

Attorney-Client: Privilege as Applied to a Corporate Litigant Under the Federal Rules of Civil Procedure

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charged with the duty of defending or prosecuting in criminal proceedings.¹¹

The New Jersey court expressly approved of the reasoning and conclusions of the California decision. The court succinctly summarized the position suggested in this note:

However, the very fact that our scheme of compensation is couched in indefinite terms rather than precise monetary figures leads us to find an intent that the amount awarded should be somewhat more than the mere token or *honorarium* appearing to be the result in many states, even though the recompense must be considerably less than what would be considered full compensation were the accused able to pay. While the philosophy of the assigned counsel system is founded on the basic obligation of the bar to render gratuitous services to the indigent, legislative authorization to make any recompense from public funds, especially where that authority prescribes a general standard keyed to reasonableness, must necessarily rest on recognition that the community too should assume some financial responsibility in the matter and that the bar should not have to carry the whole load.¹²

This sharing of the burden between the community and the Bar does present a problem when, as in the instant case, the community share of the burden must be borne entirely by one county. Here the defense of three non-resident indigents cost Sauk County, with its 36,179 residents as of 1960, a total of \$15,743 or slightly more than forty cents per person.¹³ It is suggested that, since a felony is actually a crime against the state, the amount that a county be called upon to supply in the form of compensation to appointed attorneys be limited and any excess beyond the limitation be borne by the State.

ROCH CARTER

Attorney-Client: Privilege as Applied to a Corporate Litigant Under the Federal Rules of Civil Procedure 43(a)—By virtue of *United States v. Becton Dickinson and Co.*,¹ a federal district court has added a new interpretation to the already confused problem of determining the availability of the attorney-client privilege to a corporate litigant in cases arising in federal courts. This case involves a civil

In view of this sharp criticism, this writer does not feel that these jurisdictions should be included in a comparison.

¹¹ *Hill v. Superior Court*, *supra* note 9, at 14. It is interesting to note that the trial court in the *Conway* case "noted that the special assistant district attorney had been paid \$6500 for his services and expenditures and concluded that \$6500 was fair and reasonable compensation for each defense counsel's trial work, preparatory work and necessary expenditures." 19 Wis. 2d 599, 602, 120 N.W.2d 671, 673 (1963).

¹² *Horton v. State*, *supra* note 9, at 8.

¹³ Brief for Appellant, pp. 118-119, *Conway v. Sauk County*, *supra* note 1.

¹ 212 F.Supp. 92 (D.N.J. 1962).

anti-trust action in which the government filed a motion for an order requiring the corporate defendant to produce for inspection and copying certain documents containing communications between the directors, officers and employees of the defendant and its attorneys. This case arose in the Federal District Court of New Jersey, a state which, by its Evidence Act of 1960,² expressly includes a corporation within the meaning of "client" for purposes of the attorney-client privilege. The Court reasoned that under Rule 43(a) of the Federal Rules of Civil Procedure, the law of the state rather than the federal jurisdiction should apply for the purpose of determining the availability of the privilege, thus granting the privilege to the corporate defendant.

The various interpretations surrounding Rule 43(a) present a picture of complete conflict and confusion. The Rule reads as follows:

. . . All evidence shall be admitted which is admissible under statutes of the United States or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. *In any case, the statute or rule which favors the reception of the evidence governs.* . . . [emphasis supplied]

The present state of the law concerning the availability of the attorney-client privilege to a corporate litigant in the federal courts has branched into at least three divergent theories. The first was expounded by Chief Judge Campbell of the Federal District Court for the Northern District of Illinois in the case of *Radiant Burners v. The American Gas Association*.³ The decision in this case was based upon federal rather than state (Illinois) law and came to the conclusion that, contrary to wide spread prior acceptance, the attorney-client privilege was not available to a corporate litigant under federal law. However, a diametrically opposed view was propounded by the United States District Court for the Eastern District of Pennsylvania, speaking through Judge Kirkpatrick, in the case of *Philadelphia v. Westinghouse Electric Corp.*⁴ This case also decided the question on the basis of federal precedents but allowed the corporation to claim the privilege, the opposite result from that of *Radiant Burners*. Now, at a time when this conflict has not been resolved, the *Becton Dickinson* case gives us a third view, namely that state law may also be used to decide the question. The problem now before the federal courts is which of these rulings to consider as the accepted federal position.

The Hon. Alexander Holtzoff, United States District Judge for the

² N. J. REV. STAT. §2A: 84A-20 cited in the opinion.

³ 207 F.Supp. 771 (N.D. Ill. 1962). This case is noted at 46 MARQ. L. REV. (1963).

⁴ 210 F.Supp. 483 (E.D. Penn. 1962).

District of Columbia, states in an article commenting upon the effect of the Federal Rules of Civil Procedure:

One of the many interesting developments growing out of the new procedure is Rule 43, relating to evidence. It introduces a unique principle of rendering admissible any evidence that has been heretofore admissible in the courts of the United States, or which is admissible under the laws of the state in which the United States Court is held. In other words, *if either rule of law favors the admission of the evidence, it prevails over that which would exclude it.*⁵ [emphasis supplied]

Another author also points out that the purpose of the rule is to broaden the base of competency in civil cases by making evidence competent if it is admissible under federal law although not under state law.⁶ His article quotes the Chairman of the Advisory Committee on the Federal Rules of Civil Procedure as making a statement which tends to set forth the same interpretation of Rule 43(a):

It became obvious that uniformity should prevail [because actions at law and suits in equity are united] so the Committee made a rule to the effect that the rules of evidence in actions under this system should be those prevailing either at law or in equity or indeed under state practice, and the most liberal rule tending to allow the admission of evidence should be followed.⁷

Based upon the actual wording of the rule and the foregoing opinions, it would seem that few problems could arise as to the applicability of the attorney-client privilege to a corporate litigant. One would surmise that if the privilege would be denied either on the basis of federal law or equity precedent or on the basis of the law of the state in which the federal court was sitting, it must be denied in order to favor the admissibility of the evidence as required by Rule 43(a). This would seem to be equally true in both diversity and non-diversity cases. However as cases discussed above indicate, the results are not that simple. The *Beckton Dickinson* case claims to be basing its decision on Rule 43(a) yet it uses state law to uphold the privilege and thus *excludes* the evidence, when it could have admitted the evidence by denying the privilege under the *Radiant Burners* decision.

Nor does the confusion end with the divergent opinions already discussed, for other interpretations of this rule by both the courts and commentators frequently bear little relationship to its plain wording and are often diametrically opposed to each other.⁸ For example, one

⁵ Holtzoff, *A Judge Looks at the Rules*, FEDERAL RULES OF CIVIL PROCEDURE 1, at 16-17 (1960).

⁶ Green, *The Admissibility of Evidence under the Federal Rules*, 55 HARV. L. REV. 197 (1941).

⁷ *Id.* at 207.

⁸ Louisell, *Confidentiality, Conformity, and Confusion: Privileges in the Federal Courts Today*, 31 TUL. L. REV. 101, 102-103 (1956). This article presents a resumé of the divergent interpretations placed upon Rule 43(a) of the

writer feels that the federal courts are bound to apply the doctrine of *Erie v. Tompkins*⁹ to this question, applying state privilege in diversity cases but never in litigation involving federal substantive questions.¹⁰ Contentions can also be found to the effect that a rule of privilege is not a rule of "admissibility" so as to come under the purview of Rule 43(a).¹¹ The article so contending also states that it is normally desirable that the state privileges be applied but that a federal court would not be bound to do so. Some writers feel that the privilege problem can be treated separately from the question of admissibility which is supposedly governed by Rule 43(a).¹² Authority can also be found to the effect that state law must be followed where it denies a privilege but not where it grants one.¹³

Other cases have held that under Rule 43(a), all state privileges must control,¹⁴ but other cases as well as commentaries indicate that only statutory state privileges must control,¹⁵ while others hold that state privileges are never applicable.¹⁶ With the cases seeming to apply either state or federal privileges quite indiscriminately, the law regarding the purpose and power of Rule 43(a) is extremely confused, a fact that has generally been admitted.

However the law had seemed to be settled on at least one point; that is: state privileges need not be applied in a "federal question" case when they are broader than those traditionally recognized in the federal courts.¹⁷ And yet the *Becton Dickinson* case may be interpreted to have overthrown this once steadfast principle. It does apply a state privilege

Federal Rules of Civil Procedure. The import of the entire article is to the effect that the federal courts must apply state privileges in all cases, whether they are based upon diversity of citizenship or not. (see p. 121).

⁹ 304 U.S. 64 (1938).

¹⁰ Weinstein, *Recognition in the United States of Privileges of Another Jurisdiction*, 56 COL. L. REV. 535, 545-547 (1956).

¹¹ Pugh, *Rule 43(a) and the Communication Privilege Under State Law: An Analysis of Confusion*, 7 VAND. L. REV. 556, 563 (1954).

¹² Degan, *The Feasibility of Rules of Evidence in Federal Courts*, 24 F.R.D. 341, 353 (1960).

¹³ *Supra* note 6.

¹⁴ *Palmer v. Fisher*, 228 F.2d 603 (7th Cir. 1955), *cert. denied*, 351 U.S. 965 (1956); *Berdon v. McDuff*, 15 F.R.D. 29 (E.D. Mich. 1953).

¹⁵ *Anderson v. Benson*, 117 F.Supp. 765 (D. Neb. 1953); see also, 5 MOORE'S FEDERAL PRACTICE §26.31 (3d ed. 1944) which states, . . . [a] "state statute, if there is one, should control though it is more restrictive than Federal precedents, but, if there is no state statute and the Rule is doubtful as to the particular situation, . . . more liberal federal precedents may be followed."

¹⁶ *Scourtes v. Fred Albrecht Grocery Co.*, 15 F.R.D. 55 (N.D. Ohio 1953); *Willard C. Beach Air Brush Co. v. General Motors Corp.*, 118 F.Supp. 242, 244 (D.N.J.) 1953, *aff'd.*, 214 F.2d 664 (1954).

¹⁷ *Fraser v. United States*, 145 F.2d 139 (6th Cir. 1944), *cert. denied*, 324 U.S. 849 (1944). Added breadth should not be given to a privilege by virtue of state law where inequities would result therefrom; *United States v. Bruner*, 200 F.2d 276, 280 (6th Cir. 1952) refused to apply a state privilege in a "Federal question" case; *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961) refused to apply a state privilege in a federal criminal trial; *cf.* the opposite holdings in diversity of citizenship cases, *e.g.* *Stricker v. Morgan*, 268 F.2d 882, 888 (5th Cir. 1959).

statute in a "federal question" case, citing as its authority for so doing, *Stricker v. Morgan*,¹⁸ a diversity case. The attorney-client privilege, as applied to a corporate litigant may or may not be considered to be "traditionally recognized" in the federal courts depending upon whether you follow the *Radiant Burners*¹⁹ or the *Philadelphia* case. The court in *Becton Dickinson* concludes in its opinion that state law must apply in the determination of the availability of the privilege to a corporation completely irrespective of the position of the federal law, by virtue of Rule 43(a).

In this writer's opinion, the holding in the *Becton Dickinson*²⁰ case is contrary to the policy that a state privilege may not broaden the scope of a federal privilege in a non-diversity case.²¹ By virtue of the reasoning behind *Erie R. R. v. Tompkins*,²² state law should govern privilege when it governs the rest of the substantive law of the case (i.e. a diversity case) so that the federal court will reach substantially similar results to those which the state court would reach. In a case governed by federal substantive law, however, it could be argued that, while a case may directly concern a federal matter, the relationship between the corporation and its attorney is a transaction separate and distinct from the federal matter and can thus properly be covered by state law. The privilege arises out of contract between the attorney and his client. This is a "state" contract and if what occurs is not privileged under state law, why should it be privileged because a federal matter is concerned? On the other hand, if the question is one of introducing evidence to prove facts pertaining to a federal matter, a state privilege should not stand in the way of the federal court ruling so as to accomplish a federal purpose. Thus the policy of the words used in the rule allowing maximum admissibility can be theoretically justified under these circumstances. The *Becton Dickinson* case falls under the latter and allows a state to impose its privileges or lack of them upon a wholly federal domain.²³ In any event, Rule 43(a) is a very weak basis upon which to rest a decision. The apparently ambiguous nature of the Rule was recognized as far back as 1941.²⁴ Since then, the courts have derived little or no settled policy regarding its purpose and application.

The above analysis of existing case law leaves few, if any, settled principles as to the availability of the attorney-client privilege to a corporate litigant in the federal courts. The district courts must first decide what the state of the federal law is concerning the availability of

¹⁸ 268 F.2d 882, 888 (5th Cir. 1959).

¹⁹ *Supra* note 3.

²⁰ *Supra* note 4.

²¹ *Supra* note 17.

²² *Supra* note 9.

²³ *Supra* note 10; for a similar opinion also see 2B BARRON AND HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE §967, at 243-244 (1961 ed.).

²⁴ *Supra* note 6, at 224-225.

the attorney-client privilege. This law is now completely unsettled between the *Philadelphia* and *Radiant Burners* cases. When it is decided whether or not federal precedents will extend the privilege to a corporation, then it must be decided whether these precedents or the prevailing law of the state in which the federal court is sitting must control. It seems that when the question finally becomes settled, the most probable result will be that a corporate client would be entitled to claim the attorney-client privilege by virtue of a combination of federal and state precedents in a "federal question" case and that state privileges will control, as substantive law, in a diversity case.²⁵

STEPHEN L. BEYER

Criminal Law: Appointment of Counsel for Indigent Defendant in Non-Capital State Court Proceeding Required by Due Process Clause of Fourteenth Amendment—On March 18, 1963 the United States Supreme Court overruled a decision of twenty-one years standing and held that the State of Florida's failure to appoint defense counsel in a non-capital criminal case deprived the petitioner of due process as guaranteed by the Fourteenth Amendment. *Gideon v. Wainwright*.¹

Petitioner Gideon was charged in a Florida court with having broken and entered a poolroom with intent to commit a misdemeanor—a felony under Florida law. Being indigent, petitioner asked the court to appoint counsel for him. The court denied this request on the basis that no capital offense was charged and that under the law of Florida, counsel need be appointed only in capital cases. Petitioner conducted his own defense, was convicted and sentenced to a term of five years. After state habeas corpus proceedings were exhausted, the Supreme Court granted certiorari in order to review the question of possible violation of constitutional rights with special attention to the then controlling decision of *Betts v. Brady*.²

The facts in the *Gideon* case are remarkably similar to those of the 1942 *Betts* case. In both proceedings the defendant requested counsel in a non-capital felony charge; in both cases counsel was denied and the defendant was forced to conduct his own defense without in any way waiving his rights. However, in the *Betts* case, the rule was laid down that due process was a flexible concept which must be tested by an appraisal of the totality of facts in a given case.

²⁵ See, holding to this effect, *Comercio E. Industria Continental v. Dresser Industries*, 19 F.R.D. 513 (S.D.N.Y. 1956); *Georgia Pacific Plywood Co. v. United States Plywood Corp.*; 18 F.R.D. 463 (S.D.N.Y. 1956); see also, Note, 46 MARQ. L. REV. 551 (1963) for other holdings to the same effect.

¹ 372 U.S. 335 (1963).

² *Betts v. Brady*, 316 U.S. 455 (1942).