4-25-75

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD
BEFORE THE SPECIAL MASTER

In the Matter of	)	
	)	
The Toledo Edison Company	)	Docket No. 50-346A
The Cleveland Electric Illuminating Company	)	
(Davis-Besse Nuclear Power Station)	)	
	)	
The Cleveland Electric Illuminating Company, et al.	)	Docket Nos. 50-440A and 50-441A
(Perry Plant, Units 1 and 2)	)	

To the Honorable Marshall Miller, Esquire
Special Master

CITY OF CLEVELAND'S MEMORANDUM OF
LAW FOR THE SPECIAL MASTER FOR THE
DETERMINATION OF ASSERTIONS OF PRIVILEGE

The Atomic Safety and Licensing Board in the above-entitled dockets appointed a special master to resolve disputes with regard to the assertion of privilege or confidentiality as a defense to the production of documents requested pursuant to Section 2.741 of the Commission's Rules of Practice and Procedure. During a conference of the parties, the Chairman and the Special Master, it was agreed that the parties would submit initial briefs on the privilege issues on April 25, 1975.

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I ATTORNEY-CLIENT PRIVILEGE

A. THE ATTORNEY-CLIENT PRIVILEGE MUST BE BALANCED AGAINST THE NEED FOR PROPER DECISION FROM AN INFORMED COURT.

The fundamental principle behind the attorney-client privilege, full and adequate representation, is basic to our judicial system. The privilege is meant to remove any subjective fear or chilling effect that possible disclosure of the contents of a communication would have upon attorney-client communications, because there can only be adequate representation when the attorney is fully informed by his client of all of the pertinent facts, both beneficial and detrimental. The privilege thus aids the client by creating the situation where the best representation can be obtained without fear of repercussion. But the privilege as a catalyst for the free flow of information from client to attorney for the purpose of obtaining legal advice is not an end in itself, but is for the purpose of enabling the counsel to act in his legal capacity as advocate for the client.

On the other hand, a reasoned and proper disposition of litigation requires that all pertinent information be made available to the trier of fact and all parties. There is presented then the difficult situation of balancing the need for informed counsel against the need for an informed court. Dean Wigmore commented on th: problem and stated that:

> [T]he investigation of truth and the enforcement of testimonial duty demand the restriction, not the expansion, of these privileges. 1/

1/ 8 Wigmore, Evidence, § 2192, at 73 (McNaughton rev. 1961); cited with approval in Falsone v. United States, 205 F.2d 734 (5th Cir.), cert. denied, 346 U.S. 864 (1953).

Dean Wigmore concluded:

> Nevertheless, the privilege remains an exception to the general duty to disclose. Its benefits are all indirect and speculative; its obstruction is plain and concrete . . . . It is worth preserving for the sake of a general policy, but is nonetheless an obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits consistent with its principle. 2/ [emphasis added]

While case law recognizes that this privilege is applicable to corporations, where the requirements of the privilege are met, the fundamental principle behind the the privilege -- the removal of the subjective fear in the client to permit full disclosure of the facts to his attorney -- seems to lose considerable force when it is applied to a large corporation and is balanced against the need for justice provided by an informed court.

In accordance with Dean Wigmore's suggestion that the privilege be "strictly confined within the narrowest possible limits," it has been well settled that the burden of proof rests heavily upon the party objecting to the discovery. The cost of depriving a court of pertinent information must not be a mere peppercorn. The party claiming the privilege has been held to the burden of "establishing the existence of the privilege" 3/ and of meeting this burden by a preponderance of the evidence, not by "mere conclusory or ipse dixit assertions, for any such rule would foreclose meaningful inquiry into the existence of the relationship [attorney-client], and any spurious claims could never be exposed." 4/

2/ Wigmore, § 2291, at 554.

3/ 8 Wright & Miller, Federal Practice and Procedure, § 2016 at 126 (1970); United States v. Johnson, 465 F. 2d 793 (5th Cir. 1972).

4/ In re Bonanno, 344 F. 2d 830, 833 (2d Cir. 1965).

B. THE ATTORNEY-CLIENT PRIVILEGE IS NOT APPLICABLE TO ALL DOCUMENTS AND COMMUNICATIONS BETWEEN ATTORNEY AND CLIENT.

Not all documents which emanate from the client or his agents which are directed to the attorney are deemed within the scope of the privilege. Dean Wigmore, referring to the fundamental principle behind the privilege, stated:

> Since the privilege is designed to secure subjective freedom of mind for the client in seeking legal advice . . . it has no concern with other persons' freedom of mind nor with the attorney's own desire for secrecy in the conduct of a client's case. It is therefore not sufficient for the attorney, in invoking the privilege, to state that the information came somehow to him while acting for the client, nor that it came from some particular third person for the benefit of the client. 5/ [emphasis in the original]

Under this rationale many items have not been classified as communications and therefore are not subject to the sanctuary of the privilege. Some of these items include the identity of the client, the factor amount of a retainer fee arrangement, the nature of legal services performed and physical characteristics. 6/

Essential to the privilege is the requirement that the communication to be suppressed from discovery be prepared by or in behalf of the client,

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5/ Wigmore, § 2317(2), at 619.

6/ Colton v. United States, 306 F. 2d 633 (2d Cir. 1962), cert. denied 396 U.S. 905 (1969); In Re Wasserman, 198 F. Supp. 564 (D. D.C. 1961); United States v. Kendrick, 331 F. 2d 110, 113-4 (4th Cir. 1964).

for the purpose of confidential communication to the attorney. 7/ Documents which do not conform with this requirement, as well as those prepared prior to the attorney's involvement in the case as counsel, have been held to lie beyond the scope of this privilege. 8/ Suppression of these documents does not aid in the promotion of attorney-client communication but significantly hinders the ends of justice.

There is no presumption that a document prepared by a client or on his behalf, even after he had retained counsel, is a privileged document. The price for obstruction of the judicial process is high and must be strictly and fully met at each instance.

Workpapers which have been compiled in strict accordance with the elements of the privilege must be deemed within the privilege. But the claimant of the privilege has the burden of showing that the documents were not prepared as a routine or policy matter, nor for reasons other than to communicate with his attorney as such documents are independent of the attorney's involvement and are not privileged. 9/

It also follows directly from these examples that documents which are not privileged in the hands of the clients do not become so when transmitted to his attorney, even when done in confidence for the purposes of professional consultation. 10/

7/ United States v. Silverman, 430 F. 2d 106 (2d Cir. 1970).
8/ United States v. Judson, 322 F. 2d 460 (9th Cir. 1963); Bouschor v. United States, 316 F. 2d 451 (8th Cir. 1963).
9/ United States v. Judson, 322 F. 2d 460 (9th Cir. 1963); United States v. Bartlett, 449 F. 2d 700 (8th Cir. 1971).
10/ Grant v. United States, 227 U.S. 74 (1913); Colton v. United States, 306 F. 2d 633 (2nd Cir. 1962).

C. ATTORNEY-CLIENT PRIVILEGE MORE NARROWLY CONSTRUED FOR COMMUNICATIONS FROM THE ATTORNEY TO THE CLIENT.

In providing the privilege to the client there exists, as stated earlier, a need to remove all barriers which might cause the client to withhold information from his attorney.

It has been held in certain situations that the privilege exists, to a much more limited extent, where the communications are from an attorney to his client. 11/ Dean Wigmore, discussing this aspect of the privilege, stated that the privilege was not designed to secure the attorney's freedom of expression but to prevent the use of the attorney's statements as admissions of the client or as leading to inferences of the tenor of the client's communications. 12/

The application of these principles has lead to the suppression of documents where the attorney has adopted in his communication to his client a portion of the client's privileged disclosure. 13/ Conversely, discovery of advice by the attorney to his client is not banned where it is based on sources of information other than his client's privileged disclosures. These other sources have been described as including public records, communication from third parties, and judicial opinions. Accordingly, to

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11/ United States v. Silverman, 430 F. 2d 106 (2d Cir. 1970); Natta v. Hogan, 392 F. 2d 686 (10th Cir. 1968).

12/ Wigmore, §2320, at 629; Accord, United States v. Silverman, 430 F. 2d 106, 122 (2d Cir. 1970); Natta v. Hogan, 392 F. 2d 686, 693 (10th Cir. 1968).

13/ United States v. Silverman, 430 F. 2d 106 (2d Cir. 1970); American Cyanimid Co. v. Hercules Powder Co., 211 F. Supp. 85, 87 (D. Del. 1962).

protect communication from the attorney to his client, the claimant must first demonstrate that all the elements of the privilege have been satisfied, and secondly that without the application of the privilege disclosure of a protected communication from client to attorney would result.

D. COMMUNICATIONS MUST BE MADE IN THE COURSE OF OBTAINING LEGAL ADVICE FROM A PROFESSIONAL LEGAL ADVISOR ACTING IN HIS CAPACITY AS SUCH.

The question of privilege becomes more involved when the attorney is either acting as a business advisor or actively participating in the business itself. In these cases the philosophy of supplying the attorney with all relevant information to permit adequate representation in a legal dispute is many times without applicability. Without the presence of a need to overcome the subjective fear of a client, justice requires that there be no privileged suppression conferred on any communications. To obtain the sanctuary of the privilege when an attorney is employed by or engages in the business, the claimant has the additional burden of proof of showing that the attorney was acting in his legal capacity as such with respect to the communication. 14/ Legal capacity has been defined in this context as the "receiving and applying rules of law to confidential information received from" the client. 15/ From the application of these principles it has been held that "communication involving business, rather than legal, advice are, therefore, not privileged." 16/

14/ Georgia-Pacific Plywood Co. v. United States Plywood Corp., 18 F.R.D. 463 (S.D.N.Y. 1956); Zenith Radio Corp. v. Radio Corp. of America, 121 F. Supp. 792 (D. Del. 1954).

15/ Paper Converting Machine Co. v. FMC Corp., 215 F. Supp. 249, 252 (E.D. Wis. 1963).

16/ United States v. Vehicular Parking, Ltd., 52 F. Supp. 751 (D. Del. 1943); Colton v. United States, 306 F. 2d 633 (2d Cir. 1962); United States v. Aluminum Co. of America, 193 F. Supp. 251 (N.D.N.Y. 1960).

E. ONLY THE CORPORATION'S "CONTROL GROUP" SHOULD BE CONSIDERED AS A "CLIENT" WITHIN THE MEANING OF THE PRIVILEGE.

The application of the attorney-client privilege to a corporation raises an important question. Who speaks for the corporation, such that his communication to the attorney should become privileged? This question has been answered by the courts for the purposes of the privilege, by the creation of a corporate sub-entity called the "control group." The courts have determined that a corporate employee is a member of this control group only if he -

> . . . 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 17/

Other courts have further narrowed this definition of control group to exclude any employee who did not participate or could not have participated in the corporation's decision on the question on which legal advice was sought. 18/ Thus, having the authority to make decisions giving rise to the corporate liability is not sufficient.

17/ City of Philadelphia v. Westinghouse Electric Co., 210 F. Supp. 483 (E. D. Pa. 1962).

18/ State of Illinois v. Harper & Row Publishers, Inc., 50 F. R. D. 37 (N. D. Ill. 1969). On appeal, the Seventh Circuit recognized that while it felt the district court had properly applied the "control group" test, it felt this test was not the appropriate legal standard. Harper & Row Publishers, Inc. v. Decker, 423 F. 2d 487 (7th Cir. 1970), aff'd by equally divided court, 400 U.S. 378 (1971).

The courts have narrowly construed this group so as not to allow a privilege, which is extremely limited when applied to a natural person, to be expanded by the fact that a corporation requires a person to speak for it. To expand this group would give unfair advantage to the corporate form over the partnership even without regard to its detrimental impact on the discovery process.

The theory of the "control group" as the test for the persons who speak for the corporation has run into some criticism in the Seventh Circuit in the case of Harper & Row Publishers, Inc. v. Decker. [19] In that case the privilege was expanded to non-control group employees -

> . . . 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. [20]

When we consider the basic principle behind the privilege, it seems as if the court in Harper & Row Publishers, Inc. v. Decker, supra, failed to take into account the real essence of the rationale behind the privilege. One commentor noted:

> When they [non-control group employees] consider how much to reveal to counsel, they are likely to be deterred more by the fear that management will be displeased when it learns of their conduct than by the fear of disclosure to opposing litigants. The attorney-client privilege does nothing to meet the fear that weighs significantly in their calculations. [21]

19/ 423 F. 2d 487 (7th Cir. 1970), aff'd by equally divided court, 400 U.S. 348 (1971).

20/ Id. at 491-92.

21/ Note, Attorney Client Privilege for Corporate Clients: The Control Group Test, 84 Harv. L. Rev. 424, 429 (1970).

When these factors are placed in the balance of an informed court and reasoned decision against the more immediate fear of employer reprisal, justice demands that the former prevail as the privilege can do nothing to alleviate this fear. The use of this extension further restricts the ability of the court to come to a reasoned determination based upon all the facts without any countervailing benefit to which the privilege rightfully addresses itself.

It should be pointed out that this area of dispute in the attorney-client privilege deals with only a minor and specific factual situation. In order to invoke this extension of the privilege within the Seventh Circuit, the additional burden is upon the claimant to show that non-control group employee's communication is (1) about the performance of his duties, and (2) the communication to the attorney had been directed by the employee's superiors. 22/ Where the communication had not been directed it would not be privileged even in the Seventh Circuit.

22/ Harper & Row Publishers, Inc. v. Decker, supra at 491-92.

F. THE COMMUNICATION MUST HAVE BEEN INTENDED TO BE AND MUST HAVE REMAINED CONFIDENTIAL.

The principle behind this privilege is to insure that a client will disclose information pertaining to his case to his attorney. A client who discloses the information to third parties cannot be permitted to hide this information just from the court. The privilege in such case is of negligible value as the court could with added difficulty obtain the information from other sources. The requirement has been enunciated as follows:

> It is of the essence of the attorney-client privilege that it is limited to those communications which are intended to be confidential. 'The moment confidence ceases,' said Lord Eldon, 'privilege ceases.' [Citations omitted.] Thus it is well established that communications between an attorney and his client, though made privately, are not privileged if it was understood that the information communicated in the conversation was to be conveyed to others. 23/

In accordance with the strict construction given to this privilege, it must be clear from all the circumstances that the client intended that the communication be kept confidential. 24/

Several cases provide examples of when the intent to maintain the confidentiality of a client's communications has not been maintained and the privilege has been lost. In one case the presence of a third person destroyed the privilege 25/ while the intent to transmit the information to

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23/ United States v. Tellier, 255 F. 2d 441, 447 (2d Cir), cert. denied, 358 U.S. 821 (1958).

24/ Cafritz v. Koslow, 167 F. 2d 749 (D.C. Cir. 1948); Wigmore, § 2311, at 600.

25/ United States v. Simpson, 475 F. 2d 934 (D.C. Cir. 1973); Cafritz v. Koslow, supra.

third parties was held sufficient in another. [26] Inadvertent disclosure has also been held as a bar to the subsequent claim of the privilege. [27] Of special relevance to the corporate claim of the privilege is the factual situation in United States v. Kelsey-Hayes Wheel Co. [28] where the court refused to apply the privilege due to the mingling of the documents with other routine documents of the corporation. The court stated:

> It is difficult to be persuaded that these documents were intended to remain confidential in the light of the fact that they were indiscriminately mingled with the other routine documents of the corporation and that no special effort to preserve them in segregated files with special protections was made. One measure of their continuing confidentiality is the degree of care exhibited in their keeping, and the risk of insufficient precautions must rest with the party claiming the privilege. [29]

Accordingly another burden of proof must be met by the claimant of the privilege. He must show that (1) sufficient precautions were taken to avoid the disclosure of the contents of each document and (2) this was actually achieved.

26/ Colton v. United States, 306 F. 2d 633 (2d Cir. 1962).
27/ Fratto v. New Amsterdam Fire Insurance Co., 359 F. 2d 842 (3d Cir. 1966).
28/ 15 F.R.D. 461 (E.D. Mich. 1954).
29/ Id. at 465.

G. COMMUNICATIONS MADE IN THE COURSE OF A CRIMINAL, FRAUDULENT OR OTHERWISE ILLEGAL SCHEME ARE NOT PROTECTED BY THE PRIVILEGE.

Justice Cordozo in the case of Clark v. United States [30] stated that:

> A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told.

This revocation of the privilege for criminal acts has been expanded to deny the privilege to any person who "seeks legal assistance for illegal ends." [31] In order to remove the sanctuary of the privilege it has been held that a prima facie showing, independent of the communication, establishing that it was made in the course of perpetuating a crime, or fraud, or seeking illegal ends, is sufficient. [32] The courts have held that this prima facie showing can be made at any point during the proceeding by the presentation of additional evidence sufficient to establish a prima facie case. [33]

Many of the documents sought to be discovered in the proceeding have been withheld under the claim of attorney-client privilege. The City of Cleveland in its petitions for intervention in the Perry and Davis-Besse cases has made allegations of violations of Sections 1 and 2 of the Sherman Act. If it appears that communications, claimed to have been privileged,

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30/ 289 U.S. 1, 15 (1933).
31/ United States v. Billingsley, 440 F. 2d 823, 827 (7th Cir. 1971).
32/ United States v. Shewfelt, 455 F. 2d 836 (9th Cir. 1972); Clark v. United States, supra.
33/ Natta v. Zletz, 418 F. 2d 633 (7th Cir. 1969).

were in furtherance of a plan to maintain or enhance claimant's monopoly, any privilege which may have attached to such communications is lost and the substance of such communications must be immediately disclosed.

In this regard the City of Cleveland (Cleveland) would note that applicants have already stipulated in these proceedings that each of the applicants occupies a position of dominance with respect to the generation and transmission of electric power and energy in its service territory. Applicants' dominance, coupled with CEI's refusal to wheel power for Cleveland and the refusal of CEI and Duquesne to permit Cleveland to join CAPCO, establish an attempt by CEI and the CAPCO companies to monopolize and to enhance and maintain a monopoly position in the generation and transmission of electric power and energy.

II WORK PRODUCT DOCTRINE

The basic philosophy behind the modern discovery rules is that they should be "accorded a broad and liberal treatment." 34/ This represents the expression of the public policy to provide a just resolution of all litigation based upon analysis of all relevant facts. This policy requires, as in the case of the attorney-client privilege, that any infringement on the access to information be narrowly applied with the burden of establishing the existence of the privilege upon the claimant of that privilege. 35/ Accordingly the claimant of the privilege must establish, by the preponderance of the evidence, all the elements and facts to show that the particular document claimed to be privileged falls within the scope of the rule. 36/

The Nuclear Regulatory Commission has promulgated regulations governing discovery in their administrative hearings. Section 2.740 General provisions governing discovery, in Title 10 of the Code of Federal Regulations specifically sets forth the provisions governing the discovery of "work product." This section is almost a verbatim copy of the Rule 26(b)(3) of the Federal Rules of Civil Procedure except that the Federal Rules require that the documents be "prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative," while Title 10 states "prepared in anticipation of or for the hearing by or for another party's representative."

34/ Hickman v. Taylor, 329 U.S. 495, 507 (1947).
35/ 8 Wright & Miller, Federal Practice and Procedure, §2016, at 126 (1970).
36/ McNeice v. Oil Carriers Joint Venture, 22 F.R.D. 14 (E.D. Pa. 1958).

Because of the similarity of the two sections it can reasonably be assumed that the Nuclear Regulatory Commission did intend and continues to intend that these rules be given the same import and effect. Accordingly, as there has developed substantial case law under the Federal Rules and the rules are essentially identical, we submit that all analysis and case law applicable to the Federal Rules are also applicable to Title 10 of the Code of Federal Regulations.

A. FEDERAL RULES OF CIVIL PROCEDURE 26(b)(3) AND THE "WORK PRODUCT" DOCTRINE RECOGNIZE CERTAIN REQUIREMENTS.

FRCP 26(b)(3) enunciates two specific requirements which must be met in order to extent the court's protection over documents or materials. The first is that these items must have been "prepared in anticipation of litigation or for trial." Secondly, they must have been prepared "by or for another party or by or for that party's representative." Those documents which do not meet these criteria have been considered "routinely discoverable." 37/ Those which do meet the requirements are protected from discovery unless the party seeking discovery shows a -

> substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. 38/

37/ Peterson v. United States, 52 F.R.D. 317, 320 (S.D. Ill. 1971); Thomas Organ Co. v. Jadranska Slobodna Plovidba, 54 F.R.D. 367 (N.D. Ill. 1972).

38/ FRCP 26 (b)(3).

A limitation is placed upon documents which may be discovered under this latest provision. This restricts discovery of any portion of a document which discloses the "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." 39/

The predecessor of Rule 26(b)(3) was the qualified immunity set out in the leading case of Hickman v. Taylor. 40/ In that case the Supreme Court set out a qualified immunity for "interviews, mental impressions, personal briefs and countless other tangible and intangible" 41/ reflections of the work of an attorney in preparing a case for trial. Under this rule the burden was placed upon the party seeking production of the documents "to establish adequate reasons to justify [their] production . . ." 42/ presumptively after the claimant of the immunity had shown that the document fell within the protected area.

The basic philosophy behind this qualified immunity and the attorney-client privilege is very similar. The immunity from discovery is meant to remove any subjective fear that "his thoughts and information will be invaded by his adversary if he records them[.]" 43/

As with the attorney-client privilege the court in the Hickman case did not confer a blanket immunity from discovery. In that case the court stated:

39/ Id.
40/ 329 U.S. 495.
41/ Id. at 511.
42/ Id. at 512.
43/ Republic Gear Co. v. Borg-Warner Corp., 381 F. 2d 551, 557 (2d Cir. 1967).

> Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had. 44/

B. THE IMMUNITY ONLY EXTENDS TO DOCUMENTS PREPARED IN ANTICIPATION OF LITIGATION OR FOR TRIAL.

FRCP 26(b)(3) enumerates various requirements which must be met by the claimant to receive the immunity from discovery. The first as stated above requires that the materials be "prepared in anticipation of litigation or for trial." The Advisory Committee notes in reference to this rule that:

> materials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, are not under the qualified immunity provided by [Rule 26(b)(3)]. 45/

The phrase "anticipation of litigation" has taken on increased importance as a prerequisite for application of the immunity to the "mental impression, conclusions, or legal theories of attorneys" to the area covered by the rule It has been held that where the document was not produced in "anticipation of litigation," that the immunity did not attach to the "mental impressions," etc., of the attorney. This seems to indicate that the rule is more prone to protect preparations for trial than the privacy of an attorney's opinion, mental impressions, etc. This caveat obtains even greater significance when one looks at the case-by-case application of this rule.

44/ 329 U.S. at 511.

45/ Advisory Committee on Civil Rules, Proposed Amendments of the Federal Rules of Civil Procedure Relating to Discovery, 48 F.R.D. 487, 501 (1970).

The cases have held that the possibility of litigation must be more than the "remote possibility of litigation such as surrounds nearly every act of the office attorney" for the work-product doctrine to apply. 46/ The documents must directly relate to the possible litigation 47/ and not have been "gathered with the knowledge that [they] might be used in some future litigation." 48/

C. THE DOCUMENTS ARE REQUIRED TO INVOLVE AN ATTORNEY IN THE ROLE OF COUNSELOR IN THEIR ORIGINATION OR PREPARATION.

One factor which courts have relied upon in making a determination of whether the documents are work-product has been the amount of involvement by an attorney in the preparation of the document either by request for its preparation or direct participation in its preparation.

It has been held to create a conclusive presumption that the document was prepared in the ordinary course of business and not in anticipation of litigation where there was no attorney involved in the origination and preparation of a document. 49/ But the converse is not always true. The fact that an attorney requested the preparation or even participated in its preparation does not establish that the document was prepared in anticipation of

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46/ Zenith Radio Corp. v. Radio Corp. of America, 121 F. Supp. 792, 795 (D. Del. 1954).

47/ Abel Investment Co. v. United States, 53 F.R.D. 485 (D. Neb. 1971); Peterson v. United States, 52 F.R.D. 317 (S.D. Ill. 1971).

48/ Thill Securities Corp. v. New York Stock Exchange, 57 F.R.D. 133 (E.D. Wisc. 1972).

49/ Thomas Organ Co. v. Jadranska Slobodna Plovidba, 54 F.R.D. 367 (N.D. Ill. 1972).

litigation. As with the attorney-client privilege, the attorney must have been involved with that particular document in his role as attorney preparing for litigation and not as a corporate executive involved in the policy decisions of the corporation. Courts have emphasized the requirement that attorney-executives, in order to obtain the immunity, must have been "acting in the role of counselor." 50/ The courts have recognized that it would be far too easy for a corporation to claim the immunity from discovery simply by "funnelling them routinely through an attorney." 51/

D. OTHER REQUIREMENTS WHICH MUST BE MET

Courts have also reviewed the contents of the document to discover if the substance of the document is a "compendium of the attorney's mental impression and beliefs, and reflects the attorney's opinion which is based on legal skills" and properly within the scope of the work product protection. 52/ Or whether the documents consisted of routine reports containing "business advice such as that related to product marketing" 53/ or financial operation and thus not within the scope of the protection.

Other limitations which have evolved narrow the use of the work product protection even further. Courts have refused to grant protection to pre-existing documents or materials which are referred to or consulted. 54/

50/ Id. at 372.
51/ Jack Winter, Inc. v. Koratron Co., Inc., 54 F.R.D. 44, 47 (N.D. Cal., 1971).
52/ Stix Products, Inc. v. United Merchants & Mfrs., Inc., 47 F.R.D. 334, 337 (S.D. N.Y. 1969).
53/ Jack Winter, Inc. v. Koratron Co., Inc., supra, at 47.
54/ Ledge Hill Farms, Inc. v. W.R. Grace & Co., Inc., 5 F.R. Serv. 2d 26b.31 Case 2, at 447 (S.D.N.Y. 1962); Jack Winter, Inc. v. Koratron Co., Inc., supra.

Also documents prepared in order to fulfill the requirements of regulatory agencies have been held to be prepared in the "ordinary course of business" and therefore beyond the scope of the protection. 55/ In addition, the privileged immunity afforded to these documents does not last forever once obtained. Once the anticipated litigation has terminated, the protection ceases. The court, noting this in Hanover Shoe, Inc. v. United Shoe Machinery Corp., 56/ stated:

> There is nothing in the Hickman case which extends the work product principle to preclude discovery of a lawyer's memorandum, prepared during a prior case, in a subsequent action between different parties. 57/

E. DISCOVERY OF THE REQUESTED MATERIALS IS ESSENTIAL TO THE PREPARATION OF THE CITY OF CLEVELAND'S CASE, AND EVIDENCE TO BE GAINED THEREFROM CAN BE OBTAINED FROM NO OTHER SOURCE.

In this case the City of Cleveland has filed a petition to intervene in connection with the antitrust review aspects of the application. By the very nature of antitrust review, the facts sought to be established deal specifically with the corporate intent and policy. The intention and policy of a corporation are major elements in both the allegations of antitrust and, conversely, the defense. The corporate intent and policy can only be determined by a detailed analysis of the internal memoranda, letters, opinions, etc., which circulate within the corporate structure. These documents are in the sole

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55/ Goosman v. A. Duie Pyle, Inc., 320 F. 2d 45, 52 (4th Cir. 1963).
56/ 207 F. Supp. 407 (M. D. Pa. 1962).
57/ Id. at 410.

possession and control of the Cleveland Electric Illuminating Company and are not available to the City of Cleveland from any other source.

It is essential to the preparation of our case and to public interest, which has required investigation of the antitrust aspects of this case, to grant discovery of these documents so that a complete analysis can be performed and this board can make a reasoned determination based upon all the relevant facts.

III APPLICATION OF THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE TO THE DOCUMENTS SOUGHT BY DISCOVERY

In the preceding pages the basic principles under which various courts have ruled on numerous motions for discovery have been set forth. The task of applying these principles to the documents in question is both a complex and an unequally burdensome task. The task is unequally burdensome in that one party knows exactly what he does not want set forth in the record or given to the other party. He realizes the impact of each element of the rules and their interpretations with respect to each undisclosed document. The situation of the discovering party can be likened to the children's story of the encounter of the blind men and an elephant. One holds the tail and decides the elephant is like a snake while another holds the ear and thinks it more like a large leaf. As the discovering party, we are very much like the blind men who know the strange animal only by a few given clues. The party claiming privilege can be likened to the elephant trainer who knows the entire animal and restricts the contacts of the blind.

The courts have seen fit under the inspiration of Dean Wigmore to try to narrow the parameters of these rules in order to aid the ends of justice. They have cast a heavy burden upon those who would restrain the operation of discovery. The courts have required that those claiming the privilege and immunities carry the full burden of proof that documents have complied fully with each and every aspect of the rules. The discovering party can not argue, nor are they expected to argue, that these documents do not comply with one or more of the elements. Since arguing over history

and contents of documents they have not seen is likened to the blindmen trying to agree on the shape of the elephant.

In the case before this board there are numerous documents sought to be discovered. If there were only one document, the board would be required by the principles of the rules and of justice to require the party claiming privilege to carry the burden of showing the existence of the privilege or immunity. Furthermore, that party would be required to show that the privilege or immunity has not been waived or defeated by the failure of the claimant to meet all the contingencies enumerated in the brief. Equal justice demands that these same principles and burdens apply in similar weight to the case where there are numerous documents to be discovered. The price which must be paid for the hindrance of discovery cannot be a peppercorn nor a multi-columnar chart listing documents as either reciting an alleged confidential communication to attorney or pertaining to present litigation. Because of the hindrance to justice attempted to be perpetrated by the suppression of these documents, it is requested that the special master weigh not only the facts which must be presented as to each document and each element of the claimed applicable rule but also consider the guiding principles set forth by Dean Wigmore and the Advisory Committee which restrict the use of these rules to narrow segments of communications and documents.

Respectfully submitted,

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April 25, 1975

CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing Memorandum of Law for the Special Master for the Determination of Assertions of Privilege of the City of Cleveland has been made on the following parties listed on the attachment hereto this 25th day of April, 1975, be depositing copies thereof in the United States mail, first class or air mail, postage prepaid, or by hand delivery.

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