Comment

Attorney-Client Sieve

Some fear recent limits on Big Tobacco's attorney-client privileges. But Kenneth Starr's assault on individual attorney confidences poses a greater danger.

By CAROL M. LANGFORD and RICHARD A. ZITRIN

A recent article from *Recorder* reporter Nick Budnick on the possible erosion of the attorney-client privilege ["Waning Confidence in Confidentiality?," March 27] makes a fundamental error that is becoming all too common when the attorney-client privilege is discussed.

Rebuttal

It equates the personal, individual privilege with the corporate privilege. These two privileges have never been the same, and the erosion of the corporate privilege — particularly the example of the recent tobacco litigation disclosures — does not necessarily mean that the personal attorney-client privilege is in jeopardy.

Individual attorney-client confidentiality traces its roots back to ancient Rome. It was already a well-established principle in England by Elizabethan times, when a lawyer came to be considered the "fiduciary" of a client's secrets. The privilege, of course, is based on these rules of confidentiality.

The corporate attorney-client privilege, however, has no such history. There's no evidence that our founders intended this very personal protection to apply to what Justice Marshall called "an artificial being, invisible, intangible, and existing only in law." Indeed, there is no evidence of the existence of a corporate privilege until the end of the last century, when a small handful of cases anointed powerful railroads with this protection almost as an afterthought.

SELF-PERPETUATING PRIVILEGE

The creation of this privilege became something of a self-perpetuating occurrence, without the usual analytical approach that marks the development of most significant common-law changes. Indeed, not until the 1963 case of *Radiant Burners Inc. v. American Gas Assoc.*, 320 F.2d 314 (7th Cir. 1963), was the privilege clearly and uniformly established throughout the country. It is of more than passing note that the European Union has *no* corporate attorney-client privilege, to the extent that in many EU countries, in-house counsel are not allowed to remain members of the Bar.

The distinction between individual and corporate privilege is important for many reasons, but the one we want to focus on is this: Efforts like Kenneth Starr's unjustified attempts to erode individual privacy by using barely colorable claims of crime fraud to subpoena the records of various attorneys unquestionably endanger everyone's attorney-client privilege.

But the erosion of the attorney-client privilege in tobacco and other corporate contexts holds no significant danger for the *personal* privilege we all enjoy. In fact, the privilege has failed in these cases not primarily because of procedural technicalities such as inadvertent or momentary waivers, as many recent stories in the press have emphasized, but because the tobacco industry has abused its privilege beyond recognition.

Tobacco companies are not the only ones that funnel business advice through lawyers to try to get maximum breadth for their corporate secrets. But tobacco companies have gone well beyond even this hyperextended view of the privilege. For example, they created the Council for Tobacco Research and then placed a "special products" unit within the CTR — under the supervision of lawyers rather than scientists — in an effort to conceal scientific protocols if they didn't come out the right way. The reasoning was that even a scientific effort would be protected by the privilege, so long as the lawyers controlled the protocol.

AN OVERDUE AWAKENING

That courts are beginning to recognize that this kind of behavior will not be protected by privilege is merely a long-overdue awakening. Part of the reason for that awakening is the extreme to which the tobacco industry has stretched the attorney-client umbrella. But another part of the equation — even though some courts may not fully have understood it yet — is that the corporate privilege simply doesn't play out in real life in the same way the individual privilege does. This should not be surprising. The corporate attorney-client privilege has never rested on the same logical justification as the individual privilege.

Having depersonalized a well-established personal right — the ability to disclose all to one's attorney without fear — American courts now find themselves boxed into a corner. Some have finally begun to realize that applying this personal privilege across the board to that most "artificial" of entities has jammed a square peg into a round hole. Removing the peg — particularly after the Supreme Court hammered it home in its 1981 decision in *Upjohn Co. v. United States*, 449 U.S. 383 — may well prove impossible. But we would be surprised if courts did not continue to give increased scrutiny to the use of the corporate privilege.

While this scrutiny will not, in our view, endanger the rights of individuals, Mr. Starr's actions are another story — one for another time and place. ■

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