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Corporations—Attorney-Client Privilege—Nonavailability of the Privilege to Corporations.—*Radiant Burners, Inc. v. American Gas Ass'n.*[1]— During the course of discovery proceedings in a federal district court, counsel for plaintiff moved to inspect certain documents submitted by a New York law firm to the counsel of record for American Gas Association (AGA). A claim of the attorney-client privilege was urged for certain documents on grounds that information contained therein was obtained by the New York firm in its capacity as counsel for AGA. At a pre-trial hearing held on April 27th, it was ruled that certain documents qualified for the privilege and that those not within the privilege were to be handed over to counsel for plaintiff. A second group of documents was to be ruled on after further consideration of their contents. In a memorandum opinion the court reversed its earlier pre-trial ruling. HELD: A corporation is not entitled to claim the attorney-client privilege. The court also ruled: (1) The documents excluded earlier due to an improper application of the privilege were excludable under the attorney's "work-product" privilege; (2) those documents which were to be studied further did not qualify for the "work-product" privilege.[2] A supplemental opinion was issued which reaffirmed the court's earlier rulings.[3] The court restated as its reasons that (a) the courts have heretofore assumed the privilege applies to corporations; (b) secrecy which is so essential to the existence of the privilege is impossible in a corporation; and (c) the privilege is analogous to the privilege against self-incrimination which is fundamentally personal in nature.[4]

The attorney-client privilege, which has its roots in early common law,[5] has long-standing recognition and approval despite the fact that it excludes relevant evidence often materially important to the outcome of legal proceedings. The privilege is based on the public policy that effective legal advice can be rendered by an attorney only if predicated on the fullest disclosure of all relevant and material facts by the client to his attorney. It is felt that a party will be more responsive and cooperative in divulging such information if assured that the law will treat as privileged those communications made in confidence to his counsel. Consequently, the privilege is widely upheld on the theory that it serves to facilitate and promote the administration of justice.[6]

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[1] 207 F. Supp. 771 (N.D. Ill. 1962).

[2] Id. at 776.

[3] 209 F. Supp. 321 (N.D. Ill. 1962).

[4] Despite his ruling, Judge Campbell remarked:

> . . . due to the large and complex nature of modern corporate business transactions corporations should in fact be entitled to the attorney-client privilege. However, I am not a Court of sufficient importance or authority to create such a privilege by judicial ordination.

Id. at 325.

[5] 8 Wigmore, Evidence § 2292 (McNaughton rev. 1961). Professor Wigmore's definition is generally regarded as expressive of the common law rule:

> Where legal advice of any kind is sought from a professional legal advisor in his capacity as such, the communications relating to that purpose made in confidence by the client are at his instance permanently protected from disclosure by himself or by the legal advisor except the protection be waived.

[6] Id. at § 2291.

The decision reached in the instant case marks the first time a court has seen fit to draw a distinction between the individual and corporate clients' right to assert the attorney-client privilege, although the same policy considerations are involved.[7] After further research of the problem, Judge Campbell concluded that the common law privilege was never meant to apply to corporations. However, considerable support for a contrary conclusion can be found.

An important body of case law has upheld a corporation's right to claim the privilege where the circumstances warrant its application.[8] Furthermore, thirty-nine states[9] have passed statutes codifying the privilege that attaches to the confidential communications between a client and his attorney. Because of the application of the privilege to corporations, the legislatures of these states must have known of this practice, and, therefore, by their failure to differentiate between an individual and a corporate client, regarded them as equally entitled to the privilege. Both the Model Code of Evidence, published in 1942 by the American Law Institute, and the Uniform Rules of Evidence, drafted in 1953 by the Commissioners of Uniform State Laws, explicitly recognize a corporation's right to the privilege.[10]

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[7] Note, 56 Nw. U.L. Rev. 235, 241 (1962):

> . . . it appears 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. It is the office of these men to fear for the well-being of the corporation just as an individual fears for his own well-being, and absent the privilege, corporate agents would doubtless be reluctant to disclose facts which might work against the corporation if disclosed.

[8] United States v. Louisville & N.R.R., 236 U.S. 318, 336 (1915); United States v. Aluminum Co. of America, 193 F. Supp. 241 (N.D.N.Y. 1960); Georgia-Pac. Plywood Co. v. United States Plywood Corp., 18 F.R.D. 463 (S.D.N.Y. 1956); Zenith Radio Corp. v. RCA, 121 F. Supp. 792 (D. Del. 1954); United States v. United Shoe Mach. Corp., 89 F. Supp. 357 (D. Mass. 1950); A. B. Dick Co. v. Marr, 95 F. Supp. 83, 102 (S.D.N.Y. 1950); Lalance & Grosjean Mfg. Co. v. Haberman Mfg. Co., 87 Fed. 563 (C.C.S.D.N.Y. 1898); Stewart Equip. Co. v. Gallo, 32 N.J. Super. 15, 107 A.2d 527 (1954); Ex parte Schoepf, 174 Ohio St. 1, 77 N.E. 276 (1906); Davenport Co. v. Pennsylvania R.R., 166 Pa. 480, 31 Atl. 245 (1895); Robertson v. Virginia, 181 Va. 520, 25 S.E.2d 352 (1943); Southwark & Vauxhall Water Co. v. Quirk, 3 Q.B.D. 315 (1878).

[9] Memorandum for Defendants, p. 13. See generally, 8 Wigmore, op. cit. supra note 5, § 2292, for a partial list of these statutes which are regarded as expressive of the common law rule.

[10] Model Code of Evidence Rule 209 and Uniform Rule of Evidence 26(3) are identical.

> (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. . . .

In the Introduction (vii) to the Model Code it is important to note that the authors stated:

> [The Code] . . . is the orderly statement of those basic or specially important subjects of the general common law susceptible of useful restatement.

In regard to the attorney-client privilege, the authors of the Code indicated that Rule 209 represented no deviation from existing common law. Thus far, New Jersey has been the only state to adopt the Uniform Rules of Evidence. See N.J. Stat. Ann. 2A:84A-20(1) (Supp. 1961).

It should be noted, however, that these cases have not considered the basic issue here in question, *i.e.*, does the privilege exist at all for the corporation, but rather have assumed that point and merely decided whether or not in a given case the communications qualify for the privilege.

But, while the court is correct in pointing out that cases supporting the privilege are based upon this assumption, one court has explicitly stated that so many years of assumptions make for a well settled rule, remarking:

> I find myself unable to follow Judge Campbell's decision 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.[11]

While no attempt will be made to forecast how the Court of Appeals might decide the issue,[12] an analysis of some of the more important reasons assigned by the District Court for reaching its conclusion contained in its original as well as supplemental opinion is in order. One of the most essential features of the common law rule is confidentiality. The statutes, case law, treatise writers and commentators are in fundamental agreement that the communication to be privileged must not only be intended to be confidential but must also be kept confidential.[13] In the case of the individual client, once the attorney-client relationship has been established, a presumption of secrecy seems warranted where the communications are not made in the presence of third parties.[14] The exact opposite presumption was found by the present court where a corporate client was involved.[15]

It is submitted that this conclusion seems unwarranted and that the "thickness of the corporate walls" may have been underestimated. The possibility of disclosure to third persons cannot be controverted. However, the court seems to be equating mere possible disclosure with actual disclosure. Instead of relying on demonstrations of such disclosures which would destroy the privilege, the court proceeds on a speculative line of reasoning that there should be a presumption of lack of confidentiality because of the nature of corporations. In this respect, Judge Campbell was evidently disturbed by the fact that members of AGA's board of directors and executive committees served in corporations engaged in various aspects of the utility industry. Each had extensive business dealings with others and because of this intimate interlocking relationship, the court was prompted to conclude that

> Information from or in the hands of these individuals would unquestionably be information from or in the hands of persons outside

[11] City of Philadelphia v. Westinghouse Elec. Corp., 5 CCH Trade Reg. Rep. ¶ 70,536 (E.D. Pa. 1962) (attorney-client privilege held not applicable on other grounds).

[12] Application for leave to appeal has been filed with the Court of Appeals for the Seventh Circuit, but the court has not yet acted on it.

[13] Wigmore, op. cit. supra note 5, § 2311.

[14] Ibid.

[15] 207 F. Supp. at 773-75.

> the scope of the term 'client.' . . . It is most unrealistic to presume that such communications are made with the intention of confidentiality or could possibly avoid the 'profanation' so clearly condemned by the Rule as created at common law.[16]

However, the court again *assumes* there have been actual disclosures and that the communications were not intended to be confidential, without proof to that effect. Furthermore, the court appears to have assumed a breach of the fiduciary duty owed by the directors to the corporation.

It has long been recognized that the corporation can only act through its agents and that comunications remain privileged in instances where the agent acts as a conduit between the client and the attorney or where the communication originates with the agent himself.[17] It has also been recognized that the privilege is not waived if the communications are disclosed to other interested agents,[18] or to those agents who are necessary for its transmittal to counsel.[19] Therefore, the secrecy of the communications will not be destroyed where it can be shown that the information was in the hands of authorized agents of the corporation.[20]

Also, instead of condemning the attorney-client privilege entirely, the court should have followed the more reasonable approach adopted in *United States v. Aluminum Co. of America* and *Zenith Radio Corp. v. RCA*.[21] Rather than engage in wide-sweeping generalizations, the court in each case preferred to make a detailed analysis of each document to determine whether it qualified for the privilege. In the *Zenith Radio* case, it was pointed out that the privilege "is not a blanket one," and must be decided by "the special relationship that must be found for each document separately considered."[22] The court in the instant case, therefore, would have been on firmer ground had it looked to see if there were actual disclosures of the communications.

Another reason assigned for the present ruling was that the attorney-client privilege is a personal privilege and as in the case of the privilege against self-incrimination, can only be claimed by a natural person.[23] However,

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[16] Id. at 774.

[17] Stewart Equip. Co. v. Gallo, supra note 8. See 8 Wigmore, op. cit. supra note 5, § 2317.

[18] See United States v. Aluminum Co. of America, supra note 8, at 253, where the court stated:

> 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.

[19] Davenport Co. v. Pennsylvania R.R., supra note 8.

[20] See Simon, The Attorney-Client Privilege as Applied to Corporations, 65 Yale L.J. 953, 957 (1956), where the author points out that

> If the day-to-day legal affairs of corporations are to be carried forward in a practical fashion, the director or officer should be permitted the privilege for confidential disclosures bearing on corporate matters within the area of his responsibility. With respect to directors still in office, it is hornbook law that they are responsible for the corporation as a whole and should interest themselves in all its affairs.

[21] Supra note 8.

[22] Zenith Radio Corp. v. RCA, supra note 8.

[23] 207 F. Supp. at 773, 775.

denial of the privilege against self-incrimination to a corporation[24] does not compel a similar conclusion with respect to the attorney-client privilege.[25] In *United States v. White*,[26] Mr. Justice Murphy speaking for the Court stated the underlying reasons behind the privilege against self-incrimination:

> The constitutional privilege against self-incrimination is essentially a personal one, applying only to a natural individual. . . . It is designed to prevent the use of legal process to force from the lips of the accused individual the evidence necessary to convict him or to force him to produce and authenticate any personal documents that might incriminate him. Physical torture and other less violent but equally reprehensible modes of compelling the production of incriminating evidence are thereby avoided.

It is therefore evident that the acts condemned by this privilege can only be applied to a natural person.[27] The policy supporting the attorney-client privilege, on the other hand, is based on the theory that suppression of relevant evidence is outweighed by the need for clients to secure legal advice without fear that their attorneys will be forced to disclose communications made in confidence.

In reversing its earlier ruling, the court placed certain documents within the "work-product" privilege.[28] While extended discussion of this ruling is beyond the scope of this note, it is suggested that this conclusion would provide no safeguard for the corporate client. The attorney-client privilege belongs to the client and is absolute unless waived by him.[29] The "work-product" privilege, on the other hand, belongs to the attorney and may be defeated by a showing of "good cause."[30] In the instant case, the documents are within the hands of counsel for defendants; and in all likelihood they would be discoverable upon the argument that they are admissible evidence, which evidence is unavailable to plaintiff, and/or that they contain certain information which might lead to relevant evidence. The "work-product" privilege, therefore, is not an adequate substitute for the attorney-client privilege.

The impact of the instant case is obvious. The complexity of our legal system has made it necessary for the individual and especially the corporation to seek legal advice continuously. Denial of the attorney-client privilege to the corporate client results in an anomalous situation for it would mean that businesses which are largely responsible for the economic well-being of this country, cannot secure legal assistance without fear that their confidential comunications might be disclosed.

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[24] Wilson v. United States, 221 U.S. 361 (1910).

[25] Memorandum for Defendants, pp. 25-31.

[26] 322 U.S. 694, 698 (1943) (labor union not entitled to privilege against self-incrimination).

[27] Memorandum for Defendants, at 29.

[28] 207 F. Supp. at 776.

[29] See note 5 supra.

[30] Fed. R. Civ. P. 34. See Hickman v. Taylor, 329 U.S. 495, 511 (1947).