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Volume 12
Issue 1 *Corporation Tort Problems (A
Symposium)*

Article

1963

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Recommended Citation

Richard C. Klein, *Attorney-Client Privilege and Corporations*, 12 *Clev.-Marshall L. Rev.* 95 (1963)

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Attorney-Client Privilege and Corporations

Richard C. Klein*

ON AUGUST 3, 1962 a memorandum decision was handed down in an antitrust proceeding which startled practicing attorneys and text writers alike. It held specifically that the "attorney-client privilege" did not apply to the corporate client.¹ What had been accepted as law for over one hundred and twenty-five years was curtly cast aside by Chief Judge William J. Campbell.

The decision was an even greater surprise to the parties involved in the action. There was, in fact, no brief submitted by either party on the precise issue, because the presiding judge had been reluctantly applying the privilege for about a year during the course of the action and the parties were not alerted that this issue was going to be considered.

The action was brought by the plaintiff in connection with defendants' violations of antitrust legislation to the damage of the plaintiff. During the pretrial and discovery proceedings, the judge read and considered several files of assorted documents submitted by counsel for the defendant. Counsel contended that the information contained in these files was obtained by them in their capacity as attorneys for American Gas Association, a defendant, and that therefore, the documents were privileged from disclosure to the plaintiff. Some of the documents were returned to the defendant's counsel during the course of an earlier pretrial hearing and other documents were designated as not being of the nature to justify the allowance of the attorney-client privilege. These latter documents were delivered over to plaintiff's attorney for inspection. From that earlier hearing there remained eight letters, and one document from the Delco Appliance Division of General Motors, one of the other defendants, with which the judge was concerned in this ruling to which defense counsel contended that the attorney-client privilege applied.

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¹ *Radiant Burners, Inc. v. American Gas Association, et al.*, 207 F. Supp. 771 (N. D. Ill., Aug. 3, 1962).

In his ruling, Campbell, Chief Judge, stated:

I myself and from their briefs all counsel herein, have taken for granted or presumed that a corporation is entitled to the privilege. Indeed, as previously noted herein, I have granted it in this case. My subsequent research into the problem, however, has failed to indicate any authority for so doing or wherein the courts *decided* that the privilege should be extended to corporations.

While most of the cases alluding to this point have not explained in express terms why they have treated the attorney-client privilege as applicable to corporations, the trial court here underestimated the weight of the decisions which have applied the privilege to such cases. For one hundred and twenty-five years the judiciary have applied the privilege to corporations without dispute.² In 1950 a court in New York stated.³

² The following cases have assumed or held the privilege to exist:

FEDERAL cases:

United States v. Louisville & Nashville R. R., 236 U. S. 318, 336 (1919); Belanger v. Alton Box Board Co., 180 F. 2d 87, 93-94 (7th Cir. 1950); Cole v. Hughes Tool Co., 215 F. 2d 924, 930-31 (10th Cir., 1954); A. B. Dick Co. v. Marr, 95 F. Supp. 83, 102 (S. D. N. Y. 1950); United States v. United Shoe Mach. Corp., 89 F. Supp. 357 (D. Mass. 1950); Zenith Radio Corp. v. R. C. A., 121 F. Supp. 792 (D. Del. 1954); United States v. Aluminum Co. of America, 193 F. Supp. 241 (N. D. N. Y. 1960); Georgia-Pacific Plywood Co. v. United States Plywood Corp., 18 F. R. D. 463 (S. D. N. Y. 1956); RCA v. Rauland Corp., 18 F. R. D., 440 (N. D. Ill. 1955); Lalance & Grosjean Mfg. Co. v. Haberman Mfg. Co., 87 F. 563 (C. C. S. D. N. Y. 1898); Leonia Amusement Corp. v. Loew's Inc. 13 F. R. D. 438 (S. D. N. Y. 1952); International Minerals and Chemicals Corp. v. Golding-Keene Co., 162 F. Supp. 137 (W. D. N. Y. 1958); Commercio E. Industria Continental, S. A. v. Dresser Industries, Inc., 19 F. R. D. 513 (S. D. N. Y. 1956); United States v. American Radiator & Standard Sanitary Corp., 1958 CCH-Trade Cases ss 68,954 (W. D. Penn. 1958); United States v. Insurance Board of Cleveland, 1954 CCH-Trade Cases ss 67,873 (N. D. Ohio 1954); Wonne-man v. Stratford Securities Co., Inc., 23 F. R. D. 281 (S. D. N. Y. 1959).

STATE cases:

Schmitt v. Emery, 211 Minn. 547, 2 N.W. 2d 413, 139 A.L.R. 1242 (1942); Stewart Equipment Co. v. Gallo, 32 N. J. Super. 15, 107 A. 2d 527 (1954); Robertson v. Virginia, 181 Va. 520, 25 S. E. 2d 352, 146 A. L. R. 966 (1943); Holm v. Superior Court, 42 Cal. 2d 500, 267 P. 2d 1025 (1954); Jessup v. Superior Court, 151 Cal. App. 2d 102, 311 P. 2d 177 (1959); Fire Ass'n v. Fleming, 3 S. E. 420 (Sup. Ct. of Ga. 1887); Russell v. Second Nat. Bank, 136 N. J. L. 270, 55 A. 2d 211 (1911); Ex parte Schoepf, 74 Ohio St. 1, 77 N. E. 276, 6 L. R. A. N. S. 325 (1906); In Re Hyde, 149 Ohio St. 407, 413, 79 N. E. 2d 224, 227 (1948); Davenport Co. v. Pennsylvania R. R., 166 Pa. 480, 31 A. 245 (1895); Beach v. Oil Transfer Corp., 143 (48) N. Y. L. J. Col. 4M (Spec. Term Kings Co. 3-11-60); Pressman v. C. B. S., Inc., 133 (51) N. Y. L. J. 7 Col. 4M (Spec. Term N. Y. Co. 3-15-55); Stahl v. Federated Meat Corp., 121 (114) N. Y. L. J. 2102 Col. 3F (Spec. Term Queens Co. 6-13-49);

(Continued on next page)

Since these early statements the necessity of protecting the attorney-client relationship has become even more apparent; the legal rights and duties of large corporations and those who dispute with them would not be susceptible of judicial administration in the absence of lawyers, nor, in the absence of the privilege could lawyers properly represent their clients. I am, frankly, hesitant to do anything which would contribute to the undermining of the protection afforded by the time-honored rule which excludes from evidence such confidential communications.

That same year in Massachusetts in a civil antitrust action brought by the United States, it was held that some of the exhibits to which defendant objected were within the attorney-client privilege, while others were not.⁴

The United States Supreme Court has spoken in favor of the privilege, although the issue was not decided specifically.⁵ And in the course of holding that correspondence *per se* was not intended to be included within the scope and extent of a Congressional investigation statute which the government was trying to enforce against the company, it followed then, that the attorney-client privilege applied to correspondence between the attorney and his client, and in addition that such correspondence was not subject to investigation. Judge Campbell noted in his opinion that the attorney-client privilege was mentioned in only one small paragraph, and while acknowledging the "privilege," noted that the government had not even made an issue of it.

(Continued from preceding page)

Reiser Co. v. Loew's Inc., 81 N. Y. S. 2d 861 (Spec. Term, N. Y. Co. 1948); L. Michel Plumb. & Heat. Corp. v. Randall Ave. Theatre Corp., 39 N. Y. S. 2d 830 (Spec. Term N. Y. Co. 1943).

ENGLISH cases:

Beginning with Bolton v. Corporation of Liverpool, 1 My & K. 88, 39 Eng. Rep. 614 (1833) there have been no less than 9 reported cases prior to 1900.

³ A. B. Dick v. Marr. *supra* n. 2, *affd.* on other grounds, 197 F. 2d 498 (2d Cir.), cert. den. 344 U. S. 878.

⁴ United States v. United Shoe Machinery Corp., (U. S. D. C. Mass.) decided 3/10/50, *supra* n. 2,

In a civil antitrust action by the United States, the court specifically noted that:

It follows that insofar as these letters were prepared to solicit or give an opinion on law or legal services, such parts of them are privileged as contain, or have opinion based on information furnished by an officer or employee of the defendant in confidence and without the presence of third persons.

⁵ United States v. Louisville and Nashville R. R., *supra*, n. 2.

Many other cases have accepted the existence of the attorney-client privilege as applying to corporations without ever putting it in issue.⁶ The Ohio Supreme Court made reference to the privilege by the following:⁷

We can see no reason to limit or modify the rule because the defendant is a corporation and obtained its information and made its memoranda for the purposes stated through the usual agencies of the corporation.

In *Civil Aeronautics Board v. Air Transport Association* (D. D. C., Civ. Act. No. 3214-60) the court declared in its oral opinion of Oct 3, 1961:

The Court is of the opinion that the attorney-client privilege may be asserted in the proceeding pending before the Civil Aeronautics Board and involved in this action.

The text writers have treated the privilege as applying to corporations, and with apparent unanimity have at least defined the term "client," as embodying corporations as well as natural persons.⁸ The Model Code of Evidence in Rule 209, and the Uniform Rules of Evidence in Rule 26(3) likewise include "corporation" in their definitions of client. Furthermore, the Canons of Ethics now declare that it is the duty of a lawyer to preserve his client's confidences without distinction between individual or corporate clients.⁹

From the authorities cited, it appears that there are certain legal concepts which are accepted as logical conclusions without any court specifically deciding that such concepts must be accepted. This is the nature of the attorney-client privilege as it applies to the corporate client.

It is important to consider that the decision in the immediate case, should, if sustained on appeal, be limited to cases similar in fact to the case at hand, and should not be, at the maximum, extended beyond the withholding of the exercise of the privilege in Federal pretrial discovery, and should be distinguished from other matters such as trade secrets and work product of the lawyer. By rejecting the attorney-client privilege to the corpo-

⁶ Cases noted *supra* in n. 2.

⁷ *Ex Parte Schoepf*, *supra* n. 2.

⁸ McCormick on Evidence 183 (1954); 8 Wigmore, Evidence, Sec. 2292 (McNaughton Rev., 1961).

⁹ American Bar Association, Canons of Professional Ethics, Canon 37. (1957).

rate client the free exercise of the judgment of the corporate attorney will be hindered by the fear that if he expresses his opinion he may at some future time be directly responsible for his client's subsequent loss of a law suit.

If Judge Campbell is sustained on appeal, the work product rule granting the attorney's privilege against having his work and efforts disclosed will have to be relied on more heavily.