

THE ATTORNEY-CLIENT PRIVILEGE: A LITIGATOR'S
PERSPECTIVE

BY RODMAN WARD, JR. *

Last night in going over an outline authored by Alvin Hellerstein which dealt with competing factors that argue for and against the application of attorney-client privilege,¹ I wrote a plus or a minus next to each paragraph which indicated a factor arguing for or against production of a document withheld for attorney-client privilege. When I was finished, there were about as many pluses as there were minuses on the outline.

From the point of view of the advocate, it is a wise thing to take such an outline, read it through and tick off the elements, consider your fact situation, and prepare to make your arguments. That may be a sort of pragmatic approach, but I do not think any other approach in this area other than pragmatic is worth very much.

That is because the area of privilege is one in which there are very strong competing policy interests. The arguments for and against production, as they are reported in conferences or in articles, either strengthen or weaken, depending on a variety of factors, including where we stand in time. To predict the outcome of any given argument before a judge is one of the most difficult problems. But, if it is difficult after the fact, it is particularly difficult before the fact to predict how a court will eventually react when you are working on a transaction in your office or furnishing advice to somebody who is working in his office. You have no idea which court will be judging your product, or whether it will be on the state or federal level. Even if you were able to predict that, you would have no idea which judge on the particular court would be sitting and what his background will have been; whether, before he went to the bench, he represented primarily consumer interests, stockholder plaintiffs, or large corporations.

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1. A. HELLERSTEIN, *THE ATTORNEY-CLIENT PRIVILEGE THROUGH A 1975-76 PRISM, CURRENT PROBLEMS IN FEDERAL CIVIL PRACTICE II* (1976).

Since discovery is such a discretionary area, those things may have more effect on the ultimate judgment than abstract case authority. A senior partner in our firm regularly advises those boards of directors whom he is advising that, if they take notes of what is going on in a board meeting or under any circumstances where the lawyer is talking to them or indeed at any time of potential controversy, they should do so on a note pad, entitled at the top, "ladies and gentlemen of the jury." How, after all, can you predict the result of a legal argument in which one advocate will say that production should be made because "the law is entitled to every man's evidence," and the other advocate will say that the document should be withheld so as to "encourage full and frank exchange between lawyers and clients so that clients may know what is right to do."

The first rule, therefore, in modern commerce is to develop a good memory and an efficient and regularized procedure for the destruction of those records not subject to litigation and neither under subpoena nor reasonably expected to be so. If you learn one thing in this area, that is the thing to learn. For those who have a tendency to forget, it is well to know a couple of rules, and I see these rules primarily from the point of view of a litigator.

You actually see a number of things from the point of view of a litigator that you never expect to see. Yesterday in a deposition, I pulled out a paper and handed it to the witness. It was covered with scrawls and it was obviously the witness' handwriting because we had been through that ad nauseam.

I handed it to the witness, and I said, "What is this paper?" And he said, "Well, those are notes of my conference with the senior partner of my law firm." Then the lawyer who was defending him said, "What? What?" He reached down and grabbed it, and said, "That's inadvertent production."

Then I pulled out the next paper, and there were ten of them. We took a brief recess—it was an expedited case—and I gave it back to him and said, "Nobody is going to take advantage of inadvertent production in this case." It is possible, of course, that I had already taken advantage of inadvertent production because I had had them marked for identification.

If you think that you are safe under any circumstance with any document which theoretically is covered by attorney-client privilege, you might think of the possibility of inadvertent production.

First, as an aid to guide your understanding, you might give some thought to the question of the difference between legal advice and business advice. Advice as to governing legal rules and facts

submitted to obtain such advice are privileged if they are communicated confidentially.² But advice as to a preferable course of conduct may not be, if the reasons for the conduct depend on considerations such as greater profit or more effective competition or business considerations of that sort.³

Mixed advice, which most advice is, may all be privileged under one view,⁴ none privileged under another view,⁵ or, if you can slice the document up, using the arcane term, "redaction," you may find that only some of it is to be produced and some of it is not.⁶ This is simply further evidence that what is being provided in litigation depends a lot on subjective factors such as time of day and the disposition of the judge.

Second, be careful who is around when you are giving advice. Waiver of the privilege by communication to outsiders is one of the points most talked about in a litigation context. The classic example involves the presence of the investment banker. Very few major transactions are performed these days without the advice of the ubiquitous investment banker. He is every bit as ubiquitous as the ubiquitous lawyer. At meetings discussing legal strategy, the presence of the investment banker is highly desirable.

An analogy to the investment banker can be drawn, in the case of really large companies like Du Pont, to their inhouse financial advisors, who are, in effect, their investment bankers. I do not think anybody would say that such advisers were anything except a part

2. *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357 (D. Mass. 1950); see also 8 WIGMORE, EVIDENCE § 2292, at 554 (McNaughton rev. 1961).

3. *United States v. Vehicular Parking Ltd.*, 52 F. Supp. 751, 753 (D. Del. 1954) (privileges do not exist unless the attorney was acting in his professional capacity; privilege is not accorded to communications regarding advice on matter of business); see 8 WIGMORE, EVIDENCE § 2296, at 567 (McNaughton rev. 1961).

4. *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 359 (D. Mass. 1950). "The modern lawyer almost invariably advises his client upon not only what is permissible but also what is desirable. . . . And the privilege of nondisclosure is not lost merely because relevant nonlegal considerations are expressly stated in a communication which also includes legal advice." See also *Hercules, Inc. v. Exxon Corp.*, 434 F. Supp. 136 (D. Del. 1977). See generally Simon, *The Attorney-Client Privilege as Applied to Corporations*, 65 YALE L.J. 953, 978 (1956).

5. *RCA v. Rauland Corp.*, 18 F.R.D. 440 (N.D. Ill. 1955) (individual documents to be produced where the attorney was acting in the capacity of negotiator or in any capacity other than advising a client on legal matters); *In re Fisher*, 51 F.2d 424 (S.D.N.Y. 1931); *In re Robinson*, 140 A.D. 329, 125 N.Y.S. 193 (1910).

6. *Myles E. Rieser Co. v. Lowe's, Inc.*, 194 Misc. 119, 81 N.Y.S.2d 801 (1948) (pages and paragraphs of attorney's letters dealing with negotiations held unprivileged, but portions of letters containing counsel's advice held privileged); compare *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730 (4th Cir. 1974), cert. denied, 420 U.S. 997 (1975). On remand, the district court was permitted to excise privileged "work product" material from documents and order the balance to be produced. *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146 (D.S.C. 1975).

of the client, and their presence would not break the privilege.⁷ But an argument can be made that an outside investment banker's presence does destroy the privilege.⁸

The practical effect of this situation is sometimes amusing, because whenever you come to a key point of advising on strategy, somebody says, "Maybe the investment bankers ought to leave." If everybody is being terribly careful, they get up and go out, and if there are lots of interspersed bits of important advice it begins to look like a religious ceremony, with participants getting up and sitting down, withdrawing and returning. That is really a very silly result.

I thought that before going a little farther, I would say a word about *Garner*,⁹ *Valente*,¹⁰ and *Meisterbrau*,¹¹ which, I think, are the major cases that cause concern to Leo [Herzel] and have been cited in the *LTV*¹² case. The *LTV* case, incidentally, is a very thorough and careful review of this area, and I commend its reading to you.

I was involved in the *Valente* case. Lead counsel on our side was Herbert Milstein of the Kohn firm in Washington. It appears to be the high watermark of the doctrine that a stockholder is really a cestui que trust and therefore should not be denied privileged communications on the ground that the legal advice was actually given on his behalf.

Valente actually shifts the burden of proof from what you read in the *Meisterbrau* and *Garner* cases so that, whereas in *Meisterbrau* and *Garner* the stockholder must prove that he has special cause to receive the documents, in *Valente* the corporation must prove that production would cause harm to the corporation.

In that context, no corporate executive would deny that he seeks legal advice to further the interest of the stockholders. That has got

7. Prior to *Upjohn Co. v. United States*, 449 U.S. 383 (1981), some courts' primary inquiry was whether the communication was made by a member of the "control group." See *City of Philadelphia v. Westinghouse Elec. Corp.*, 210 F. Supp. 483 (E.D. Pa. 1962), *mandamus and prohibition denied sub nom.* General Elec. Co. v. Kirkpatrick, 312 F.2d 742 (3d Cir. 1962), *cert. denied*, 372 U.S. 943 (1963) (only employees in a position of control personify corporation for purposes of the privilege). In light of the *Upjohn* decision, however, the courts may not place as much emphasis on the employee's relationship with the "control group."

8. Compare *Himmelfarb v. United States*, 175 F.2d 924 (9th Cir. 1949), *cert. denied*, 338 U.S. 860 (1949) (presence of an accountant, engaged by the attorney, broke the privilege, since his presence was not "indispensable" in the sense that the presence of the attorney's secretary might be). *But see* CAL. EVID. CODE ANN. § 952 (West 1966) and Law Revision Commission Comment.

9. *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970), *cert denied sub nom.* *Garner v. First Am. Life Ins. Co.*, 401 U.S. 974 (1971).

10. *Valente v. Pepsi Co.*, 68 F.R.D. 361 (D. Del. 1975).

11. *Bailey v. Meisterbrau, Inc.*, 55 F.R.D. 211 (N.D. Ill. 1972).

12. *In re LTV Sec. Litigation*, [1981 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,969 (N.D. Tex. March 23, 1981).

to be what he is doing all the time. The real question, then, is a threshold question: Is the stockholder in the lawsuit really acting for or seeking to act for his fellow stockholders in a way which will benefit the corporation?

When Leo [Herzel] says that, to obtain production, the plaintiff must have a case which will withstand summary judgment¹³ (or he may have said, which will make a good solid argument on summary judgment), I sense that what he is actually saying is: Is this a frivolous stockholder's case or is this a genuine stockholder's case which has some chance of success?

I think those are the considerations the courts recognize by the various rules for shifting the burden of proof. It may be that Judge Wright, in the *Valente* case, felt that the plaintiff in that case had a good substantial claim, and that the plaintiff in *Valente* was not just there for harassment, or, to use the nasty word, for a "strike" suit.

Valente, in case anybody wants to undo what was done there, contains the seeds of its own destruction. That is found in Judge Wright's statement that there are limits on the corporation's fiduciary obligation to its stockholders: "Were the claim here one made in bad faith, or one where the interests of the great majority of the beneficiaries would be better served by the privilege, the case would be different indeed."¹⁴ You have there the seed, even in *Valente*—which is the high watermark of liberality of production—of some kind of threshold finding to determine whether or not the stockholder's claim is a valid one so that it is in the corporation's interest to make the production.

From the point of view of the lawyer in his law office writing the document, there is no way—if I can come back to my main theme—to know what is going to happen in court with regard to the threshold or mini-hearing, or to know if there is going to be one, or to anticipate its effect.

The root of all these cases—*Garner*, *Valente*, and *Meisterbrau*—is trust law. But the situation in trust law is clearer and cleaner. There are usually few beneficiaries with easily identifiable interests. It is usually clear that if a beneficiary is suing his trustee, there is a genuine claim before the court. The peculiar situation surrounding stockholders' litigation has, in the past, led to such rules and statutes as: security for costs;¹⁵ requirements that there be evidence, if

13. See pp. 443-46 *supra*.

14. *Valente v. Pepsi Co.*, 68 F.R.D. 361, 370 (D. Del. 1975).

15. See ABA-ALI MODEL BUS. CORP. ACT §49 (1971) as an example of a "security for expenses" statute with fixed requirements. See also CAL. CORP. CODE

it is a class action, that the representative is truly a representative of his fellows;¹⁶ and evidence, or, if it is a derivative action, that a demand be made that the corporation itself bring the action.¹⁷

The translation of trust concepts into corporate law can be misleading. Indeed, as Justice Quillen is constantly asking us, if a man is a trustee, for whom is he a trustee and for what purpose? Those are the questions that must be asked first. If the answers are unclear, then I do not know whether you should go as far as Leo [Herzel] says and say that the plaintiff must make a substantial showing of bona fides as on summary judgment, or the court should be satisfied with some lesser showing. But it seems to me that it's inevitable that some showing should be made before the corporation's privilege in a stockholder's suit should be removed in favor of the volunteering stockholder plaintiff.

One final irony, which emphasizes my main point that a lawyer or client cannot tell in advance what's going to happen to his papers if suit is brought, is that many privilege claims are tested by the judge in a private in-camera inspection of the questionable paper.¹⁸ Therefore, unless we are talking about a jury case (and we frequently are not in Delaware), the scandalous document that you are trying to protect may well find its way to the trier of fact in order to determine if it is subject to protection. In such an in-camera proceeding, the judge gets the hot document, reads it, decides that it is protected by the attorney-client privilege, seals it up, and returns it, and, of course, forgets it.

So far as corporate practitioners are concerned, the best rule is the rule of preventive medicine. Do not write very much. Do not keep very much. Keep all your notes on a pad that says at the top, "ladies and gentlemen of the jury."

§ 800(c)-(f) (West 1976) as an example of a more flexible approach. Delaware has no statute or rule requiring security in a shareholder's derivative action. See generally Dykstra, *The Revival of the Derivative Suit*, 116 U. PA. L. REV. 74, 88-97 (1967).

16. See, e.g., FED. R. CIV. P. 23; DEL. CH. CT. R. 23; see generally Sachnoff, *Determining the Basic Requirements for a Class Action in S. WECHSLER, PROSECUTING AND DEFENDING STOCKHOLDER SUITS* 117, 120 (1973).

17. See, e.g., FED. R. CIV. P. 23.1; DEL. CH. CT. R. 23.1. While the original purpose of this requirement was apparently to insure that intracorporate remedies were exhausted, see Fischel, *The Demand and Standing Requirements in Stockholder Derivative Actions*, U. CHI. L. REV. 168 (1976), the requirement has apparently entered into the debate over the use of the business judgment rule as a basis for dismissing derivative actions. See *Abramowitz v. Posner*, 513 F. Supp. 120 (S.D.N.Y. 1980).

18. See, e.g., *Palermo v. United States*, 360 U.S. 343 (1959); *Jack Winter, Inc. v. Koratron Co.*, 54 F.R.D. 4 (N.D. Cal. 1971); in particular, see *Duplan Corp. v. Deering Milliken, Inc.*, 184 U.S.P.Q. (BNA) 775 (D.S.C. Feb. 13, 1975) (elaborate in-camera proceeding described).