

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSIONBEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	Docket Nos. 50-329
CONSUMERS POWER COMPANY)	50-330
)	(Remand Proceeding)
(Midland Plant, Units 1 and 2))	

NRC STAFF MEMORANDUM ON ATTORNEY-CLIENT PRIVILEGEI. Introduction

During the discovery taken in preparation for the evidentiary hearing which commenced on July 2, 1979, Intervenor the Dow Chemical Company (hereafter Dow), asserted the attorney-client privilege with respect to legal advice it had received in late 1976 relating to Dow's intent with respect to its contract with Consumers Power Company (hereafter Consumers Power). The privilege was asserted at pages 19, 32 and 66 of the deposition of James F. Hanes taken at Midland, Michigan on Monday, May 14, 1979. Mr. Hanes stated that Dow had retained outside counsel to write legal opinions regarding Dow's position subsequent to the Court of Appeals remand and both before and after the Dow corporate review. (Tr. 67-68). When asked further questions concerning the name of the attorney and other details, Mr. Hanes asserted the attorney-client privilege.

The purpose of this memo is to discuss the elements of the attorney-client privilege, to suggest to the Board that the privilege has been waived and, in the event the Board believes the record needs to be supplemented with respect to the privilege issue, to suggest the appropriate procedure.

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II. The Attorney-Client Privilege

The case most frequently cited for the essential elements of the attorney-client privilege is U. S. v. United Shoe Machinery Corp., 89 F.Supp. 357 (1950). At page 358, the Court stated:

(1) The asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

The attorney-client privilege applies to corporations^{1/}. The Meredith case describes two tests developed in the Federal Courts for the application of the attorney-client privilege to corporations.

Two tests have developed in the federal courts. The first is the "control group" test formulated in City of Philadelphia v. Westinghouse Electric Corp. 210 F. Supp. 483 (E.D.Pa.), mandamus and prohibition denied sub nom., General Electric Co. v. Kirkpatrick, 312 F.2d 742 (3rd Cir. 1962), cert. denied, 372 U.S. 943, 83 S.Ct. 937, 9 L.Ed.2d 969 (1963). In this test, an employee's statement is not considered a corporate communication unless the employee "is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, or if he is an authorized member of a body or group which has that authority[.]" Id. at 485. It is the most widely used test. Virginia Electric & Pow. Co. v. Sun Shipbuilding & D.D. Co., 68 F.R.D. 397, 400 (E.D.Va. 1975).

^{1/} Diversified Industries, Inc. v. Meredith, 572 F.2d 596 (1978).

The second test is that formulated in Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970), aff'd by an equally divided court, 400 U.S. 348, 91 S.Ct. 479, 27 L.Ed. 2d 433 (1971). In this test, "an employee of a corporation, though not a member of its control group, is sufficiently identified with the corporation * * * where the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment." Id. at 491-492.

Because of Dow's refusal to allow discovery on the privilege issue, the existing record does not permit a conclusion as to whether the result would vary depending on which of these two tests were applied. The privilege, of course, enjoys less protection under the "most widely used" "control group" test because the group from whom the communication can come is more restricted. The Staff's position that the privilege has been waived, as discussed below, is not affected by the choice of the above tests.

III. Waiver

It is the Staff's view that the privilege has been waived. The record shows that Dow sought advice from outside counsel (Mr. Wessel and another unnamed counsel) with respect to its legal obligations concerning its contract with Consumers Power (see pp. 19, 32 and 66-70 of the Hanes deposition). As to advice on this subject from Mr. Wessel, Dow has waived the privilege (see the deposition of Milton R. Wessel, Washington, D. C., May 16 and 17, 1979, the eight page draft pleading ("Action for Declaratory Judgment") prepared by Mr. Wessel and referred to at pp. 26-27 of his deposition, and Mr. Wessel's letter to Mr. Nute dated September 15, 1975). As to advice on the same subject, Dow has asserted the privilege as to other outside counsel.

Dow also waived the privilege as to advice on this same subject with respect to in-house counsel James F. Hanes and Leslie F. Nute (see depositions of May 14 and 15, 1979, June 5 and 6, 1979, the Nute notes, and Mr. Nute's note to J. Temple dated August 5, 1976). With respect to the attorney-client privilege, the cases make no distinction between in-house and outside counsel. See Burlington Industries v. Exxon Corporation, 65 F.R.D. 26 at 36-7 (1974) and United States v. United Shoe Machinery Corporation, 89 F.Supp. 357 at 360 (1950). A point of clarification must be made. The attorney-client privilege is usually couched in terms of confidential communications from the client to the attorney. Here the privilege is claimed with respect to a communication from the attorney to the client. The privilege extends to attorney to client communications "...only to the extent that they reveal confidential information communicated by the client to the lawyer".^{1/}

Thus, Dow can only claim the privilege as to legal advice from unnamed outside counsel to the extent that the legal advice included confidential information Dow conveyed in seeking legal advice concerning its contract with Consumers Power. The privilege has been waived, however, as to that subject matter when Dow did not assert the privilege as to advice from three of its other counsel on the same subject. Wigmore, Evidence Section 2327 discusses waiver of the attorney-client privilege as follows:

^{1/} United States v. International Business Machines Corporation, 66 F.R.D. 206, 212 (1974).

A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or to disclose, but after a certain point his election must remain final.

It is the Staff's view since Dow has waived the privilege as to information it conveyed to three of its counsel in seeking legal advice, it has waived the privilege as to information conveyed to a fourth counsel when seeking legal advice on the same subject matter.

IV. Procedure

If this Board is satisfied that Dow has waived the attorney-client privilege as to outside counsel other than Mr. Wessel, this issue is resolved. If this Board is not satisfied in that regard, the Staff suggests that the record should be developed to determine facts relevant to the existence and waiver of the privilege. The Staff has been precluded from developing that record because of Dow's refusal to answer more than preliminary questions with respect to advice from outside counsel other than Mr. Wessel.

In Northern States Power Company (Monticello Nuclear Generating Plant, Unit 1), ALAB-10, 4 AEC 390 at 392-3 (1970), the Appeal Board addressed, at length, the procedures to be followed when a party asserts privilege in adjudicatory proceedings. As relevant to current rules of practice, Monticello would first require this Board to determine whether the information is of a type generally discoverable.^{1/} The record shows the legal advice to be relevant and therefore discoverable unless privileged.^{2/}

Once relevancy has been determined

A Licensing Board must, consistent with our adjudicatory process, determine initially whether the data sought fall within a properly privileged category, and must do this without forcing a disclosure of the very thing the privilege is designed to protect.^{6/}

[Footnote 6: Courts as well as regulatory agencies have adopted in camera inspection as the procedure for accommodating claims of privilege with the demand for production. The procedure permits the deciding body to consider the privilege without initially forcing disclosure. The Commission's rule against ex parte communications (10 C.F.R. Sections 2.719 and 2.780) does not apply to such an in camera procedure, followed by courts and agencies to deal with privilege controversies under similar circumstances. See, e.g., Westinghouse Electric Corporation v. City of Burlington, 358 [sic - apparently should be 351] F.2, 762, 766 (D.C. Cir. 1965)].^{3/}

^{1/} Rule 2.741, as discussed in Monticello (1970) required a showing of good cause. That requirement has been eliminated.

^{2/} See Rules of Practice, Section 2.740(b) - Scope of Discovery.

^{3/} Northern States Power Company (Monticello Nuclear Generating Plant, Unit 1), ALAB-10, 4 AEC 390 at 392-3 (1970).

There is at least one alternative to the Board itself considering this issue in camera. In the Toledo Edison Company, et al, (Davis-Besse Nuclear Power Station), ALAB-300, 2 NRC 752 (1975) the Appeal Board approved the Licensing Board's reference of a claim of privilege to a "special master", to be heard in camera.

V. Conclusion

The existing record shows that Dow's claim of privilege as to legal advice from outside counsel other than Mr. Wessel has been waived. In the event the Board determines the record needs to be supplemented with respect to this issue, further proceedings should be held in camera.

Respectfully submitted,

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for William J. Olmstead
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Dated at Bethesda, Maryland
this 3rd day of July, 1979

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF MEMORANDUM ON ATTORNEY-CLIENT PRIVILEGE" dated July 3, 1979 in the above-captioned proceeding, have been served on the following, by deposit in the United States mail, first class, or as indicated by an asterisk through deposit in the Nuclear Regulatory Commission's internal mail system, this 5th day of July, 1979. (This document was handed to the Board and those parties who were present at the evidentiary hearing on July 3, 1979.)

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