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The Attorney-Client Privilege: A Look at Its Effect on the Corporate Client and the Corporate Executive

Executive *X* may be making statements to his employer's corporate counsel which he believes fall within the scope of the corporation's attorney-client privilege and cannot be disclosed, but may in fact legally be divulged by the corporation's attorney.[1] In this scenario, unless the executive informs his employer's counsel that he is seeking advice for himself, even if the information falls within the scope of the corporation's privilege the executive is not protected because the privilege belongs to the corporation.[2]

The attorney-client privilege is a narrow exception to the general duty to disclose.[3] It is based on the rationale that the best way to induce the client to divulge all the information necessary to reach a reasoned legal decision is to protect such communication with a privilege.[4] The attorney-client privilege encourages communication in the noncorporate setting because it protects the client who typically is also the spokesperson.[5] The attorney-client privilege thus

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[1] *See, e.g., In re* Grand Jury Proceedings, 434 F. Supp. 648 (E.D. Mich.), *aff'd per curiam*, 570 F.2d 562 (6th Cir. 1977).

[2] A corporate client, as well as an individual client, is entitled to waive the privilege. Note, *The Attorney-Client Privilege in the Corporate Setting: A Suggested Approach*, 69 MICH. L. REV. 360, 366-69 (1970); *See* Heininger, *The Attorney-Client Privilege As It Relates To The Corporation*, 53 ILL. B.J. 376, 386 (1965). *See generally* Note, *The Lawyer-Client Privilege: Its Application to Corporations, The Role of Ethics, and Its Possible Curtailment*, 56 NW. U.L. REV. 235-43 (1961).

[3] It is a fundamental principle that the public is entitled to every person's evidence, and exemptions from the general duty to disclose are exceptional. Garner v. Wolfinbarger, 430 F.2d 1093, 1100 (5th Cir. 1970) (citing 8 J. WIGMORE, EVIDENCE § 2192, at 70 (rev. ed. J. McNaughton 1961)).

[4] "If the privilege is to achieve its purpose of encouraging communications, the communicants must be able to discern at the stage of primary activity, whether the communications will be privileged." Note, *Attorney-Client Privilege For Corporate Clients: The Control Group Test*, 84 HARV. L. REV. 424, 426 (1970).

"By providing an exception preventing confidential communications from being elicited from an attorney by judicial coercion, the privilege induces the client to communicate information which would otherwise remain undisclosed." Note, *The Attorney-Client Privilege and the Corporation in Shareholder Litigation*, 50 SO. CAL. L. REV. 303, 305-06 (1977).

[5] The classic formula is that

> [t]he privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceedings; and not (d) for the purpose of committing a crime or torts; and (4) the privilege has been

supplements the right to counsel.[6] The traditional rationale breaks down, however, when it is applied in the corporate setting. The corporate executive is only the spokesperson; the corporation is the client and it alone may invoke or waive the privilege.[7]

Although there have been few reported cases in which a corporation has waived its attorney-client privilege and left an executive to seek protection for himself,[8] even these few cases pose the danger that as executives realize that they may not be protected by the corporation, the corporate attorney-client privilege will not serve to encourage the executive to provide corporate counsel with the information necessary to make legal decisions for the corporation.[9] This is particularly important in the corporate setting where such communication is necessary to plan the corporation's daily actions so as to be within the law.[10] The danger for the executive is that the corporation is free to legally disclose information he has communicated to corporate counsel with the belief that it would not be disclosed.[11]

While the conventional privilege could be extended to encompass the executive and grant him the status and protection of a client within the scope of the attorney-client privilege, such an extension is impractical because of the joint-clients exception to the privilege and the conflicts of interest created when an attorney represents two

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(a) claimed and (b) not waived by the client.
United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950).

[6] "The attorney-client privilege is basic to a relation of trust and confidence that, though not given express constitutional security, is yet essentially interrelated with the specific constitutional guaranties of the individual's right to counsel. . . ." State v. Kociolek, 23 N.J. 400, 415, 129 A.2d 417, 425 (1957) (citing 8 J. WIGMORE, EVIDENCE § 2191, at 70 (rev. ed. J. McNaughton 1961)).

[7] *See generally* Note, 56 NW. U.L. REV. 235 (1961), *supra* note 2; *see also* Simon, *The Attorney-Client Privilege As Applied To Corporations*, 65 YALE L.J. 953 (1956).

[8] *E.g.*, United States v. Bartlett, 449 F.2d 700 (8th Cir. 1971), *cert. denied*, 405 U.S. 932 (1972); United States v. De Lillo, 448 F. Supp. 840 (E.D.N.Y. 1978); *In re* Grand Jury Proceedings, 434 F. Supp. 648 (E.D. Mich.), *aff'd per curiam*, 570 F.2d 562 (6th Cir. 1977).

[9] For example, one observer of the privilege in the corporate arena has noted that "the policy of the privilege gives its full application to corporate communications, since the group of agents and directors who motivate a corporation need the incentive of the privilege fully as much as do private clients to encourage full disclosure to counsel." Note, 56 NW. U.L. REV. 235 (1961), *supra* note 2, at 241.

[10] Because of the complex regulation of business that currently prevails in our society, corporations must seek counsel daily to stay within the bounds of the law. Miller, *The Challenges To The Attorney-Client Privilege*, 49 VA. L. REV. 262, 268-70 (1963). "If there exists any single place where society needs the buffer of legal advice to separate the whims of a client from immediate gratification, that place is the boardroom of the modern corporation." Kobak, *The Uneven Application of the Attorney-Client Privilege to Corporations in the Federal Courts*, 6 GA. L. REV. 339, 340 (1972).

[11] *See* note 2 *supra*.

clients with competing interests.[12] Moreover, recent cases indicate that the courts are reluctant to extend the privilege in this manner.[13] Given the judicial reluctance to extend the conventional privilege to include the corporate executive, there is a need for a separately formulated executive privilege.[14] Such an executive privilege would encourage attorney-client communication in the corporate arena by granting the executive spokesperson protection similar to that bestowed upon the client (spokesperson) in the noncorporate arena. By encouraging the executive to communicate with corporate counsel, the executive privilege thus would not only provide the executive with protection but also supplement the corporation's right to legal counsel.[15]

This note will explore the reason for the corporate executive's misplaced reliance on the attorney-client privilege and the corporate executive's dilemma in deciding whether to divulge information to the corporation's attorney. The note will then propose a new corporate executive privilege analogous to the governmental executive privilege set forth in the Freedom of Information Act.

THE EXECUTIVE'S MISPLACED RELIANCE ON THE PRIVILEGE

The scope of the corporate attorney-client privilege is currently defined by two conflicting lines of authority.[16] One view describes

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[12] *See* text accompanying notes 38-44 *infra.*

[13] *E.g.*, United States v. Bartlett, 449 F.2d 700 (8th Cir. 1971), *cert. denied*, 405 U.S. 932 (1972); United States v. De Lillo, 448 F. Supp. 840 (E.D.N.Y. 1978); *In re* Grand Jury Proceedings, 434 F. Supp 648 (E.D. Mich.), *aff'd per curiam*, 570 F.2d 562 (6th Cir. 1977).

[14] As corporate executives begin to realize that they cannot predict whether the corporation will hold their communications to be privileged, they may provide less information to the corporation's attorney. One critic of the privilege in the corporate arena has noted that

> without the predictive certainty needed to induce disclosure by the client, the privilege is effectively vitiated; none of the benefits flowing from disclosure will be realized, and counsel will be made less effective. This lack of certainty may not only fail to induce communications, but may even have a chilling effect upon communications between a client and his attorney.

Note, 50 So. CAL. L. REV. 303 (1977), *supra* note 4, at 322.

[15] One observer has noted that

> the nature of an attorney as an arm of law enforcement lends support to the legitimacy of the corporate need for legal counsel. The probability of bringing corporations into compliance with the law is enhanced by the greater access of corporations to counsel resulting from the availability of the privilege. Therefore, corporations need effective legal counsel, perhaps even more than do individual clients, to advise them in their varied and complex array of activities.

Id. at 309 (footnotes omitted).

[16] Some courts, for example, have held that communications are privileged only when made to a lawyer from a corporate employee who is in a position to control or take substantial part in a deicision about action that the corporation

the privilege in terms of the "control group test." Under this test, in order to determine whether a particular communication is privileged it is necessary to determine if the employee who communicates the information is in a position of control and plays such a substantial role in the corporate decisionmaking process that when he makes a decision he personifies the corporation.[17] This has been praised as a "bright-line test" because it applies to a very small, identifiable group within the corporation;[18] on reflection, however, less desirable effects become evident. One such effect of its "bright-line" nature is that those executives who properly conclude that they are within the control group often *assume* that the corporation will protect communications they make to corporate counsel regarding corporate matters, because the communications fall within the corporation's attorney-client privilege.[19] Should the interests of the corporation and the executive subsequently be severed, however, the executive may discover that the corporation has waived its attorney-client privilege with respect to communications which the executive assumed would be protected.[20]

A newer line of authority defines a privilege which is broader than that delimited by the "control group test."[21] Under this view, an employee under a duty to make a corporate communication, although not a member of the control group, may nonetheless make a privileged communication if the communication is made at the direction of an executive within the control group, under circumstances where the members of the control group seek advice from the corporation's attorney about the subject matter of the communication.[22] Because even lower level employee communications may

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> may take on the attorney's advice. Other courts finding the 'control group' test too restrictive, extend the privilege to communications by an employee made at the direction of his superiors when the subject matter of the communication concerns the employee's performance of duties within the scope of his employment and the privilege has been found to operate without regard to the status of the employee.

Holiday Inns, Inc. v. Fay, 451 F.2d 343, 344 (5th Cir. 1971) (citations omitted); Note, 84 HARV. L. REV. 424 (1970), *supra* note 4, at 429-35; *see* Note, 69 MICH. L. REV. 360 (1970), *supra* note 2, at 369-74.

[17] City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483, 485 (E.D. Pa. 1962).

[18] *See* Note, 84 HARV. L. REV. 424 (1970), *supra* note 4, at 430.

[19] "[T]he privilege may fulfill its function more effectively when corporate officers are involved, since these officers are more likely than the average private litigant to know of its existence." Note, 56 NW. U.L. REV. 235 (1961), *supra* note 2, at 241.

[20] The corporation is the client and it alone controls the application of its privilege. *See* note 6 *supra*. *See also In re* Grand Jury Proceedings, 434 F. Supp. 648 (E.D. Mich.), *aff'd per curiam*, 570 F.2d 562 (6th Cir. 1977).

[21] Note, 69 MICH. L. REV. 360 (1970), *supra* note 2, at 360-66.

[22] Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 491 (7th Cir. 1970), *aff'd mem.*

fall within the scope of the expanded privilege this line of authority endorses,[23] an even greater number of corporate employees may be induced to rely upon a privilege which is not their own.[24]

THE CORPORATE EXECUTIVE'S DILEMMA

The corporate executive often finds himself under a duty to supply information on behalf of his employer to the corporation's attorney. If he discloses the information he is required to divulge, he may subsequently find that the corporation has waived its attorney-client privilege and its attorney has divulged information the executive believed was confidential.[25] If the attorney is later called to testify before a grand jury, the executive may find himself subject to an indictment.[26]

On the other hand, if the executive refuses to divulge information to the corporation's attorney he may lose his job. It is true that the executive has the right to claim the protection of the fifth amendment in the courtroom, but there is no basis for protecting the executive who seeks to invoke the fifth amendment for protection against his employer.[27] Moreover, when the officers of a corporation

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by an equally divided court, 400 U.S. 348 (1971).

[23] *E.g.,* cases citing *Harper & Row* with approval: Hercules Inc. v. Exxon Corp., 434 F. Supp. 136, 146 (D. Del. 1977) (citing *Duplan Corp., infra);* Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1165 (D.S.C. 1974) ("We conclude that the control group test is not wholly adequate, that the corporation's attorney-client privilege protects communications of some corporate agents who are not within the control group. . . ."); Sylgab Steel & Wire Corp. v. IMOCO-Gateway Corp., 62 F.R.D. 454, 456 (N.D. Ill. 1974), *aff'd mem.,* 534 F.2d 330 (7th Cir. 1976) ("It is well settled that the dissemination of a communication between a corporation's lawyer and an employee of that corporation to those employees directly concerned with such matters does not waive the attorney-client privilege."); Xerox Corp. v. International Business Machines Corp., 64 F.R.D. 367, 388 (S.D.N.Y. 1974) ("While the Special Master is inclined to accept the formulation of the *Harper & Row* case there has not been provided sufficient data as to each of the interviewees for the Special Master to make an informed judgment on that basis."); Hasso v. Retail Credit Co., 58 F.R.D. 425, 428 (E.D. Pa. 1973) ("We feel that the proper rule is that announced in Harper & Row Publishers, Inc. v. Decker.").

[24] *See* note 19 *supra.*

[25] *In re* Grand Jury Proceedings, 434 F. Supp. 648 (E.D. Mich.), *aff'd per curiam,* 570 F.2d 562 (6th Cir. 1977).

[26] If a corporation—*i.e.* its attorneys, directors or officers—divulges an executive's communication to a grand jury or a prosecutor, the executive may become subject to criminal charges, notwithstanding the executive's belief that his communication would be privileged. *See, e.g.,* Hale v. Henkel, 201 U.S. 43, 65-66 (1905).

[27] While there are no reported cases in the private sector, the Supreme Court has upheld the discharge of government employees for failure to divulge information. In Nelson v. Los Angeles County, 362 U.S. 1 (1960), employees of the county of Los Angeles, California were subpoenaed by a subcommittee of the House Un-American Activities Committee. They refused to answer certain questions concerning employment. A California statute required

disclose information communicated by one of the executives, it is difficult for the executive to protect himself. A corporation typically is made up of a large number of stockholders, directors and employees; because of this diversity, a single executive is not likely to be aware of all the decisions taking place throughout the corporation and thus may not recognize that his communications may subject him to criminal liability. Moreover, should the executive later be indicted, this lack of information may make it impossible for him to prove his innocence.[28]

EXECUTIVE-ATTORNEY COMMUNICATION: ITS SIGNIFICANCE TO THE CORPORATION

An executive's inability to rely on the corporation's attorney-client privilege is detrimental to the corporation as well. The corporate client, more than any other client, plans its daily actions to be assured that they are within the law, and depends on the information supplied to it by its agents.[29] Without the protection of the attorney-client privilege, although the executive may not refuse to speak with corporate counsel, he may be inclined to provide less information; and without this information it is doubtful whether the corporation's attorney will be able to provide adequate counsel.[30]

There are two possible solutions to this problem: the present corporate attorney-client privilege could be extended to protect the corporate executive; or, a new privilege could be developed to protect the corporate executive.

The Inadequacy of the Conventional Privilege

Rule 501 of the Federal Rules of Evidence would allow the

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government employees to answer such questions, but the employees sought the protection of the first and fifth amendments. The Supreme Court nevertheless upheld the discharge, reasoning that the state had a legitimate interest in obtaining information touching on the field of security. *Id.* at 8.

[28] [T]he fact is, the intelligence-gathering operations of any organization have to be limited, and, at present, the areas in the corporation's environment from which it seeks data are typically those that will inform it upon prospective sales volume, demand shifts, competitive behavior, and the like. Of its own accord (and, as we saw, even under the law's implied threats) the corporation is not readily prepared to find out where, say, its pollutants are going, or to evaluate systematically what harm they may be causing over an extended period of time.

C. STONE, WHERE THE LAW ENDS 116 (1975).

[29] *See* note 10 *supra.*

[30] *See* note 14 *supra.*

attorney-client privilege to be extended on a case-by-case basis.[31] The cases indicate, however, that the courts are reluctant to extend the corporate attorney-client privilege to protect the individual executive. In *United States v. Bartlett*[32] it was held that the chief executive officer of the corporation (who was also a director) who had been accused of securities fraud, could not claim the corporation's attorney-client privilege to prevent the testimony of the corporation's attorney. Even though the attorney had represented the director at SEC hearings after the allegedly privileged communications were made, the court maintained that the defendant failed to establish that the necessary attorney-client relationship existed at the time the allegedly privileged communication was made.[33]

In *In re Grand Jury Proceedings (Jackier)*,[34] the Sixth Circuit held that the corporate attorney-client privilege should not be extended to protect the communicating officer of a corporation. The conflict in *Jackier* resulted when a grand jury subpoenaed the counsel of a corporation to testify about communications with the ex-vice-president of the corporation. Between the time of the communication and the subpoena, the interests of the corporation and the vice-president were severed; he was no longer affiliated with the corporation when the grand jury subpoenaed the corporation's attorney, and the corporation waived the attorney-client privilege with respect to communications the vice-president made to the attorney. The former vice-president then sought to invoke the privilege to protect himself, but both the district court and the court of appeals rejected his claim.[35] The corporate client was allowed to waive the attorney-client privilege, despite the interests of its former employee. For the executive, the decision meant that the communications he had believed to be immune from disclosure would be open to the grand jury and could serve as the basis of an indictment

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[31] Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law. FED. R. EVID. 501.

[32] 449 F.2d 700 (8th Cir. 1971).

[33] *Id.* at 704.

[34] 434 F. Supp. 648 (E.D. Mich.), *aff'd per curiam*, 570 F.2d 562 (6th Cir. 1977).

[35] *Id.* at 650.

against him.[36]

The inability of the attorney-client privilege to protect individual executives is a function of the corporation's unitary operation. While the members of a corporate entity may have diverse interests as individuals, they must develop an organizational interest in order to function properly, and it is this collective interest that is represented when the corporation hires an attorney:

> The concept of a representative of the client comes into the rule and is needed to permit an accurate consideration of how a corporation communicates with a lawyer. Surely [the communicating officer is] a representative of the client. Surely his communications [are] privileged, but the privilege [is] that of [the corporation] under the traditional statement of rule.[37]

Because the executive is only a representative of the corporate client, if the corporate executive needs individual protection, it will not come from the conventional attorney-client privilege. The unstated rationale for this limitation is two-fold: first, an extension of the privilege to protect the corporate executive may create conflict of interests between the attorney, the executive, and the corporation; second, the joint-clients exception to the privilege may make it impossible for the attorney at once to keep confidential the communications received from the corporation and the executive.

The Corporate Counsel's Conflict of Interest

A conflict of interest may occur because the interests of the corporation and the executive are not always the same.[38] A lawyer has ethical responsibilties which make it impossible for him to represent two conflicting interests.[39] Since the attorney cannot give his pri-

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[36] In addition, the courts have refused to extend the privilege to the individual members of an organization even when the organization remained unincorporated. In United States v. De Lillo, 448 F.Supp. 840 (E.D.N.Y. 1978), the conflict arose after the interests of the board of trustees of a union pension fund and one of its former chairmen were severed. The court held that since the present board of trustees waived the attorney-client privilege, the board's attorney could testify about communications made by the defendant to the board and its attorney. 448 F. Supp. at 843.

[37] 434 F. Supp. 648, 650 (E.D. Mich. 1977).

[38] The problem occurs when a lawyer or a law firm represents a number of entities or persons; this can arise in a number of ways. "It sometimes occurs when both a public corporation and some of its officers or directors are under investigation. Although their interests may be the same in some instances, they may not be in others and sharp conflicts may exist." Sonde, *The Responsibility of Professionals Under the Federal Securities Laws—Some Observations*, 68 Nw. U.L. Rev. 1, 10 (1973).

[39] Canon Seven of the Code of Professional Responsibility directs the attorney to represent his client wholeheartedly within the bounds of the law. A lawyer cannot represent one client wholeheartedly if he simultaneously represents a second client whose interests conflict with

mary allegiance to both, at least one of his clients will suffer.[40] Moreover, The Code of Professional Responsibility directs the attorney to represent his "client." This indicates that when a lawyer represents a corporation he owes his primary allegiance to the corporate entity, and not its agents, shareholders or any other person associated with the corporation.[41] The theory that the attorney owes his primary loyalty to his "client" is also evident in malpractice law.[42] While the lawyer may be sued for malpractice if he negligently harms his client, generally he may not be sued by third parties who are also harmed in the process.[43] Both the Code of Professional Responsibility and malpractice law thus indicate that the attorney owes his primary duty to his client; he should not represent two clients with conflicting interests.

The Joint-Clients Exception

The joint-clients exception to the privilege is a further reason why it is difficult for the corporate attorney to represent both the corporate executive and the corporate entity. This is especially true when the attorney represents the executive individually, to protect the communications made by the executive to the attorney. Under the

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those of the first. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Ethical Considerations Canon 7.

[40] While a lawyer may represent potentially divergent interests, he is professionally obligated to obtain the consent of both parties. One must ask whether such consent is meaningful when dealing with the public corporation because in many cases there does not exist a truly disinterested management or board of directors capable of giving consent. The better practice would be to have the corporation separately represented, as is the case in shareholder derivative suits. Sonde, *supra* note 38.

[41] ABA CODE OF PROFESSIONAL RESPONSIBILITY, Ethical Consideration 5-18.

[42] As a general rule, the plaintiff in a malpractice action is required to prove that he was the attorney's client. *See, e.g.*, Chaplin v. Brennan, 114 Ariz. 124, 559 P.2d 680 (1976); Reamer v. Kessler, 233 Md. 311, 196 A.2d 896 (1964).

[43] However, in recent years the courts have begun to recognize liability to third persons where the attorney negligently rendered services which he should have recognized as involving a foreseeable injury to the third party. Most actions seeking to extend the liability imposed upon an attorney to nonclients have involved assertions of negligence either in connection with the preparation of a will or the examination and certification of title to property. *E.g.*, Heyer v. Flaig, 70 Cal. 2d 223, 449 P.2d 161 (1969) (the court upheld the right of the daughters of the deceased to sue the decedent's attorney for failing to fulfill the instructions of the decedent and thereby injurying the plaintiffs); Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685 (1961), *cert. denied*, 385 U.S. 987 (1962) (the court held that lack of privity between the beneficiaries and the attorney did not preclude the beneficiaries from maintaining an action in tort against the attorney for negligently drafting decedent's will); Licata v. Spector, 26 Conn. Supp. 378, 225 A.2d 28 (1968) (the court upheld the right of the administrator and the beneficiaries of a will declared invalid because of its failure to meet statutory requirements to sue the attorney-drafter of the will for negligence). *See also* Note, *Public Accountants and Attorneys: Negligence and the Third Party*, 47 NOTRE DAME LAW. 588 (1972).

joint-clients exception, communications made to the same attorney by separate clients are not privileged if the two clients should become adversaries in subsequent litigation.[44] Both a corporation and its executive represented by the same attorney could find the communications made to that attorney unprotected if they should one day find themselves on opposing sides in court.

A NEW "EXECUTIVE PRIVILEGE"

While there is no statutory bar to extending the attorney-client privilege to the executive who is employed by a corporation represented by corporate counsel, an analysis of the potential conflicts of interests, the dangers of legal malpractice and the joint-clients exception to the privilege all indicate that such an extension would not benefit either the attorney, the corporation, or the executive. Of course, the executive may always seek legal counsel for himself, but this is impractical in the business world where an executive constantly must disclose information and make snap decisions that require the advice of the corporation's legal counsel. The actions of both the executive and the corporation would be constrained if the executive were required to consult his own legal counsel as well as the corporation's legal counsel in order to protect himself in the event of legal proceedings. Moreover, should the executive's private attorney counsel him to refuse to divulge corporate information, the executive has no protection against losing his job if he follows his attorney's legal advice. It is evident, therefore, that an additional form of protection for the executive is necessary.

A private sector privilege analogous to the executive privilege adopted in the governmental sector under the Freedom of Information Act[45] could be employed to obviate these concerns. The problems encountered in the governmental sector are not unlike those encountered outside government; in both sectors it is necessary to promote a free flow of ideas and information in order to develop the best plans and ideas, and to receive the most helpful kind of legal advice. At the same time, it is important to place some controls on

[44] "It is a settled rule that the privilege does not apply, *inter sese*, when two or more persons having shared a single attorney on a matter of common interest subsequently have a falling out with respect to the subject matter of the consultation." Simon, *supra* note 7, at 986-87.

[45] 5 U.S.C. § 552 (1976). The executive privilege is based on the first exception to the Freedom of Information Act, although the courts have extended the privilege beyond the language of the exception. *See* note 51 & accompanying text *infra*.

the governmental entity,[46] as well as the corporate entity,[47] so that they will not wield power in disregard of the law.

The Executive Privilege in the Governmental Sector

The executive privilege recognized in the Freedom of Information Act,[48] like the attorney-client privilege,[49] is a narrow exception to a general duty to disclose. While the drafters of the Act recognized that the public cannot make intelligent, informed decisions without having access to the necessary information, they also realized that protection was needed for certain types of communications. According to a former Attorney General, in order to be fair to governmental employees, information accumulated in personnel files ought to be protected from disclosure.[50] Individuals within the government must be able to communicate fully and frankly without publicity and government officials cannot operate effectively when they are required to disclose information prematurely.

Motivated by such concerns, Congress provided nine exceptions to the Freedom of Information Act.[51] At the same time the drafters

[46] In Ethyl Corporation v. Environmental Protection Agency, 478 F.2d 47 (4th Cir. 1973), the court stated that the common law aspect of the executive privilege was codified in the Freedom of Information Act and as a result a bare assertion of the executive privilege does not limit the court's authority to participate in determining the scope of the privilege through the use of *in camera* inspection. *Id.* at 50.

[47] For a discussion of the need to control the attorney-client privilege within the corporation, see Note, 84 HARV. L. REV. 424 (1970), *supra* note 4, at 424-35.

[48] The policy of the Act requires that the disclosure requirement be construed broadly, the exemptions narrowly. Soucie v. David, 448 F.2d 1067, 1080 (D.C. Cir. 1971).

[49] Garner v. Wolfinbarger, 430 F.2d 1093, 1101 (5th Cir. 1970) (citing 8 J. WIGMORE, EVIDENCE § 2291, at 554 (rev. ed. J. McNaughton 1961)).

[50] Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act (United States Dept. of Justice, Ramsey Clark, Attorney General, June 1967) 1, *reprinted in* FREEDOM OF INFORMATION SOURCE BOOK, at 200 (1974).

[51] The Act does not apply to matters that are—

(1) specifically required by Executive Order to be kept secret in the interest of the national defense or foreign policy;
(2) related solely to the internal personnel rules and practices of an agency;
(3) specifically exempted from disclosure by statute;
(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation, with the agency;
(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
(7) investigatory file compiled for law enforcement purposes except to the extent available by law to a party other than an agency;
(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation

of the Act realized the necessity for these exemptions, however, they recognized that it was important to place controls on the resulting privileges. Accordingly, when an assertion of a privilege arising under the Act is challenged, the court must decide whether the circumstances are appropriate for the claim of the privilege; it is able to make this determination through *in camera* inspection without disclosing allegedly confidential information.[52]

The scope of the executive privilege was closely examined in *Nixon v. Sirica*,[53] where President Richard M. Nixon claimed that the privilege was absolute, at least with respect to conversations he had with his advisors. When the Special Prosecutor challenged this assertion of the executive privilege, the court was forced to consider whether the executive privilege was subject to judicial determination.

The court, in reaching the conclusion that the privilege was not absolute, noted the importance of the privilege in governmental decisionmaking and reviewed three important factors. Courts generally recognize that there is a public interest in maintaining the secrecy of military and diplomatic plans which overrides private litigation interests.[54] Moreover, the courts generally recognize executive pleas to protect intragovernmental documents reflecting deliberations which are a part of the governmental decisionmaking process and as a result extend the executive privilege beyond that specified under the first exemption in the Freedom of Information Act.[55] The rationale for the extension is that the candor of executive advisors will be diminished if they are persistently concerned about whether their advice and deliberations will later be made public.[56]

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or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Freedom of Information Act, 5 U.S.C. § 552(b) (1976).

[52] The court itself must determine if the circumstances of the case are appropriate for the claim of the executive privilege but in doing so cannot force disclosure of the very thing that is to be protected. United States v. Reynolds, 345 U.S. 1, 8-10 (1953); Epstein v. Resor, 296 F. Supp. 214, 218 (N.D. Cal. 1969), *aff'd*, 421 F.2d 930 (9th Cir.), *cert. denied*, 398 U.S. 965 (1970). The court is not required to inspect the report as long as the government can satisfy the court that its claim of privilege is justifiable. *See* Soucie v. David, 448 F.2d 1067, 1078 (D.C. Cir. 1971).

[53] 487 F.2d 700 (D.C. Cir. 1973).

[54] United States v. Reynolds, 345 U.S. 1 (1953); Totten v. United States, 92 U.S. 105 (1875); Nixon v. Sirica, 487 F.2d 700, 713 (D.C. Cir. 1973).

[55] Nixon v. Sirica, 487 F.2d 700, 713 (D.C. Cir. 1973); Carl Zeiss Shifung v. V.E.B. Carl Zeiss Jena, 40 F.R.D. 318, 324 (D.D.C. 1966), *aff'd*, 384 F.2d 979 (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967).

[56] *See* Kaiser Aluminum & Chem. Corp. v. United States, 157 F. Supp. 939, 947 (Ct. Cl. 1958).

The third factor cited by the court is one that suggests a solution to the private sector executive's dilemma: whenever the executive privilege has been challenged the court has determined its applicability.[57] While there is a presumption that conversations between the President and his advisors are privileged, whenever the privilege has been challenged the court has generally ordered *in camera* inspection of the allegedly privileged materials.[58] This procedure has protected privileged information from public disclosure and allowed the courts to order the disclosure of non-privileged information.

Nixon v. Sirica is relevant to the formulation of a new executive privilege because it holds that the executive privilege is not absolute; it can be subject to judicial determination.[59] This safeguard is essential because without this method of judicial control, the executive privilege would be subject to the caprice of the executive and could be used to protect an executive from criminal prosecution; such protection is clearly beyond the intended scope of the privilege.[60]

The *Nixon* opinion is also relevant because it indicates that application of the executive privilege in each case depends upon a weighing of the public interest protected by the privilege against the public interest that would be prejudiced by disclosure.[61] The court

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[57] Nixon v. Sirica, 487 F.2d 700, 713 n.60 (D.C. Cir. 1973) (citing United States v. Reynolds, 435 U.S. 1 (1953); Olson Rug Co. v. NLRB, 291 F.2d 655 (7th Cir. 1961); Timken Roller Bearing Co. v. United States, 38 F.R.D. 57 (N.D. Ohio 1964); United States v. Procter & Gamble Co., 25 F.R.D. 485 (D.N.J. 1960); Kaiser Aluminum & Chem. Corp. v. United States, 157 F. Supp. 939 (Ct. Cl. 1958)).

[58] *E.g.*, Machin v. Zuckert, 316 F.2d 336, 341 (D.C.Cir.), *cert. denied*, 375 U.S. 896 (1963); Boeing Airplane Co. v. Coggeshall, 280 F.2d 654, 660-61 (D.C. Cir. 1960); Olson Rug Co. v. NLRB, 291 F.2d 655, 662 (7th Cir. 1961); O'Keefe v. Boeing Co., 38 F.R.D. 329, 336 (S.D.N.Y. 1965).

[59] 487 F.2d 700, 716 (D.C. Cir. 1973).

[60] *See* Gravel v. United States, 408 U.S. 606, 627 (1972).

[61] A comparison of both the attorney-client privilege and the executive privilege recognized by the courts under the Freedom of Information Act indicates that both privileges are based on a balancing test. For example, in determining the application of the attorney-client privilege, the Fifth Circuit has stated that "an exception is justified if—and only if—policy requires it to be recognized when measured against the fundamental responsibility of every person to give testimony." Garner v. Wolfinbarger, 430 F.2d 1093, 1100 (5th Cir. 1970) (citing 8 J. WIGMORE, EVIDENCE §§ 2192, 2285, at 70, 525 (rev. ed. J. McNaughton 1961)). The Ninth Circuit, upholding the claim of the attorney-client privilege where the attorney-defendant refused to divulge the names of clients who had employed him to voluntarily mail sums of money to the government in payment for income taxes when no government audit or investigation was pending, stated that "[w]hile it is the great purpose of law to ascertain the truth, there is the countervailing necessity of insuring the right of every person to freely and fully confer and confide in one having knowledge in the law, and skilled in its practice in order that the former may have adequate advice and proper defense." Baird v. Koerner, 279 F.2d 623, 629-30 (9th Cir. 1960). Similarly, the *Nixon* court, in construing United States v. Burr, 25 F. Cas. 30 (1800) (No. 14,692), stated that the application of the executive privilege

held that the Special Prosecutor had made a strong showing that the subpoenaed tapes contained information that was vital to the prosecutor's case and could not be obtained elsewhere. The President was thus ordered to present the taped conversation in question to the court for *in camera* inspection.

The Executive Privilege in the Private Sector

Because the free flow of ideas and the protection necessary to communicate those ideas is just as important in the private sector, a protection similar to the executive privilege under the Freedom of Information Act should be created to protect communications made by corporate executives which would normally fall within the corporation's attorney-client privilege. The protection of the executive under such a privilege would be derived from the executive's position in the corporation and not from his relationship with the corporation's attorney.[62] First, this would allow the attorney to avoid the conflict of interest and malpractice problems that would be created by an extension of the conventional privilege. Second, communications made by the corporate executive to corporate counsel would not be disclosed by the corporation without the executive's consent or a court order issued after *in camera* inspection to determine if the circumstances are appropriate for recognizing the privilege. The court, of course, need not hear the whole communication; it simply must be satisfied that the executive's claim is justified.

Under such an executive privilege, the nature of the privileged communication would not differ from those considered privileged under the conventional attorney-client privilege. The executive privilege would simply allow the corporate spokesperson to claim the privilege for himself when the communication in question falls within the category of communications for which a corporate client could assert the attorney-client privilege. Communications made pursuant to fraudulent and criminal acts would be excepted under the executive privilege in the same manner as they are excepted under the conventional attorney-client privilege.[63] Moreover, com-

depends upon a weighing of the public interest protected by the privilege against the public interests that would be served by disclosure in a particular case. 487 F.2d 700, 716 (D.C. Cir. 1973).

[62] The joint-clients exception to the privilege would thus not affect an executive's right to claim the new privilege because the joint-clients exception is based upon the attorney-client relationship while the proposed executive privilege is not.

[63] "Communications made by a client to his attorney during or before the commission of a crime or fraud for the purpose of being guided or assisted in its commission are not privileged." Garner v. Wolfinbarger, 430 F.2d 1093, 1102 (5th Cir. 1970).

bining the fraud and crime exception to the attorney-client privilege with *in camera* inspection would provide the courts with the tools necessary to prevent abuses of the proposed privilege.

Neither the quality nor the quantity of evidence necessary for effective judicial factfinding would be reduced by this limited executive privilege. Under the current law, corporate counsel only supplies the type of evidence in question if the interests of the corporation and its executives should be severed. The elimination of this entirely fortuitous evidence is unlikely to have much impact on the judicial system.

CONCLUSION

The creation of an executive privilege in the private sector analogous to the governmental executive privilege in the Freedom of Information Act would protect the interests of the executive and insure the free flow of information necessary for the corporation to plan its daily actions. Like the conventional privilege, the executive privilege would be a narrow exception to the general duty to disclose evidence.

For the corporate executive, the executive privilege would mean that he no longer may be required to disclose information to the corporation's attorney without any protection against disclosure of the communication. For the corporation, it would facilitate the flow of information between the executive and the corporation's attorney. As the court noted in *Nixon,* governmental advisors, and by analogy corporate executives, are more willing to express their ideas and voice their doubts when they are secure that such communications may not easily be disclosed. The proposed executive privilege will thus bolster the corporation's attorney-client privilege because it will encourage the type of client communication the attorney-client privilege was designed to foster.

Moreover by encouraging executive communications in the corporation the executive privilege will supplement the corporation's right to legal counsel in the same way that the attorney-client privilege supplements the right to counsel in the noncorporate setting; it will provide the corporation's attorney with the information necessary to help his client.[64]

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[64] "The privilege is in vain if it does not secure freedom of professional consultation. Unless the confidence be inviolate, there will of necessity be restraints upon communication working grievous injury and injustice. The solemn obligation of secrecy is inherent in the essential right to counsel." State v. Kociolek, 23 N.J. 400, 415, 129 A.2d 417, 425 (1957).