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ATTORNEY-CLIENT PRIVILEGE: DOES IT APPLY TO CORPORATIONS?

INTRODUCTION

The attorney-client privilege originated during the reign of Elizabeth I. At early common law it was the privilege of the lawyer, and he alone could assert it "to protect his faith and honor."[1] In the eighteenth century a purpose to protect the client began to emerge. Today the privilege lies with the client and facilitates his free consultation with counsel by removing any apprehension that information which he confided to the attorney could be discovered and used against him.[2] It is hoped that this full disclosure will aid in the administration of justice and encourage compliance with the law,[3] for, absent the privilege "everyone would be thrown upon his own legal resources. Deprived of all professional assistance, a man would not venture to consult any skillful person, or would only dare to tell his counsellor half his case."[4]

All communications with counsel, however, are not protected by the privilege. Only those confidential disclosures made while seeking legal advice from a lawyer in his capacity as such cannot be uttered by the attorney without the consent of the client.[5] While the qualification necessary to be considered an *attorney* for the purpose of exercising the privilege have been long settled, critical judicial investigation into the question of who can qualify as a *client* has only recently begun.

The first reported judicial analysis of the right of the corporate client to claim the attorney-client privilege, *Radiant Burners, Inc. v. American Gas Ass'n*,[6] resulted in a denial of the corporation's claim. This decision caused a tremor in both the bench and the bar because of the assumption by many that both corporations and individuals enjoyed the same privilege.[7] Indeed, even Chief Judge Campbell, who rendered the controversial opinion, confessed in indulging in this assumption prior to his exhaustive research, when he was unable "to find any authority . . . wherein the

[1] 8 WIGMORE, EVIDENCE § 2290 (McNaughton rev. 1961) (hereinafter cited as WIGMORE).

[2] 8 WIGMORE § 2290. See also MODEL CODE OF EVIDENCE, rule 210, comment a (1942).

[3] 8 WIGMORE § 2291.

[4] Greenough v. Gaskell, 1 My. & K. 98, 39 Eng. Rep. 618 (Ch. 1833). Quoted with approval in Blackburn v. Crawfords, 70 U.S. (3 Wall.) 175, 192–93 (1865).

[5] 8 WIGMORE § 2292.

[6] 207 F. Supp. 771, *adhered to on rehearing* 209 F. Supp. 321 (N.D. Ill. 1962).

[7] The attorney-client privilege has been defined as "A communication made to a counsel, solicitor, or attorney in professional confidence and which he is not permitted to disclose." BLACK'S LAW DICTIONARY (4th ed. 1951).

courts *decided* that this privilege should be extended to corporations."[8] The Judge further concluded that in the past the corporation's right to claim the privilege had been assumed without a proper reliance on *stare decisis* or a clear legal analysis of the issues involved.[9]

The *Radiant Burners* decision encouraged litigants in several other actions to seek discovery from corporations of what were heretofore considered privileged communications.[10] The rulings in these cases showed a reluctance to follow the lead of *Radiant Burners*.[11] The question is now before the appellate courts, and every indication is that a trip to the Supreme Court will be necessary for a final determination.

A better understanding of the problems encountered in resolving this issue can be gained if the arguments supporting each position are known. These arguments will be presented, therefore, before any attempt will be made to suggest a solution. Each position will be presented separately in disputatious form to retain some semblance of rational development.

The Corporation Is Not a Client

While the proponents of the privilege urge that in several reported decisions[12] the privilege "was treated" as applicable, this "treatment" consisted, at most, of a naked assumption.[13] Many of these decisions were not involved with the same issue for which they are cited as precedent, and are, therefore, without any controlling value in the determination of this problem.[14] The only function these cases serve is to show that the assumption that corporations enjoyed the privilege was widespread.

Both the Model Code of Evidence[15] and the Uniform Rules of Evidence[16] list the terms "corporation" and "association" within their defini-

[8] Radiant Burners, Inc. v. American Gas Ass'n, 207 F. Supp. 771, 772 (N.D. Ill. 1962).

[9] *Ibid.*

[10] Philadelphia v. Westinghouse Electric Corp., 210 F. Supp. 483 (E.D. Pa. 1962); American Cyanamid Co. v. Hercules Powder Co., 211 F. Supp. 85 (D. Del. 1962); U.S. v. Becton Dickinson, 212 F. Supp. 92 (D.N.J. 1962).

[11] This reluctance was best expressed by Judge Kirkpatrick: "His [Judge Campbell] opinion is supported by a good deal of history and sound logic, but the availability of the privilege to corporations has gone unchallenged so long and has been so generally accepted that I must recognize that it does exist." Philadelphia v. Westinghouse Electric Corp., 210 F. Supp. 483, 484 (E.D. Pa. 1962).

[12] See list of cases in note 39, below.

[13] This was admitted by Judge Kirkpatrick, as quoted in note 11.

[14] E.g. United States v. Louisville and Nashville R.R. Co., 236 U.S. 318 (1915) was concerned with a grant of investigatory power to the Interstate Commerce Commission, and was resolved by an analysis of the specific statutory grant.

[15] Rule 209 (1942).

[16] Rule 26 (3) (1953).

tion of the term client, as that term is used with reference to the attorney-client privilege. These, however, have no value in jurisdictions where they have not been formally adopted, for "both works . . . set forth what the law *should be* and not necessarily what the law is."[17]

A widespread assumption that a privilege did in fact exist should not be the basis for a grant of the privilege. While some customs may attain the force of law in certain circumstance, it is essential that the custom be certain in its application.[18] In the instant problem, the high degree of uncertainty in the determination of who, in fact, in the corporate structure qualifies as the client would be fatal to any claim that the custom had evolved into law.

Since 1906 the United States Supreme Court limited the privileges available to the corporate or collective body.[19] There has also been an increasing tendency to emphasize full and frank discovery while limiting technicality and concealment. Both these trends are diametrically opposed to the assumption that the corporate client has a right to claim the attorney-client privilege.

THE NATURE OF THE PRIVILEGE

The attorney-client privilege, like the privilege against self-incrimination, is personal in nature, and cannot be claimed by an impersonal entity. The rationale of the attorney-client privilege is the facilitation of communication with counsel.[20] This is accomplished by removing any apprehension on the part of the client that his confidences could later be used to bring about his incrimination. The privilege against self-incrimination bars discovery of these confidences from the client, while the attorney-client privilege thwarts any attempt to turn the consultation with counsel into a conduit of self-incrimination. Thus these two privileges are similar in both their basic purpose and their personal nature.[21]

While there never had been a reported decision in which the application of the attorney-client privilege to the corporate client had been squarely placed in issue prior to *Radiant Burners*, the analogous protection against self-incrimination has been frequently discussed and denied to an impersonal entity.

The inherently personal nature of the privilege, and the fallacy of ex-

[17] Radiant Burners, Inc. v. American Gas Ass'n., 209 F. Supp. at 323 (N.D. Ill. 1962).

[18] BLACKSTONE, COMMENTARIES, I, as quoted in READINGS IN THE HISTORY AND SYSTEMS OF THE COMMON LAW 3 ed. (1927).

[19] *E.g.* Hale v. Henkel, 201 U.S. 43 (1906); Wilson v. United States, 221 U.S. 361 (1911); United States v. White, 332 U.S. 694 (1944).

[20] 8 WIGMORE § 2290.

[21] Radin, *The Privilege of Confidential Communication between Lawyer and Client*, 16 CALIF. L. REV. 487, 490 (1928).

tending such a right to a collective entity, was the principal foundation of the Court's opinion in *United States v. White*.[22]

> Individuals, when acting as representatives of a collective group, cannot be said to be exercising their purely personal rights and duties nor be entitled to their purely personal privilege. Rather they assume the rights, duties, and privileges of the artificial entity or association of which they are agents or officers.[23]

The court later set down a guide to be followed in determining what associations are so impersonal in their nature as to be excluded from the protection of personal privileges.

> The test, rather, is whether one can fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only. If so, the privilege cannot be invoked on behalf of the organization or its representatives in their official capacity.[24]

The analogy between the two privileges is clear. Because of their inherently personal nature neither should be extended to an impersonal corporate entity which is manifestly an embodiment of collective interests.

Public policy considerations also weigh heavily against the application of a rule of immunity, basically personal in character, to a state-created entity. The corporation is a creature of the state which is presumed to be incorporated for a public benefit.[25] Certain special privileges and franchises are held by it, subject to the laws of the state and the limitations of its charter. "It would be a strange anomaly to hold that a state, having chartered a corporation to make use of certain franchises, could not in the exercise of its sovereignty inquire how these franchises had been employed, and whether they had been abused. . . ."[26]

While an individual may lawfully frustrate discovery of incriminatory evidence, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges.

THE CONFIDENTIALITY REQUIREMENT

One of the basic common law requisites for a claim of the attorney-client privilege is confidentiality.[27] Traditionally, this requirement is predicated upon a disclosure in confidence and both the intention and the

[22] 322 U.S. 694 (1944). The privilege was denied to a labor union.

[23] *Id.* at 699.

[24] *Id.* at 701. See also 8 WIGMORE § 2259a.

[25] Hale v. Henkel, 201 U.S. 43 (1906).

[26] *Id.* at 74–5.

[27] 8 WIGMORE § 2292.

ability to maintain this secrecy in the future. If at any time the matter which was communicated in confidence is "profaned" by transmission to a third person the protection is lost. "The moment confidence ceases, privilege ceases."[28] This much is universally conceded.[29]

The impossibility of a corporation of any magnitude complying with the traditional confidentiality requirement is the most insurmountable bar to any attempt to include corporations within the ambit of "client" for the purpose of claiming the privilege. The proponents of the corporate client's claim face the problem of both defining and confining confidentiality. Whose confidence gives rise to the privilege, and whose communication may profane it?

In the *Radiant Burners* decision many of the difficulties encountered in determining what persons in the corporate structure hold its confidence, and might, therefore, be considered to be the client, were discussed.[30] Is the scope of the term so narrow as to include only the president, or so broad as to include all employees? Chief Judge Campbell was of the opinion that the group which would best qualify as the client for this purpose must be the stockholders, for the privilege is actually asserted for their benefit as owners.[31]

A short period after the *Radiant Burners* decision a Pennsylvania Federal District Court was faced with a similar problem. It was there held that the attorney-client privilege will exist only if the employee has actual authority to control or to take a substantial part in whatever action the corporation may take in response to advice sought from the lawyer.[32]

Other authorities have attempted to circumscribe those persons in a corporate structure who come within the ambit of the term client for the purpose of the privilege. With each attempt the scope of the term fluctuates.[33]

Wigmore argues that special exceptions or privileges inhibiting full disclosure of the truth must be confined to the narrowest scope "consistent with the logic of the principle."[34] He further describes the attorney-client privilege as "an exception to the general duty to disclose" whose "benefits are all indirect and speculative; its obstruction is plain and concrete."[35]

[28] Parlahurst v. Lowten, 2 Swanst. 194, 216, 36 Eng. Rep. 589, 596 (Ch. 1819).

[29] 8 WIGMORE § 2311.

[30] Radiant Burners, Inc. v. American Gas Ass'n, 207 F. Supp. 771, 775 (N.D. Ill. 1962).

[31] *Id.* at 774.

[32] Philadelphia v. Westinghouse Electric Corp., 210 F. Supp. 483, 485, (E.D. Pa. 1962).

[33] Different approaches to the problem are analyzed in Simon, *The Attorney-Client Privilege as Applied to Corporations*, 65 YALE L. J. 953 (1956).

[34] 8 WIGMORE § 2291.

[35] *Ibid.*

Such an obstruction to the administration of justice should not be permitted if the identity of persons who have a right to claim it is speculative, and dependent upon a definition of the courts in each instance.

It would be equally unwise to permit the corporation to designate the person to act as its spokesman, or to adopt any disclosures made for it as privileged. This would extend the privilege far beyond that now allowed to the individual client.[36]

Further problems in confidentiality are presented by the right of the shareholder and the state of incorporation to examine the records of the corporation. Confidentiality is traditionally predicated upon a reasonable expectancy that the secrecy of the communication will be maintained. "Surely one who voluntarily places a document in a position where it is subject to inspection by other persons can hardly be said to have reasonably intended to retain the secrecy of the document, notwithstanding the document having actually retained this non-intended secrecy."[37] Certainly the state is without the term "client," and many authorities would also exclude the stockholders from this designation. Hence their unchallenged right to inspection must be considered a profanation of any confidential transmission and result in the destruction of any possible claim of privilege.

The Corporation Is a Client

Although only one case has specifically held that the attorney-client privilege extends to corporations as a matter of the common law,[38] many have referred to its existence as a matter of common knowledge.[39] One

[36] Simon, *The Attorney-Client Privilege as Applied to Corporations*, 65 Yale L. J. 953 (1956).

[37] Radiant Burners, Inc. v. American Gas Ass'n, 209 F. Supp. 321, 324 (N.D. Ill. 1962).

[38] American Cyanamid Co. v. Hercules Powder Co., 211 F. Supp. 85 (D. Del. 1962).

[39] United States v. Louisville and Nashville R.R. Co., 236 U.S. 318 (1915); United States v. Aluminum Co. of America, 193 F. Supp. 251 (N.D.N.Y. 1960); Wonneman v. Stratford Securities Co., Inc., 23 F.R.D. 281 (S.D.N.Y. 1959); Elis-Foster Co. v. Union Carbide and Carbon Corp., 159 F. Supp. 917 (D.N.J. 1958); International Minerals and Chemical Corp. v. Golding-Keene Co., 162 F. Supp. 137 (W.D.N.Y. 1958); Georgia-Pacific Plywood Co. v. U.S. Plywood Corp., 18 F.R.D. 463 (S.D.N.Y. 1956); Comercio E. Industria Continental v. Dresser Industries Inc., 19 F.R.D. 513 (S.D.N.Y. 1956); Zenith Radio Corporation v. Radio Corporation of America, 121 F. Supp. 792 (D. Del. 1954); Willard C. Beach Air Brush Co. v. General Motors Corp., 118 F. Supp. 242 (D.N.J. 1953); Leonia Amusement Corp. v. Loew's Inc., 13 F.R.D. 438 (S.D.N.Y. 1952); Shawmut Inc. v. American Viscose Corp., 12 F.R.D. 488 (D. Mass. 1952); A.B. Dick Co. v. Marr, 95 F. Supp. 83 (S.D.N.Y. 1950); United States v. United Shoe Machinery Corp., 89 F. Supp. 357 (D. Mass. 1950); Bliss v. Cold Metal Process Co., 1 F.R.D. 193 (N.D. Ohio 1940); Edison Electric Light Co. v. U.S. Electric Lighting Co., 44 Fed. 294 (S.D.N.Y. 1890). An interesting state case is *Ex Parte* Schoepf, 74 Ohio St. 1, 77 N.E. 276 (1906).

case has stated in a strong dictum that corporations have the privilege;[40] another has held it applicable under a controlling New Jersey Statute.[41]

Judge Medina, in *A. B. Dick Co. v. Marr*,[42] contended that:

> the legal rights and duties of large corporations and those who dispute with them would not be susceptible of judicial administration in the absence of lawyers, nor, in the absence of the privilege could lawyers properly represent their clients. I am, frankly, hesitant to do anything which would contribute to the undermining of the protection afforded by the time-honored rule which excludes from evidence such confidential communications.[43]

The reason that there had been no reported decision prior to *Radiant Burners* pertaining to the right of the corporation to claim the attorney-client privilege in which the matter was expressly argued and decided is clear: neither the bench nor the bar challenged the corporation's assertion of the protection. When the corporation relied upon the privilege there was but a brief statement in the reported decision that the information sought was protected.[44] Even this assumption is of value, however, for the common law is not a rigid body of principles. The usages and customs of a period have a controlling influence, for the common law evolves to fit the times.[45] When the corporation was created the then-existing attorney-client privilege was influenced by this new creation. The long period in which the courts have recognized the corporation as a "client" serves to point up the fact that the privilege has adapted to include corporations within the scope of its protection.

In discussing the attorney-client privilege the *Model Code of Evidence* defines the client as "a person or corporation or other association. . . ."[46] A similar statute has been enacted in several states.[47] Many law review commentators, also, have recited that the attorney-client privilege applies to corporations as a matter of common understanding.[48] That the attorney-client privilege includes corporations, therefore, has been well estab-

[40] Philadelphia v. Westinghouse Electric Corp., 210 F. Supp. 483 (E.D. Pa. 1962).

[41] United States v. Becton Dickinson, 212 F. Supp. 92 (D.N.J. 1962).

[42] 95 F. Supp. 83 (S.D.N.Y. 1950), *aff'd on other grounds*, 197 F. 2d 498 (2 Cir.), *cert. den.* 344 U.S. 878 (1952).

[43] *Id.* at 102.

[44] See list of cases in note 39.

[45] BLACK'S LAW DICTIONARY (4th ed. 1951).

[46] MODEL CODE OF EVIDENCE rule 209 (1942). The introduction at p. viii states that the Code is a restatement of the common law unless there is an accompanying provision which explains that the rule changes the common law. Rule 209 contains no such provision. The writers, therefore, thought that they were restating the common law on this point.

[47] *E.g.* N.J. STAT. ANN. 2A: 84A-20 (3).

[48] Simon, *The Attorney-Client Privilege as Applied to Corporations*, 65 YALE L. J. 953, 990 (1956); Comment, 56 NW. U. L. REV. 235, 241 (1961); Comment, 71 YALE L. J. 1226, 1241–43 (1962). See also 8 WIGMORE § 2292.

lished by cases, restaters, texts, statutes, and the common understanding of bench and bar.

THE CONFIDENTIALITY REQUIREMENT

The common law rules of confidentiality were developed with reference to individual clients. There is no basic conflict, however, between the complex organization of the corporation and this traditional requirement.

The right of a shareholder to inspect documents does not preclude an assertion of the privilege by the corporation. Inspection must be for a proper purpose and reasonably related to the interest of the shareholder.[49] It is doubtful, therefore, that access could be gained to privileged matter without proof of a specific need.[50] This remote possibility of disclosure should not destroy confidentiality. A sounder approach to the question of confidentiality would be to consider each document separately, and permit discovery of only those which had, in fact, been profaned.

To permit corporate clients to avail themselves of the attorney-client privilege does not insulate all their records or activities from disclosure or create a "zone of silence." Corporate agents can always be called to testify as to facts within their own knowledge.[51] There is no basis for the suggestion that the attorney-client privilege might be employed by a corporation to make any desired part of its corporate papers immune to legal process simply by depositing them with the corporation's lawyers. The privilege cannot be invoked merely by making an attorney custodian of documents for his clients.[52] Only those communications are privileged which constitute a submission of a matter to an attorney for legal advice or the rendition of legal services.

THE NATURE OF THE PRIVILEGE

The denial of the privilege against self-incrimination to the corporation[53] does not afford a reason for denying the attorney-client privilege. The purposes and reasons for the two privileges are different, and an analogy between them cannot be drawn. The attorney-client privilege is based upon social policy, in the belief that justice will be better administered if the client can make complete disclosures to his attorney. The privilege against self-incrimination, different in origin and function, prevents torture and browbeating;[54] it is a purely personal privilege.[55]

Thus, there is a basic difference between the two privileges. The at-

[49] BALLANTINE, CORPORATIONS, §§ 160–61 (rev. ed. 1946).

[50] 5 FLETCHER, PRIVATE CORPORATIONS §§ 2217–26.4 (Wolf repl. vol. 1952).

[51] 8 WIGMORE § 2291 at 554.

[52] Grant v. United States, 227 U.S. 74, 79 (1913); 8 WIGMORE § 2307.

[53] Wilson v. United States, 221 U.S. 361, 382–84 (1911).

[54] 8 WIGMORE § 2250. [55] United States v. White, 322 U.S. 694, 698–99 (1944).

torney-client privilege was designed to *encourage* clients to disclose information to their attorney. The privilege against self-incrimination was created to *discourage* the forceable disclosure of evidence which would be incriminating to the individual. Physical force, by its very nature, can be applied only to natural persons. The facilitation of full disclosure, however, is desirable whether the client is a corporation or an individual.

CONCLUSION

The size and complexity of the modern corporation mitigate against extension to them of a right which was developed and refined for an individual. It is impossible to tailor corporate action to conform to the historically essential requirement of confidentiality without a clear definition of who will be considered the "client."

Any distortion of the privilege to remedy these problems would be unwise, for then the corporation would enjoy a more liberal area of protection than is currently available to the individual client when he avails himself of the attorney-client privilege. The corporation thus would assume a more favorable position than the individual solely because of the complex nature of the corporate organization.

While the corporation does not enjoy the privilege as it has existed at common law, it shares with the individual the need for free communication with counsel. To facilitate these disclosures, some form of privilege should be granted.[56]

The adoption of the Model Code of Evidence's definition of "client" would not satisfactorily solve the problem, for the application of that term within the organization would still remain uncertain. Any promulgation by the courts would be limited by the factual situation of the particular case at hand. The only adequate solution, therefore, is legislative enactment of a special privilege against disclosure which would modify the confidentiality requirement to fit modern corporate practices, and clearly define what persons in the organization would have a valid claim to the privilege. In this way a general guide would be laid out, and the courts could interpret factual situations within the framework of a specific and detailed grant of privilege.[57]

Any legislative action of this sort would be most welcome, for it would both grant the corporation the privilege desired and preserve the common law privilege for individuals in the same form as it has existed for centuries.

[56] Even the *Radiant Burners* decision concedes that a privilege *should* exist. "Due to the large and complex nature of modern corporate business transactions corporations should in fact be entitled to the attorney-client privilege." 209 F. Supp. at 325.

[57] An attempt to formulate a judicial determination of "client" can be found in Philadelphia v. Westinghouse Electric Corp., 210 F. Supp. 483, 485 (E.D. Pa. 1962).