Who is the Client? Attorney–Client Privilege in the Growing Complexity of the ANC Corporate Family

Peter R. Jarvis* & Trisha Thompson†

INTRODUCTION

Shortly after Alaska's statehood, Alaska's Native residents brought litigation to protect their interest in their ancestral lands. In response, the United States Congress passed the Alaska Native Claims Settlement Act of 1971.[1] Under the Act, Alaskan Natives were organized into Alaska Native Corporations, or ANCs. These entities operate as for-profit corporations governed by Alaska's corporate code.[2] In the last thirty years, ANCs have taken advantage of their corporate status to create subsidiary corporations that diversify their revenue-generating opportunities.[3] As the use of subsidiary corporations continues to grow, the ANCs, their subsidiaries, and their attorneys must be aware of how the corporate family relationship affects what communications are covered by attorney-client privilege.

This Paper accompanies a panel discussion on the protection of attorney-client privilege in the joint representation of parent companies and their subsidiaries at the ANSCA Symposium and Alaska Native Law Annual Conference hosted at the University of Alaska Anchorage. Part I outlines the attorney-client privilege and an attorney's broader duty of confidentiality. Part II addresses a crucial question in determining whether the attorney-client privilege applies: who is the client? Finally, this Paper concludes by making recommendations that should help ANCs—or more generally Alaskan parent corporations—retain the ability to control the application of the attorney-client privilege to the communications of their subsidiary corporations.

I. THE ATTORNEY-CLIENT PRIVILEGE AND THE BROADER DUTY OF CONFIDENTIALITY

The attorney-client privilege empowers clients to fully confide in their attorneys by protecting certain communications from disclosure. However, the full breadth of the protection given to client confidences and secrets cannot be understood without also discussing an attorney's ethical duty of confidentiality. While these two protections are related in many ways, they are distinct, differing in the important respects of scope and application. This Part first

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* B.A., Harvard University; M.A., Economics, Yale University; J.D., Yale School of Law. Peter Jarvis is a partner in the Portland, Oregon office of Holland & Knight LLP. His practice focuses on professional responsibility and risk management. Throughout his career he has served on legal ethics committees for the American Bar Association, Association of Professional Responsibility Lawyers, Oregon State Bar, and Washington State Bar, as well as co-authored leading legal ethics treatises such as *The Law of Lawyering* and *The Ethical Oregon Lawyer*. He is licensed to practice law in Alaska, California, New York, Oregon, and Washington.

† B.A., Communications, University of Minnesota; J.D., University of Oregon School of Law. Trisha Thompson is an associate in the Portland, Oregon office of Holland & Knight LLP. She is licensed to practice law in Oregon.

[1] 43 U.S.C. §§ 1601–1629(h) (2012). For background and a summary of the Act, see E. Budd Simpson, *Doing Business with Alaska Native Corporations*, 16 BUS. L. TODAY 6 (July/Aug. 2007), https://apps.americanbar.org/buslaw/blt/2007-07-08/simpson.shtml.

[2] Simpson, *supra* note 1.

[3] GOV'T ACCOUNTING OFFICE, GAO-06399, CONTRACT MANAGEMENT: INCREASED USE OF ALASKA NATIVE CORPORATIONS' SPECIAL 8(A) PROVISIONS CALLS FOR TAILORED OVERSIGHT (2006), http://www.gao.gov/assets/250/249931.html ("From fiscal year 1988 to 2005, ANC 8(a) subsidiaries increased from one subsidiary owned by one ANC to 154 subsidiaries owned by 49 ANCs.").

discusses what communications are protected from disclosure under Alaska's attorney-client privilege rule. It then contrasts the attorney-client privilege with the duty of confidentiality, highlighting the importance of knowing who the attorney's client is for both protections.

A. Attorney-Client Privilege Under Alaska Rule of Evidence 503

Attorney-client privilege is an evidentiary rule that prevents the government, or someone using government processes like a subpoena, from compelling the disclosure of certain communications between an attorney and her client. This protection is important to the attorney-client relationship and is arguably one of the oldest privileges in our judicial system.[4] The privilege is "based on the moral ideas of autonomy, privacy, and trust."[5] If a client and his attorney know that their communication is protected from disclosure, the client is more likely to seek legal assistance early and to convey all of the facts necessary for the attorney to provide the best legal advice for the situation. The attorney-client privilege is recognized by every court and administrative body in the United States, including Alaska state courts and administrative boards.[6] Thus, maintaining the ability to assert privilege over attorney-client communications is an important consideration for both ANCs and their subsidiaries.

1. Establishing Attorney-Client Privilege

Not all communications with an attorney are privileged. For example, if an attorney and her client are talking in the stands at their children's hockey game about an upcoming presidential debate, that communication is likely not privileged. Nor would the privilege likely apply to documents created in the regular course of business that were merely *also* sent to in-house counsel or the corporation's attorney.[7] Instead the party asserting the privilege must show that all of the elements of privilege have been satisfied.[8] Different courts and legal scholars have broken the essential elements into lists ranging from four to eight elements, but the following list clearly sets out each essential piece: "(1) a client, prospective client, or client representative; (2) a lawyer, a representative of a lawyer, or someone whom the client believes to be a lawyer or a representative of a lawyer; (3) a communication about a legal matter; . . . (4) a reasonable expectation of confidentiality[;]"[9] and (5) not subject to an exception. As you can see, determining who is or is not the client is an important threshold issue when determining whether privilege may be asserted.

2. Parameters of the Co-Client and Common Interest Privileges

Determining whether the parent and its subsidiary corporation are a single client or are separate clients is also important to determining whether the communications fall within an exception to the privilege. Alaska Evidence Rule 503(d) bars the assertion of privilege over five

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[4] Comment, Anthony Cuesta, *Identifying the Client in a Corporate Family: The Overreliance on Corporate Affiliation in Attorney-Client Privilege*, 1 TEX. A&M L. REV. 163, 165 (2013).
[5] GEOFFREY C. HAZARD ET AL., THE LAW OF LAWYERING § 10.06 (4th ed. 2016).
[6] ALASKA R. EVI. 503. For an example of application of the attorney-client privilege in the Federal District of Alaska, see *Adams v. Teck Cominco Alaska, Inc.*, 232 F.R.D. 341, 344 (D. Alaska 2005).
[7] *E.g.*, *id.* at 344–45 (documents are not privileged if they were not created for the purpose of obtaining legal advice).
[8] *Id.* at 344.
[9] HAZARD ET AL., *supra* note 5, at § 10.07.1.

types of communications that would otherwise fall within it. If the parent and subsidiary are deemed to be two separate clients, the fifth exception could apply. The fifth exception covers "communication[s] relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common . . ." when the parties are later adverse to one another.[10] This exemption arises in two types of situations, depending upon how counsel is used. If the parent and subsidiary use the same counsel, the co-client privilege applies. Meanwhile, if the parent and subsidiary use separate counsel that communicates about the common interests of the corporations, the common interest privilege applies.[11] The application of the co-client or common interest privilege can create both helpful aspects and risks for parents and subsidiaries seeking joint representation.

Application of the co-client or common interest privilege is helpful to corporate families because it facilitates open communication about the legal interests of each entity. Within these privileges, neither the subsidiary nor the parent is considered a third party. This "privileged persons" status maintains a "reasonable expectation of confidentiality," and it allows either party to assert privilege over the communication if an action is brought against it by an outside party.[12] Further, the co-client and common interest privileges allow privileged persons to exchange important information relevant to the legal issues they face without fear that the other client will waive privilege in its stead.

Waiver can occur when a client voluntarily discloses the privileged information with a non-representative, third party—regardless of whether the client had a specific intent to waive the privilege. And, once privilege is waived, an adverse party may be allowed access to all communications on the "same subject" as the disclosure.[13] Depending on the subject matter of the otherwise-protected communications, waiver of attorney-client privilege can be disastrous to a claim. Under the co-client and common interest models, each client maintains control over the information it discloses to the other privileged persons and may independently choose whether to waive privilege over that information.[14] This protects the parties' information from waiver through both intentional or inadvertent disclosure by the other party. Further, all of the co-clients must agree to waive privilege if the privileged information arose out of their joint representation.[15]

However, attorney-client privilege can be lost completely if the parties pursue an action against one another. Such an action is exactly the situation contemplated in Alaska Rule of Evidence 503(d)(5), which prevents the assertion of privilege in an action between joint, or co-, clients.[16] If a parent corporation decides to consult the same counsel as its subsidiary, it should

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[10] ALASKA R. EVI. 503(d)(5).
[11] HAZARD ET AL., *supra* note 5, at § 10.13.
[12] *Id.*
[13] For a more robust discussion on waiver of attorney-client privilege and the other ways that privilege could be waived, see *id.* at § 10.10.
[14] *In re Grand Jury Subpoena*, 274 F.3d 563, 572–73 (1st Cir. 2001). However, there is authority that suggests a corporation may be able to waive privilege for both itself and its employee. *See id.* at 573.
[15] *Teleglobe Commc'ns Corp. v. BCE, Inc.*, 493 F.3d 345, 363 (3d Cir. 2007) (citing Restatement (Third) of the Law Governing Lawyers § 75(2) (2000)).
[16] From a policy perspective, it is assumed that the clients did not, at the outset, maintain confidentiality between themselves. Because confidentiality is an essential element for the assertion of the attorney-client privilege, it cannot therefore be invoked. HAZARD ET AL., *supra* note 5, at § 10.13.

consider defining the scope of the shared counsel's representation of each entity. While a written agreement may not be required, it is advised because it is evidence that the subsidiary gave fully-informed consent to the limitations placed on the representation and agreed to limit its control over assertion of attorney-client privilege over some of its communications with counsel and the parent.[17]

B. The Duty of Confidentiality Under the Alaska Rules of Professional Conduct

Another related yet distinct protection of client communications is effectuated through the duty of confidentiality imposed by Rule 1.6 of the Alaska Rules of Professional Conduct. This rule prohibits an attorney from revealing client "confidences" and "secrets" without the client's informed consent, implied authorization, or under a Rule 1.6(b) exception. The Alaska Supreme Court has defined a client "confidence" as any information covered by attorney-client privilege, and a client "secret" as any other information learned by the attorney in the course of representing the client's legal interests that the client has either requested the attorney to keep secret or "it is reasonably foreseeable that disclosure of the information would be embarrassing or detrimental to the client."[18] As you can see, the duty of confidentiality is much broader than the related attorney-client privilege.

The duty of confidentiality is a core concept of legal ethics. As the Alaska Bar Association Ethics Committee put it:

> The preservation of confidences and secrets of a client are essential to the attorney / client relationship and should be protected. Both the fiduciary relations existing between the lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him. A client must feel free to discuss whatever he wishes with his lawyer and the lawyer must be equally free to obtain information beyond that volunteered by his client. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client, but also encourages laymen to seek early legal assistance.[19]

Under the duty of confidentiality, an attorney cannot volunteer a client confidence or secret, and the Alaska Supreme Court has instructed attorneys to err on the side of nondisclosure.[20] While the duty protects more information than the privilege, it cannot protect information from being compelled by government processes unless the information is also covered by the privilege. If, after attempting to invoke privilege and appeal to her duty of

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[17] *Id.*; Jaculin Aaron & Stephen Marzen, *Privilege in Corporate Family Representations*, 32 DEL. LAW. 20, 22–23 (2014); Comment, Robert B. Cummings, *Get Your Own Lawyer! An Analysis of In-House Counsel Advising Across the Corporate Structure After* Teleglobe, 21 Geo. J. Legal Ethics 683, 698 (2008). For more resources on defining the scope of the attorney-client relationship, see generally RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 14, 75, 76; MODEL RULES OF PROF'L CONDUCT 1.2.

[18] ALASKA R. PROF'L CONDUCT 1.6(a). While the Model Rules of Professional Conduct proposed by the American Bar Association propose protecting "information" relating to the representation of the client, the Alaska Supreme Court rejected this language as too broad and elected to maintain the confidences and secrets standard. ALASKA R. PROF'L CONDUCT 1.6, Alaska cmt. ¶ 1.

[19] Alaska Bar Ass'n Ethics Comm'n, Formal Op. 84-2 (1984) (citations omitted) (determining that an attorney for a partnership may not subsequently represent one partner against another partner in a partnership dispute).

[20] ALASKA R. PROF'L CONDUCT 1.6(a) and 1.6, Alaska cmt. ¶ 2.

confidentiality, a lawyer is ordered by a court to reveal a client secret, she has discretion to comply with the court order,[21] or be held in contempt of court.

Corporations should consider the implications of sharing counsel with their subsidiary corporations. Unless otherwise agreed upon, the attorney's duty of confidentiality does not prevent the attorney from sharing one co-client's confidences and secrets with the other co-client.

> This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit.[22]

When an attorney is representing co-clients, she has an obligation to fully explain the effects of joint representation on both the attorney-client privilege and her duty of confidentiality. As with the attorney-client privilege, the co-clients have the opportunity to adjust these duties through contract—potentially limiting what information may be shared between them.[23]

II. WHO IS THE CLIENT? DETERMINING WHO CONTROLS THE ATTORNEY-CLIENT PRIVILEGE

As discussed in Part I(A)(1), falling within the definition of "client" is essential to establishing attorney-client privilege. Alaska Rule of Evidence 503(a)(1) defines a client as a "corporation . . . who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services." This definition does not address whether the parent corporation and subsidiary corporations are one client or co-clients for the purposes of attorney-client privilege. As courts across the country have been faced with this issue, separate conclusions have been drawn depending upon whether (1) the subsidiary is wholly-owned by the parent, (2) the subsidiary was wholly-owned by the parent before either being sold or filing for bankruptcy, or (3) the subsidiary is partially-owned by the parent corporation. Part II addresses each of these scenarios and their impact on attorney-client privilege.

A. Wholly-Owned Subsidiaries

A wholly-owned subsidiary is a corporation with one shareholder: the parent corporation. To determine if the parent corporation could exert control over the subsidiary corporation's assertion of privilege, courts have utilized two analytical approaches. The first is an organizational approach; the second is a policy-oriented approach.[24] While this Section will outline both approaches, in dicta, it appears that the Ninth Circuit has interpreted the U.S.

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[21] ALASKA R. PROF'L CONDUCT 1.6(b)(6) and 1.6, cmt. ¶ 17.
[22] ALASKA R. PROF'L CONDUCT 1.7, cmt. ¶ 30.
[23] ALASKA R. PROF'L CONDUCT 1.7, cmt. ¶¶ 30–31. The ABA Comment adopted by the Alaska Supreme Court provides this example: "the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients." ALASKA R. PROF'L CONDUCT 1.7, cmt. ¶ 30.
[24] JOHN W. GERGACZ, ATTORNEY-CORPORATE CLIENT PRIVILEGE § 2:30 (3d, 2016-2 ed. 2016).

Supreme Court's decision in *Upjohn v. United States* to mandate a policy-oriented approach.[25] The Ninth Circuit's interpretations of the law are controlling authority in Alaska federal courts and persuasive in the Alaska state courts. That being said, in 2007—eighteen years after the Ninth Circuit dicta—the Third Circuit applied an organizational approach in *Teleglobe Communications Corp. v. BCE*, focusing on the structure of the corporations as distinct legal entities rather than one corporate client.[26] Therefore, it is wise for counsel of parent corporations to be aware of both approaches and how courts may apply each of the approaches to its specific circumstances.

The organizational approach focuses on corporate structure. Under this approach, the parent corporation controls the assertion of privilege if the parent and subsidiary are deemed to operate as one entity; however, if they were deemed to be two distinct entities they were treated as co-clients. This approach respects the corporate form: treating the parent and subsidiary as distinct legal entities "absent compelling circumstances."[27] For example, in *Teleglobe*, the court expressed doubt that the parent corporation would claim to be a single entity with the subsidiary corporation for the purposes of tort liability. It stated that the parent corporation could not "have it both ways," and determined the parent and subsidiary should be treated as co-clients.[28]

Under the policy-oriented approach, on the other hand, the structure of the organizations is not determinative. Instead, the approach focuses on whether the public policies underlying the attorney-client privilege will be advanced by allowing the parent corporation to control the assertion or waiver of the privilege. Its application is more nuanced then allowing privilege whenever it would merely "increase the flow of information" but rather extends privilege when it "is likely to encourage *compliance-enhancing* communication that makes our system for resolving disputes more operable."[29] It also extends privilege when the communications by the subsidiary corporations are "critical to the representation of the parent company."[30] This policy-oriented approach is friendlier to the parent corporation in its effort to control attorney-client privilege over otherwise-privileged communications with its subsidiary than the organizational approach.

As mentioned earlier, corporate counsel for the parent should analyze the risks created under the application of both the organizational or policy-oriented approach. However, neither of these approaches is applied if the subsidiary corporation is divested—wholly or partially.

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[25] *Admiral Ins. Co. v. U.S. Dist. Court for Dist. of Ariz.*, 881 F.2d 1486, 1493 n.6 (9th Cir. 1989) (interpreting *Upjohn v. United States*, 449 U.S. 383 (1981)).
[26] *Teleglobe Commc'ns Corp. v. BCE, Inc.*, 493 F.3d 345, 371–72 (3d Cir. 2007).
[27] *Id.* at 371.
[28] *Id.* at 371–72.
[29] *Id.*at 361 (emphasis in original); *see also Ins. Co. of N. Am. v. Superior Court*, 108 Cal.App.3d 758, 765 (2d Dist. 1980) (allowing privilege over communications "reasonably necessary to further the purpose of the legal consultation"). While the court in *Teleglobe* ultimately decided the corporation was joint client through application of the organizational approach, it discussed its interpretation of *Upjohn* and the policy-oriented approach in the same opinion. *Id.*
[30] *Admiral Ins. Co.*, 881 F.2d at 1493 n.6.

B. Formerly-Owned and Insolvent Subsidiaries

The privilege analysis changes when a wholly-owned subsidiary is sold, reincorporated as a completely separate entity, or pursues bankruptcy. In each of these scenarios, the fiduciary duty of the subsidiary corporation is no longer to the former parent as its sole shareholder. As a result, courts have uniformly held that the parent may no longer assert privilege over the communications between the former subsidiary and legal counsel—regardless of whether the communication occurred before the subsidiary was divested.[31] Therefore, parent corporations should review what otherwise-privileged communications the subsidiary was involved in before divesting the subsidiary and assess the risk the corporation faces if the shared information is no longer protected by the attorney-client privilege.

C. Partially-Owned Subsidiaries

A partially-owned subsidiary is a corporation with more than one shareholder. While the parent corporation will still generally maintain majority control over the shares, the subsidiary no longer exists for the parent's exclusive benefit. Therefore, a partially-owned subsidiary is inarguably a separate "client" from its parent corporation. The parent and subsidiary may still utilize the same corporate counsel subject to the conflict of interest rules under Alaska Rule of Professional Conduct 1.7, which requires informed consent from both the parent corporation's representative and either a representative of the subsidiary who is not affiliated with the parent or the subsidiary's shareholders.[32] The parent and subsidiary are then treated as co-clients.

If the corporations choose to proceed as co-clients, the attorney has a duty to fully explain and clearly define her scope of representation towards each of the clients.[33] If, at any time, the legal interests of the parent and subsidiary diverge, the attorney has a duty to cease the joint representation and, depending upon the agreed upon scope of the attorney's services, may have a duty to cease representation of both as a conflict of interest.[34]

CONCLUSION

The utilization of subsidiary corporations by ANCs forces in-house and outside counsel to review the application of attorney-client privilege to its joint communications. Counsel must be wary of the subsidiary's relationship to the parent ANC and, if the ANC decides not to provide separate counsel for its subsidiaries, how the rules of attorney-client privilege could be

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[31] *E.g.*, *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 349 (1985) ("[W]hen control of a corporation passes to new management, the authority to assert and waive the corporation's attorney-client privilege passes as well."); *In re Grand Jury Subpoenas, 89-3 and 89-4, John Doe 89-129*, 902 F.2d 244, 249 (4th Cir. 1990) (stating that the rationale behind the privilege does not focus on when the documents were generated). *See generally* Aaron & Marzen, *supra* note 17 (summarizing situations where a parent corporation loses the right to assert attorney-client privilege over its subsidiary's communications); Comment, Andrew R. Taggart, *Parent-Subsidiary Communications and the Attorney-Client Privilege*, 65 U. CHI. L. REV. 315 (1998) (arguing for bilateral control of attorney-client privilege).

[32] ALASKA R. PROF'L CONDUCT 1.13(g).

[33] ALASKA R. PROF'L CONDUCT 1.13, cmt. ¶ 10.

[34] *See* Alaska Bar Ass'n Ethics Comm., Formal Op. 2012-3 (2012) (discussing the ethical duties arising from representation of a closely held organization). This is a factually-specific inquiry without a one-size-fits all answer. *See id.*

affected. While the answer to this question is highly dependent upon the specific relationship and the claim at issue, a few general principles should be followed. The attorney should discuss the implications of a co-client relationship on the attorney-client privilege, her duty of confidentiality, and potential conflicts analyses.[35] Then, the attorney should execute an engagement letter outlining the agreed-upon scope of her representation, using clear and definite statements.[36] If, at any time, the attorney senses that the interests of the corporations are beginning to diverge, she must reengage this discussion between the entities and advise, at least the subsidiary, to seek other counsel. While this may result in additional costs, the benefits gained through the retention of attorney-client privilege and the confidence to disclose sensitive information with corporate counsel are worth it if litigation arises.

[35] Conflicts of interest analyses are outside the scope of this Paper, for more information see HAZARD ET AL., *supra* note 5, at § 12.23.

[36] *Id.* at § 12.23; *see also id.* § 12.24 (providing an example of a limitation on representation that would be "reasonable under the circumstances" and permissible under MODEL R. PROF'L CONDUCT 1.2(c)).