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Privilege - Extension of Attorney-Client Privilege to Corporations

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in cases like the present one (since such extreme steps were contemplated by the defendant here), it might very well be significant in cases such as those involving picketing and boycotting.

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PRIVILEGE—EXTENSION OF ATTORNEY-CLIENT PRIVILEGE TO CORPORATIONS.

Radiant Burners, Inc. v. American Gas Ass'n (N.D. Ill. 1962)

City of Philadelphia v. Westinghouse Electric Corp. (E.D. Pa. 1962)

In *Radiant Burners, Inc. v. American Gas Ass'n*,[1] it was held that a plea invoking the attorney-client privilege was not available to a corporation as a defense to a request by a plaintiff for certain documents. In *City of Philadelphia v. Westinghouse Electric Corp.*,[2] it was stated that the attorney-client privilege could be pleaded by a corporation in answer to a request by a complainant for information obtained by the company's general counsel in the course of an investigation of facts relating to a pending indictment of the corporation.

In general, the attorney-client privilege may be defined thus: "(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."[3] The purpose of the privilege is to remove any inhibition a client might have to disclose all the pertinent facts to his attorney lest the latter be forced subsequently to reveal these communications. Considering for a moment only the intent of the privilege and the problem it was intended to rectify there can be little doubt that a corporate being comes logically within its scope. Certainly, a corporation, as well as an individual, needs such protection to insure full disclosure; a corporation benefits no less than a natural person from legitimate legal assistance.[4]

Historically, of course, the privilege was extended only to communications between a legal adviser and a natural person. However, this distinction between a natural being and a legal entity has, of itself, little

1. 209 F. Supp. 321 (N.D. Ill. 1962). For discussion of this case, see Note, 4 B. C. IND. & COM. L. REV. 416 (1963) and Note, 57 NW. U. L. REV. 596 (1962).
2. 210 F. Supp. 483 (E.D. Pa. 1962).
3. 8 WIGMORE, EVIDENCE § 2292 (McNaughten rev. 1961). The distinction between the attorney-client privilege and the work-product privilege of the attorney should be kept in mind.
4. *Cf.* Simon, *The Attorney-Client Privilege As Applied to Corporations*, 65 YALE L.J. 953, 955 (1956).

validity today. This dichotomy has been abandoned for many purposes.[5] Weighing, especially, the corporation's need of the protection in the modern business world, this already weakened distinction should not be placed as a critical obstacle. However, a further and related restriction which has been traditionally imposed is not so easily dispelled. The parties invoking the privilege have always been obliged to show that all communications were made in an atmosphere of secrecy and confidence.[6] If disclosure were made in the presence of a third party, the protection was lost. Because the corporate entity is composed of many individuals, the difficulties in meeting this test may seem to be increased. In fact, in the present *Radiant Burners* case, it was suggested that this requirement be dropped regarding corporations, although it was admitted that this was a task for the legislature.[7] However, such a drastic change may not be necessary. Even at common law, communications made to an attorney by an agent of the client were given the same privileged status as statements made directly by the principal to the adviser.[8] The corporation-agent relation seems closely analogous to that of principal and agent. Thus, even if it were not conceded that more than one individual could exist as the corporation-client, it could very persuasively be argued that certain employees were valid agents of the corporation and entitled to the coverage of the privilege. This principal-agent exception to the traditional rule of strict confidentiality points up the rationale behind the requirement itself. It was assumed that if a disinterested third party were given access to the information he would be free to disclose at will what he had learned. In such a case, the privilege which demands non-disclosure would be useless. On the other hand, an agent of the client was presumably not free to make such disclosures. Certainly, at least a director or an officer is under a duty to his corporation not to promulgate information revealed in confidence. In fact, he has a definite interest in preserving the secrecy of such information. In any event, whatever may be the logical reasons for rejecting a strict interpretation of the confidentiality requirement in regard to corporations, it appears that an overwhelming

5. It should be noted, however, that a corporation cannot invoke the privilege of refusing to give self-incriminating evidence. In this regard, it has been said: "This particular privilege [i.e., the attorney-client privilege] should not be denied them merely because of their power, wealth, or quasi-public position, since — unlike the privilege against self-incrimination, which they do not enjoy — it is not intended as a shield to the weak, but rather as an encouragement to all, strong and weak alike, to consult freely with counsel." Simon, *The Attorney-Client Privilege As Applied to Corporations*, *supra* note 4 at 955.

6. United States v. Tellier, 255 F.2d 441 (2d Cir. 1958), *cert. denied*, 358 U.S. 821, 79 S. Ct. 33 (1958); Pollock v. United States, 202 F.2d 281 (5th Cir. 1953), *cert. denied*, 345 U.S. 993, 73 S. Ct. 1133 (1953). See also 8 WIGMORE, EVIDENCE § 2311 (McNaughton rev. 1961):

> No *express* request for secrecy, to be sure, is necessary. But the mere relation of attorney and client does not raise a presumption of confidentiality, and the circumstances are to indicate whether by implication the communication was of the sort intended to be confidential. These circumstances will of course vary in individual cases, and the ruling must therefore depend much on the case in hand.

7. Radiant Burners, Inc. v. American Gas Ass'n, *supra* note 1 at 323-24.

8. *Cf. Annot.* 139 A.L.R. 1250, 1254-1260 (1942), for a collection of cases supporting this proposition.

number of courts have implicitly done so.[9] Also, it is interesting to note that both the Uniform Rules of Evidence[10] and the Model Code of Evidence[11] have granted the corporation the status of client.

Even assuming that a corporation is considered a "client," there is still left unsolved the problem suggested in the above discussion of the corporate agent, namely, the scope of the privilege within the corporate structure. Since a corporation acts only through its representatives, someone must be allowed to speak on its behalf without such disclosures being considered third party statements. However, if all disclosures made on behalf of a corporation are considered privileged, the privilege would extend far beyond that allowed to an individual.[12] Several views have been posed regarding the allowable breadth of the privilege. In *United States v. United Shoe Machinery Corp.*,[13] the court did not seem to place any limitation upon which agents or employees could act as spokesmen for the corporation.[14] The court reasoned that since the client was the corporation, a disclosure by a corporate employee to an attorney for the purpose of obtaining legal assistance for the company was privileged. Under such a broad approach, it would appear that even the lowliest corporate employee would have access to the corporation's privilege.

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9. *E.g.*, Stewart Equipment Co. v. Gallo, 32 N.J. Super. 15, 17, 107 A.2d 527, 528 (1954), where the court stated: "Since a corporation can only act through its agent, it must necessarily follow that if the attorney-client privilege is to extend to corporations, as it does, it must necessarily extend to confidential communications made by the agent of the corporation." Zenith Radio v. Radio Corp. of America, 121 F. Supp. 792 (D. Del. 1954). *Cf.* Klein, *Attorney-Client Privilege and Corporations*, 12 CLEVE.-MAR. L. REV. 95, 96 (1962), for a collection of cases assuming the privilege.

10. UNIFORM RULE OF EVIDENCE § 26(3):

> As used in this rule (a) 'Client' means 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 or advice from him in his professional capacity.

11. MODEL CODE OF EVIDENCE rule 209 (1942):

> (a) Client means 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.
>
> (b) Holder of the privilege.
>
> (ii) if the client is a corporation or other association, means the corporation or other association until its existence as such is terminated.

12. Simon, *The Attorney-Client Privilege As Applied to Corporations*, *supra* note 4 at 956.

13. 89 F. Supp. 357 (D. Mass. 1950).

14. The court set out the following guides:

> The 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 the 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 proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client. 89 F. Supp. at 358-59.

Cf. Note, *The Lawyer-Client Privilege: Its Application to Corporations, The Role of Ethics, and Its Possible Curtailment*, 56 NW. U. L. REV. 235, 241 (1961).

In the present *City of Philadelphia* case, the court limited the privilege to statements made on behalf of a corporation by one in a decision making position. The test was whether "the employee making the communication, of whatever rank he may be, is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, or if he is an authorized member of a body or group which has that authority . . ."[15] The court added that ". . . it is implicit in the foregoing that the authority of the person speaking with the lawyer to participate in contemplated decisions must be actual authority."[16] It seems apparent that the court in *United Shoe* would also have required at least actual authority. Although it might be argued that since the corporation, as such, is the client, everyone comprising the corporate entity should be cloaked with the privilege, it is certainly questionable whether an appellate court would permit such a sweeping characterization. The approach of the court in the *City of Philadelphia* case, in the other hand, seems eminently more realistic. The purpose of the privilege is to insure the client the benefit of his attorney's advice based on a full disclosure of all relevant facts so that the former may best decide his course of action. Since, viewed in this light, the object of the privilege is the ultimate decision and activity of the client, in the case of a corporation it should be limited to the communications between the attorney and those who are in a position to make such decisions.[17] Certainly, all corporate employees would not be so included and, in the case of a large publicly held company, probably not even many of the stockholders. Whether a statement made by a specific employee was within the scope of the privilege would be determined by a reference to the particular facts of each case as to what influence and position the employee exerted in the company. However, such an analysis does not solve the problem of when the privilege is violated. In a large modern corporation, any significant report will be the product of the combined skills of many employees. The necessary disclosures involved in this process should not be sufficient to dissolve the privilege. Possibly, such disclosures would fall under the traditional exemption of statements made to persons who must necessarily be involved. Also, in such a situation the intent of the parties would probably reveal a desire to retain secrecy. Similarly, although disclosures might be made to certain corporate employees who are not in a decision-making position, for instance, technicians and other skilled personnel, this should not necessarily raise a presumption that an intent

15. City of Philadelphia v. Westinghouse Electric Corp., *supra* note 2 at 485. This test has been adopted in Garrison v. General Motors Corp., 213 F. Supp. 515 (S.D. Cal. 1963).

16. *Ibid.*

17. In United States v. Aluminum Co. of America, 193 F. Supp. 251, 253 (N.D.N.Y. 1960), it was declared: "I know of no authority which would hold that the privilege is lost because one executive in a corporation discloses to another such executive the factual information which he has given to counsel upon which to base a legal opinion. The document is privileged."