

# Pursuant to Federal Law, the Attorney/Client Privilege Does Not Survive Corporate Dissolution

By Leo K. Barnes Jr.

For individuals, the attorney-client privilege protects communications even after a death (see *Swidler & Berlin v. United States*, 524 U.S. 399 (1998)), thereby encouraging individuals to speak candidly with counsel without the fear of the information becoming public after death, and thus possibly opening up litigation or shame against the deceased and/or his or her family. *Id.*, at 407. To the contrary, when a corporation is dissolved, it no longer has assets to protect, shareholders to appease, or goodwill to maintain. Therefore, the necessity for the continued protection of the attorney-client privilege is greatly diminished. See, *City of Rialto v. United States Department of Defense*, 492 F.Supp.2d 1193, 1200 (C.D.Cal.2007) ("As there are usually no assets left and no directors, the protections of the attorney-client privilege are less meaningful to the dissolved corporation.").

In the recent decision of *S.E.C. v. Carrillo Huettel, LLP*, 2015 WL

1610282, 13 Civ. 1735 (S.D.N.Y. 2015), Southern District Magistrate Judge James Francis IV specifically ruled upon this issue, and held that when applying federal common law, the attorney-client privilege does not survive a corporation's dissolution or extinction.

The privilege issue arose when the Securities and Exchange Commission (SEC) commenced an action alleging a law firm helped facilitate stock fraud by aiding several companies in their violations of federal securities laws. As part of the ongoing investigation, the SEC requested that the court compel the production of documents and testimony withheld by the law firm on the grounds of attorney-client privilege. The SEC's primary argument, *inter alia*, for compelling the production was that any privilege asserted on behalf of the law firm's corporate clients was ineffective because those corporations had ceased to exist.

In evaluating whether to grant the



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SEC's motion to compel, the court held that "the weight of authority ... holds that a dissolved or defunct corporation retains no [attorney-client] privilege." *Id.*, at \*2. The court noted that the concerns set forth by the Supreme Court in *Swidler* regarding an individual's future liability, harm to reputation, or possi-

ble harm were inapplicable to corporations because "[t]he possibility that a corporation's management will hesitate to confide in legal counsel out of concern that such communication may become unprivileged after the corporation's demise is too remote and hypothetical to outweigh the countervailing policy considerations supporting discoverability." *Id.*, at \*2 (internal quotations omitted).

The court noted that after dissolution a corporation will not have any goodwill to maintain, shareholders to appease, or tangible assets to protect, and as such, the protections offered by the extension of the attorney-client

privilege were unnecessary. *Id.* The court continued by stating that "once a corporation is truly extinct, it has lost practical ability to assert the [attorney-client] privilege," because "there is no one who can speak for a defunct corporation in order to assert the privilege." *Id.*, at \*3.

The court added that this limitation of the privilege "is consistent with the principle that the privilege is to be construed narrowly because it withholds relevant information from the judicial process." *Id.* The court elaborated that keeping relevant information from a fact-finder to protect an entity that no longer needed protection is beyond the narrow construction of the rights offered by the privilege.

It is important to note that the court did acknowledge two exceptions to the rule that the attorney-client privilege is lost when the corporation is defunct or dissolved. First, and most importantly, the court's decision is based upon on a federal claim where the court applied federal common law, and has no bearing on

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whether the privilege will survive a state law claim. For state law claims brought in federal court under diversity jurisdiction, privilege shall be determined under state law. See, *Id.*, at \*3. In *Randy International, Ltd. v. Automatic Compactor Corp.*, the New York City Civil Court held that the fact that corporations, which were judgment creditors, were "defunct and no longer functioning or operating" did not preclude them from invoking the attorney-client privilege. 412 N.Y.S.2d 995, 997 (N.Y.Civ.Ct. 1979). Thus, the attorney-client privilege survives the dissolution or extinction of a corporation for state law claims

determined under New York law. Second, the court did differentiate a fully defunct corporation from one that was still in the process of dissolution: "A dissolved corporation should be permitted to assert its privilege during the windup process at least until all matters involving the company have been resolved and no further proceedings are contemplated." *Carrillo Huettel, LLP*, at \*3.

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