. 1146 (D.S.C. 1974), *supp. order, reconsid. denied* (1975).

<sup>3</sup>642 F.2d 1285 (D.C. Cir. 1980).

<sup>4</sup>IND. CIV. CODE STUDY COMM'N, COMMENTS ON THE PROPOSED FINAL DRAFT OF IND. R. CIV. P., at 1, 125 (1968) [hereinafter IND. CIV. CODE STUDY COMM'N (1968)]; 2 W. HARVEY, INDIANA PRACTICE § 26.1, 490, 491 (2d ed. 1987).

<sup>5</sup>See also 1967 PROPOSED AMENDMENTS TO THE FED. R. CIV. P. RELATING TO DISCOVERY, 48 F.R.D. 487 (1969).

<sup>6</sup>Cf. 43 F.R.D. 211, 224 (1967); 48 F.R.D. 459, 487 (1969); see also Advisory Committee's Explanatory Statement Concerning the 1970 Amendments of the Discovery Rules, 48 F.R.D. 487, 497-508 (1969).

<sup>7</sup>IND. CIV. CODE STUDY COMM'N (1968), *supra* note 4, at 125; 2 W. HARVEY, *supra* note 4, at 459-83.

In 1982, the Indiana discovery rules were amended and many of the differences between the federal and Indiana rules were removed.<sup>8</sup> Again, the intent was to make the Indiana rules parallel in function and form to the federal rules.<sup>9</sup> Indiana courts have acknowledged the similarity between the Indiana and federal rules and have often relied on federal authorities in construing the Indiana rules.<sup>10</sup> However, Indiana's courts have also recognized important differences remaining between the Indiana and federal discovery rules.<sup>11</sup> For example, neither federal rule 26(f)<sup>12</sup> nor the 1983 amendments to federal rules 26(b)<sup>13</sup> and 26(g)<sup>14</sup> were adopted by Indiana.

### A. Scope of Discovery

The policy of the Indiana Supreme Court is that the scope of Indiana's discovery rules is broader than that of the federal rules.<sup>15</sup> This policy is based, in part, on a recognition of the need to apply the Indiana rules to civil cases such as dissolution of marriage, child custody, support assignments, and the probate of wills—topics that are not litigated in federal courts.<sup>16</sup> In addition, the relevancy test, which determines whether or not information is discoverable, is broadly interpreted under the Indiana rules.<sup>17</sup>

In Indiana, under trial rule 26(B)(1), nonprivileged information that is relevant will be discoverable. Information will be found to be actually relevant "if there is the *possibility* the information sought will be relevant

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<sup>8</sup>IND. CIV. CODE STUDY COMM'N (1982). Some differences remain between the Indiana and federal rules. For example, rules 33 and 36 are still different in the federal and Indiana rules.

<sup>9</sup>*Id.*; see also 2 W. HARVEY, *supra* note 4, § 26.1, at 491.

<sup>10</sup>See, e.g., *Cigna-INA/Aetna v. Hagerman-Shambaugh*, 473 N.E.2d 1033, 1036 (Ind. Ct. App. 1985); *Coster v. Coster*, 452 N.E.2d 397, 400 (Ind. Ct. App. 1983); *Rembold Motors, Inc. v. Bonfield*, 155 Ind. App. 422, 439, 293 N.E.2d 210, 220 (1973).

<sup>11</sup>IND. CIV. CODE STUDY COMM'N (1982).

<sup>12</sup>*Plummer v. Ulsh*, 248 Ind. 462, 463, 229 N.E.2d 799, 800 (1967) (Indiana has an equivalent of FED. R. CIV. P. 26(f)); IND. CIV. CODE STUDY COMM'N (1982).

<sup>13</sup>IND. CIV. CODE STUDY COMM'N (1982); 2 W. HARVEY, *supra* note 4, § 26.1, at 492.

<sup>14</sup>2 W. HARVEY, *supra* note 4, § 26.1, at 492.

<sup>15</sup>*Front v. Lane*, 443 N.E.2d 95, 98 (Ind. Ct. App. 1982); *Costanzi v. Ryan*, 175 Ind. App. 257, 265-66, 370 N.E.2d 1333, 1338 (1978); 2 W. HARVEY, *supra* note 4, § 26.1, at 491-92 (discussing findings of the Indiana Supreme Court Committee on Rules of Practice and Procedure); see also *Chustak v. Northern Ind. Public Serv. Co.*, 259 Ind. 390, 395, 288 N.E.2d 149, 152-53 (1972).

<sup>16</sup>2 W. HARVEY, *supra* note 4, § 26.1, at 492.

<sup>17</sup>See *Chustak*, 259 Ind. at 395, 288 N.E.2d at 152-53 (distinguishing the breadth of discovery in Indiana from that in federal courts); see also *Davisson v. Indiana Nat'l Bank*, 493 N.E.2d 1311, 1316 (Ind. Ct. App. 1986); *Kaufman v. Credithrift Financial, Inc.*, 465 N.E.2d 207, 210 (Ind. Ct. App. 1984); *Costanzi*, 175 Ind. App. at 271, 370 N.E.2d at 1341.

to the subject matter of the action.”<sup>18</sup> Indiana courts have found reversible error when a party has been denied access to potentially relevant information through the discovery process.<sup>19</sup>

Within the spirit of the rules, Indiana trial judges have considerable discretion in defining the scope of discovery.<sup>20</sup> Appellate review of discovery orders is limited to situations where the trial court abused its discretionary powers.<sup>21</sup> “An abuse of discretion is an erroneous conclusion which is clearly against the logic and effect of the facts of the case.”<sup>22</sup> However, Indiana’s rules do not include the second paragraph of federal rule 26(b)(1) which gives the court power to limit the time for discovery or otherwise curtail discovery where there is undue expense or burden on a party. The intent in Indiana is to promote a full and self-executing discovery process.<sup>23</sup>

### *B. Privilege as an Exception to the General Rule of Discoverability*

Under both the Indiana and federal rules, information that is not privileged and that is relevant is discoverable.<sup>24</sup> There are both absolute and partial privileges. Information that is *absolutely privileged* is not discoverable once the privilege has attached unless the privilege is waived by the holder of the privilege.<sup>25</sup> If the information sought is *partially privileged*, there are circumstances in which the information may or may not be subject to discovery.<sup>26</sup>

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<sup>18</sup>Cigna-INA/Aetna v. Hagerman-Shambaugh, 473 N.E.2d 1033, 1036 (Ind. Ct. App. 1985) (emphasis added).

<sup>19</sup>See, e.g., Indiana & Mich. Elec. Co. v. Pounds, 426 N.E.2d 45 (where information was relevant and there was no discernible basis for denying discovery, the plaintiff was “gravely handicapped” in his search for evidence), *reh’g denied*, 428 N.E.2d 108 (Ind. Ct. App. 1981). *But see* Ellis v. Public Serv. Co. of Ind., Inc., 168 Ind. App. 269, 342 N.E.2d 921 (1976) (no reversible error where a motion to compel answers to interrogatories was denied because the plaintiff had already received similar information through requests for admissions).

<sup>20</sup>Coster v. Coster, 452 N.E.2d 397, 400-01 (Ind. Ct. App. 1983) (see also cases cited therein); Campbell v. Eli Lilly & Co., 413 N.E.2d 1054, 1058 (Ind. Ct. App. 1980).

<sup>21</sup>Drexel Burnham Lambert, Inc. v. Merchants Investment Counseling, Inc., 451 N.E.2d 346, 348-49 (Ind. Ct. App. 1983); City of Bloomington v. Chuckney, 165 Ind. App. 177, 183, 331 N.E.2d 780, 784 (1970).

<sup>22</sup>Condon v. Patel, 459 N.E.2d 1205, 1207 (Ind. Ct. App. 1984) (quoting Boles v. Weidner, 449 N.E.2d 288, 290 (Ind. 1983)); see also Kaufman v. Credithrift Financial, Inc., 465 N.E.2d 207, 210 (Ind. Ct. App. 1984); THQ Venture v. SW, Inc., 444 N.E.2d 335, 340 (Ind. Ct. App. 1983).

<sup>23</sup>Chrysler v. Reeves, 404 N.E.2d 1147, 1151 (Ind. Ct. App. 1980); 2 W. HARVEY, *supra* note 4, § 26.1, at 491-92 (discussing the findings of the Indiana Supreme Court Committee on Rules of Practice and Procedure).

<sup>24</sup>FED. R. CIV. P. 26(b)(1) & 26(b)(3); IND. R. TR. P. 26(B)(1) & 26(B)(3). For a general discussion of the power to compel discovery, see 8 J. WIGMORE, EVIDENCE §§ 2192, 2195 (3d ed. 1940). See also Hickman v. Taylor, 329 U.S. 495 (1946).

<sup>25</sup>2 W. HARVEY, *supra* note 4, § 26.5, at 494.

<sup>26</sup>*Id.* at 496.

Because there is no federal statutory law of privilege,<sup>27</sup> state law, whether of statutory or common law origin, will control questions of privilege in both federal and state courts.<sup>28</sup> In Indiana, the absolute privileges that are recognized are those of the attorney-client,<sup>29</sup> clergy-penitent,<sup>30</sup> husband-wife,<sup>31</sup> and physician-patient.<sup>32</sup> These privileges are codified at Indiana Code section 34-1-14-5. In addition, other absolute privileges recognized in Indiana are those of the accountant-client,<sup>33</sup> news reporter,<sup>34</sup> and governmental agencies.<sup>35</sup>

Under both Indiana and federal rule 26(b)(3), there is a limited or partial privilege for documents and tangible things prepared in anticipation of litigation by a party or a party's agent.<sup>36</sup> These documents or other tangible things will not be protected from discovery where the party seeking disclosure is able to show "substantial need" for the materials, and inability "without undue hardship to obtain the substantial equivalent of the materials by other means."<sup>37</sup> However, the partial

<sup>27</sup>FED. R. CIV. P. 26(b)(1) refers to privilege as defined in the Federal Rules of Evidence. FED. R. EVID. 501 states:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

<sup>28</sup>*Couch v. United States*, 409 U.S. 322, 335 (1972) (there is no federal statutory law of privilege); *Collins v. Bair*, 256 Ind. 230, 234, 268 N.E.2d 95, 97 (1971) (state law of privilege controls in federal courts).

<sup>29</sup>The attorney-client privilege was recognized in Indiana as early as 1840 in *Jenkinson v. State*, 5 Blackf. 465, 466-67 (Ind. 1840). Indiana recognizes the attorney-client privilege in case law, by statute (IND. CODE § 34-1-14-5 (1982)), and in its Code of Professional Responsibility. *Brown v. State*, 448 N.E.2d 10, 14 (Ind. 1983); see also *Colman v. Heidenreich*, 269 Ind. 419, 421-22, 381 N.E.2d 866, 868-69 (1978); *Newton v. Yates*, 170 Ind. App. 486, 494, 353 N.E.2d 485, 491 (1976), *reh'g denied* (attorney-client privilege in Indiana generally).

<sup>30</sup>See, e.g., *Farner v. Farner*, 480 N.E.2d 251, 260 (Ind. Ct. App. 1985); *Dehler v. State*, 22 Ind. App. 383, 390, 53 N.W. 850, 853 (1899).

<sup>31</sup>See, e.g., *Solomon v. State*, 439 N.E.2d 570, 574 (Ind. 1982); *Hunt v. State*, 235 Ind. 276, 281, 133 N.E.2d 48, 50 (1956).

<sup>32</sup>See, e.g., *Corder v. State*, 467 N.E.2d 409, 415 (Ind. 1984); *Collins v. Bair*, 256 Ind. 230, 236, 268 N.E.2d 95, 97 (1971).

<sup>33</sup>See, e.g., *Ernst & Ernst v. Underwriters Nat'l Assurance Co.*, 178 Ind. App. 77, 81, 381 N.E.2d 897, 899-900 (1978).

<sup>34</sup>*Slone v. State*, 496 N.E.2d 401, 405 (Ind. 1986) (citing IND. CODE § 25-2-1-23 (1971)).

<sup>35</sup>*Avery v. Webb*, 480 N.E.2d 281, 282 (Ind. Ct. App. 1985).

<sup>36</sup>FED. R. CIV. P. 26(b)(3); IND. R. TR. P. 26(B)(3).

<sup>37</sup>FED. R. CIV. P. 26(b)(3); IND. R. TR. P. 26(B)(3); see also *Hickman v. Taylor*, 329 U.S. 495, 511-12 (1947).

privilege in rule 26(b)(3) does not protect against discovery of the underlying facts contained in the documents or other tangible things through the use of written interrogatories or oral depositions<sup>38</sup> unless an absolute privilege, such as the attorney-client privilege, also applies to the information sought or unless the information can be brought under the scope of the more general common law work product privilege<sup>39</sup> or the mental impressions exception of rule 26.<sup>40</sup>

The privilege for documents and tangible things prepared in anticipation of litigation found in rule 26(b)(3) should be distinguished from the more general work product privilege established in both federal<sup>41</sup> and Indiana case law.<sup>42</sup> Because the rule 26 work product privilege is limited to items prepared in anticipation of litigation, it does not apply to documents or other items prepared in the normal course of business.<sup>43</sup> The common law work product privilege, established in *Hickman v. Taylor*,<sup>44</sup> recognized by Indiana courts,<sup>45</sup> operates beyond the scope of the rule 26 privilege because it is not limited to items prepared in anticipation of litigation<sup>46</sup> and will protect against discovery through interrogatories and depositions, unlike the privilege in rule 26(b)(3), which covers only documents and tangible things.<sup>47</sup>

The protection against discovery of the attorney's mental impressions, conclusions, opinions, or legal theories is also established both in rule 26(b)(3) and in case law.<sup>48</sup> Like the work product privilege, the privilege for an attorney's mental impressions is protected under rule 26(b)(3) when the opinion, conclusion, or impression is found in a document or tangible thing.<sup>49</sup> When the source of the attorney's mental impression is a conclusion drawn or opinion expressed in an answer to a question at a deposition or in a interrogatory, the protection is found in case law, particularly in *Hickman v. Taylor*.<sup>50</sup> It is unclear, however, both

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<sup>38</sup>*Upjohn v. United States*, 449 U.S. 383, 395 (1981). The distinction between what is a discoverable fact and what is a privileged communication may be cloudy in some cases. See, e.g., *Colman v. Heidenreich*, 269 Ind. 419, 427, 381 N.E.2d 866 (1978) (question of the discoverability of client identity information).

<sup>39</sup>*Hickman*, 329 U.S. at 508-11; *Newton v. Yates*, 170 Ind. App. 486, 494-96, 353 N.E.2d 485, 490-91 (1976), *reh'g denied*; see also 2 W. HARVEY, *supra* note 4, § 26.8, at 503.

<sup>40</sup>FED. R. CIV. P. 26(b)(3); IND. R. TR. P. 26(B)(3).

<sup>41</sup>*Hickman*, 329 U.S. at 510; see also 2 W. HARVEY, *supra* note 4, § 26.3, at 503.

<sup>42</sup>*Newton*, 170 Ind. App. at 493, 353 N.E.2d at 490; see also 2 HARVEY, *supra* note 4, § 26.3, at 503.

<sup>43</sup>*Cigna-INA/Aetna v. Hagerman-Shambaugh*, 473 N.E.2d 1033, 1037-39 (Ind. Ct. App. 1985); *In re Snyder*, 418 N.E.2d 1171, 1177 (Ind. Ct. App. 1981).

<sup>44</sup>329 U.S. at 495.

<sup>45</sup>See, e.g., *Newton*, 170 Ind. App. 486, 353 N.E.2d 485.

<sup>46</sup>2 W. HARVEY, *supra* note 4, § 26.8, at 503.

<sup>47</sup>*Upjohn v. United States*, 449 U.S. 383, 399-401 (1981); see also 2 W. HARVEY, *supra* note 4, § 26.3, at 503.

<sup>48</sup>*Upjohn*, 449 U.S. at 397-401.

<sup>49</sup>*Hickman*, 329 U.S. at 509-10.

<sup>50</sup>*Id.*

in rule 26(b)(3) and in the cases discussing mental impressions, whether the privilege is absolute or subject to invasion upon a proper showing.<sup>51</sup>

### C. Waiver of Privilege

All sources of privilege rest on policy considerations about the nature of confidential information and our adversary system of justice. In the case of the attorney-client privilege and similar privileges based on confidential relationships, it is the underlying belief in the social value of such relationships upon which the privilege ultimately rests.

[P]rivileges do not exist in a vacuum. They are enacted to foster some relationship or protect some interest that is believed to be of sufficient social importance to justify the sacrifice of relevant evidence to the fact finding process. In analyzing the nature and scope of any statutorily created privilege, the first step is to determine the specific interest or relationship that the privilege seeks to foster. Only by doing this can a specific claim of privilege be evaluated against the principle that the public is entitled to every person's evidence.<sup>52</sup>

In the case of the attorney-client relationship, the privilege is intended to encourage full and honest communication between the attorney and client in order that the client will seek legal advice early and that the attorney may give informed legal advice, thereby best representing the interests of the client.<sup>53</sup> The attorney-client privilege is an exception to the general rule that courts are entitled to everyone's evidence.<sup>54</sup> The privilege will protect information from disclosure only where the party claiming the privilege can prove all the necessary elements of the privilege. Wigmore identified eight elements needed to establish a claim of attorney-client privilege:

- (1) Where legal advice of any kind is sought
- (2) from a professional legal advisor in his capacity as such,
- (3) the communications relating to that purpose
- (4) made in confidence
- (5) by

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<sup>51</sup>*Upjohn v. United States*, 449 U.S. at 401, did not decide the question whether opinion work product is absolutely protected from discovery. The Supreme Court in *Upjohn* noted a split among the circuits on this question. See *In re Grand Jury Proceedings*, 473 F.2d 840, 848 (8th Cir. 1973) (finding absolute protection for personal notes and recollections of attorney); cf. *In re Grand Jury Investigation*, 599 F.2d 1224, 1231 (3d Cir. 1979); *In re Grand Jury Subpoena*, 599 F.2d 504, 511-12 (2d Cir. 1979) (both reaching a different result on the discoverability of attorney's mental impressions and opinion work product). No Indiana courts have given a definitive answer to this question, but see *CIGNA/Aetna v. Hagerman-Shambaugh*, 473 N.E.2d 1033, 1037 (Ind. Ct. App. 1985), on discovery of mental impressions of the attorney under Indiana Trial Rule 26(B)(3).

<sup>52</sup>*Ernst & Ernst v. Underwriters Nat'l Assurance Co.*, 178 Ind. App. 77, 86, 381 N.E.2d 897, 902 (1978).

<sup>53</sup>See, e.g., *Trammel v. United States*, 445 U.S. 40, 51 (1980); *Upjohn*, 449 U.S. at 389.

<sup>54</sup>*In re Continental Illinois Securities Litigation*, 732 F.2d 1302, 1315 (7th Cir. 1984) (there is no equivalent to the fifth amendment protection against self-incrimination in civil discovery); J. WIGMORE, *supra* note 24, § 2192, at 64.

the client, (6) are at [the client's] instance permanently protected (7) from disclosure by [the client] or by the legal advisor, (8) except the protection may be waived.<sup>55</sup>

Confidentiality alone is insufficient to establish the attorney-client relationship.<sup>56</sup> Although the United States Supreme Court, in *Upjohn v. United States*,<sup>57</sup> held that the attorney-client privilege includes not only the giving of legal advice to the client, but also the giving of information to the attorney "to enable him to give sound and informed advice," the presence of the attorney-client privilege rests on the subject matter of the communications in the context of legal problem-solving and advice.<sup>58</sup> The essence of the privilege is the confidentiality necessary to obtain legal advice;<sup>59</sup> hence, confidential information, even between attorney and client, is not always privileged.<sup>60</sup>

When attorney-client communications are disclosed to a third party, the confidentiality of the information has been willfully breached and the privilege is waived.<sup>61</sup> There is no need to protect attorney-client communications from discovery by an adversary party where the holder of the privilege has voluntarily disclosed the information outside the bounds of the confidential relationship.

#### D. Limitations to Waiver of Privilege

Federal circuit courts are split as to whether particular circumstances warrant an extension of the waiver of attorney-client or work product privilege, notwithstanding the client's disclosure of some information in a limited context.<sup>62</sup> Because the premise that all relevant evidence should

<sup>55</sup>8 J. WIGMORE, *supra* note 24, § 2292, at 558.

<sup>56</sup>*In re Continental Illinois Securities Litigation*, 732 F.2d at 1315 (whether information is damaging to a client is an issue apart from the question of privileges).

<sup>57</sup>449 U.S. 383 (1981).

<sup>58</sup>*Id.* at 394.

<sup>59</sup>*United States v. Willis*, 565 F. Supp. 1186, 1190 (S.D. Iowa 1983) (establishing a test for legal versus nonlegal advice); *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357, 360 (D. Mass. 1950) (business advice even when given by attorney is not privileged).

<sup>60</sup>8 J. WIGMORE, *supra* note 24, § 2311, at 600.

<sup>61</sup>*United States v. AT&T*, 642 F.2d 1285, 1299-1300 (D.C. Cir. 1980).

<sup>62</sup>Federal cases suggesting that voluntary disclosure of privileged communications to regulatory agencies constitutes waiver include *Joy v. North*, 692 F.2d 880, 894 (2d Cir. 1982), *cert. denied*, 460 U.S. 1051 (1983); *Permian Corp. v. United States*, 665 F.2d 1214, 1221 (D.C. Cir. 1981); *In re Weiss*, 596 F.2d 1185, 1186 (4th Cir. 1979); *see also In re Sealed Case*, 676 F.2d 793, 817-18 (D.C. Cir. 1981) and cases cited therein. *But see Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1977), *rehearing en banc* (dictum) (limited waiver of privilege for voluntary disclosure to the SEC). The Indiana Supreme Court adopted new disciplinary rules in January 1987 dealing with confidentiality and privilege. Rule 1.6 allows the attorney to reveal information to the extent the attorney believes it is reasonably necessary to carry out the representation of the client, to prevent the client from committing a criminal act, and in a controversy between the attorney and client. Such disclosure of client confidences may include sharing of information with other attorneys in a firm. 499 N.E.2d CXII-CXIII. *See also* rule 2.2 where an attorney acts as an intermediary between two clients. 499 N.E.2d CXXXVII.

be heard undergirds our entire judicial system, privileges are construed narrowly.<sup>63</sup> Such strict interpretation has resulted in the application of the doctrine of implied waiver whenever the client has acted in a manner inconsistent with the privilege or contrary to the policy underlying the privilege, regardless of the client's subjective intent not to waive the privilege.<sup>64</sup> Based on public policy considerations for promoting cooperation with investigatory and regulatory agencies of the federal government, some federal courts have recognized a limitation of the waiver of the attorney-client privilege where a client voluntarily discloses confidential information to a governmental agency such as the Internal Revenue Service or the Securities and Exchange Commission.<sup>65</sup>

The doctrine of subject matter waiver, which also stems from a strict interpretation of privilege, states that a client who voluntarily waives the privilege as to some document(s) or some information that the client considers not harmful may not reassert the privilege for other items covering the same subject matter that the client considers damaging.<sup>66</sup> Once a client has breached the privilege, whether through voluntary disclosure or an action inconsistent with the privilege, all communications between the attorney and client on that subject matter become discoverable.<sup>67</sup> The rationale is one of basic fairness, and the rule will be applied even where the client has attempted to limit the waiver of the privilege in some way.<sup>68</sup>

Because the work product privilege is intended to protect the fruits of the attorney's labors in trial preparation, disclosure to a non-party outsider is not necessarily inconsistent with the privilege and will not automatically result in waiver.<sup>69</sup> Where the disclosure is made to further trial preparation, such as consultation with experts or other attorneys, courts generally do not find a waiver.<sup>70</sup> However, where the work product

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<sup>63</sup>8 J. WIGMORE, *supra* note 24, § 2192, at 67.

<sup>64</sup>*Permian*, 665 F.2d at 1221; *In re Grand Jury Investigation of Ocean Transportation*, 604 F.2d 672, 675 (D.C. Cir.), *cert. denied*, 444 U.S. 915 (1979).

<sup>65</sup>*Diversified Industries*, 572 F.2d at 611; *see also* *Chubb Integrated Systems v. National Bank of Wash.*, 103 F.R.D. 52, 63-64 (D.D.C. 1984) (distinguishing waiver of attorney-client privilege from waiver of work product privilege).

<sup>66</sup>8 J. WIGMORE, *supra* note 24, § 2327, at 631-32.

<sup>67</sup>*United States v. AT&T*, 642 F.2d 1285, 1298-99 (D.C. Cir. 1980); *see also* cases cited therein.

<sup>68</sup>*In re Sealed Case*, 676 F.2d at 818, 825; *see also* *Transamerica Computer Co. v. IBM Corp.*, 573 F.2d 646, 651-52 (9th Cir. 1978) (disclosure as a result of judicial compulsion will not result in waiver); *Diversified Industries*, 572 F.2d at 611. *Cf.* *United States v. Nobles*, 422 U.S. 225, 239 (1975) (testimonial use of privileged information results in waiver of work-product privilege).

<sup>69</sup>*Hickman v. Taylor*, 329 U.S. 495, 511 (1946). *See generally* 8 J. WIGMORE, *supra* note 24, § 2301, at 584.

<sup>70</sup>*See, e.g.*, *United States v. AT&T*, 642 F.2d at 1300; *GAF Corp. v. Eastman Kodak Co.*, 85 F.R.D. 46, 52 (S.D.N.Y. 1979) (no waiver unless disclosure is inconsistent with purpose of work product privilege and disclosure "substantially increases the possibility" that an adversary will obtain the information). *But see* *Chubb Integrated Systems*, 103 F.R.D. at 63 (few courts have considered "the degree of disclosure necessary to constitute a waiver").



is divulged in such a way that an adversary party may become privy to the information, courts have reached the opposite result.<sup>71</sup>

Other exceptions to the waiver of attorney-client or work product privilege revolve around overlapping of interests between those privy to otherwise confidential communications.<sup>72</sup> Most cases in this area have involved exchange of confidential information between co-parties<sup>73</sup> (often referred to as the joint defense exception) or situations where two clients knowingly retain the same attorney and intend to disclose their individual communications to each other, but not to third parties.<sup>74</sup> In the majority of cases dealing with disclosure of confidential information between co-parties, no waiver has been found based on the "commonality of interests" between the parties or the "mutual interests" of related parties in the litigation.<sup>75</sup>

### III. CORPORATE EXCEPTIONS TO WAIVER OF ATTORNEY-CLIENT AND WORK PRODUCT PRIVILEGES

It is well established in Indiana<sup>76</sup> and federal<sup>77</sup> law that corporations may assert the attorney-client privilege and that their attorneys may assert the work product privilege. The implications of attorney-client privilege in the corporate context have only recently come under judicial scrutiny.<sup>78</sup> "Although attorney-client privilege has ancient origins, its applicability and scope in the context of attorneys representing corporate clients appears to be a relatively recent subject of litigation. The only major Supreme Court decision, in fact, was decided [in 1981]."<sup>79</sup>

As noted earlier, the United States Supreme Court clarified the extent of attorney-client and work product privileges in *Upjohn v. United States*.<sup>80</sup> However, the *Upjohn* decision and numerous subsequent decisions in federal and state courts have acknowledged that many questions about privileged communications in the corporate context remain un-

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<sup>71</sup>*In re Sealed Case*, 676 F.2d at 822-23; *In re Subpoenas Duces Tecum to Fulbright and Jaworski*, 99 F.R.D. 582, 586, *rev. suppl. memo.*, (D.D.C. 1983); *Gulf Oil Corp. v. Fuller*, 695 S.W.2d 769, 774 (Tex. Ct. App. 1985).

<sup>72</sup>J. WIGMORE, *supra* note 24, § 2312, at 603-07 (sharing information between parties and adversaries).

<sup>73</sup>*See, e.g., Vilastor-Kent Theater Corp. v. Brandt*, 19 F.R.D. 522, 524 (S.D.N.Y. 1956).

<sup>74</sup>This is often the case among business partners and makers of mutual wills. *See, e.g., Estate of Voelker*, 182 Ind. App. 650, 396 N.E.2d 398 (1979).

<sup>75</sup>*Stanley Works v. Haeger Potteries, Inc.*, 35 F.R.D. 551, 555 (N.D. Ill. 1964); *Transmirra Products Corp. v. Monsanto Chemical Co.*, 26 F.R.D. 572, 578 (S.D.N.Y. 1960).

<sup>76</sup>*See, e.g., Newton v. Yates*, 170 Ind. App. 486, 494, 353 N.E.2d 485, 490 (1976) (citing *Radiant Burners, Inc. v. American Gas Ass'n*, 320 F.2d 314 (7th Cir. 1963)), *reh'g denied*.

<sup>77</sup>*See, e.g., Upjohn v. United States*, 449 U.S. 383, 390 (1981).

<sup>78</sup>*See In re John Doe Corp.*, 675 F.2d 482, 487 (2d Cir. 1982).

<sup>79</sup>*Id.*

<sup>80</sup>449 U.S. at 383.

answered.<sup>81</sup> Among these questions is whether attorney-client or work product privilege is waived when the corporation reveals a confidential communication to a third party, albeit one within the corporate umbrella. A partial answer to this question appeared in *Duplan Corp. v. Deering Milliken, Inc.*,<sup>82</sup> which addressed waiver of privilege when confidential information is exchanged between parent-subsidary corporations. In 1985, in *Roberts v. Carrier Corp.*,<sup>83</sup> the United States District Court for the Northern District of Indiana addressed waiver of privilege between sister subsidiaries. Although it did not involve inter- or intracorporate communications, *United States v. AT&T*,<sup>84</sup> an earlier federal case, applied a test for waiver similar to that in *Roberts* in situations where confidential information was disclosed by a corporation to a nonparty regulatory agency.

#### A. *Roberts v. Carrier Corp.*

*Roberts v. Carrier Corp.*<sup>85</sup> involved an ancillary proceeding on a motion to compel discovery under Federal Rule of Civil Procedure 37(a), which governs the deposition of a nonparty witness. The underlying lawsuit is currently pending in the United States District Court for the Eastern District of Texas.<sup>86</sup> The primary dispute is a personal injury action involving a question of products liability for a component valve, manufactured by Hamilton Standard Controls and used in a gas furnace which was, in turn, manufactured and marketed by Carrier Corp. Both Carrier and Hamilton are part of the Essex Group, Inc., and are wholly-owned subsidiaries of United Technologies, Inc. Only Carrier is a party-defendant in the Texas district court action.<sup>87</sup>

Plaintiff Roberts' discovery motions contained a request for the production of documents, including "[a]ll communications and/or agreements between Carrier Corporation and Hamilton Standard Controls, Inc. concerning this lawsuit, whether written or not."<sup>88</sup> Hamilton and Carrier objected to this discovery request on the basis of attorney-client and work product privileges.<sup>89</sup>

Consequently, Hamilton filed a motion to quash the discovery request, based on a claim of attorney-client and work product privileges, in the district court for the Northern District of Indiana, the place where the deposition was to take place.<sup>90</sup> Before reaching the merits of the attorney-client privilege defense, the Indiana district court determined

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<sup>81</sup>See, e.g., *In re John Doe Corp.*, 675 F.2d at 487-88.

<sup>82</sup>397 F. Supp. 1146 (D.S.C. 1974) *supp. order, reconsid. denied* (1975).

<sup>83</sup>107 F.R.D. 678 (N.D. Ind. 1985).

<sup>84</sup>642 F.2d 1285 (D.C. Cir. 1980).

<sup>85</sup>107 F.R.D. 678.

<sup>86</sup>*Id.* at 681.

<sup>87</sup>*Id.*

<sup>88</sup>*Id.*

<sup>89</sup>*Id.*

<sup>90</sup>*Id.*

that *privilege*, as used in Federal Rule of Civil Procedure 26(b)(1), is defined by the Federal Rules of Evidence, specifically Federal Rule of Evidence 501.<sup>91</sup> Under Federal Rule of Evidence 501, the forum state's law of privilege controls in a diversity action such as this.<sup>92</sup> In the Seventh Circuit, the forum state is the state where the district court sits;<sup>93</sup> therefore, the district court applied the Indiana law of privilege.<sup>94</sup>

Hamilton and Carrier argued that attorney-client privilege protected the documents requested because they originated from communications between Carrier and its attorneys and between Carrier and its insurer.<sup>95</sup> Roberts contended that any privilege had been waived when Carrier shared confidential documents with Hamilton.<sup>96</sup> The Indiana district court noted that Indiana state courts recognize waiver of privilege when confidential communications are divulged to a third party,<sup>97</sup> but found that a narrower question—whether waiver occurs when the third party is a sister corporation of the claimant of attorney-client privilege—was one of first impression for Indiana courts.<sup>98</sup> In applying what it believed Indiana law would be, the federal court held that no waiver should be found.<sup>99</sup> It based its conclusion on a three-part analysis.

First, the court distinguished other Indiana cases where waiver of the attorney-client privilege was found by noting these cases “involved third parties with clearly divergent interests from that of the client.”<sup>100</sup> For example, in *Webster v. State*,<sup>101</sup> the Indiana Supreme Court found no privilege for communications between the prosecutor and the attorney of the brother of a criminal defendant regarding leniency for the brother if he testified against the defendant because the attorney and the prosecutor were in adversarial positions and had no common interests. In *Model Clothing House v. Hirsch*,<sup>102</sup> the Indiana Court of Appeals found communications from an employer to the attorney of an employee were

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<sup>91</sup>*Id.* at 685-86 (citing *United States v. Reynolds*, 345 U.S. 1, 6 (1953); *Sirmans v. City of So. Miami*, 86 F.R.D. 492 (S.D. Fla. 1980)).

<sup>92</sup>107 F.R.D. at 685 (citing *Sommer v. Johnson*, 704 F.2d 1473, 1478 (11th Cir. 1983); *Miller v. TransAmerican Press, Inc.*, 621 F.2d 721, 724 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); *Samuelson v. Susen*, 576 F.2d 546, 549 (3d Cir. 1978); *Railroad Salvage of Conn., Inc. v. Japan Freight Consolidators (U.S.A.), Inc.*, 97 F.R.D. 37, 39 (E.D.N.Y. 1983)).

<sup>93</sup>*Palmer v. Fisher*, 228 F.2d 603, 608 (7th Cir.), *cert. denied*, 351 U.S. 965 (1955); *see also Samuelson*, 576 F.2d at 549; 2 W. HARVEY, *supra* note 4, § 26.7, at 497-98.

<sup>94</sup>*Roberts*, 107 F.R.D. at 686-87 (citing *Brown v. State*, 448 N.E.2d 10 (Ind. 1983); *Key v. State*, 235 Ind. 172, 132 N.E.2d 143 (1956); *Bruce v. Osgood*, 113 Ind. 360, 14 N.E. 563 (1887); *Model Clothing House v. Hirsch*, 42 Ind. App. 270, 85 N.E. 719 (1908); *Webster v. State*, 261 Ind. 309, 302 N.E.2d 763 (1973)).

<sup>95</sup>*Id.* at 686.

<sup>96</sup>*Id.*

<sup>97</sup>*Id.* at 687.

<sup>98</sup>*Id.*

<sup>99</sup>*Id.* at 688.

<sup>100</sup>*Id.* at 687.

<sup>101</sup>261 Ind. 309, 302 N.E.2d 763 (1973).

<sup>102</sup>42 Ind. App. 270, 85 N.E. 719 (1908).

not confidential because of the different interests represented by the employer and the employee and the fact that the employer did not intend the communication to be confidential.

Second, the *Roberts* court looked at the nature of the corporate structure and the subsidiary relationship between Hamilton and Carrier. Noting that the attorney-client privilege applies to corporate clients,<sup>103</sup> the court looked to *Duplan Corp. v. Deering Milliken, Inc.*,<sup>104</sup> as supporting the extension of nonwaiver doctrines beyond intracorporate and parent-subsidiary communications to communications between sister subsidiary corporations.

The *Duplan* litigation centered on confidential attorney-client communications among a number of corporate subsidiaries and between a patent owner and the manufacturer/licensees.<sup>105</sup> The *Duplan* court found no waiver of the attorney-client privilege where the corporations sharing confidential communications have sufficient community of legal interests.<sup>106</sup> Because the underlying objective of the attorney-client privilege is "to secure objective freedom of mind for the *client* in seeking legal advice . . .,"<sup>107</sup> the *Duplan* court decided that the key considerations were that the interests be legal and be identical.<sup>108</sup>

Thus, where there is no legal interest (duty or direct transaction between the two clients of the attorney), the mere interest of a non-party client in legal transactions between the prime client and an outsider is not sufficient to prevent a waiver of the attorney-client privilege. This is true no matter how commercially strong the non-party client's interest is, or how severely the non-party client may be legally effected by the outcome of the transaction between the prime client and an outsider.<sup>109</sup>

The *Duplan* court emphasized that it was the *legal* interest among the corporations, and not their business structure or commercial interests alone, that led it to hold that communications remain protected by the attorney-client privilege even though shared between parent and subsidiary corporations.<sup>110</sup> In particular, the *Duplan* court stated:

Although an interest of a third-party corporation from a commercial standpoint would not establish a sufficient community

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<sup>103</sup>*Roberts*, 107 F.R.D. at 687.

<sup>104</sup>397 F. Supp. 1146, 1184-85 (D.S.C. 1974), *supp. order, reconsid. denied* (1975).

<sup>105</sup>*Id.* at 1175-77.

<sup>106</sup>*Id.* at 1175.

<sup>107</sup>*Id.* at 1175 (quoting 8 J. WIGMORE, *supra* note 24, § 2317, at 615-16) (emphasis in original).

<sup>108</sup>*Id.* at 1185.

<sup>109</sup>*Id.* at 1175.

<sup>110</sup>*Id.* at 1184. (In *Gulf Oil Corp. v. Fuller*, 695 S.W.2d 769, 774 (Tex. Ct. App. 1985), an overlapping of commercial and legal interests, where the relationship was more adversarial than co-operative, was held to be a basis for precluding plaintiffs from using the *Duplan* exception as a means of resisting discovery.)

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 interrelated-corporate communications in the same manner as intra-corporate communications.<sup>111</sup>

Thus, corporate relationship is necessary, but not sufficient in itself, to establish the preservation of the privilege. However, citing *United States v. United Shoe Machinery Corp.*,<sup>112</sup> the *Duplan* court opined that “[i]f the communication were relayed to an unrelated third party corporation, the privilege would be waived.”<sup>113</sup>

In applying the *Duplan* test to the *Roberts* case, the Indiana district court held there was identity of legal interest between Hamilton and Carrier sufficient to bar any waiver of the attorney-client privilege even though confidential communications had been passed between the two corporations.<sup>114</sup> This identity existed despite the fact that Hamilton was not a party in the underlying litigation because Hamilton had a “significant interest” in the litigation, especially in terms of other pending or potential litigation involving the gas furnace valve.<sup>115</sup> “[T]he identity of interest arises out of the valve itself and the defense of the claim involving it.”<sup>116</sup>

While the *Roberts* court paralleled the *Duplan* analysis by focusing on the mutuality of interest between corporate entities and the specific legal nature of their interest, it altered the *Duplan* analysis by adding a third element, the identity of the gas furnace valve itself.<sup>117</sup> The identity of the exact transaction or factual basis for the litigation seems to narrow the application of the *Duplan* exception to the waiver doctrine. By requiring identity of the gas valve itself *and* identity of legal interests between the two corporations vis-a-vis their relationship to the valve, specifically the defense of products liability claims involving the valve, the *Roberts* decision both expands and contracts the *Duplan* exception.

In the third part of its analysis, the *Roberts* court went on to discuss the work product privilege under Federal Rule of Civil Procedure 26(b)(3) as it related to communications between Carrier and Hamilton “regarding this lawsuit.”<sup>118</sup> Because the documents requested by Roberts were clearly prepared in anticipation of litigation, there is no doubt that the work product privilege applied.<sup>119</sup> The court concluded summarily that Roberts had not made a showing sufficient under rule 26(b)(3) to warrant dis-

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<sup>111</sup>397 F. Supp. at 1184.

<sup>112</sup>89 F. Supp. 357, 359 (D. Mass. 1950).

<sup>113</sup>397 F. Supp. at 1185.

<sup>114</sup>107 F.R.D. at 688.

<sup>115</sup>*Id.*

<sup>116</sup>*Id.*

<sup>117</sup>*Id.*

<sup>118</sup>*Id.* at 688-89.

<sup>119</sup>*Hickman v. Taylor*, 329 U.S. 495, 510 (1946).

covery.<sup>120</sup> Because waiver of the attorney-client privilege is more strictly construed and therefore subsumes waiver of the work product privilege based on the policy rationales for these privileges, the court denied production of the documents requested by Roberts on the independent grounds of both attorney-client privilege and work product privilege.<sup>121</sup>

### B. AT&T v. United States

Commonality of legal interests and identity of the underlying transaction leading to litigation were factors recognized by the District of Columbia Circuit Court of Appeals, which, in *United States v. AT&T*,<sup>122</sup> held there was no waiver of the work product privilege when unrelated entities exchanged confidential trial preparation materials. The *AT&T* case, like *Roberts*, was an ancillary proceeding to compel discovery.<sup>123</sup> The primary dispute in the case involved two separate antitrust actions against AT&T brought by MCI Communications, Inc.,<sup>124</sup> and the United States Department of Justice.<sup>125</sup>

In the interest of judicial economy and efficiency, the United States District Court for the Northern District of Illinois allowed MCI to share with the Department of Justice discovery materials which MCI had obtained from AT&T and other documents MCI had prepared in anticipation of its private antitrust action against AT&T.<sup>126</sup> MCI shared with the government its copies of thousands of pages of documents obtained from AT&T and its explanations of those documents. In addition, MCI had developed a computerized litigation support system which included in its database explanatory and analytical materials pertaining to the AT&T documents.<sup>127</sup> While allowing the government to obtain these items from MCI, the Illinois court ordered that the documents remain confidential.<sup>128</sup>

AT&T then moved against the Department of Justice in the United States District Court for the District of Columbia to compel discovery of the database and explanatory materials which the government had received from MCI on the basis that the work product privilege for the documents had been waived by MCI when it gave the materials to the government.<sup>129</sup> The District of Columbia court held that the work product privilege had been waived and granted AT&T's motion.<sup>130</sup> The court of

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<sup>120</sup>107 F.R.D. at 689.

<sup>121</sup>*Id.*

<sup>122</sup>642 F.2d 1285 (D.C. Cir. 1980).

<sup>123</sup>*Id.* at 1288.

<sup>124</sup>*MCI Communications Corp. v. AT&T*, 462 F. Supp. 1072, 1077 (N.D. Ill.), *aff'd*, 594 F.2d 594 (7th Cir. 1978), *cert. denied*, 440 U.S. 971 (1979).

<sup>125</sup>*United States v. AT&T*, 461 F. Supp. 1314, 1317 (D.D.C. 1978).

<sup>126</sup>*AT&T*, 642 F.2d at 1289.

<sup>127</sup>*Id.*

<sup>128</sup>*Id.*

<sup>129</sup>*Id.*

<sup>130</sup>*Id.*

appeals for the District of Columbia reversed the lower court and held that the work product privilege would preclude discovery by AT&T.<sup>131</sup>

Generally, the court of appeals focused on the existence of common interests between the transferor and transferee of the work product information, concluding that this commonality was relevant to a determination of whether the disclosure was consistent with the privilege.<sup>132</sup> In addition, the appellate court noted that “where the disclosure is made under a guarantee of confidentiality, the case against waiver is even stronger.”<sup>133</sup>

Specifically, the *AT&T* court based its holding on four considerations: (1) the same transaction was the subject of the litigation in both the private antitrust action brought by MCI and in the public action brought by the Department of Justice; (2) MCI and the government stood in the same position as adversaries of AT&T; (3) the information exchanged between MCI and the government could be characterized as trial tactics and strategy, the “essence” of work product; and (4) the exchange did not involve any evidentiary materials, but only things generated by attorneys.<sup>134</sup>

The ultimate objects of AT&T’s discovery motion were documents that AT&T had given to MCI in response to MCI’s discovery request in the private antitrust action. AT&T was seeking to “rediscover” its own documents, albeit in the form of work product as they had been reorganized and analyzed by MCI.<sup>135</sup> Thus, AT&T was not seeking attorney-client information like the intercorporate communications about the gas valve sought by Roberts. The distinction between work product and attorney-client communications was noted by the *AT&T* court as underlying its holding.<sup>136</sup>

Another important aspect of the *AT&T* decision was the fact that MCI and the Department of Justice became co-parties. MCI’s intervention in the proceeding was held to be a matter of right.<sup>137</sup> This is in contrast with the situation in *Roberts*, where at no point in the proceedings were Hamilton and Carrier Corp. co-parties. Clearly, co-party status bolsters any assertion of commonality or identity of legal interests.

The *AT&T* court’s analysis of the long-term effects and benefits of permitting the exchange is even more telling. The court analogized the information sharing between MCI and the government to “giving expert

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<sup>131</sup>*Id.* at 1301.

<sup>132</sup>*Id.* at 1300.

<sup>133</sup>*Id.* at 1299-1300. The court specifically rejected the holding in *GAF v. Eastman Kodak*, 85 F.R.D. 46 (S.D.N.Y. 1979), a more narrow application of the waiver rule.

<sup>134</sup>*AT&T*, 642 F.2d at 1299-1300.

<sup>135</sup>*Id.*

<sup>136</sup>*Id.* at 1300.

<sup>137</sup>*Id.* at 1296; *see also* discussion of the intervention issue, *id.* at 1291-95. The court held that MCI could intervene in this action as a matter of right under federal rule 24. The presence of MCI was then noted by the court as being a significant factor in allowing assertion of the work product privilege. *Id.* at 1297.

advice'' and distinguished it from the informant situation where evidence must be disclosed to an adversary.<sup>138</sup> The court noted that protecting the work product privilege for MCI's materials against discovery by AT&T would strengthen trial preparation and promote vigorous advocacy on the part of AT&T.<sup>139</sup> Further, the court suggested its holding would encourage future cooperation with the government on the part of private litigants such as MCI.<sup>140</sup>

In the end, the *AT&T* decision rested on dual policy grounds of encouraging cooperation with governmental agencies and promoting the adversarial system. Trial preparation and advocacy are encouraged because the adversary party will be encouraged to seek its own experts and perform its own database analysis. No unfair prejudice results to the adversary because no underlying communications of an evidentiary nature are being protected, only the work product of an advocate. The *AT&T* decision is consistent with prior case law on work product privilege and co-party litigation.<sup>141</sup> Despite the narrower connotation of the *Roberts* court's "identical" interest test as compared to the *AT&T* court's "common" interest test, the *Roberts* exception is more significant because it extends to non-parties and applies to both the attorney-client and work product privileges.

### C. *Identity of Legal Interests Exception for Related Corporations*

Identity of legal interests as a basis for allowing exchange of confidential communications without effecting a waiver of either attorney-client or work product privilege has significance for corporations in both the legal planning and litigation contexts. The presence of this exception will allow for greater exchange of information between related corporations and will foreclose discovery by an opponent on the basis of the exchange.

While application of the identity of legal interests exception to communications shared between parent and subsidiary corporations and between sister subsidiary corporations is established in the *Duplan*<sup>142</sup> and *Roberts*<sup>143</sup> cases, some questions regarding the scope and application of the exception to attorney-client and work product privileges remain unresolved. For example, questions remain regarding the applicability of the identity of legal interests exception to waiver in noncorporate business settings. The effect on subsidiaries that are not wholly-owned and on unincorporated business structures, such as partnerships and joint ventures, is also unclear.

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<sup>138</sup>*Id.* at 1301.

<sup>139</sup>*Id.* at 1300-01.

<sup>140</sup>*Id.*

<sup>141</sup>See *supra* notes 69-74 and accompanying text.

<sup>142</sup>397 F. Supp. at 1146.

<sup>143</sup>107 F.R.D. at 678.



At least three factors appear to be relevant to application of the waiver exception based on identity of legal interests between related corporations: (1) status of the corporations as parties in the litigation; (2) nature of the legal interest or presence of a legal duty between the corporations; and (3) identity of the underlying event, transaction, or object that forms the basis of the claim or defense.

The *Duplan* holding encompassed both parties and non-parties to both pending and anticipated litigation.<sup>144</sup> The *AT&T* case began with independent litigants who became co-parties in order to assert the work product privilege against a common adversary.<sup>145</sup> The *Roberts* case dealt only with a non-party, but acknowledged the possibility of future litigation involving the non-party.<sup>146</sup> Yet, all three decisions point to the actual or potential co-party status of the entities that were privy to confidential communications.

The question remains whether a court, confronted with a case involving exchange of information among related corporations, either parent-subsidiary or sister subsidiaries, would allow the exchanged communications to remain sheltered within the attorney-client privilege where litigation is neither pending nor anticipated at the time of the exchange. Obviously not all legal advice involves litigation or even potential litigation. Corporations today are faced with many regulatory and reporting requirements which could also involve confidential communications, yet do not entail status as a party to litigation. Based on the holding of the *Roberts* court, potential party status may be a sufficient basis for raising the exception to waiver of privilege when related corporations exchange confidential communications.

A second consideration for determining application of the exception is the presence of a legal duty owed by one corporation to the other. Both *Duplan* and *Roberts* required that the interest shared between the two corporations be based on a legal duty or transaction.<sup>147</sup> Shared commercial, business, or nonlegal interests will not be sufficient to raise the exception.<sup>148</sup> Where both parties to the communication are involved in the same transaction, such as a contract or joint venture, this requirement will not be problematic. However, in some cases involving a question of identity of a legal duty, a court may be put in the awkward position of having to make a determination that goes to the merits of the case—for example, presence of a duty to defend or issues of proximate cause—in order to rule on a pretrial discovery motion. Not only does this inversion run counter to the intent and purpose of modern discovery rules, but it will result in burdensome hearings and ancillary proceedings. A court's ability to rule on the waiver issue will be more difficult where

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<sup>144</sup>397 F. Supp. at 1146.

<sup>145</sup>642 F.2d at 1285.

<sup>146</sup>107 F.R.D. at 687.

<sup>147</sup>397 F. Supp. at 1190; 107 F.R.D. at 687.

<sup>148</sup>*Duplan*, 397 F. Supp. at 1185.

the identity of legal interest was not apparent at the time the confidential information was exchanged between the corporations. For example, where two corporations share attorney-client communications in a business planning context, the legal interests which might later become the subject of a suit against one of the corporations may not be immediately apparent.

The uncertainty of what constitutes an identical legal interest or duty sufficient to bar waiver of attorney-client or work product privilege may also create difficulties for corporate counsel as they attempt to anticipate the effect of sharing information on later discovery motions. The *AT&T* test for *common* interest is more flexible and easier to apply in the corporate setting.<sup>149</sup> Not only is a common interest more easy to demonstrate than identical interest, but there is no restriction in *AT&T* that the interest be legal, although the court of appeals based its discussion of common interests between MCI and the government entirely on the similarity of their positions as adversaries against a common opponent.<sup>150</sup> The fact that MCI and the government could never be co-parties in a single antitrust suit means that their legal positions, while similar, could never be identical.

None of these decisions indicates the effect on waiver of privilege where the legal interests of the parties shift over time. The *Roberts* and *Duplan* requirement of *identical* legal interests places an additional burden on corporate counsel where it is likely the legal interests of those privy to a confidential communication may not be the same at the time the disclosure occurs and by the time a motion for discovery is made. If parties do not have identical legal interests at the time of disclosure, earlier case law on waiver of privilege would seem to indicate no privilege attaches.<sup>151</sup> However, if those corporations that share confidential information later become co-parties in a legal action, perhaps the identity of interest exception applies.

The third element of the exception, identity of the object or transaction that is the subject of the underlying litigation, is unique to the *Roberts* holding. Although the *Duplan* litigation involved questions of patent and licensing rights, the court did not identify them as essential to its holding.<sup>152</sup> The *AT&T* court noted certain similarities of the public and private antitrust actions brought by the Department of Justice and MCI, but did not base its holding on a common event or transaction.<sup>153</sup> Both the requirement of identity of legal interest and identity of the object or event underlying the litigation make the *Roberts* bar to waiver of privilege a narrow exception.

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<sup>149</sup>642 F.2d at 1285-1300.

<sup>150</sup>*Id.* at 1299.

<sup>151</sup>*See, e.g.,* United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 360 (D. Mass. 1950).

<sup>152</sup>397 F. Supp. at 1185.

<sup>153</sup>642 F.2d at 1300.

#### D. Mixed Business and Legal Communications

Inasmuch as the *Duplan*, *AT&T*, and *Roberts* courts were all dealing primarily with work product materials, the distinction between legal and business communications was not as sharply drawn as it might be in a case dealing exclusively with attorney-client communications. Courts have not hesitated to find waiver of the attorney-client privilege where attorneys did not act in a legal capacity.<sup>154</sup>

The *Roberts* decision eases disclosure problems for corporations once the attorney-client privilege has attached, but it does not change the prerequisites for the existence of the privilege. Before the question of waiver is reached, the proponent of the privilege must establish there was a confidential attorney-client communication dealing with the procurement of legal advice or service.<sup>155</sup> Courts do recognize that in the course of daily business, corporate communications may pass through the hands of mailroom employees, file clerks, secretaries, and other individuals without necessarily breaching confidentiality.<sup>156</sup>

Courts are not so lenient, however, where communications for which the attorney-client privilege is asserted have been shared with auditors, or marketing or financial officers. Where documents prepared by attorneys are used for preparing financial statements and audits,<sup>157</sup> preparing Securities and Exchange Commission compliance documents,<sup>158</sup> and in other nonlegal contexts,<sup>159</sup> the attorney-client privilege may not attach to the documents, making questions of waiver moot. A more difficult question involves preparation of documents that have mixed legal and business purposes, such as in the context of tax planning and common stock offerings. Given the split among the circuits regarding the effect of sharing privileged information with governmental agencies,<sup>160</sup> corporations are well-advised to move cautiously where documents covered by attorney-client privilege are shared with outsiders and used for purposes other than trial preparation or procurement of expert advice.

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<sup>154</sup>See, e.g., *SEC v. Gulf & Western Industries, Inc.*, 518 F. Supp. 675, 683 (D.D.C. 1981) (attorney not acting in legal capacity); *United States v. United Shoe Machinery Corp.*, 89 F. Supp. at 360-61 (business advice is not privileged).

<sup>155</sup>8 J. WIGMORE, *supra* note 24, § 2292, at 558, § 2296, at 569. The party asserting a privilege has the burden of showing that all necessary elements, including absence of waiver, are present.

<sup>156</sup>See, e.g., *James Julian, Inc. v. Raytheon Co.*, 93 F.R.D. 138, 142 (D. Del. 1982).

<sup>157</sup>*In re John Doe Corp.*, 675 F.2d 482, 488 (2d Cir. 1982).

<sup>158</sup>*United States v. Gulf Oil Corp.*, 760 F.2d 292, 297 (Temp. Emer. Ct. App. 1985).

<sup>159</sup>*Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 328 (N.D. Cal. 1985) (where the purpose of the communication is not clear, privilege may not attach). *But see In re Grand Jury Subpoena Duces Tecum Dated March 24, 1983*, 566 F. Supp. 883, 884 (S.D.N.Y. 1983) (there is no authority for the proposition that a document loses its privileged character because the owner of the privilege relies on it in making a statement in *another* document) (emphasis in original). The Supreme Court skirted this issue in the *Upjohn* decision, 449 U.S. at 387.

<sup>160</sup>See *supra* note 62 and accompanying text.

### *E. Procedural Effects of the Identity of Interests Exception*

Allowing related corporations to share confidential communications without waiving their ability to claim attorney-client or work product privilege for the communications will have procedural implications for both corporations and their adversaries. Not only is the exception to waiver of privilege an issue for both the proponent<sup>161</sup> and the opponent of a discovery motion,<sup>162</sup> but there are implications for notice, service of process, amendment of pleadings, and joinder of parties as well.

There is precedent in Indiana that supports an argument that a related corporation that shared confidential information with a corporate party to an action may be charged with notice of the action for purposes of the statute of limitations and amendment of complaints.<sup>163</sup> The closeness of the relationship between two corporations, which is a factor in establishing identity of their legal interests under the *Roberts* and *Duplan* analyses, may also be a basis for finding that there was substituted service of process on the related corporation.<sup>164</sup> The United States Supreme Court has held that a mere parent-subsidiary relationship is insufficient for proving substituted service of process;<sup>165</sup> however, Indiana courts may use estoppel and other equitable principles "to support substance over form, facts over 'procedural complexity' where justice deserves."<sup>166</sup> Where a sister corporation is included in attorney-client communications or privy to materials prepared in anticipation of litigation and where the other tests for finding no waiver of privilege have been met, justice and fairness may lead a court to estop the corporation from claiming insufficient service of process.<sup>167</sup> A corporation may want to

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<sup>161</sup>8 J. WIGMORE, *supra* note 24, § 2292, at 558. The proponent corporation will have an evidentiary and persuasive burden to establish the presence of a privilege, absence of waiver, and/or presence of an exception. These determinations will be questions of fact for the judge. *Id.*, § 2322, at 627; *see also* N.L.R.B. v. Harvey, 349 F.2d 900, 907 (4th Cir. 1965); *Duplan*, 397 F. Supp. at 1159-61.

<sup>162</sup>Where a claim of privilege has been asserted, the party attempting to compel discovery will try to glean as much information about the privileged materials as possible, even where the content of the documents is shielded. Most adversaries will ask for identifying information, such as who were the parties or communicants involved, the capacity in which the individuals were acting at the time of the communication, the subject matter or purpose of the communication or document, and what other individuals were present or privy to the communication or document. While all of these items will have a direct bearing on whether or not an exception to waiver of privilege is found, the relationship among the parties to the communication, their roles and responsibilities regarding the communication and its subject matter, and the individuals or entities to which disclosure has been made will be of particular importance.

<sup>163</sup>*Front v. Lane*, 443 N.E.2d 95, 98 (Ind. Ct. App. 1982); *General Finance Corp. v. Skinner*, 426 N.E.2d 77, 82-84 (Ind. Ct. App. 1981).

<sup>164</sup>*General Finance Corp.*, 426 N.E.2d at 84.

<sup>165</sup>*Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925).

<sup>166</sup>*General Finance Corp.*, 426 N.E.2d at 84.

<sup>167</sup>*See Front v. Lane*, 443 N.E.2d 95, 98 (Ind. Ct. App. 1982) (where a party had actual notice of a deposition, no error even though the requirements of trial rule 30 had not been met).

weigh the benefits expected from sharing of confidential information with the jurisdictional and procedural risks, whether the corporation is the giver or receiver of the privileged information.

Similarly, where a related corporation is later joined in an action as party, both Indiana and Federal Rules 15(C) permit an amendment adding a party to relate back to the original date of service of process for the purpose of tolling the statute of limitations.<sup>168</sup> Where no prejudice has occurred and the new party should have known of the original action, the amendment will relate back to the original complaint.<sup>169</sup> It is unlikely that a corporation that has been privy to work product materials of its parent or sister subsidiary would be able to claim prejudice in opposition to a rule 15 motion to amend. Where a corporation that was a party to an action shared privileged communications with a related corporation that was not a party, such as the case with Hamilton and Carrier in the *Roberts* case, the non-party corporation may be estopped from raising a motion under rule 15(C) to preclude joinder even as a party-defendant.<sup>170</sup>

When confidential communications are exchanged between parent-subsidiary or between sister subsidiary corporations, issues of jurisdiction, notice, service of process, and joinder of parties should be considered as potential risks for the corporation that seeks to avoid becoming a party to the action. The adversary party may consider the exchange of confidential communications to be within the parameters of the identity of interest exception as a bar to discovery, but may also find the exchange of privileged communications to be evidence of a sufficient community or identity of interests and evidence that actual notice of the action was received by the non-party corporation such that issues of joinder, jurisdiction, and service of process are moot.

#### IV. CONCLUSION

The comparison of the various tests for the related corporation exception to waiver of privilege begins and ends with the policy rationales for the attorney-client and work product privileges. Whereas the work product privilege does not depend on confidentiality per se for its justification, but only on preventing disclosures that are inconsistent with a strong adversary system, both the common interests test in *AT&T* and the identity of legal interests tests in *Duplan* and *Roberts* are logical and practical bases for permitting complex corporate structures to share information among various entities.

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<sup>168</sup>*Honda Motor Co., Ltd. v. Parks*, 485 N.E.2d 644, 651 (Ind. Ct. App. 1985), *reh'g denied*, (1986); *Ryser v. Gatchel*, 151 Ind. App. 62, 69, 278 N.E.2d 320, 324 (1972) (Indiana Trial Rule 15(C) cannot be used to bring in a new party-defendant after the statute of limitations has run).

<sup>169</sup>IND. R. TR. P. 15(C).

<sup>170</sup>*Honda Motor Co.*, 485 N.E.2d at 647.

The identity of legal interests required by *Duplan* and *Roberts* for attorney-client information is more difficult to establish but fully supports the confidentiality and legal advice purposes of the attorney-client privilege. These exceptions give flexibility to the modern corporation in conducting its business and legal affairs while supporting the judicial and social purposes for allowing privileged communications under modern discovery rules.

JUDY L. WOODS

