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THE APPLICABILITY OF THE ATTORNEY-CLIENT PRIVILEGE TO A CORPORATION—THE CURRENT EVOLUTION OF AN "ACCEPTED" RULE OF LAW

INTRODUCTION

The utilization of the attorney-client privilege by corporations in litigation has been an accepted assumption by the courts and the profession for many years.[1] Only recently, in the case of *Radiant Burners Inc. v. American Gas Ass'n*,[2] has a court questioned the validity of the privilege's application to the corporate entity. In the months subsequent to this decision several courts have been confronted with the question of whether or not the corporation is entitled to claim the attorney-client privilege.

In *Radiant Burners* the Illinois district court held that the attorney-client privilege was a personal one and therefore not applicable to the corporation. The court suggested that its holding be accepted by the profession as the general rule of law. In the second case, *City of Philadelphia v. Westinghouse Elec. Corp.*,[3] a federal district court in Pennsylvania, while assuming that *Radiant Burners'* premise was historically sound, refused to follow that decision. It said that the privilege's applicability to corporations was "so generally accepted" it was forced to recognize its existence. In the third case, *United States v. Becton, Dickinson & Co.*,[4] the New Jersey district court held that *Radiant Burners* was not applicable since the court was bound under Federal Rule of Civil Procedure 43(a) to follow a New Jersey rule of evidence which recognizes the right of corporations to claim the privilege in courts of general jurisdiction of that state. A fourth case, *Garrison v. General Motors Corp.*,[4a] in rejecting *Radiant Burners*, has followed the rationale of the *Westinghouse* case.

1. "It is generally assumed that corporations and other legal entities are entitled to the privilege just as much as individuals are. The idea seems to go unchallenged—perhaps because in law, as in life, many of the most deeply believed assumptions are unspoken. Indeed, one can imagine the response of the surprised practitioner to any suggestion that it be otherwise: 'Why should a corporation not be entitled to the privilege? Cannot a corporation sue and be sued? Is it not punishable for its crimes? Does it not need legal advice of its own? How could it go about getting such advice if its confidences were not respected? It is an ancient rule that a master is privileged to consult with counsel through his servant, a principal through his agent—why not a corporation in the same way?'" Simon, *The Attorney-Client Privilege As Applied to Corporations*, 65 YALE L.J. 953 (1956). See Ellis-Foster Co. v. Union Carbide and Carbon Corp., 159 F. Supp. 917 (D.N.J. 1958); Radio Corp. of America v. Rauland Corp., 18 F.R.D. 440 (N.D. Ill. 1955); Zenith Radio Corp. v. Radio Corp. of America, 121 F. Supp. 792 (D. Del. 1954); United States v. United States Mach. Corp., 89 F. Supp. 357 (D. Mass. 1950); Stewart Equip. Co. v. Gallo, 32 N.J. Super. 15, 107 A.2d 527 (1954); United States v. Vehicular Parking Ltd., 52 F. Supp. 751 (D. Del. 1943); *Ex parte* Schoepf, 74 Ohio St. 1, 77 N.E. 276 (1906).

2. 207 F. Supp. 771, *upheld on reconsideration*, 209 F. Supp. 321 (N.D. Ill. 1962).

3. 210 F. Supp. 483 (E.D. Pa. 1962).

4. 31 U.S.L. WEEK 2325 (D.N.J. Dec. 31, 1962).

4a. 31 U.S.L. WEEK 2394 (S.D. Cal. Jan. 22, 1963).

The purpose of this paper is to examine the nature of the attorney-client privilege, to investigate its characterization by the *Radiant Burners* court as a personal privilege, and to analyze and attempt to determine the value in future litigation of the positions taken by the courts in the series of cases which rejected the holding of *Radiant Burners*.

THE HISTORY AND ELEMENTS OF THE PRIVILEGE

The attorney-client privilege is traceable to 16th century England.[5] Its precise origin is not known although some scholars suggest it is a derivative of the Roman concept of "fides."[6] The privilege at common law applied to "whatever is communicated professionally by a client to his legal adviser in confidence, and with the view of obtaining professional assistance or legal guidance."[7]

This common law view of the privilege has been restated by Professor Wigmore in a rule providing for the application of the privilege:[8]

> (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.

In determining whether the corporation can meet these requirements, the major issues are whether a corporation is a client under the rule and if so, whether it can ever achieve the secrecy demanded in order for the privilege to apply, considering the size of corporate employment today.

THE RATIONALE OF RADIANT BURNERS

The basis of the *Radiant Burners* decision is that the attorney-client privilege is a personal one and therefore should be denied to the corporation, as has been the right against self-incrimination.[9] The court

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5. The earliest English cases dealing with the attorney-client privilege are Dennis v. Codrington, Cary 100, 21 Eng. Rep. 53 (Ch. 1580); Kelway v. Kelway, Cary 89, 21 Eng. Rep. 47 (Ch. 1580); Austin v. Vesey, Cary 63, 21 Eng. Rep. 34 (Ch. 1577); Berd v. Lovelace, Cary 62, 21 Eng. Rep. 33 (Ch. 1577).

6. This concept of family loyalty was held to preclude family members from testifying since they would more likely lie than be subject to the disapproval of the community for betraying this primary trust. The concept was extended to the counsel and his client. See HAGEMAN, PRIVILEGED COMMUNICATIONS AS A BRANCH OF LEGAL EVIDENCE § 13, at 9 (1889); MCCORMICK, EVIDENCE 182 (1954); Radin, *The Privilege of Confidential Communications Between Lawyer and Client*, 16 CALIF. L. REV. 487, 488 (1928).

7. Hageman, *op. cit. supra* note 6, at 1; 1 GREENLEAF, EVIDENCE, § 237 (16th ed. 1899); 3 JONES, EVIDENCE, § 828 (5th ed. 1958); 1 STARKIE, EVIDENCE, 228-232 (1837).

8. 8 WIGMORE, EVIDENCE § 2292, at 554 (McNaughton Rev. 1961).

9. The corporation was denied the right against self-incrimination in Wilson v. United States, 221 U.S. 361 (1911).

also contended that even if the corporation could qualify as a client, it still could not claim the privilege since the rights of all interest holders to inspect the corporate records constituted a "profanation" of any alleged confidence the corporation claimed in its legal dealings.

THE NATURE OF THE PRIVILEGE

The court's holding that the client must be a natural person goes to the very nature of the privilege. Is it a personal right of protection from coercion or is it an aid in the administration of justice? In *United States v. Louisville & N.R.R.*,[10] the Supreme Court said:

> The desirability of protecting confidential communications between attorney and client as a matter of public policy is too well known and has been too often recognized by text-books and courts to need extended comment now. If such communications were required to be made subject to examination and publication, such enactment would be a practical prohibition upon professional advice and assistance.[10a]

This evidentiary privilege has been occasionally criticized on the abstract level as allowing concealment of facts which, if not so protected, might be used to bring offenders to prosecution.[11] However, its unquestioned acceptance based upon practical policy reasons is attested to by innumerable decisions throughout Anglo-American case law.[12]

This protection accorded the client is based upon the recognition that in a complex society expert legal advice is essential. As stated in the Model Code of Evidence:[13]

> 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 communications, the privilege to prevent their later disclosure is said 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.

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10. 236 U.S. 318 (1915).

10a. *Id.* at 336.

11. "This being the professed object of the English system of law,—viz., the prevention of offences,—is it reconcilable to the idea of wisdom or consistency, that it should lay down a rule, the effect of which, without contributing to the protection of the innocent . . . is purely and simply to counteract its own designs?" 7 THE WORKS OF JEREMY BENTHAM 475 (Bowring ed. 1962).

12. Alexander v. United States, 138 U.S. 353 (1891); Hunt v. Blackburn, 128 U.S. 464 (1888); Chirac v. Reinicker, 24 U.S. (11 Wheat.) 280 (1826); Parish v. Gates, 29 Ala. 254 (1856); Stephens v. Mattox, 37 Ga. 289 (1867); Doherty v. O'Callaghan, 157 Mass. 90, 31 N.E. 726 (1892); Bacon v. Frisbie, 80 N.Y. 394 (1880); Anderson v. Bank [1876], 2 Ch. D. 644; Greenough v. Gaskell, 1 Myl. & K. 98, 39 Eng. Rep. 618 (Ch. 1833).

13. MODEL CODE OF EVIDENCE rule 210(a) (1942).

Thus, it would appear that there is little basis for characterizing the attorney-client privilege as a personal one. Rather, the historical thrust of the privilege is directed towards the efficient and proper administration of justice.

THE ELEMENT OF CONFIDENTIALITY

The question of whether the agents of a corporation can attain the element of confidentiality should, it seems, be determined on a basis comparable to that used at common law in extending the privilege's circle of secrecy to qualified agents of both the client[14] and the attorney.[15]

Obviously, all interest holders do not have an unbridled right to inspect corporate records. This right of inspection can be challenged if it is not for good cause. It has been suggested that when a stockholder brings an adverse claim against the corporation, he should be treated as an outsider acting in a personal capacity. Thus, he would only come within the bounds of the privilege when acting in "coordination" with the directors.[16]

Several standards have been advanced to determine whether an agent of the corporation is qualified to represent it in its legal dealings. These include conferring confidentiality by rank in the corporation or upon the person who is the "logical" one to transmit the information to the attorney in a given situation.[17] In the *Westinghouse*[18] case, Judge Kilpatrick discarded the previous methods utilized and proposed what he considered a better approach:

14. Lalance & Grosjean Mfg. Co. v. Haberman Mfg. Co., 87 Fed. 563 (S.D.N.Y. 1898); Webb v. Francis J. Lewald Coal Co., 214 Cal. 182, 4 P.2d 532 (1931); Schmitt v. Emery, 211 Minn. 547, 2 N.W.2d 413 (1942); Russell v. Jackson, 9 Hare 387, 68 Eng. Rep. 558 (1851).

15. Hawes v. State, 88 Ala. 37, 7 So. 302 (1890); Sibley v. Waffle, 16 N.Y. 180 (1857); Hunt v. Taylor, 22 Vt. 556 (1850); Taylor v. Foster, 2 C. & P. 195 (1825).

16. Simon, *supra* note 1, at 967-8.

17. "Generally, with respect to the confidential nature of the disclosure and the status of the corporate employee making the disclosure, I think corporate counsel's largest problem is the education of second level management personnel who, for some reason or other, believe that a company, like the government, cannot be efficiently run unless everyone, including the building custodian, personnel manager, and of course the comptroller, indiscriminately receive copies of all documents prepared by the legal department and unless several surplus people sit in on conferences involving legal matters. Some reference has been made in an article entitled *'The Attorney-Client Privilege As Applied to Corporations,'* 65 YALE L.J. 953 as to whether the person making the disclosure is a 'managing agent,' 'communicating agent,' or 'source agent.' I realize 8 WIGMORE, EVIDENCE § 2317 (3d ed. 1940) furnishes a basis for such characterizations, but this would appear to be an artificial test. The safe and reasonable guide is whether the discloser is the logical person, in the circumstances of each factual situation, to make the communication under the *necessity* of obtaining legal advice for the protection or defence of corporate legal rights." Reddy, *Practical Guides for the Preservation of Attorney-Client Privilege Within A Corporation,* PROCEEDINGS AT THE FIRST ANNUAL INSTITUTE OF CORPORATE COUNSEL 78 (Fordham U. School of L. 1959).

18. City of Philadelphia v. Westinghouse Electric Corp., 210 F. Supp. 483 (E.D. Pa. 1962).

> [T]he 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 the 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 that authority, then, in effect, he is (or personifies) the corporation when he makes his disclosure . . . and the privilege should 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.[19]

This "control" standard has been subsequently adopted by the Federal District Court for the Southern District of California in the *Garrison* case.[20] In that case the court held that communications between patent attorneys of a corporation and the "control group"[21] were protected by the privilege.[22]

Which of these proposed standards is preferable is a matter of conjecture. But they are means which can be utilized to prevent wholesale profanation of privileged communications, thus preserving the applicability of the attorney-client privilege to the corporation. An awareness of the possibilities of maintaining confidentiality in legal communications is reflected by the movement of corporate counsels to tighten internal working rules among the corporation's employees.[23]

WESTINGHOUSE ELECTRIC REJECTS RADIANT BURNERS

In *City of Philadelphia v. Westinghouse Elec. Corp.*,[24] Judge Kilpatrick in a brief "preliminary" remark rejected *Radiant Burners*:

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19. *Id.* at 485.

20. Garrison v. General Motors Corp., 31 U.S.L. WEEK 2394 (S.D. Cal. Jan. 22, 1962).

21. The court held that this control group consisted of officers, directors and department heads of the corporation.

22. The court specified that the communication must be related to patent information with respect to which the corporation reasonably believes legal advice is necessary.

23. One writer's suggested definition of the attorney-client privilege as applicable to corporate house counsel, based upon cases dealing with the various elements of the common law definition where corporations were involved would be: "*Where an attorney at law, or an employee under his supervision, in a corporate legal department receives or sends a communication, from* or to another employee of the *same corporation*, which communications were sent or received *solely for the purpose of*, or as the result of, the application of legal skill, knowledge or training to the subject matter of the communication, such communication shall be privileged provided its *distribution* within the corporation, its *filing* and *handling* are consistent with the *confidential nature* of such material and is limited to those employees *required* to have knowledge thereof for the securing, enforcement or preservation of some legal right of the corporation or relates to the defense of the corporation against a claim, or set of facts which reasonably *may give rise* to a claim, under the law." Reddy, note 17 *supra*, at 75-76. The author also outlines a suggested set of internal working rules to be adopted to protect the privilege. *Id.*, at 85-6.

24. City of Philadelphia v. Westinghouse Electric Corp., 210 F. Supp. 483 (E.D. Pa. 1962).

> His opinion [Judge Campbell's in *Radiant Burners*] 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.[25]

This refusal to follow *Radiant Burners*, even under the belief that its historical basis might be valid, illustrates the strength of the assumption which the *Radiant Burners* court challenged. Regardless of the correctness or incorrectness of *Radiant Burners'* basic premise that the attorney-client privilege is historically a personal one, the realities of modern day society make the decision difficult for both bench and bar to accept.

When the public policy basis of fostering the proper administration of justice is considered, it is apparent there is probably a greater need for the corporation to have the benefit of the privilege than the individual. The broad scope and complexity of corporate affairs require the constant attention and guidance of effective legal counsel in the fullest sense if these organizations are to function properly. To deprive the corporation of the privilege would serve only to discourage full and honest disclosure by its agents to the attorney, thus preventing him from performing his vital function.

Judicial Discretion—Possible Middle Ground?

The holdings of the first two decisions discussed are diametrically opposed. Either the court rejects the corporation's claim to the privilege entirely or recognizes it and applies it whenever the requisites are attained by the corporation. A possible middle ground was used in *Jackson v. Pillsbury*,[26] where the court utilized its discretion as to whether the communication would be regarded as privileged. The test adopted was that "the resultant injury to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of the litigation."[27]

The wisdom of accepting a discretionary approach as to the applicability of the privilege, whether it be in favor of the natural person or the corporation, is questionable considering the purpose of the privilege. It is arguable that this would weaken the client's confidence in the attorney since there is no longer an absolute guarantee of silence. Thus, it would seem that the privilege cannot be made discretionary without endangering its effectiveness.[28] It is clear that there is no middle ground between *Radiant Burners* and *Westinghouse Electric*.

25. *Id.* at 484.
26. 380 Ill. 554, 44 N.E.2d 537 (1942).
27. *Id.* at 576, 44 N.E.2d at 547.
28. See note 35 *infra*.

The courts must decide if the corporation is or is not entitled to the attorney-client privilege unless there is a state statute to decide the question for them. However, this raises some basic questions as to the classification of the privilege as substantive or procedural when a federal court is involved.

STATE STATUTE AS A BAR TO RADIANT BURNERS

In *United States v. Becton, Dickinson & Co.*,[29] the final case under consideration, the court held that the New Jersey Evidence Act of 1960, which defines a client[30] as a person, corporation or association, was binding on it as well as the state courts:

> It would be very strange indeed were this federal court to deprive a litigant before it of the protection afforded by the state statute. Since the Legislature of this State has spoken, there is no 'statute or rule' authorizing the disregard of the privilege. On the contrary, Rule 34 of the Federal Rules of Civil Procedure, without which the plaintiff would be disentitled to inspection or copying of documents, expressly provides that only documents which are not privileged may be subject to that form of discovery. In sum, the New Jersey Legislature has set at rest any doubt respecting the persistence of the attorney-client privilege, and its availability to a corporate litigant in this State. Since the privilege exists in favor of the defendant corporation under the New Jersey statute the documents which the plaintiff seeks to examine are protected not only by those provisions of Rule 34, but by those of Rule 43(a) as well.[31]

While rule 43(a) states that the federal courts must be governed by the state statute or rule which favors the admissibility of evidence,[32] Professor Moore advocates that a federal court be given latitude in determining whether a matter does in fact come within the scope of the

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29. 31 U.S.L. WEEK 2325 (D.N.J. Dec. 31, 1962).

30. The Model Code of Evidence defines client similarly: "[A] person or corporation or other association that, directly or through an authorized representative, consults a lawyer or the lawyer's representative for the purpose of retaining the lawyer or securing legal service from him in his professional capacity . . . ." MODEL CODE OF EVIDENCE rule 209(a) (1942).

31. United States v. Becton, Dickinson & Co., 31 U.S.L. WEEK 2325, 2326 (D.N.J. Dec. 31, 1962).

32. FED. R. CIV. P. 43(a) states: "In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner."

state statutes and decisions even though the court looks to the state's interpretation of the word "privileged."[33]

The question of whether a privilege is a substantive or procedural matter has caused disagreement. Moore contends that the privilege is a procedural matter, not being one that "by its nature must substantially affect the outcome of a case."[34] This view is utilized by some federal courts, as evidenced by the trend towards broadening the discovery process at the expense of various privileges including that of attorney-client.[35] The state courts have not followed the federal pattern, at least in regard to the attorney-client privilege, if the requisites of the privilege can be satisfied.[36]

Those who view privilege as a substantive right abhor the treatment of the various privileges as simply exclusionary rules. The supporters of this view demand that federal courts apply the State privilege law in diversity cases and in certain federal question cases.[37]

CONCLUSION

The suggestion by the court in *Radiant Burners* that its view be adopted by the profession as the general rule of law has not met with success in its initial tests, as illustrated in the *Westinghouse, Becton* and *Garrison* cases. It is highly likely that the historical, practical and procedural aspects mentioned above will be relied upon by other courts to reject the *Radiant Burners* holding.

While practical policy reasons should be the major motivation of the courts to reject *Radiant Burners*, the historical basis should not be overlooked in holding that the corporation is entitled to the attorney-client privilege. While *Radiant Burners* may be an example of ill-considered law, the action of the court in *Westinghouse Electric* in failing to investigate the validity of *Radiant Burners'* basic premise is an example of judicial shortcuts that result in arbitrary law-making. While the analogy to the right of self-incrimination might have been logical, the premise upon which it depends is not supported by a "good deal of

33. 4 MOORE, FEDERAL PRACTICE § 26.23(9), at 1483 (2d ed. 1956).

34. *Id.* at 1484.

35. The following Ohio cases illustrate the tendency of the federal courts to expand the discovery process at the expense of the attorney-client privilege: Brookshire v. Pennsylvania R. Co., 14 F.R.D. 154 (N.D. Ohio 1953); Humphries v. Pennsylvania R. Co., 14 F.R.D. 177 (N.D. Ohio 1953); Pannella v. Baltimore & O. R.R., 14 F.R.D. 196 (N.D. Ohio 1951).

36. The following state cases show a tendency to protect the attorney-client privilege from the discovery process if the requisite elements have been satisfied: Seaboard Airline Ry. v. Timmons, 61 So.2d 426 (Fla. 1952); Neugass v. Terminal Cab Corp., 139 Misc. 699, 249 N.Y. Supp. 631 (1931); *Ex parte* Shoup, 154 Ohio St. 221, 94 N.E.2d 625 (1950); *In re* Keough, 151 Ohio St. 307, 85 N.E.2d 550 (1949); *In re* Hyde, 149 Ohio St. 407, 79 N.E.2d 224 (1948).

37. Louisell, *Confidentiality, Conformity and Confusion: Privilege in Federal Court*, 31 TUL. L. REV. 101 (1956-57).

history." There is no effective substitute for legal analysis in our judicial system.

Although the existence of a right may be widely assumed, is it conducive to good law to uphold it without investigating the validity of the legal analysis utilized by another court in attacking the assumption? One may argue that the assumption is so strong that the process of legal analysis is unnecessary. But who is to judge the strength of any assumption?

The effectiveness of a state statute in circumventing *Radiant Burners* will be largely discretionary with the courts. That is, if a court chooses to follow the views of Professor Moore referred to above, it may curtail or negate the effect of a state statute which permits the corporation to assert the attorney-client privilege. Conversely, a strict application of Rule 43(a) or the acceptance of the substantive view of privilege in conjunction with the Erie doctrine would give full force and effect to that type of statute.

While the chances are remote that *Radiant Burners* will be adopted as the general rule of law,[88] this series of cases and those which will follow illustrate the influences which operate in the evolution of a corpus of law. Where before there was merely an assumption, there is now taking shape a fiber of law, the outlines of which are discernible.

WALTER WAYNE SYLVESTER

38. The Court of Appeals for the Fifth Circuit recognized the public policy basis of the privilege in Modern Woodmen of America v. Watkins, 132 F.2d 352, 354 (5th Cir. 1942). The court stated that "the rule . . . is founded upon the necessity, in the interest and administration of justice, that persons seeking legal aid and counsel should be free to communicate with their confidential adviser about the subject matter of their problem without fear of consequences or apprehension of disclosure."

The Florida Supreme Court placed emphasis on the sanctity of the ancient privilege and its public policy basis in Seaboard Air Line Ry. v. Timmons, 61 So.2d 426, 428 (Fla. 1952). The court stated that "even if the plaintiff has stated facts sufficient to justify setting aside a release, which question is not before us, he has not stated sufficient facts to justify drawing aside the veil of secrecy surrounding an attorney's legal advice to his clients. The plaintiff's sole reason for requesting the confidential communication between the defendant and its attorney is that 'such documents contain or may contain evidence relevant and material to the matter involved in this action.' The confidential relationship of attorney and client is a sacred one, and one that is indispensable to the administration of justice. It cannot so lightly be brushed aside." One may well wonder if the court's language that the privilege "cannot so lightly be brushed aside" implies that Florida might follow the discretionary approach utilized in Jackson v. Pillsbury, 380 Ill. 554, 44 N.E.2d 537 (1942), discussed with text accompanying notes 26-27 *supra*, if the reason for disclosure might seem more definite and vital to the outcome of the case.