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Federal Civil Procedure-Discovery-Availability of Attorney-Client Privilege to Corporations

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FEDERAL CIVIL PROCEDURE—DISCOVERY—AVAILABILITY OF ATTORNEY-CLIENT PRIVILEGE TO CORPORATIONS—During the pre-trial stage of a civil antitrust suit, plaintiff sought inspection of certain documents in the files of the corporate defendants' outside counsel. The defendant contended that these documents were protected from discovery by the attorney-client privilege. Upon motion for inspection, *held*, granted. The attorney-client privilege is not available to any of the corporate parties in this action. *Radiant Burners, Inc. v. American Gas Ass'n*, 207 F. Supp. 771, *aff'd on rehearing*, 209 F. Supp. 321 (N.D. Ill. 1962).

When a client seeks legal advice from an attorney, any communication relating to that purpose is permanently protected from compulsory disclosure by himself or his attorney if such communication is made in confidence and the privilege is not waived.[1] This privilege has been recognized by courts for centuries, evolving gradually from a protection for the oath and honor of the attorney to, instead, a safeguard for the client.[2] The policy behind the privilege is to promote full and complete revelation by a client to his attorney to the end that he may be properly advised

1 8 WIGMORE, EVIDENCE § 2292 (McNaughton rev. 1961).

2 *Id.* § 2290. See Bierman v. Marcus, 122 F. Supp. 250 (D.N.J. 1954); People v. Horowitz, 70 Cal. App. 2d 675, 161 P.2d 833 (1945).

without apprehension,[3] for without the assurance that his confidences will be kept the client might not communicate all the pertinent facts with the fullest freedom and honesty. The privilege has traditionally been deemed applicable to corporate clients, with few courts feeling it was necessary to give any reason for this extension of the privilege.[4] Those few courts which felt some justification was required pointed to the fact that a corporation can sue and be sued, and needs legal advice just as an individual does.[5] In addition, corporations can act only through their agents, and it is recognized that the privilege can be invoked for the benefit of the principal by his agent.[6] Corporations are specifically included in the definition of "clients" who are entitled to claim the privilege by one state statute,[7] the Model Code of Evidence,[8] the Uniform Rules of Evidence[9] and the United States Treasury Regulations.[10]

In the principal case the court advanced two rationales for its decision: since this is a "personal" privilege it is not available to an artificial entity, and, because the corporate arrangement makes it impossible for the communication to remain confidential, the essential requirement of secrecy cannot be met. In support of its first reason the court analogized this privilege to the privilege against self-incrimination, which is not available to corporations.[11] This analogy, however, seems inappropriate since the policy considerations which underlie the two privileges have little in common. Because our society has rejected the inquisitorial system for enforcement of criminal laws, the privilege against self-incrimination serves as a basic guarantee that the prosecutor will be forced to make a case for the state by means of an independent investigation rather than be allowed to secure convictions based on information obtained by coercion or intimidation of the accused.[12] A similar threat of physical compulsion does not exist where an artificial entity is involved; the evidence of the criminal

3 Wisconsin Lime & Cement Co. v. Hultman, 306 Ill. App. 347, 28 N.E.2d 801 (1940); MODEL CODE OF EVIDENCE rule 210, comment (a) (1942). See generally MCCORMICK, EVIDENCE § 91 (1954); 8 WIGMORE, *op. cit. supra* note 1, §§ 2290, 2294.

4 Georgia-Pacific Plywood Co. v. United States Plywood Corp., 18 F.R.D. 463 (S.D.N.Y. 1956); Zenith Radio Corp. v. Radio Corp. of America, 121 F. Supp. 792 (D. Del. 1954); United States v. United Shoe Mach. Corp., 89 F. Supp. 357 (D. Mass. 1950); McWilliams v. American Fid. Co., 140 Conn. 572, 102 A.2d 345 (1954).

5 *In re* Sanitary Dist. Attorneys, 351 Ill. 206, 268, 184 N.E. 332, 384 (1933); Stewart Equip. Co. v. Gallo, 32 N.J. Super. 15, 107 A.2d 527 (1954); *Ex parte* Schoepf, 74 Ohio St. 1, 77 N.E. 276 (1906); Mayor & Corp. v. Cox, 26 Ch. D. 678, 682 (1884).

6 *Ex parte* Schoepf, *supra* note 5; Southwark & Vauxhall Water Co. v. Quick, 3 Q.B.D. 315 (1878); Russell v. Jackson, 9 Hare 387, 68 Eng. Rep. 558 (Ch. 1851).

7 N.J. STAT. ANN. § 2A: 84A-20(3) (Supp. 1961).

8 MODEL CODE OF EVIDENCE rules 209-13 (1942).

9 UNIFORM RULES OF EVIDENCE 26(3)A.

10 Treas. Reg. § 1.6046-1(d) (1961). According to 8 WIGMORE, *op. cit. supra* note 1, § 2292, these statutes, rules, and regulations (cited in notes 7-10 *supra*) are generally held to be merely codifications of the common law.

11 Essgee Co. v. United States, 262 U.S. 151 (1923); Wilson v. United States, 221 U.S. 361 (1911); Hale v. Henkel, 201 U.S. 43 (1906).

12 8 WIGMORE, *op. cit. supra* note 1, § 2251.

acts of a corporation are often found only in their writings, and the sentiment that the state should make its own case is not as strong when the accused is not a natural person.[13] On the other hand, the attorney-client privilege is not intended as a shield to the weak, but is designed to encourage free and private consultation between every client and his attorney. If the court was looking for an analogy to a right protected by the Constitution, it would seem that freedom from unreasonable search and seizure, which applies to corporations as well as natural persons,[14] is more relevant and appropriate than the privilege against self-incrimination. The policy behind the former is to protect the privacy of the home and place of business, while the attorney-client privilege similarly seeks to guarantee privacy—to the client's communications with his attorney.[15]

The second rationale presented by the court in the principal case appears to have more validity. Clearly, for the privilege to be efficacious, the communication must remain confidential, and disclosure by the client to a third party constitutes a waiver. In considering corporate directors and officers the court recognized that such persons are frequently influential businessmen who are associated with other corporations and associations, and therefore information made available to these individuals would, in effect, be given to persons who do not come within the scope of the term "client."[16] However, since directors and officers stand in a fiduciary relationship to the corporation which they serve, it is reasonable to assume that they would maintain the required standard of confidentiality. Although the question remains unsettled as to who represents the corporation in its role as a client,[17] other courts have faced this issue and have succeeded in drawing lines which limit the "zone of silence"[18] and insure that corporations comply with the requirement of confidentiality.[19] In a recent decision the test used to decide who could represent the corporation at meetings with counsel was whether the person had a right to control or take a substantial part in reaching a decision on the subject matter of the communication with the attorney.[20] In the principal

13 *Id.* § 2259(a).

14 FTC v. American Tobacco Co., 264 U.S. 298 (1923); Hale v. Henkel, 201 U.S. 43 (1906).

15 *E.g.*, Mapp v. Ohio, 367 U.S. 643 (1961), and Wolf v. Colorado, 338 U.S. 25 (1949) (unreasonable search and seizure); Wilcoxon v. United States, 231 F.2d 384 (10th Cir. 1956) (attorney-client privilege).

16 Principal case, 207 F. Supp. at 774.

17 Simon, *The Attorney-Client Privilege as Applied to Corporations*, 65 YALE L.J. 953, 956 (1956).

18 *Ibid.*

19 *E.g.*, Zenith Radio Corp. v. Radio Corp. of America, 121 F. Supp. 792 (D. Del. 1954) (any member of the corporation may claim the privilege for the corporation and only those persons not associated with the corporation are strangers to whom disclosure constitutes waiver of the privilege); United States v. United Shoe Mach. Corp., 89 F. Supp. 357 (D. Mass. 1950) (anyone associated with the corporation or its affiliates may be considered the client, and communications do not lose the privilege simply because they contain relevant non-legal material).

20 Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483 (E.D. Pa. 1962).

case the court also suggested that the corporate entity is best represented by the stockholders since the privilege is being asserted for their benefit, and that this approach would result in the unmanageable situation of having literally thousands of persons being considered as the "client."[21] But the shareholders are not required to bear the responsibility of management of the corporation and usually have no legal duty to represent the corporation in prosecuting or defending litigation. Moreover, the right of stockholders to examine corporate records and files is limited,[22] and seemingly communications of the corporation with an attorney would not be subject to stockholder inspection. The visitation rights of the state of incorporation were mentioned by the court as posing another problem in maintaining confidentiality.[23] However, the state could probably not examine all of the corporation's files without having a valid purpose for such an inspection, and it is doubtful that visitation rights would ever extend to the files of the corporation's outside counsel. Even assuming that these inspection and visitation rights pose a threat of disclosure, it is still not impossible to meet the requirement of confidentiality, so long as they have not actually been exercised.

Another important factor to be considered—what law should govern the question of privilege—was never reached in the principal case. The Federal Rules of Civil Procedure provide the basis for extensive discovery by litigants in the federal courts,[24] provided, however, that a deposition or examination of documents may not encompass privileged matter.[25] But there is no suggestion in the Rules as to what law shall be applied in determining whether a deponent can refuse to answer a question or whether a document may be withheld on the grounds that the information is privileged. Although the principal case involved "federal question" jurisdiction, the mandate of *Erie R.R. v. Tompkins*,[26] though frequently so regarded, is not limited solely to "diversity" cases.[27] Certainly Congress has the power in a non-diversity situation to derogate from state-recognized privileges, but it has not chosen to do so in civil proceedings.[28] Indeed,

21 Principal case, 207 F. Supp. at 774-75.

22 See, *e.g.*, DEL. CODE ANN. tit. 8, § 220 (1953); ILL. REV. STAT. ch. 32, § 157.45 (1961); N.J. REV. STAT. § 14:5-1 (1937).

23 Principal case, 207 F. Supp. at 775.

24 FED. R. CIV. P. 26-37.

25 FED. R. CIV. P. 26(b).

26 304 U.S. 64 (1938).

27 Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101, 119-20 (1956). *Cf.* Wichita Royalty Co. v. City Nat'l Bank, 306 U.S. 103 (1939) (state commercial and trust law controls bank's affairs); Austrian v. Williams, 198 F.2d 697 (2d Cir.), *cert. denied*, 344 U.S. 909 (1952) (state-created statute of limitations as interpreted by state courts applicable to state-created cause of action in federal court suit jurisdictionally based on Bankruptcy Act); Rothenberg v. H. Rothstein & Sons, 183 F.2d 524 (3d Cir. 1950) (in proceeding under federal Perishable Agriculture Commodities Act, proper state law determines contract validity where federal law silent).

28 *Cf.* FED. R. CRIM. P. 26: "The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules

under the Rules of Decision Act[29] it would seem that a federal court should acknowledge a privilege recognized by the forum state if the claim of privilege is viewed as substantive rather than procedural.[30] However, whether a claim of a privilege is substantive or procedural is unsettled, with no clear majority emerging for either position.[31] Some courts have held that this matter is procedural, and that the federal courts are free to follow federal law in resolving issues as to the existence or scope of a particular privilege.[32] Other courts take the opposite approach and apply state law in deciding the same question.[33] In addition, there is authority that state law will be followed only when the legislature has granted the privilege by statute.[34] The Illinois Supreme Court has specifically recognized the availability of the attorney-client privilege to a corporate client.[35]

otherwise provide, 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"; Notes of Advisory Comm. on Federal Rules of Crim. Proc. 26, n.2, 18 U.S.C. 3424 (1958): "This rule differs from the corresponding rule for civil cases (Federal Rules of Civil Procedure, rule 43(a), 28 U.S.C., Appendix), in that this rule contemplates a uniform body of rules of evidence to govern in criminal trials in the Federal courts, while the rule for civil cases prescribes partial conformity to State law." See Petition of Borden Co., 75 F. Supp. 857 (N.D. Ill. 1948).

29 28 U.S.C. § 1652 (1958).

30 See Connecticut Mut. Life Ins. Co. v. Union Trust Co., 112 U.S. 250 (1884); Connecticut Mut. Life Ins. Co. v. Schaefer, 94 U.S. 457 (1876). The court in the principal case rejected the first *Connecticut Mutual Life* decision as authority because it did not grant the attorney-client privilege to a corporation, but the Supreme Court did hold that a privilege granted by the forum state must be recognized by a federal court. See also Leonia Amusement Corp. v. Loew's, Inc., 13 F.R.D. 438, 441 (S.D.N.Y. 1952) (the court in an antitrust suit looked to state law in construing the attorney-client privilege under FED. R. CIV. P. 26); Hill, *State Procedural Law in Federal Nondiversity Litigation*, 69 HARV. L. REV. 66, 97-98 (1955) (state procedural rules which determine the outcome must be applied by the federal courts under the Rules of Decision Act whether or not they are statutory in form); Louisell, *supra* note 27, at 120, where the author states that the dichotomy referred to in the Rules of Decision Act is "not between diversity and federal question litigation, but between cases where the United States Constitution, treaties or laws apply, on the one hand, and those where they do not apply on the other. It would seem that the privileges are within the act as much in federal question litigation as in diversity litigation." *But cf.* Green, *The Admissibility of Evidence Under the Federal Rules*, 55 HARV. L. REV. 197, 208-09 (1941) (Rule 43(a) is equivalent to an act of Congress and provides a controlling federal evidence rule); Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797 (1957).

31 See Comment, 23 U. CHI. L. REV. 704 (1956).

32 Phelan v. Middle States Oil Corp., 220 F.2d 593 (2d Cir. 1955); Erie R.R. v. Lade, 209 F.2d 948 (6th Cir. 1954); Falsone v. United States, 205 F.2d 734 (5th Cir.), *cert. denied*, 346 U.S. 864 (1953); 5 MOORE, FEDERAL PRACTICE § 43.07 (2d ed. 1951).

33 Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960); Palmer v. Fisher, 228 F.2d 603 (7th Cir. 1955); Berdon v. McDuff, 15 F.R.D. 29 (E.D. Mich. 1953); Louisell, *supra* note 27.

34 Anderson v. Benson, 117 F. Supp. 765 (D. Neb. 1953); *Ex parte* Sparrow, 14 F.R.D. 351, 353 (N.D. Ala. 1953).

35 *In re* Sanitary Dist. Attorneys, 351 Ill. 206, 184 N.E. 332 (1933), involving a disbarment proceeding in which an attorney refused to testify as to his activities with the municipal corporation, alleging this communication was privileged and the corporation had not waived the privilege. The court in upholding his claim stated that "no good reason appears why a municipal corporation as well as a private individual may not have privileged communications with its attorney." *Id.* at 268, 184 N.E. at 354.

Therefore, it may be persuasively argued that the court in the principal case, sitting in the Northern District of Illinois, should have abided by state law because the Seventh Circuit has clearly stated that a privilege granted by the forum state is substantive and must be recognized by a federal tribunal sitting in that state.[36]

On rehearing, the court in the principal case affirmed its decision denying the attorney-client privilege to corporations, although expressing its belief that corporations "should" have the privilege.[37] The court was reluctant to grant the privilege for the same reasons it had previously given and because it lacked the authority to create a privilege which has no common-law or statutory basis. Moreover, it was suggested that, if the privilege is granted to corporations by a higher court or by the legislature, the requirement of confidentiality be eliminated to avoid the difficult line-drawing problem in defining the scope of the "client" to whom the privilege would apply. Perhaps the better solution to the problem would be a legislative enactment that not only grants the privilege to corporate clients but which also establishes standards to guide the courts in drawing lines, rather than eliminating basic elements of the common-law privilege. Wigmore's four conditions for a privilege[38] should still be met, and, to insure that the resulting damage to the attorney-client relationship continues to outweigh the benefits gained by full disclosure, the standards should be strict. The privilege may be limited to the directors and specified officers of the corporation, which would provide a test easily administered by the courts. On the other hand, a more flexible approach might be taken, allowing the courts to extend the privilege to any communication made by a corporate agent who has a right to control or take a substantial part in reaching a decision on the subject of the communications with the attorney.[39] It would be advisable to indicate specifically the types of communications entitled to be privileged. Only those documents which are prepared primarily for the purpose of aiding counsel in rendering competent legal advice should be privileged, while those relating principally to business matters should not be. Existing documents, such

36 Palmer v. Fisher, 228 F.2d 603, 608 (7th Cir. 1955). In the decision on rehearing of the principal case the court rejected the "analogy" between the accountant-client privilege and the attorney-client privilege by pointing out that in the former the privilege was statutory in nature and intended for the benefit of the accountant and not the client.

37 Principal case, 209 F. Supp at 323.

38 These four fundamental conditions are required before a communication is entitled to be privileged: "(1) The communications must originate in a *confidence* that they will not be disclosed. (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties. (3) The relation must be one which in the opinion of the community ought to be sedulously *fostered.* (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation." 8 WIGMORE, *op. cit. supra* note 1, § 2285.

39 Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483 (E.D. Pa. 1962).

as records or communications made in the ordinary course of the corporation's business, should not be immunized from discovery merely by transmitting them to outside counsel.[40] In order for a corporation to insure itself the full benefit of a narrowly-applied privilege, it should maintain its internal organization in such a manner that it is obvious that no abuse can take place.[41]

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[40] United States v. Aluminum Co. of America, 193 F. Supp. 251 (N.D.N.Y. 1960); 37 N.Y.U.L. REV. 955, 959 (1962).

[41] See generally Maurer, *Privileged Communications and the Corporate Counsel*, 16 BUS. LAW 959, 983 (1961).