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Stephen L. Beyer

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Attorney-Client Privileges: Application To A Corporate Client—

During the course of discovery and pretrial examination, Radiant Burners' attorneys attempted to subpoena certain American Gas Association documents which had been given to its New York counsel in conjunction with prior litigation on the part of the Association. The Association contended that these documents were not subject to discovery because they were given to the law firm for purposes of litigation and therefore were protected from disclosure under the attorney-client privilege. The United States District Court for the Northern District of Illinois in an opinion by Judge Campbell held that the corporation was not entitled to claim the privilege. *Radiant Burners Inc. v. American Gas Association*.¹

This decision conflicts with recognized rules of law. The writer was unable to find any case which accords with this decision. However, as the Court stated, notwithstanding the fact that many decisions hold in favor of applying the privilege to a corporate client, few, if any, have discussed the proposition upon its merits.² Since the law of Wisconsin and other states generally agrees with the federal law concerning this subject, further discussion primarily will be limited to an analysis of federal cases. In *Radiant Burners*, the court passively appears to use Federal law relative to the applicability of the privilege with respect to corporations. It cites federal rather than Illinois authority to substantiate the decision.³

Several cases, including United States Supreme Court decisions have reasoned that since a corporation can sue and be sued, it needs the privilege to protect confidential information necessarily revealed in dealing with counsel. The same courts, and others, unquestionably assume that the privilege exists on behalf of a corporate client.⁴ Text writers also tend to include a corporate entity as a qualified "client."⁵

¹ 207 F. Supp. 771 (N.D. Ill. 1962).

² *Id.* at 773.

³ *Supra* note 1.

⁴ *Stewart Equipment Co. v. Gallo*, 32 N.J. Super. 15, 107 A. 2d 527 (1954) citing *State v. Loponio*, 85 N.J.L. 357, 88 Atl. 1045 (1913) which applies the privilege to a corporation's agent. *Ex Parte Schoepf*, 74 Ohio St. 1, 77 N.E. 276 (1906) directly applies the privilege to a corporate client. The most impressive authority in favor of applying the privilege is *U.S. v. Louisville and Nashville R.R.*, 236 U.S. 318, 336 (1915) which states, "The desirability of protecting confidential communications between attorney and client as a matter of public policy is too well known and has been too often recognized by text books and courts to need extended comment now. If such communications were required to be made the subject of examination and publication, such enactment would be a practical prohibition upon professional advice and assistance." See also *Connecticut Mutual Life Ins. Co. v. Schaefer*, 94 U.S. 457, 458 (1876); *Lalanc and Grosjean Mfg. Co. v. Haberman Mfg. Co.* 87 Fed. 563, 564 (S.D.N.Y. 1898) to the same effect. The existence of the privilege is often assumed without discussion. E.g. *Consolidated Theatres Inc. v. Warner Bros. Circulation Management Corp.*, 216 F. 2d 920 (2d Cir. 1954).

⁵ 8 WIGMORE, EVIDENCE §2291 (McNaughton Rev. 1961) applies a policy argument which is equally applicable to both corporations and private individuals

The American Law Institute in its *Uniform Rules of Evidence* also agrees with this application. It defines a client as, "a person or corporation or other association that, directly or through an authorized representative, consults a lawyer. . . ."⁶ State law also follows a like pattern, in that most statutory statements of the privilege use the word "client" rather than "person." A corporation would more readily fit into the former of these terms.⁷ English law apparently accords with the American jurisdictions in that it also has applied the privilege to a corporate client by means of a codification.⁸

The reasoning used in arriving at the instant decision was twofold. First the court drew a comparison between the attorney-client privilege and the privilege against self-incrimination. It pointed out that the reasoning and basis for these two privileges were sufficiently similar that their application should be limited by the same criteria. For this reason the court ruled that only natural persons, and not corporations, were entitled to claim the protection of the attorney-client privilege.

The above reasoning contains various weaknesses. The privilege against self-incrimination is a remedy for the effects of the old Star Chamber; basically it is a tool for the protection of the weak against themselves. The attorney-client privilege is designed to protect the lawyer-client relationship to the end of full disclosure by the client. One benefit arising from such disclosure is more just and accurate litigation. This purpose is fulfilled completely when persons and corporations are held to be "clients" within the privilege. Any person or business entity in need of legal counseling falls within the scope of the basic reasoning which supports the attorney-client privilege. The privilege against self-incrimination is denied to corporations in most instances on grounds of public policy.⁹ This policy, however, should not be used to thwart an extension of the attorney-client privilege to corporations; such privilege is designed to encourage both the strong and the weak to consult freely with counsel.

The second of the court's objections to the application of the privilege to a corporate client is the lack of a specified person to qualify as the "communicating client."¹⁰ The court reasoned that a corporation is likely to be owned and operated by many separate individuals and thus cannot put forth any one spokesman who qualifies as a "client." The court also raised the problem of determining who is the client and who is a third party, i.e. the type of person whose

(see essays quoted therein). See also McCORMICK, EVIDENCE Chap. 10 (1954 ed.).

⁶ UNIFORM RULES OF EVIDENCE, Rule 26 (3).

⁷ See statutes listed in 8 WIGMORE, EVIDENCE §2292 (McNaughton Rev. 1961).

⁸ The English Companies Act of 1948 codifies the privileges, presumably for corporations, 11 and 12 Geo. 6, c. 38 §175.

⁹ 8 WIGMORE, EVIDENCE §2259 (a) (McNaughton Rev. 1961).

¹⁰ *Supra* note 1, at 774.

knowledge of the subject matter would "profane" the communication by destroying its confidentiality.

There are two primary lines of thought on the "communicating client" question. One limits the privileges to officers and directors of the corporation who communicate to an attorney on behalf of the corporation for the purpose of securing legal advice. The other extends its application to certain categories of employees.

In the first category doubt exists regarding the "client" status of a director when he is not an officer and when the board of directors has not cloaked him with the authority to act in such capacity. There is authority for the proposition that a director as well as an officer would qualify.¹¹ However, this is not the case in the Federal Courts. They refuse to qualify the communications uttered by a director on the grounds that his attendance at discovery proceedings cannot be compelled.¹² From a practical viewpoint therefore, an attorney, interested in preserving the privilege, should pose questions concerning the subject matter desired to be protected only to corporate officers or to directors who are acting under board authorization.

The second line of inquiry asks: "What about employees?" The problem is whether the employee is acting as the corporation itself and is the "communicating client," or whether he is a third party to the attorney-client relationship whose knowledge of the subject matter would violate the "confidential" requirement of the privilege. The United States Supreme Court, in *Hickman v. Taylor*,¹³ states (*dicta*) that an employee not also an officer acts only as a witness and not as the client itself, in giving information to the corporation's attorney. He is not the client, and therefore, the privilege would fail.¹⁴ Other federal cases, however, hold that the communications of all officers, directors, employees, or "outside counsel" are privileged and that none of these persons are "strangers" who would profane the communication.¹⁵

A comprehensive article on the subject suggests that employees be divided into three categories: source agents, communicating agents, and managing agents. This article applies the principles of agency law

¹¹ *Stewart Equipment Co. v. Galle*, 32 N.J. Super. 15, 107 A. 2d 527 (1954), where the opinion seems to assume that a director as well as an officer would qualify as spokesman for the corporation.

¹² *FED. R. CIV. P. 37* (d) as construed by *Campbell v. General Motors Corp.*, 13 F. R. D. 331 (S.D.N.Y. 1952).

¹³ *Hickman v. Taylor*, 320 U.S. 495 (1947) (actually applies to a partnership and the "work product" privilege but also points out the employee problem and shows what communications are not privileged).

¹⁴ For an analysis of this viewpoint see cases cited in note 24; Simon, *The Attorney-Client Privileges as Applied to Corporations*, 65 *YALE L.J.* 953, 960 (1956).

¹⁵ *U.S. v. United Shoe Machinery Corp.*, 89 F. Supp. 357 (D. Mass. 1950); *Zenith Radio Corp. v. Radio Corp. of America*, 121 F. Supp. 792, 795 (D. Del. 1954).

to determine the availability of the privilege as to managing and communicating agents. The writer feels that the real problem arises with respect to source agents and creates further distinctions in this area which are beyond the scope of this article.¹⁶

In *Radiant Burners* the court felt that the position of "client" would be filled best by the stockholders since they possess a proprietary and pecuniary interest in the corporation.¹⁷ This theory disagrees with past cases and treatise writers as previously shown herein. Traditionally stockholders have been regarded as "strangers," and their communications to a corporation's attorney were not privileged.

Diametrically opposed to *Radiant Burners*, is the more recent case of *Philadelphia v. Westinghouse Electric Corp.*¹⁸ At the outset of the opinion Judge Kirkpatrick writing for the Court, leveled a broadsides attack upon *Radiant Burners* and unequivocally refused to be guided by that decision.¹⁹ He distinguished the attorney-client communication from the attorney-witness relationship and recognized the need for a solution to the problem of which corporate personnel can qualify as the "client" in communications with counsel concerning matter to be protected by the privilege. In the opinion the court proposed the following test to be used in determining this issue: the employee (not necessarily an officer) may be of any rank and still qualify for the privilege, provided however, that he 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. . . ." ²⁰ Any person in this category personifies the corporation, and the privilege would attach to communication made by him to the attorney on behalf of the corporation. In all other instances, the employee would be a mere third-party witness or "stranger" with respect to the privilege. Under the *Philadelphia* facts, the court held that an employee was not in the privileged category and therefore, could not claim the privilege on behalf of the corporation.²¹

If the *Radiant Burners* reasoning is adopted in later cases, the consequences thereof could be extremely far-reaching. The opinion was rendered to support on interlocutory order arising from pre-trial

¹⁶ Simon, *The Attorney-Client Privilege as Applied to Corporations*, 65 YALE L.J. 953, 963-66 (1956).

¹⁷ *Supra* note 1.

¹⁸ 210 F. Supp. 483 (N.D. Ill. 1962).

¹⁹ "Preliminarily, I may say that I find myself unable to follow Judge Campbell's decision (*Radiant Burners Inc. v. American Gas Association*) to the effect that the attorney-client privilege is not available to corporations. His opinion is supported by a good deal of history and sound logic, but the availability of the privilege to corporations has gone unchallenged so long and has been so generally accepted that I must recognize that it does exist."

²⁰ *Supra* note 18.

²¹ *Supra* note 18.

discovery proceedings. This type of order is not appealable in the federal courts.²² Moreover, when such order is issued the corporation's attorney must turn over the requested information. The detrimental effects upon a business whose trade secrets, vital to its continued success, must be disclosed to its competitors are obvious. Irreparable damage could be caused to the corporation before an opportunity would arise to have the question reviewed by an appellate tribunal.

Philadelphia v. Westinghouse Electric Corp. demonstrates that the *Radiant Burners Inc. v. American Gas Association* case has not started a general trend in the law. The attorney-client privilege is deeply ingrained and its application to a corporate client will be difficult to dislodge.²³

STEPHEN L. BEYER

Sales: Failure to File upon Removal Voids Vendor's Reservation of Title as against a Bona Fide Purchaser—One James purchased a car from Hudiburg, an Oklahoma dealer, paying the \$500.00 down payment with a worthless check and executing a conditional sale contract for the remainder of the purchase price. Hudiburg held the certificate of title. James then took the car to Georgia where he obtained a certificate of title (Georgia being a "no title" state). He brought the car to Wisconsin, obtained a Wisconsin certificate of title, and sold the car to a dealer who sold it to Ponce. This suit was instituted by Hudiburg, who located the car two years later, to replevy it from Ponce. The Court held that Hudiburg could not assert title against Ponce, because the conditional sale contract had not been filed in Wisconsin within ten days after Hudiburg received notice of its removal to this state. *Hudiburg Chevrolet v. Ponce*.¹

A conditional sale contract is an example of the divided property interest or "split title" concept.² In a conditional sale the vendor usually delivers the goods to the vendee, but retains title in himself until the price is fully paid.³ The vendee has possession and beneficial ownership of the goods while the vendor's reserved title is his security for the payment of the price and is equal to the outstanding balance due him on the price.⁴

²² The only interlocutory orders which are appealable are those set forth in 28 U.S.C. 1292.

²³ A subsequent article will deal with another approach to the problem in which a federal district court applies state law to decide a similar fact situation and applies the privilege to a corporate client. *United States v. Becton Dickinson and Co.*, 212 F. Supp. 92 (D.N.J. 1962).

¹ 17 Wis. 2d 281, 116 N.W. 2d 252 (1962).

² VOLD, *LAW OF SALES* §57 (2d ed. 1959).

³ See BOGERT, *COMMENTARIES ON CONDITIONAL SALES* §29 (1924). (ULA, Vol. 2A).

⁴ *Supra* note 2.