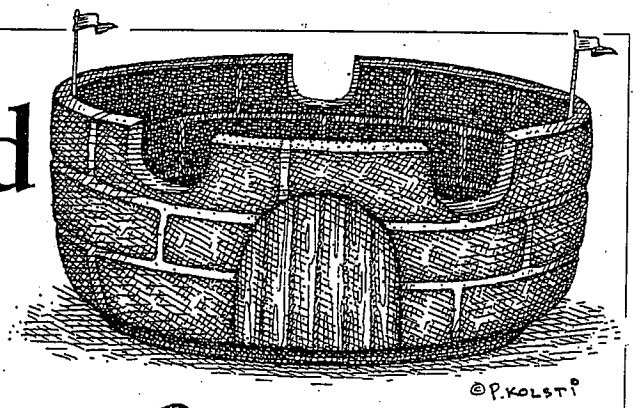
Comment

Over privileged

Corporate counsel blow smoke for more than tobacco companies



By RICHARD ZITRIN and CAROL M. LANGFORD

RJR Nabisco is throwing in the towel. Nabisco will go back to baking cookies, and R.J. Reynolds Tobacco will make cigarettes for someone else. "They are very different enterprises, with different problems [and] different challenges," said CEO Steven Goldstone in a moment of profound understatement.

The company's breakup was the lead story in a recent edition of *The New York Times*. Just below it was a piece on former tobacco-busting lawyers preparing for their next big target: the gun industry. And these lawyers are already looking beyond guns to chemical companies that contaminate drinking water and HMOs that mismanaged health.

Many reasons impelled RJR's decision, and many others will inform how plaintiffs' lawyers choose their next score. But at least one common thread connects these stories: No longer can American industry rely on abusing the attorney-client privilege. For this, ironically, we can thank the tobacco companies.

Richard Zitrin and **Carol M. Langford** are in private practice in the San Francisco Bay Area and both teach legal ethics at the University of San Francisco and Hastings College of the Law. Their book, *The Moral Compass of the American Lawyer*, will be published by Ballantine in April. This article originally appeared in "Open Court," the opinion page of American Lawyer Media's Law News Network (www.lawnewsnetwork.com).

THE PRIVILEGE HEDGE

The industry formed the Council on Tobacco Research (CTR) in the 1950s and then put CTR's "Special Projects" unit under the control of lawyers, in order to hide its own studies showing the deadly dangers of smoking behind a wall of attorney-client privilege. The plan worked. The research remained hidden for more than 30 years. But the walls of privilege eventually crumbled.

In December 1997, Minnesota Judge Kenneth Fitzpatrick ordered the public release of 865 secret tobacco documents, citing big tobacco's "conspiracy of silence and suppression of scientific research." Then last April, the House Commerce Committee released 39,000 formerly secret tobacco documents. Their own research on the evils of tobacco no longer protected by claims of privilege, the tobacco companies quickly settled the Minnesota case alone for $6.6 billion.

Tobacco companies are hardly the first to use — or abuse — the attorney-client privilege, and they will not be the last. But although strong historical and social bases justify an individual's right to this privilege, the personal right to speak to a lawyer in strictest confidence was never intended to fit the corporate model.

Individual attorney-client confidentiality traces its roots back to ancient Rome, where slaves went to the marketplace on behalf of their masters and were strictly prohibited from sharing their masters' secrets. By Elizabethan times, confidentiality was already a well-established principle, with the lawyer considered the "fiduciary" of a client's secrets. The privilege, of course, is based on these rules of confidentiality. But until the turn of the last century, no one questioned that this privilege was limited to protecting the autonomy, dignity and privacy of the individual.

The corporate attorney-client privilege has no such history — no evidence that our founders intended this very personal protection to apply to what Justice John Marshall once called "an artificial being, invisible, intangible and existing only in law." Its development since seems almost accidental, devoid of the usual reasoning that we expect of significant common law changes. It appears in an 1895 Pennsylvania case that with little serious analysis granted the powerful Pennsylvania Railroad "the privilege accorded to communications made to counsel."

WIDE 'ZONE OF SILENCE'

Not until 1963, relatively recent history, was a corporation's right to keep information confidential clearly established. The year before, Chicago federal Judge William Campbell had ruled that corporations were not entitled to hold a privilege that was "historically and fundamentally personal in nature." Who among all the corporate employees, Campbell wondered, would be able to claim that the privilege applied to them? He warned of a wide "zone of silence" because of a corporation's "large number of agents, masses of documents and frequent dealings with lawyers." He worried that corporations would be tempted to "insulate all their activities by discussing them with legal advisors," blocking the ability of others to discover relevant information.

In reversing, Chief Judge John Hastings of the Seventh Circuit U.S. Court of Appeals chided Campbell for his concerns with these ironic words: "Certainly, the privilege would never be available to allow a corporation to funnel its papers and documents into the hands of its lawyers for custodial purposes and thereby avoid disclosure," *Radiant Burners,*

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Inc. v. American Gas Association, 320 F.2d 314 (1963). Hastings proved a remarkably poor prognosticator.

The Supreme Court has never directly ruled on the validity of corporate confidentiality. It declined to review Hastings' opinion, and by 1981, when it decided *Upjohn Co. v. United States*, 449 U.S. 383, the issue was no longer whether corporations were entitled to confidentiality, but the degree of their entitlement. *Upjohn* extended a corporation's zone of silence well beyond just the company's "control group" to mid- or even lower-level employees who "have the relevant information needed by corporate counsel if he is adequately to advise the client."

NO CORPORATE PRIVILEGE IN EUROPE

In Europe, this couldn't happen. In 1982 the European Court of Justice decided that no European Community country could allow in-house lawyers to maintain any confidential communications with their employers. The Court of Justice deferred to the laws of several member nations — Italy, France, Belgium and Luxembourg — where in-house lawyers are corporate employees first and lawyers second, and are not even permitted to be active members of the bar.

Incredibly, the American Bar Association's ethics rules "give significantly broader protection to the confidences and secrets of corporate clients than to those of unincorporated individuals," in the words of noted ethics maven Monroe Freedman. The attorney for an individual is released from the bonds of confidentiality if the lawyer reasonably believes it is necessary to prevent a client from committing a crime "likely to result in imminent death or substantial bodily harm." But if an in-house lawyer believes the company is violating the law in a way that could cause "substantial injury to the organization," the ABA declares that counsel "shall proceed as is reasonably necessary in the best interest of the organization.

What if in-house counsel learns that a client is going to do something that will cause irreparable harm? When a pharmaceutical company hides the dangerous side effects of its new wonder drug or an auto maker tries to avoid a recall — even though its own tests show the car has a defective steering system — the in-house lawyer's only "remedy" under the ABA's corporate counsel rule is to resign. Although resignation may be the ultimate act for the lawyer-employee, it's meaningless to the outside world. Regulatory agencies and the public are left completely in the dark.

By depersonalizing a well-established personal right and applying it across the board to that most "artificial" of entities, our courts and rulemakers have jammed a square peg into a round hole. Removing the peg, particularly after the Supreme Court hammered it home in *Upjohn*, may well prove impossible. Even putting individual and corporate confidentiality back on an equal footing is a challenge, though the revisions to the confidentiality rule proposed last month by the ABA Ethics 2000 Commission are a step in the right direction.

The issue of corporate confidentiality is barely on our courts' radar screens. The blips that are visible are only those of corporations, like the tobacco industry, that clearly abuse the current privilege. But our courts and rulemakers should be far more ambitious: They should re-examine this counterintuitive rule itself. They should ask whether this uniquely individual right was ever intended to apply to corporations; how a corporation's confidentiality can ever be broader than an individual's; and whether strict limits should be imposed on both corporate confidentiality and the corporate privilege. ■