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Evidence--Attorney-Corporation Client Privilege

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(1946); *Hess v. Marinari*, *supra*. However, in those instances where the compensatory damages are not adequate to punish the defendant, punitive damages will also be assessed to deter others from pursuing a similar course of conduct and to serve as a warning of the possible consequences of willful or reckless conduct. To hold the insurer liable for these additional damages would seem to defeat the purpose of the court in assessing them. The insured would be allowed to protect himself from civil punishment by obtaining liability insurance. The most effective way to punish the defendant would be to make him personally responsible for the payment of the punitive damages by excluding them from automobile accident liability coverage.

Harold Dale Brewster, Jr.

Evidence—Attorney-Corporation Client Privilege

Files of documents from a law firm were examined during pre-trial discovery. It was contended that the information contained in the files was obtained by the law firm in its capacity as attorneys for D corporation and that the attorney-client privilege was applicable thereto. *Held*, a corporation is not entitled to claim the attorney-client privilege because, historically, it was created for natural persons only, and it is unrealistic to believe that confidentiality can be preserved for a corporation. *Radiant Burners, Inc. v. American Gas Ass'n*, 207 F. Supp. 771 (N.D. Ill. 1962).

The decision in the principal case will, no doubt, cause much activity among corporations and research by their attorneys for reasons and arguments in opposition to the court's conclusions. The court placed much emphasis on the idea that the privilege has been taken for granted without a proper reliance on precedent. The instant case has already been challenged in *Philadelphia v. Westinghouse Corp.*, 31 U.S.L. WEEK 2202 (E.D. Pa. Oct. 19, 1962). Although admitting that the principal case was supported by logic, it was unable to accept the result and reasoned that the availability of the privilege has gone unchallenged so long and has been so generally accepted that it must be recognized to exist.

The attorney-client privilege, dating back to the reign of Elizabeth I, is the oldest of the privileges for confidential communications.

8 WIGMORE, EVIDENCE § 2290 (McNaughton rev. 1961). The privilege encourages freedom of consultation. The client possesses the privilege and controls the retention or waiver thereof. The soundness of the theory has seldom been questioned. 8 WIGMORE, EVIDENCE § 2291 (McNaughton rev. 1961). The often quoted definition of the privilege is stated in these words:

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

The landmark case allowing corporations to seek the privilege is *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357 (D.C. Mass. 1950). The court sets forth the main qualifications necessary to a claim of the privilege. These qualifications include a client or prospective client and a member of the bar of a court acting as a lawyer; a communication relating to a fact of which the lawyer was informed by his client, without the presence of strangers, to secure legal advice, and not for the purpose of committing a crime or a tort; and, finally, the communication protected by the privilege claimed and not waived by the client. The *United Shoe* case held the corporation could claim the privilege when the communication was with house counsel. See Strack, *Attorney-Client Privilege—House Counsel*, 12 BUS. LAW. 229 (1957), for a compilation of cases involving corporation client and discovery under the Federal Rules of Civil Procedure.

To be distinguished from the attorney-client privilege is the “work product” privilege, developed and recognized for the attorney and not for the client. In *Hickman v. Taylor*, 329 U.S. 495 (1946), this privilege was enunciated. *P*, in an action against *D* tug owners to recover for the death of a seaman in the sinking of a tug, filed interrogatories requesting copies of written statements and summaries of oral statements that were taken by *D*'s attorney in connection with the accident. There was no showing of necessity or justification for the request. *D*'s attorney refused to comply and was held in contempt. The Circuit Court of Appeals reversed and the Supreme Court affirmed. The Court recognized a privilege for the work of the

attorney compiled in preparing the client's case. Accordingly, the attorney should not meet with needless interference impeding his client's interest. Although the discovery portions of the Federal Rules of Civil Procedure are to be liberally construed, the Court held the burden rests on the party seeking to invade the privilege to show justification for the production of the information.

The West Virginia position on whether a corporation may claim the attorney-client privilege appears never to have been adjudicated by the Supreme Court of Appeals. Note, *The Attorney-Client Privilege in West Virginia*, 54 W. VA. L. REV. 297 (1952), discusses the relationship as it applies to natural persons. W. VA. CODE ch. 50, art. 6, § 10 (Michie 1961), which encompasses those persons incompetent to testify, has been held to apply to justice of the peace practice, not to courts of record. *Mohr v. Mohr*, 119 W. Va. 253, 193 S.E. 121 (1937). *State v. Douglass*, 20 W. Va. 770, 780 (1882), declares that the principle of the attorney-client privilege is a fundamental one of evidence and greater harm would probably result from requiring disclosure than from refusal thereof. Without the privilege, the court said, the ends of justice, in many cases, could not be attained because of the reluctance of a client to make a full and confidential communication to an attorney.

In view of the decision in the *Radiant Burners* case and the fact that the issue appears never to have been directly decided in either the Supreme Court of the United States or in the West Virginia Supreme Court of Appeals, the question of the privilege as applied to corporations is one of moment and court rulings thereon may be anticipated. Arguments on both sides have much reason and logic. The court in the *Radiant Burners* case relied on the history of the privilege to deny it to corporations. It is fundamentally personal in nature. Analogous to it is the privilege against self-incrimination which can be claimed only by natural persons and not by corporate entities. Without legislation, the privilege between attorney-client should remain as it was created—only for natural persons. The court's concern also lies in the requirement of confidentiality. If the communication be disclosed to third parties, anyone other than the attorney or the client, the confidence has been "profaned" and the privilege terminated. The privilege "ought to be strictly confined with the logic of its principle." 8 WIGMORE, EVIDENCE § 2291 (McNaughton rev. 1961). Who within the corporation can be considered within the term "client"? The court concludes that

stockholders best qualify as the client, it being only for their benefit that the corporation could claim the privilege. But, with so many persons involved, the confidential nature of the communication could never exist. The court concludes that both the privilege of attorney-client and protection against self-incrimination had their origin at common law in criminal law and are very closely akin. The attorney-client privilege was extended to civil litigation, although retaining its personal character. However, due to the secrecy required, the court could not extend it to corporate parties.

The court's rationale in *Philadelphia v. Westinghouse Electric Corp.*, *supra*, was in effect that the privilege was too firmly entrenched to be rejected. The court's solution as to whom within the corporation could claim the attorney-client privilege was related to authority. If the employee making the communication "is in a position to control or 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 that authority, then, in effect he is (or personifies) the corporation when he makes his disclosure to the lawyer, and the privilege would apply." The court noted that *United States v. United Shoe Machinery Corp.*, *supra*, suggests a very broad class of employees, whereas the *Hickman v. Taylor*, *supra*, limits the class. It must be remembered the *Hickman* case discussed and dealt with the privilege of "work product." In referring to the attorney-client privilege, the court said the documents under consideration fell outside the scope of that privilege. It did not attempt to elaborate.

The position has been taken that if the attorney-client privilege is viewed in the light of a "rule of policy designed to facilitate the workings of justice," the privilege should apply to corporate communications. Those who motivate the corporation need the privilege to encourage full disclosure to counsel. Just as an individual is concerned for his own well-being, so is there concern by the directors for the corporate well-being. It is contended that, doctrinally, the privilege may easily be applied to a corporate communication. It is recognized that the privilege applies when the agent of the client originates the communication and also when the agent acts as carrier between the client and attorney. Thus, it would be a short step to apply the privilege to a corporation, which only acts through agents, rather than as an individual. *Symposium, The Lawyer-Client Privilege: Its Application to Corporations, the Role of Ethics, and*

Its Possible Curtailment, 56 NW. U.L. REV. 235 (1961). It is recognized that a major problem arises as to which "agent" qualifies as being able to apply the doctrine.

Simon, *The Attorney-Client Privilege as Applied to Corporations*, 65 YALE L.J. 953 (1956), provides an excellent depth study of the problems involved in the attorney-corporation client privilege. Including corporations within the privilege is favored.

UNIFORM RULE OF EVIDENCE 26(1), would terminate the lawyer-client privilege available to a corporation upon dissolution, and RULE 26(3)(a) defines a client as a "corporation or other association that directly or through an authorized representative, consults a lawyer . . . for the purpose of . . . securing legal relief."

Judicial review may soon be forthcoming on this question. Prior to the *Radiant Burners* case, it was generally assumed corporations could avail themselves of the attorney-client privilege. Attention has now been sharply focused on the issue. Action by the Court of Appeals and the Supreme Court of the United States will be awaited.

Thomas Edward McHugh

Evidence—Witnesses—Impeachment of Court Witness By Prior Statements

At *D*'s trial for murder, the state sought to impeach a court witness, called by the court at the state's request, by showing that the witness had previously made a statement which he would not acknowledge at the trial. The trial judge's ruling admitted only the first sentence of the statement pertaining to the time and place thereof. The state's attorney, over the objection of *D*'s attorney, and despite the judge's ruling, proceeded to introduce the contents of the statement by inquiring of the witness whether he had made specific statements. The judge, to remove any prejudicial error, instructed the jury that the questions and answers were not to be considered as evidence and that they related only to the credibility of the witness. From an adverse judgment, *D* appealed. *Held*, reversed and case remanded for a new trial. The introduction of the contents of the statement was prejudicial error. *Rankin v. State*, 143 So. 2d 193 (Fla. 1962).