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The Attorney-Corporate Client Privilege

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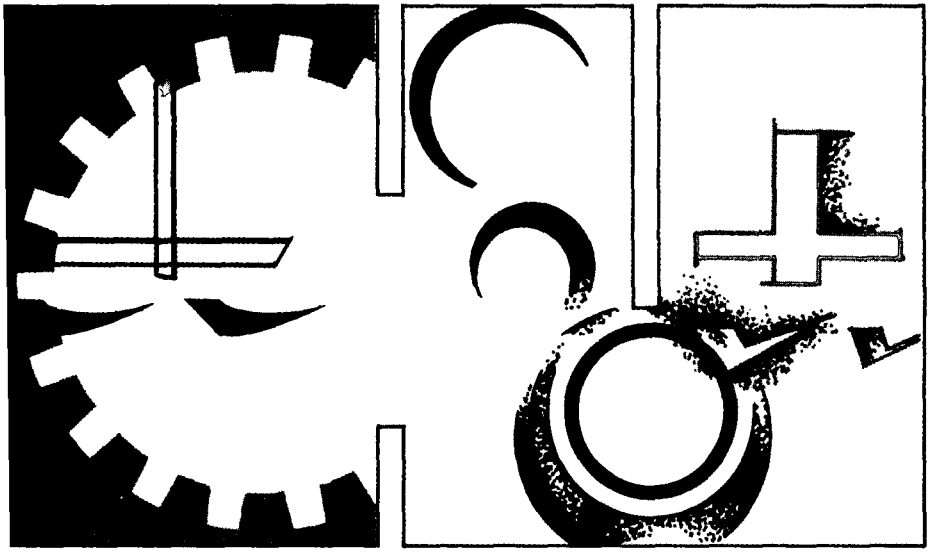

Fundamentals of the Attorney—Client Privilege

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IT will be the function of the introductory portion of this symposium to survey briefly the history and purpose of the attorney-client privilege, with special reference to its availability to corporations. It will summarize some of the existing authorities on this subject to provide a backdrop for the more practical insights into the current problems provided

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by the two sections that follow.

Dean Wigmore has tersely summarized the essential requirements for the attorney-client privilege:

"(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived." 8 J. WIGMORE, EVIDENCE §2292 (Little, Brown & Co., Boston, Mass., McNaughton rev. 1961).

A more elaborate and somewhat different formulation is found in *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357 (D. Mass. 1950).

HISTORY

The attorney-client privilege seems first to have been recognized in the 16th century.

Originally, the privilege seemed to be based upon the honor of the attorney and belonged to the attorney, who could waive it. During the 18th century, the courts found a new rationale in protecting the client from apprehension that his confidences might be betrayed. By the middle of the 19th century it was recognized that the privilege belonged to the client.

At first it existed only when a confidence had been communicated to a lawyer during litigation. Ultimately it extended to any consultation for legal advice.

The purpose of the privilege is expressed well in a comment to the Model Code of Evidence:

"In a society as complicated in structure as ours and governed by laws as complex and detailed as those imposed upon us, expert legal advice is essential. To the furnishing of such advice the fullest freedom and honesty of communication of pertinent facts is a prerequisite. To induce clients to make such communication, the privilege to prevent their later disclosure is said by courts and commentators to be a necessity. The social good derived from the proper performance of the functions of lawyers acting for their clients is believed to outweigh the harm that may come from the suppression of the evidence in specific cases." ALI, MODEL CODE OF EVIDENCE, Rule 210, Comment *a* (1942).

The privilege has undergone periodic attack by academicians of repute—Bentham, Morgan, McCormick, and Radin, to name a few. But the bar and the bench have been consistently alert to any attempt to narrow its scope.

APPLICABILITY TO CORPORATIONS

Prior to 1962 there was no case that denied the availability of the privilege to a corporation if the

requirements of the privilege were met. An impressive line of cases assumed that a corporation could assert the privilege.

The American Law Institute's MODEL CODE OF EVIDENCE [Rule 209] and the Uniform Rules of Evidence [Rule 26(3)] included corporations in the definition of clients who could assert the privilege.

Radiant Burners Cases

Hence, two decisions by Chief Judge Campbell of the Northern District of Illinois, which denied the availability of the privilege to a corporation in the *Radiant Burners* cases, came as a considerable shock to most lawyers who thought the matter was free from doubt. *Radiant Burners, Inc. v. American Gas Ass'n,* 207 F. Supp. 771 (N.D. Ill. 1962), 209 F. Supp. 321 (N.D. Ill. 1962).

Chief Judge Campbell reasoned that:

- Historically the attorney-client privilege, like the privilege against self-incrimination, was intended to be available only to natural persons;

- The essential requirement of confidentiality could not exist within a corporation, which necessarily must operate through agents; and

- The visitatorial powers of the state weaken the bases for the assertion of the privilege by a corporation.

Reversal

There followed a brief period of considerable consternation, highlighted by a number of highly critical comments in the law reviews. The furor subsided, however, when the Seventh Circuit reversed *Radiant Burners* [320 F. 2d 314 (1963)].

The opinion made clear what most observers has assumed previously—that, unlike the privilege against self-incrimination, the attorney-client privilege does not exist out of deference to a personal right, but as a rule to facilitate the working of justice. Specifically, the Court held:

"A corporation is entitled to the same treatment as any other 'client' —no more and no less. If it seeks legal advice from an attorney, and in that relationship confidentially communicates information relating the advice sought, it may protect itself from disclosure, absent its waiver hereof." *Id.* at 324.

There seems little chance that Chief Judge Campbell's views will experience a renaissance. However, *Radiant Burners* has had a profound influence on the attitude of courts towards the assertion of the privilege. The reasons suggested by Judge Campbell as a basis for his conclusion that the privilege is never available to a corporation have been utilized by other courts to test the assertion of the privilege in particular cases.

There seems to be a clear recognition tbat the difference between a corporation and a natural person affects whether in a given case a communication can be appropriately characterized as that of a corporation rather than its agent. There seems to be little doubt that the privilege will not be available to allow a corporation to immunize its records from disclosure by placing its papers and documents in the hands of its lawyers for custodial purposes. Nor is there any tendency by the courts to extend the privilege to business advice simply because it is given by a lawyer.

Tests of Applicability

The cases provide some illuminating examples of the difficulty in determining when the privilege exists.

Communications to Corporate Agents

An initial question sometimes involves the issue of whether the corporation is the client when information is communicated to a lawyer by an agent of the corporation. In some cases, the agent may be only a witness; in others he may be speaking as the representative of the corporation. What test should be applied to determine whether the communication is privileged as to the corporation?

There have been suggestions that the client is the corporation whenever any agent originates a communication for the advice of company counsel on a matter concerning the interests of the corporation. *See* Comment, *The Lawyer-Client Privilege: Its Application to Corporations, the Role of Ethics, and Its Possible Curtailment,* 56 Nw. U.L. Rev. 235, 242 (1961).

Other decisions would stop short of all agents, but would clearly permit a fairly broad group to speak for the corporation. See *United States v. United Shoe Machinery Corp.,* above; *Zenith Radio Corp. v. Radio Corporation of America,* 121 F. Supp. 792, 795 (D. Del. 1954). Others have suggested that the test should be whether the agent's communication related to his corporate responsibilities. Burnham, *Confidentiality and the Corporate Lawyer,* 56 Ill. Bar J. 542 (1968).

On occasion it has been suggested that the rank in the corporation of the employee making the communication should be the determinant. This contention was made in *City of Philadelphia v. Westinghouse Electric Corp.,* 210 F. Supp. 483, 485 (E.D. Pa. 1962).

Several courts have formulated a standard in terms of power to control. *Garrison v. General Motors Corp.,* 213 F. Supp. 515 (S.D. Cal. 1963); *Day v. Illinois Power Co.,* 50 Ill. App. 2d 52 199 N.E. 2d 802 (1964).

In *City of Philadelphia v. Westinghouse Electric Corp.,* above,

Judge Kirkpatrick stated the test in these terms:

"Keeping in mind that the question is, Is it the corporation which is seeking the lawyer's advice when the asserted privileged communication is made?, the most satisfactory solution, I think, is that if the employee making the communication, of whatever rank he may be, is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, or if he is an authorized member of a body or group which has the authority, then, in effect, he is (or personifies) the corporation when he makes his disclosure to the lawyer and the privilege would apply. In all other cases the employee would be merely giving information to the lawyer to enable the latter to advise those in the corporation having the authority to act or refrain from acting on the advice." 210 F. Supp. 483, 485 (E.D. Pa. 1962).

Thus, in a matter of overwhelming importance to a corporation, a department or division head might not be able to speak for the corporation, while in cases where an employee is actually authorized to make a decision after consultation with counsel—as, for example, the head of a claims department dealing with a minor personal injury claim—a communication to an attorney concerning the matter would be privileged as to the corporation. *Id.* at 486.

The statement of an agency outside the "control group" would simply be that of a witness. The corporation might still resist discovery on the "work product" concept of *Hickman v. Taylor* [329 U.S. 495 (1947)], but the statement would not be privileged.

Control Group Test

The "control group test" has been vigorously criticized. *See* Burnham, above, at 545-48; Heininger, *The Attorney-Client Privilege as It Relates to Corporations,* 53 Ill. Bar. J. 376, 384 (1965).

It has been pointed out that the adoption of such a test may mean that outside counsel who engages in internal investigations as a part of a vigorous program of antitrust compliance may be developing evidence against a client when he exchanges communications with corporate agents who are not within the control group.

Furthermore, the test seems to deny the privilege to the corporation when the communication is made by middle-management executives who may not qualify for inclusion in the control group, but who have responsibilities for making recommendations that are frequently ratified perfunctorily by higher management. *See* Maurer, *Privileged Communications and the*

Corporate Counsel, 28 ALA. LAW. 352, 367-69 (1967).

Confidentiality

A second problem deals with the requirements of confidentiality. A communication that is not made in confidence, as when an oral communication is made in the presence of strangers or a written communication is distributed generally throughout a corporation, will not be privileged.

A corporation must operate through agents and, therefore, some agents of the corporations are necessarily privy to any communication with the attorney for the corporation. However, it does not follow that a communication may be disclosed indiscriminately within the corporation and still be protected.

The best standard seems to recognige that disclosure may be made within the corporation on a "need to know" basis without destroying the privilege. *See* Comment, 56 Nw. U.L. REV. 235, 248 (1961).

It should, of course, be recognized that a communication that was originally confidential, and thus privileged, may lose is status by subsequently being broadcast to a larger constituency. Indeed, it has been held that the privilege may be lost by filing a document in the general files of the corporation. See *United States v. Kelsey-Hayes Wheel Co.*, 15 F.R.D. 461 (E.D. Mich. 1954); *Cote v. Knickerbocker Ice Co.*, 160 Misc. 658, 290 N.Y. Supp. 483 (N.Y. Munic. Ct. 1936); *cf. Fey v. Stauffer Chem. Co.*, 19 F.R.D. 526 (D. Neb. 1956).

Nature of Advice

A third problem area involves the kind of advice that is sought or given. The privilege applies only when legal advice is sought from a professional legal adviser who is acting in that capacity.

Normally, there is no problem when the ordinary citizen consults a lawyer. Frequently, however, lawyers render commercial and even technical advice to corporations in addition to advice concerning the law.

Thus, it is sometimes necessary for the courts to characterize a communication as one seeking or providing business advice, and thus not privileged, or one seeking legal advice and, therefore, within the protection of the privilege. See *United States v. Vehicular Parking, Ltd.*, 52 F. Supp. 751 (D. Del. 1943).

Frequently, however, the advice of a lawyer may involve mixed legal-business advice. As Judge Wysanski has pointed out:

"The modern lawyer almost invariably advises his client upon not only what is permissible but also what is desirable. And it is in the public interest that the lawyer should regard himself as more than predicter of legal consequences. His duty to society as well as to his

client involves many relevant social, economic, political, and philosophical considerations. And the privilege of nondisclosure is not lost merely because relevant nonlegal considerations are expressly stated in a communication which also includes legal advice." *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357, 359 (D. Mass. 1950).

If predominantly legal advice is sought or given, the fact that business advice is also contained in the communication should not affect the privilege. But where a communication neither invited nor expressed any legal opinion, or where the advice sought or given is largely of a business nature, the communication will not be protected. *Zenith Radio Corp. v. Radio Corporation of America*, 121 F. Supp. 792, 794 (D. Del. 1954).

House Counsel

It has been suggested that the privilege should not apply when house counsel are involved. *Wise v. Western Union Telegraph Co.*, 36 Del. (6 Harr.) 456, 178 A. 640 (1935).

An argument can be made for the proposition that no incentive to disclosure is needed when the attorney is himself an officer of the corporation. However, it seems probable that there would be much greater reluctance in confiding in house counsel if there were no privilege. The need for frequent advice of counsel who is readily accessible provides a cogent reason for encouraging the use of house counsel.

The fact that house counsel are paid annual salaries, occupy the corporation's buildings, are employees rather than independent contractors, and give advice to one regular client rather than a number of clients are not significant distinguishing characteristics insofar as the availability of the privilege is concerned. Consequently, the courts have refused to deny categorically the availability of the privilege to the corporation-house counsel communication. See, *e.g.*, *United States v. United Shoe Machinery Corp.*, above; *Zenith Radio Corp. v. Radio Corporation of America,* above; *American Cyanamid Co. v. Hercules Powder Co.,* 211 F. Supp. 85 (D. Del. 1962).

FUNCTION TEST

Whether the privilege applies to a communication to or from house counsel should depend primarily upon the function performed by the attorney in gathering or preparing the material in question. The suggestion has been made that whether a lawyer could receive a privileged communication depends on the relative amount of time spent in the role of attorney as compared to the amount of time spent in business affairs. *American Cyanamid Co. v. Hercules Powder Co.*, above.

A preferable approach would ex-

amine the function he performed with reference to each individual communication, appreciating that a lawyer who spends most of his time giving business advice may be consulted on some matters solely for legal assistance.

Administrative Safeguards

Several distinguished commentators have made some cogent suggestions of administrative techniques to minimize the danger that the privilege would not protect communication to and from house counsel. Haight, *Keeping the Privilege Inside the Corporation*, 18 Bus. Law. 551 (1963); Maurer, *Privileged Communications and the Corporate Counsel*, 28 Ala. Law. 352, 385 (1967); Burnham, *Confidentiality and the Corporate Lawyer*, 56 Ill. Bar J. 542, 543-44 (1968); Heininger, *The Attorney-Client Privilege as It Relates to Corporations*, 53 Ill. Bar J. 376, 383-84 (1965).

Their suggestions are consolidated into the following list:

- Place legal responsibility of the corporation under one person. Patent counsel, tax counsel, claims counsel, and others in organizational responsibility should be under the supervision of the chief legal attorney.

- Use legal titles for legal personnel.

- Adopt special law department stationery, separate from company's business stationery.

- Distinguish legal from business advice and label legal advice by an appropriate legend.

- Be careful of sequence. Channel reports directly between the legal department and the appropriate corporate executive—not indirectly.

- Segregate law department files and office files. Confidential communications should not be maintained in general files.

- Communicate to as few persons as possible. Corporate conferences at which confidential communication or legal advice is sought should be limited to necessary personnel who have a high degree of responsibility for the subject matter.

- Where possible, each legal communication should be set up to deal with a single legal problem, preferably with facts and business problems set up and predicated for legal conclusions.

- Beware of the copying machine. Thomas Austern goes so far as to recommend that the original be marked "Legal Opinion—Not To Be Copied—Return to Legal Division." Austern, *Corporate Counsel Communication: Is Anybody Listening?* 17 Bus. Law. 868, 871 (1962).

• Adopt and enforce record retention schedules. Mr. Austern suggests the adoption of "an accelerated program of document dispositions." He suggests that the rule should be that "in a documentary garden, an annual is not a perennial." *Ibid.*

• Where possible, have attorneys admitted to local bar. Nonmembership has been held "highly probative" of the absence of the privilege. *American Cyanamid Co. v. Hercules Powder Co.*, 211 F. Supp. 85 (D. Del. 1962).

Changing Attitudes

These matters have not been the subject of as extensive litigation during the last few years as during the 1962-1964 period. The problem area has shifted to the issue discussed in the following section by Mr. Brereton.

The problems alluded to above cannot be answered by a formula. There is the constant conflict between the policy that seeks to ascertain the truth and that which encourages the use of legal advice through the device of the privilege.

The more deeply one is convinced of the social necessity of permitting corporations to consult frankly and privately with legal advisers, the more willing one should be to accord them a flexible and generous privilege. Simon, *The Attorney-Client Privilege as Applied to Corporations*, 65 Yale L. J. 953, 990 (1956). The more convinced one is that the privilege is being used as a shield by the corporation to preclude access to the truth by immunizing vast quantities of relevant evidence, the more restrictive will be the interpretation given to the privilege.

In the long run, a different attitude may be demonstrated in the "private" cases involving routine discovery than in the "public" cases involving government regulation. Only time will tell.

In these days of business ascendency, many large corporations have their own staffs of "house counsel"; and the professional status of the lawyer acquires fuzzy edges as he takes his place on the company's payroll with other employees.

Beryl Harold Levy, Corporation Lawyer: Saint or Sinner? 9 (Chilton Co., Philadelphia, Pa. 1961).