5-3-75

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter	)	
	)	
The Toledo Edison Company	)	
The Cleveland Electric Illuminating Company	)	Docket No. 50-346A
(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)	)	

REPLY MEMORANDUM OF
THE DEPARTMENT OF JUSTICE
ON APPLICANTS' CLAIMS OF PRIVILEGE

I. Introduction

Pursuant to the Order of the Atomic Safety and Licensing Board of December 10, 1974, all documents for which claims of privilege were asserted were submitted to a Master, the Honorable Marshall E. Miller, for in camera examination and determination of the claims of privilege. Memoranda in support of the respective parties' claims of privilege were filed on April 25, 1975, and reply memoranda challenging these claims of privilege are to be submitted on May 2, 1975.

This memorandum discusses the rules of law governing attorney-

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client privilege and attorneys' work product, and applies these rules of law to Applicants' claims of privilege. Attachments A-F set forth, by category, those documents for which the Applicants have not met the burden of proving privilege. The Department submits that these documents are, therefore, subject to production.

Attorney-Client Privilege

Part I

The classic statement of the attorney-client privilege was made by Judge Wyzanski in United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950):

> The privilege applies only if (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 related 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 proceedings, and not (d) for purposes of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

These individual elements of the privilege and their application to a corporate client are discussed at length below.

Dean Wigmore has authoritatively summarized the history and purpose of the privilege: 1/

1/ 8 Wigmore, Evidence §2290, at 554 (McNaughten rev. 1961) (hereinafter cited as "Wigmore").

> In order to promote freedom of consultation of legal advisors by clients, the apprehension of compelled disclosure by the legal advisors must be removed; hence the law must prohibit such disclosure except on the client's consent. Such is the modern theory.

Encouragement of full disclosure by a client rests on the theory that

> claims and disputes which may lead to litigation can most justly and expeditiously be handled by practiced experts, namely lawyers, and that such experts can act effectively only if they are fully advised of the facts by the parties whom they represent. McCormick, Evidence, §87, at 175 (2d ed. 1972).

The fact that there are sound policy reasons for the establishment of the privilege must not be allowed to obscure the fact that each application of the privilege is a limited exception to a general rule resting upon an equally sound basis. Each time the privilege is applied, it bars examination of relevant evidence bearing on the issues under litigation. Because the general policy requiring an open examination of all relevant facts competes with the more restricted policy of encouraging unhampered attorney-client communication, a balance must be struck. Wigmore has summarized this need for balancing as follows:

> 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 it 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. Wigmore, §2291, at 554.

A. The Federal Common Law Of Privilege Should Be Applied In Federal Administrative Proceedings

Before discussing the various elements of the attorney-client privilege, it should be noted that the rule of law to be applied in this proceeding should be that established by the various federal courts.

Because a Court, in applying the rules of privilege, must balance the need to protect attorney-client communications with the need for full disclosure, those rules should be applied with a view towards fairness to all parties in a proceeding. Where, as here, an administrative agency must deal with parties from all parts of the country, it appears that the fairest and best reasoned decision would be to apply the federal common law of privilege, thus assuring a consistent application of the law, regardless of the location of the Applicants or intervenors. Any other rule would lead to an inconsistent and inequitable application of the law, based in each proceeding on the situs of the parties. The problems at their worst arising from an application of the state law of privilege can be seen if one imagines a proceeding where one Applicant is from State A and another from State B.

It is clear that an administrative agency, if it wishes, may apply the federal common law of privilege. In In re Albert Lindley Lee Memorial Hospital, 209 F. 2d 122, 123 (2nd Cir. 1953), cert. denied, 347 U.S. 906 (1954), the Court of Appeals first held that the determination of what evidence is to be admissible

in an administrative investigation "is a matter to be decided according to federal law." Accord: Colton v. United States, 306 F. 2d 633 (2d Cir. 1962), cert. denied, 371 U.S. 951 (1962); Falsone v. United States, 205 F. 2d 734 (5th Cir. 1953), cert. denied, 346 U.S. 864 (1963).

In Gretsky v. Basso, 136 F. Supp. 640, 641 (D. Mass. 1955), the Court held that even if a privilege existed under state law, "this is a federal administrative proceeding and state evidentiary restrictions would not apply."

In Federal Trade Commission v. St. Regis Paper Co. 304 F. 2d 731 (7th Cir. 1962) a proceeding to enforce a subpoena duces tecum issued by the Federal Trade Commission in an investigation under the Clayton Act, the Court of Appeals (citing Falsone) held that the federal common law of privilege was controlling and the Commission and the District Court had not erred in refusing to apply what was a legitimate privilege under state law.

It is therefore both necessary and proper to reject Applicants' argument that Ohio State law concerning privilege should apply in this proceeding. Clearly, such a claim would be rejected in any suit before the federal courts to which Applicants were a party.

B. The Attorney-Client Privilege Is To Be Strictly Construed

Dean Wigmore's warning that the attorney-client privilege "ought to be strictly confined within the narrowest possible

limits consistent with its principle" has been relied upon in numerous cases. Radiant Burners, Inc. v. American Gas Association, 320 F. 2d 314 (7th Cir.), cert. denied, 375 U.S. 929 (1963); United States v. Goldfarb, 328 F. 2d 280 (6th Cir.), cert. denied 377 U.S. 976 (1964); Kearney & Trecker Corp. v. Giddings & Lewis, Inc., 296 F. Supp. 979 (E.D. Wis. 1969).

A corollary of this need for strict construction is that the party claiming the privilege "has the burden of establishing the existence of the privilege." 8 Wright & Miller, Federal Practice and Procedure, §2016, at 126 (1970); United States v. Johnson, 465 F. 2d 793 (5th Cir. 1972); Honeywell, Inc. v. Piper Aircraft Co., 500 F.R.D. 117 (M.D. Pa. 1970). The party claiming the privilege must show that all the elements of the privilege exist. United States v. Gurtner, 474 F. 2d 297 (9th Cir. 1973); In re Bonanno, 344 F. 2d 830 (2d Cir. 1965); International Paper Co. v. Fireboard Corporation, 63 F.R.D. 88 (M.D. Pa. 1974). A mere assertion that the privilege exists is not sufficient. Rather, the claiming party must "show sufficient facts as to bring the identified and described document within the narrow confines of the privilege." International Paper Co. v. Fireboard Corporation, 63 F.R.D. at 94.

It is readily apparent that the Applicants have not met this burden of proof with respect to several elements of the privilege. For example, in its answer to the Interrogatories of the Department of Justice, The Cleveland Electric Illuminating

Company (hereinafter "CEI") stated that the distribution of a number of documents was "not known." It is clear, therefore, that with respect to those documents, CEI has not made the requisite showing of confidentiality. 2/ Applicants' failure to meet their burden of proof with respect to other elements of the privilege will be discussed in those sections dealing with the specific elements.

C. Only Communications Between Attorney And Client Are Protected

It is an essential element of the privilege that only communications between an attorney and a client are privileged. Wigmore, §2292, at 554; United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358-359 (D. Mass. 1950). As noted above, the purpose of the privilege is to encourage free and open discussion between attorney and client. Thus, only that information which the attorney would not obtain other than through his client is protected. Communications which an attorney receives from someone other than his client, or certain agents of his client, are not protected. Hickman v. Taylor, 329 U.S. 495, 508 (1947); United States v. Goldfarb, 328 F. 2d 280 (6th Cir.), cert. denied, 377 U.S. 976 (1964); Cafritz v. Koslow, 167 F. 2d 749 (D.C. Cir. 1948). As Dean Wigmore wrote:

> Since the privilege is designed to secure subjective freedom of mind for the client in

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2/ See Section II. F., infra, for a discussion of confidentiality as applied to the attorney-client privilege.

> 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, not that it came from some particular third person for the benefit of the client. Wigmore, §2317(2), at 619.

Where documents have been prepared as a matter of the client's routine or policy, or for any reason other than communication with his attorney, they are not protected. United States v. Judson, 322 F. 2d 460 (9th Cir. 1963); United States v. Bartlett, 449 F. 2d 700 (8th Cir. 1971).

It follows then that pre-existing independent documents which do not themselves satisfy all of the elements of the privilege do not become privileged when transmitted to an attorney, even if for the purpose of seeking legal advice. Colton v. United States, 306 F. 2d 633 (2d Cir. 1962); Bouscher v. United States, 316 F. 2d 451 (8th Cir. 1963); Falsone v. United States, 205 F. 2d 734 (5th Cir. 1953). As noted by the Second Circuit in Bouscher v. United States, 316 F. 2d at 639, "any other rule would permit a person to prevent disclosure of any of his papers by the simple expedient of keeping them in the possession of his attorney". This rule was applied to a corporation in Radiant Burners, Inc. v. American Gas Association, 320 F. 2d 314, 324 (7th Cir. 1963)

> 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.

An examination of Applicants' Answers to Interrogatories has revealed a substantial number of documents 3/ of which neither the writer nor the recipient was an attorney, but a copy of which was sent to an attorney. It is just this kind of "funnelling" that the Court in Radiant Burners sought to prevent, and it is clear that these documents are not within the protection of the privilege and should be produced.

Moreover, where an attorney's advice is based on communications which are not privileged, that advice (its protection deriving solely from the protection afforded the client) is not itself privileged. Sperti Products, Inc. v. Coca-Cola Co., 262 F. Supp. 148 (D. Del. 1962); American Cyanamid Co. v. Hercules Powder Co., 211 F. Supp. 85 (D. Del. 1962); United States v. United Shoe Machinery Corp., 89 F. Supp. 357 (D. Mass. 1950). 4/

The Department has challenged Applicants' claims of privilege for many documents written by an attorney because they are not based on an underlying confidential communication. If an examination of these documents shows that the sole basis for the advice given in those documents is an independent non-privileged communication, they should be ordered produced.

3/ See Attachment B.

4/ See Section G, infra, for a discussion of the attorney-client privilege as applied to communications from an attorney.

D. The Communication Must Be From A Client

To be within the scope of the attorney-client privilege, the confidential communication to the attorney which is to be protected must be from a client, prospective client or certain agents of a client. Wigmore, §2296 at 554, United States v. United Shoe Machinery Corp., 89 F. Supp. at 358. Because a corporation is a legal entity, unable to speak for itself, application of the rule in the corporate context is sometimes difficult. Although some early cases held that any corporate employee can speak for the corporation (see e.g., Zenith Radio Corp. v. Radio Corp. of America, 121 F. Supp. 792 (D. Del. 1954), the better reasoned rule is one which applies the "control group" test.

The "control group" test seeks to determine which corporate employees are in positions of sufficient authority to be considered as speaking for the corporation. Under the decision in City of Philadelphia v. Westinghouse Electric Co., 210 F. Supp. 483, 485 (E.D. Pa. 1962) mandamus and prohibition denied, sub nom. General Electric Co. v. Kirkpatrick, 312 F. 2d 742 (3d Cir.), cert. denied, 372 U.S. 943 (1963), an employee is within the control group only if he:

> . . . of whatever rank he may be, 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. . . .

The "control group" test has been approved and applied in numerous cases. Natta v. Hogan, 392 F. 2d 686 (10th Cir. 1968); Honeywell, Inc. v. Piper Aircraft Co., 50 F.R.D. 117 (M.D. Pa. 1970); Garrison v. General Motors Corp., 213 F. Supp. 515 (S.D. Cal. 1963).

Once it has been determined that the "control group" test is to be used, a decision must be made as to which employees are within that group. An employee's title or position on the corporation's organizational chart is not determinative of membership in the control group. Rather, one must look to the substance of that person's duties and his actual authority. City of Philadelphia v. Westinghouse Electric Corp., 210 F. Supp. 483 (E.D. Pa.). In Congoleum Industries, Inc. v. GAF Corp., 49 F.R.D. 82 (E.D. Pa. 1969), for example, the Court held that the director of research of a division of the corporation was not within the control group because his duties encompassed gathering the information which served as the basis for making corporate decisions but did not include participation in the actual decision making. Other decisions illustrative of the application of control group test are: Hogan v. Zletz, 43 F.R.D. 308, 315 (N.D. Okla. 1967), aff'd sub nom. Natta v. Hogan, 392 F.2d 686 (10th Cir. 1968); (Included in the control group were the manager and assistant manager of the company's Patent Division, Research and Development Division, and all members of the Patent Committee. Not within the control group was a research chemist or group leader in the Research and

Development Division); Garrison v. General Motors Corp., 213 F. Supp. 515 (S.D. Cal. 1963) (control group includes GM's officers, directors, department heads and one department head's first assistant); City of Philadelphia v. Westinghouse Electric Corp., supra, (department or division heads are not within the control group).

In its answers to the Department's interrogatories concerning the positions and duties of the writers and recipients of the documents claimed as privileged, Applicant CEI supplied the Department only with an organizational chart and a statement of the employee's title and immediate supervisor. Because of this lack of information the Government was able to challenge only those documents whose writers or recipients were clearly not within the control group as defined by the courts. As to those documents Applicant has not met its burden of showing that the employee had sufficient authority to be considered a client.

If it does not become apparent from an examination of the individual documents and the Applicants' Answers to Interrogatories that an employee claimed as a "client" possessed sufficient authority to be included within the control group, the documents written or received by that employee do not satisfy this element of the privilege and should be ordered produced.

Applicant's failure to meet its burden of proof as to employees clearly not within the control group is not remedied by its reliance upon the decision in Harper & Row Publishers

v. Decker, 423 F.2d 487 (7th Cir. 1970), aff'd by an equally divided court, 400 U.S. 348 (1971). In that case, the Court held that the privilege can apply to a communication from an employee not within the control group "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." 423 F.2d at 491-92.

When the policies behind the attorney-client privilege and the need for its limitation are recalled, it can be concluded that the control group test leads to a more reasoned application of the privilege. The policy behind the privilege is full disclosure by a client. When deciding what facts to reveal to counsel, a lower level employee will be more concerned with the reaction of management to the performance of his duties than any disclosure to litigative opponents. Thus, the existence or nonexistence of the privilege will not be determinative of the amount of information communicated by that employee. On the other hand, since the lower level employee is most often aware of and involved in the day-to-day activities which form the basis of the litigation, the application of the privilege to his communications would remove an essential and irreplaceable source of necessary facts. In short, in regards to the lower level non-control group employee, the need for a full examination of the facts outweighs the possible advantages of protecting his disclosures to counsel.

Even if the holding in Harper & Row were to be accepted as controlling, it should be emphasized that its test protects communications from noncontrol group employees only when the communication is about the performance of their duties and only when it has been directed by their superiors. Applicants have made no showing that those documents from employees not within the control group were written at the direction of the employee's superior and were made concerning the performance of his duties. If an examination of the challenged documents does not show that the writers or recipients claimed to be "clients" were within the control group, or alternatively have met the test of Harper & Row, those documents should be ordered produced.

E. The Protected Communication Must Be Made To An Attorney Who Is Acting As An Attorney In Relation To It

In order to be protected, the communication must have been made to an attorney, or to an agent of the attorney, for the purpose of securing advice from the attorney. Wigmore, §2301, at 583. A law student is not considered an attorney for purposes of the privilege. Wigmore, §2300, at 581. While only communications to an attorney are privileged, it does not follow that every such communication is protected.

One requisite for the finding that such a communication is within the privilege is that it was made (i) in the course of obtaining legal advice, (ii) from a professional legal advisor in his capacity as such. Wigmore, §2292, at 554.

In a corporation, it is not unlikely that some attorneys will be acting as both legal advisors and business advisors. Only those communications which seek legal advice (as opposed to business advice) will be protected. This has frequently been expressed in the statement that a communication to a lawyer can be privileged only when he is acting like a lawyer in relation to the communication. Georgia-Pacific Plywood Co. v. United States Plywood Co., 18 F.R.D. 463 (S.D. N.Y. 1956); Zenith Radio v. Radio Corp. of America, 121 F. Supp 792 (D. Del. 1954). Acting like a lawyer has been defined as "receiving and applying rules of law to confidential information received from the client. Paper Converting Machine Co. v. FMC Corp., 215 F. Supp. 249, 259 (E.D. Wis. 1963). Where the attorney is

acting in his capacity as a business advisor, no privilege will attach to those communications seeking or conveying business advice. United States v. Rosenstein, 474 F.2d 705 (2d Cir. 1973); Lowy v. Commissioner, 262 F.2d 809 (2d Cir. 1959).

In applying this rule to communications to or from house counsel of a corporation, one must determine the purpose of the communication to the attorney. The fact that an attorney received a copy of a document does not establish that that copy, or all other copies of the document, are privileged. Paper Converting Machine Co. v. FMC Corp., 215 F. Supp. 249 (E.D. Wis 1963). Nor does the fact that an attorney was present at a corporate meeting make all discussions at or minutes of the meeting privileged. Air Shield, Inc. v. Air Reduction Co., 46 F.R.D. 96 (N.D. Ill. 1968); United States v. Brown, 349 F. Supp. 420 (N.D. Ill. 1972).

We agree with Applicants that a document may contain both a privileged legal communication and a nonprivileged business communication. In such a case, the portion of the document which deals with unprotected business matters should be produced. Garrison v. General Motors Corporation, 213 F. Supp. 515, 520, (S.D. Cal. 1963) (The Court ordered produced "communications or portions thereof" which were not within the privilege); United States v. United Shoe Machinery Corp., 89 F. Supp. 357 (D. Mass. 1950).

While Applicants have stated broadly in their Brief in Support of Claims of Privilege that the attorney-client privilege

was claimed only for those documents which sought legal advice, this claim has not been substantiated with respect to the individual documents by Applicants' Answers to Interrogatories. Thus, those documents which, on their face, do not contain requests for legal advice or clear statements that they were written in response to requests for legal advice should be ordered produced.

F. The Communication Must Have Been Intended To Be And Have Remained Confidential

Because the attorney-client privilege exists to encourage the client to reveal those facts which he would not reveal if he believed they would be disclosed, it is the essence of the privilege that it apply only to those communications which were intended to be confidential and which have remained so. As the Court said in United States v. Tellier, 255 F.2d 441, 447 (2d Cir.) cert. denied, 358 U.S. 281 (1958):

> 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.

Accord: United States v. McDonald, 313 F.2d 832 (2d Cir.

1963); United States v. Kelsey-Hayes Wheel Co., 15 F.R. 461 (E.D. Mich. 1954); Wigmore, §2311, at 599.

It is not enough that the communications concern "matters known by both parties [the attorney and the client] to be of a sensitive nature which the client does not wish to be disclosed" (Applicants' Brief, page 6). The communication which the privilege protects must, in and of itself, be confidential. For example, Applicants may consider an interpretation of a contract clause as "sensitive" and wish that such interpretation not be disclosed. Nevertheless, if the contract is not confidential, and the legal opinion interpreting it contains no other confidential information communicated to the attorney by the client, the document is not protected by the attorney-client privilege. 5/

"[T]he mere relation of attorney and client does not raise a presumption of confidentiality, and the circumstances are to indicate whether by implication the communication was of a sort intended to be confidential." Wigmore, §2311 at 600. Where the communication occurred in the presence or hearing of a third person not the agent of the attorney or client, it has been held not to be privileged. United States v. Simpson, 475 F. 2d 934 (D.C. Cir. 1973); Cafritz v. Koslow, 161 F. 2d

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5/ See Section II. G., infra, for a discussion of the application of the privilege to communications from an attorney.

749 (D.C. Cir. 1943). Nor is legal advice, otherwise derivatively privileged, protected where it was intended that it should be communicated to third persons. United States v. Tellier, 255 F. 2d 441 (2d Cir. 1958); United States v. Brown, 349 F. Supp. 420 (N.D. Ill. 1972). Disclosure of the substance of an otherwise privileged communication, either purposely or accidently, bars a subsequent claim of privilege. Fratto v. New Amsterdam Fire Insurance Co., 359 F. 2d 842 (3d Cir. 1966); United States v. Kelsey-Hayes Wheel Co., 15 F.R.D. 461 (E.D. Mich. 1954).

When dealing with a corporation, it is therefore necessary to determine not only whether the communication was revealed to third persons outside of the corporation, but also whether employees of the corporation had knowledge of the contents of the document and if so, whether that knowledge destroys the required confidentiality. Where the control group test is used to determine which corporate employees may be said to speak for the corporation, it is clear that any dissemination of the communication outside that group destroys the privilege. Natta v. Hogan, 392 F. 2d 686 (10th Cir. 1968). The Department of Justice has challenged those documents which, because they were distributed to those persons outside the control group, do not meet the requisite test of confidentiality.

In applying the test of confidentiality to a corporation, the court in United States v. Kelsey-Hayes Wheel Co., 15 F.R.D.

461, 465 (E.D. Mich. 1954) concluded that:

> One measure of their [the documents] 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.

Thus, as with all other elements of the privilege, the party claiming privilege must show that the test of confidentiality has been met. Where, as is the case with a number of documents claimed as privileged by Applicants, the claiming party is unable to determine who has actually seen the documents, it is clear that no effort has been made to maintain the requisite confidentiality. Since Applicants have not shown factually that those documents actually were kept confidential it has not met its burden of proof and the documents should be produced.

G. Communications From An Attorney To A Client Are Derivatively Privileged

Heretofore the discussion has dealt primarily with communications from a client to an attorney. While communications from an attorney to a client may be within the privilege, United States v. Silverman, 430 F. 2d 106 (2d Cir. 1970); Natta v. Hogan, 392 F.2d 686 (10th Cir. 1968), the privilege belongs to the client and thus derives from the protections afforded him. (as stated in Section II E, supra, a law student is not considered an attorney for purposes of the privilege) It does not

apply to every communication from an attorney to a client, but only to those communications which, if disclosed, would reveal a confidential communication from the client. United States v. Silverman, 430 F. 2d 106 (2d Cir. 1970); Wigmore, §2321, at 629. Nor does it apply to an attorney's advice based on information other than his client's confidential disclosures. Sperti Products, Inc. v. Coca-Cola Co., 262 F. Supp. 148 (D. Del. 1966); American Cyanamid Co. v. Hercules Powder Co., 211 F. Supp. 85 (D. Del. 1962); United States v. United Shoe Machinery Co., 89 F. Supp. 357 (D. Mass. 1950). Therefore, a document from an attorney is privileged only where it meets all the elements of the privilege and can also be shown to contain information which would reveal a confidential communication from a client.

Applicants have claimed as privileged numerous documents which, according to Applicants' Answers to Interrogatories, do not contain confidential communications from a client. From Applicants' brief description of the subject matter of the documents, many of these consist of legal opinions based on non-privileged information. These documents, unless in camera examination should reveal a heretofore unmentioned reference to a confidential communication from a client, are clearly outside the privilege.

Further, it is a well recognized policy that where a

document contains both privileged and non-privileged information, the privileged portions should be excised and the rest of the document produced. Garrison v. General Motors Corporation, 213 F. Supp. 515 (S.D. Cal. 1963). See also, United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 359 (D. Mass. 1950): "It follows that insofar as these letters to or from independent lawyers were prepared to solicit or give an opinion on law or legal services, such parts of them are privileged as contain, or have opinions based on information furnished by an officer or employee of the defendant in confidence and without the presence of third persons." (emphasis added).

H. Communications Made For The Purpose of Committing A Crime Or Other Illegal Act Are Not Protected

Since the attorney-client privilege is based on the policy objective of promoting free attorney-client communications, it must take second place to the overriding policy of preventing and discouraging the commission of fraudulent or illegal acts. Thus, communications made for the purpose of committing such an act are outside the protections of the privilege. United States v. Rosenstein, 474 F.2d 705 (2d Cir. 1973); United States v. Shewfelt, 455 F.2d 836 (9th Cir. 1972); Wigmore, §2293, at 572-73. As stated by Mr. Justice Cardozo in Clark v. United States, 289 U.S. 1, 15 (1933):

> 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.

In order to compel production of otherwise privileged documents, a prima facie showing, independent of the document, must be made establishing that the communication was made in the course of perpetrating an illegal act. Clark v. United States, 289 U.S. 1 (1933); United States v. Shewfelt, 455 F.2s 825 (9th Cir. 1972). Production can be ordered at any time during the proceeding when the Court becomes satisfied that such a prima facie showing has been made. Natta v. Zletz, 418 F. 2d 633 (7th Cir. 1969).

In the present proceeding, the Department has alleged that applicants have engaged in anticompetitive conduct of such a nature as to constitute violations of Sections 1 and 2 of the Sherman Antitrust Act. If, upon in camera inspection, it is found that any communications between the client corporations and their attorneys have been made in the furtherance of such illegal acts, those communications must be immediately disclosed.

III. Attorney's Work Product

Any discussion of the work product privilege must necessarily begin with an examination of Hickman v. Taylor, 329 U.S. 495 (1947), the leading case on the subject. In that case plaintiff sought discovery of all written statements taken by defendant counsel from witnesses to the accident which was the basis of the claim, and discovery of memoranda of plaintiff's counsel relative to said accident. 329 U.S. at 498-499. After stating that the basic question was whether the federal discovery rules "may be used to inquire into materials collected by an adverse party's counsel in the course of preparation for possible litigation," 329 U.S. at 505, the Court went on to a discussion of procedural rules and the problems thereunder. The rules, the Court said "are to be accorded a broad and liberal treatment" but, "discovery, like all matters of procedure, has ultimate and necessary boundaries." 329 U.S. at 507.

> Here is simply an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties. As such it falls outside the arena of discovery and contravenes the public policy underlying the orderly prosecution and defense of legal claims. . . . In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion from opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. 329 U.S. at 510-511.

But this quasi-privilege is not unqualified:

> We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and non-privileged facts remain hidden in an Attorney's files and where production of those facts is essential to the preparation of one's case, discovery may properly be had. 329 U.S. at 511.

A. The Rules Of The Nuclear Regulatory Agency

Discovery in hearings before the Nuclear Regulatory Commission is governed by the Nuclear Regulatory Commission Rules of Practice, 10 C.F.R. §2.1 et seq.. Section 2.740(b)(2), which concerns trial preparation materials, reads as follows:

> Trial preparation materials. A party may obtain discovery of documents and tangible things otherwise discoverable under subparagraph (1) of this paragraph and prepared in anticipation of or for the hearing by or for another party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has 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. In ordering discovery of such materials when the required showing has been made, the presiding officer shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the proceeding.

While in large part the same as Rule 26(b)(3) of the Federal Rules of Civil Procedure, there is one significant difference between Section 2.740(b)(2) and the Federal Rule. Rule 26(b)(3) defines the privilege as protecing documents and other tangible things "prepared in anticipation of

litigation or for trial" [emphasis added] while Section 2.740 (b)(2) protects only those materials "prepared in anticipation of or for the hearing." [emphasis added] While this difference in language appears to be insignificant, when examined in light of the current debate on the extent of the protection afforded attorneys' work product, it becomes extremely important.

The language of Rule 26(b)(3) which limits the protection of the privilege to documents "prepared in anticipaton of litigation or for trial" does not define whether only materials prepared for the litigation in which discovery is sought are protected, or whether the protection extends to materials prepared for prior litigation. Currently , there are three points of view on the question. The first holds that materials prepared for prior suits are producable in all later litigation. Hanover Shoe, Inc. v. United Shoe Machinery Corp., 207 F. Supp. (M.D. Pa. 1962); Honeywell, Inc. v. Piper Aircraft Corp., 50 F.R.D. 117 (M.D. Pa. 1970). The second view is less strict, and holds that materials prepared for prior suits are protected only when the two suits are closely related. Midland Inv. Co. v. Van Alstyne, Noel & Co., 59 F.R.D. 134 (S.D. N.Y. 1973); Philadelphia Elec. Co. v. Anaconda American Brass Co., 275 F. Supp. 146 (E.D. Pa. 1967). Finally, some Courts have held that the work product of any litigation is forever protected. Duplan Corp. v. Moulinage et Retorderie de Chavanez, 487 F.2d 480 (4th Cir. 1973).

A comparison of the language of Rule 26(b)(3) with that of Section 2.740(b)(2) makes it clear that the promulgators of the Nuclear Regulatory Commission Rules of Practice deliberately limited the work product exclusion only to materials prepared in connection with the hearing at which discovery is sought, that is, the current hearing.

Thus, those documents which Applicants claim to be work product relating to "active matters which are still pending, and concern disputes between the City of Cleveland and CEI . . ." (Applicants' Brief, p. 19) should be ordered produced.

B. The Work Product Privilege Does Not Apply To Documents Prepared In the Ordinary Course of Business

It is clear that under Hickman v. Taylor and Rule 26(b)(3), documents prepared in the ordinary course of business, rather than for litigation, are not within the privilege. Thomas Organ Co. v. Jadranska Slobodna Plovidba, 54 F.R.D. 367 (N.D. Ill 1972). The more limited language of Section 2.740(b)(2) does not change this, but simply defines which litigation the documents must be prepared for. The limitation of work product protection to trial preparation materials is consistent with the policy behind the rule -- to encourage through trial preparation by an attorney, without the fear that his work will then be used by opposing counsel. Thus, where litigation is not anticipated and discovery not feared, there is no reason to extend the privilege. It is assumed that such materials will be prepared

thoroughly, whether or not they are subject to discovery in later, unanticipated litigation.

It is not necessary that the litigation have commenced but only that there is a reasonable anticipation of its occurring. Arney v. Geo. A. Hormel & Co., 53 F.R.D. 179 (D. Minn. 1971). The prospect of litigation must, however, be more than the "remote possibility of litigation such as surrounds nearly every act of the office attorney." Zenith Radio Corp. v. Radio Corp. of America, 121 F. Supp. 792 (D. Del. 1954). See also Thomas Organ Co. v. Jadranska Slobodna Plovidba, 54 F.R.D. 367 (N.D. Ill. 1972); Scourtes v. Fred W. Albrecht Grocery Co., 15 F.R.D. 55 (N.D. Ohio 1953); Abel Investment Co. v. United States, 53 F.R.D. 485 (D. Neb. 1971).

Where, as here, claimant is a corporation, care should be taken to insure that documents for which work product protection is claimed where prepared for this hearing and not just as part of the continuous paper flow of any large corporation or consortium of companies.

While it is clear under both Rule 26(b)(3) and Section 2.740(b)(2) that a document prepared by someone other than an attorney may be protected as work product, attorney involvement remains relevant in determining whether the document was prepared for litigation or in the ordinary course of business. For example, it was held that a sales manager's "chronological history of certain contractual dealings' was not prepared in

anticipation of litigation, where no showing had been made that the document had been requested by or prepared for an attorney, or that it otherwise reflected the employment of an attorney's legal expertise. Universal Vendors, Inc. v. Candimat Co. of America, 16 F.R. Serv. 1329 (E.D. Pa. 1972). And, in Thomas Organ Co. v. Jadranska Slobodna Plovidba, 54 F.R.D. 367 (N.D. Ill. 1972), the absence of attorney involvement in the origination and preparation of a document was held to create a conclusive presumption that the document was prepared in the ordinary course of business.

Thus, where examination of a document claimed as privileged by Applicants reveals that it was not prepared by an attorney and it was not requested by or prepared under the supervision of an attorney, it should not be protected as work product. Such a document must be considered as being prepared in the ordinary course of business and therefore producible.

While lack of attorney participation may remove a document from the protection of the privilege, it does not follow that all documents prepared under the supervision of lawyers are protected. In Zenith Radio Corp. v. Radio Corp. of America, 121 F. Supp. 792, 795 (D. Del. 1954), the Court said:

> The extension [of work product protection to the results of nonlawyers' pretrial preparation] does not automatically immunize the work of entire departments or staffs of corporations whose chiefs are attorneys.

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

IV. SUMMARY AND CONCLUSION

In conclusion, the Department urges that the following principles be applied in determining which documents claimed as privileged by Applicants must be produced.

Attorney-Client

1. The party claiming privilege has the burden of placing in the record sufficient facts to show that every communication for which privilege is claimed meets the requirements of the privilege.

2. The privilege applies only to confidential communications made to an attorney by a client for the purpose of securing legal advice.

3. The privilege does not apply to pre-existing documents or to information obtained by the attorney independent of the client.

4. The privilege does not apply to communications made for the purpose of obtaining nonlegal business advice.

5. Only communications from a member of the corporate control group can be considered as from a client and thus within the privilege.

6. Only communications which were intended to be confidential and which have remained so are protected.

7. The party claiming privilege must show that confidentiality was maintained.

8. Communications from an attorney to a client are protected only where necessary to protect a confidential communication from a client.

9. Where a document contains privileged and nonprivileged information, the nonprivileged information must be produced.

Attorney's Work Product

1. Only documents prepared for or in anticipation of this hearing are protected under the Nuclear Regulatory Commission Rules of Practice.

2. Documents prepared in the ordinary course of business are not protected under the work product exclusion.

3. While documents not prepared by an attorney may be protected under the work product privilege, attorney involvement plays a significant role in determining whether a document was prepared in the ordinary course of business. Where a document was not prepared by an attorney, or in response to a request from or under the supervision of an attorney, it should be produced.

Respectfully submitted,

STEVEN M. CHARNO

Melvin G. Berger

MELVIN G. BERGER

JANET R. URBAN
Attorneys, Department of Justice
Washington, D. C. 20530

ATTACHMENT A

The Department of Justice challenges the following documents for which the attorney-client privilege is claimed by CEI because they do not contain a confidential communication and are therefore not privileged.

1	94	119	137	157
2	96	120	138	158
3	99	121	139	159
5	100	122	140	160
6	101	123	141	161
7	102	124	142	162
9	103	125	143	163
10	104	126	144	164
11	107	126(a)	145	165
12	108	126(b)	146	166
27	109	127	147	167
28	110	128	148	168
30	111	129	149	169
31(a)	112	130	150	170
34	113	131	151	171
35	114	132	152	172
37	115	133	153	173
39	116	134	154	176
82	117	135	155	179
88	118	136	156	180

181	205	535	607	644
182	206	536	608	645
183	208	538	609	648
184	209	539	610	651
185	210	540	611	653
186	211	556	612	657
187	212	559	613	658
188	213	560	614	659
189	214	561	616	665
190	215	562	617	666
191	216	565	618	667
192	217	566	619	668
193	218	570	622	669
194	511	586	623	670
195	513	589	624	671
196	514	596	625	672
197	520	597	626	673
198	521	598	629	674
199	523	599	630	675
200	524	600	631	676
201	525	601	632	677
202	526	602	633	678
203	529	603	634	679
204	530	606	642	680

703	750	776	819	844
705	751	781	820	845
706	752	782	821	846
707	753	783	822	847
708	754	784	823	854
709	755	785	824	863
710	756	786	825	864
711	757	787	826	865
713	758	788	827	867
714	759	789	828	869
716	760	790	829	870
730	761	791	830	871
731	762	793	831	872
732	763	796	832	873
733	764	797	833	877
734	765	798	834	884
735	766	799	835	885
740	767	801	836	888
741	769	802	837	889
742	770	803	838	890
743	771	804	839	891
744	772	806	840	892
746	773	807	841	893
747	774	815	842	894
749	775	817	843	897

2001	2031	2059	2092	2120
2002	2032	2060	2093	2121/2121A
2003	2033	2061	2094	2122/2122A
2004	2034	2062	2095	2123
2005	2035	2063	2096 2097	2124/2124A
2006	2037	2064	2099	2125/2125A
2007	2038	2065	2100	2126/2126A
2009	2039	2066	2101	2127/2127A
2010	2041	2067	2102	2128/2128A
2011	2042	2068	2103	2129/2129A
2012	2043	2069	2104	2130
2013	2044	2070	2105	2131
2014	2045	2071	2106	2132
2015	2046	2073	2107	2133
2016	2047	2075	2108	2134
2017	2048	2077	2109	2135
2018	2049	2078	2110	2136
2021	2050	2079	2111	2137
2022	2051	2080	2112	2138
2025	2052	2083	2113	2139
2026	2053	2084	2114	2140
2027	2054	2085 2086	2115	2141
2028	2056	2087	2117	2142
2029	2057	2088	2118	2143
2030	2058	2089	2119	2144

2145	3046
2146	3048
2151	3053
2152	3057
2153	3058
2154	3059
2155	3065
2156	3069
2157/2157A	3070
3008	3071
3013	3073
3014	3074
3015	3075
3018	3076
3020	3077
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ATTACHMENT B

The Department of Justice challenges the following documents for which the attorney-client privilege is claimed by CEI because neither the writer nor the recipient was an attorney. Because the burden of proving factually that every document claimed as privileged meets all the elements of the privilege the Department has challenged those documents for which neither the author nor recipient was known or for which Applicant did not supply sufficient information to determine that either the writer or the recipient was an attorney.

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ATTACHMENT C

The following documents by or to an attorney for which Applicant CEI claims attorney-client privilege are challenged because the non-attorney writer or recipient is not within the control group and therefore not a client. This category includes those documents for which Applicant did not include information sufficient for a determination of the position of the employee.

35	602	782	847	2020
82	609	786	854	2021
95	644	789	867	2022
131	645	791	869	2023
144	674	806	871	2024
152	675	817	877	2034
156	713	821	889	2037
159	733	823	892	2041
161	734	830	893	2043
176	749	835	2002	2052
184	757	836	2006	2078
185	759	837	2009	2079
188	768	838	2010	2080
566	769	839	2011	2082
596	770	841	2013	2092
597	771	843	2016	2106
598	773	846	2019	2114

2118

2139

2141

2142

2143

2146

3003

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ATTACHMENT D

The Department of Justice challenges the documents listed below which were claimed as protected by Applicant CEI under the attorney-client privilege because they have not met the required test of confidentiality. This category includes documents which were distributed outside the control group or for which distribution was not known.

7	561	839	2071	3028
88	609	841	2073	3041
102	616	843	2074	3043
107	645	844	2076	3044
108	644	847	2078	3045
110	713	865	2079	3046
111	749	2003	2080	3057
112	757	2015	2081	3058
124	796	2019	2092	3059
125	797	2020	2114	3065
138	798	2025	2115	3070
146	822	2026	2142	3071
163	826	2027	2143	
176	830	2031	3001	
181	835	2032	3006	
187	837	2047	3022	
208	838	2069	3027	

ATTACHMENT E

The Department of Justice challenges the following documents claimed as privileged as attorney's work product because they were not written for or in anticipation of this hearing.

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106

2143

2150

2158

ATTACHMENT F

The Department of Justice challenges the following documents for which attorney-client privilege was claimed by Applicant Duquesne Light Company because they do not contain a confidential communication.

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
The Toledo Edison Company	)	
The Cleveland Electric Illuminating Company	)	Docket No. 50-346A
(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)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of REPLY MEMORANDUM OF THE DEPARTMENT OF JUSTICE ON APPLICANTS' CLAIMS OF PRIVILEGE have been served upon all of the parties listed on the attachment hereto by deposit in the United States mail, first class or airmail, with the exception of Honorable Marshall E. Miller and counsel for the Applicants, whose copies were delivered by hand, this 2nd day of May, 1975.

Janet R. Urban

Attorney
Department of Justice
Antitrust Division

ATTACHMENT

Honorable Marshall E. Miller
Master
Atomic Safety and Licensing
Board
Nuclear Regulatory Commission
Washington, D.C. 20555

Douglas Rigler, Esquire
Chairman
Atomic Safety and Licensing
Board
Foley, Lardner, Hollabaugh
& Jacobs
815 Connecticut Ave., N.W.
Washington, D.C. 20006

John H. Brebbia, Esquire
Atomic Safety and Licensing
Board
Alston, Miller & Gaines
1776 K Street, N.W.
Washington, D.C. 20006

John M. Frysiak, Esquire
Atomic Safety and Licensing
Board
Nuclear Regulatory Commission
Washington, D.C. 20555

Atomic Safety and Licensing
Board Panel
Nuclear Regulatory Commission
Washington, D.C. 20555

Frank W. Karas
Chief, Public Proceedings
Staff
Office of the Secretary
Nuclear Regulatory Commission
Washington, D.C. 20555

Abraham Braitman
Office of Antitrust and
Indemnity
Nuclear Regulatory Commission
Washington, D.C. 20555

Herbert R. Whitting, Esquire
Robert D. Hart, Esquire
Law Department
City Hall
Cleveland, Ohio 44114

Reuben Goldberg, Esquire
David C. Hjelmfelt, Esquire
1700 Pennsylvania Avenue, N.W.
Suite 550
Washington, D.C. 20006

Benjamin H. Vogler, Esquire
Roy P. Lessy, Jr., Esquire
Office of the General Counsel
Nuclear Regulatory Commission
Washington, D.C. 20555

Gerald Charnoff, Esquire
William Bradford Reynolds, Esquire
Shaw, Pittman, Potts & Trowbridge
910 Seventeenth Street, N.W.
Washington, D.C. 20006

Lee C. Howley, Esquire
Vice President & General Counsel
The Cleveland Electric
Illuminating Company
Post Office Box 5000
Cleveland, Ohio 44101

Donald H. Hauser, Esquire
Corporate Solicitor
The Cleveland Electric
Illuminating Company
Post Office Box 5000
Cleveland, Ohio 44101

John Lansdale, Jr., Esquire
Cox, Langford & Brown
21 Dupont Circle, N.W.
Washington, D.C. 20036

Chris Schraff, Esquire
Office of Attorney General
State of Ohio
State House
Columbus, Ohio 43215

Deborah Powell Highsmith, Esquire
Assistant Attorney General
Antitrust Section
30 East Broad Street
15th Floor
Columbus, Ohio 43215

Leslie Henry, Esquire
Fuller, Henry, Hodge & Snyder
300 Madison Avenue
Toledo, Ohio 43604

Thomas A. Kayuha, Esquire
Executive Vice President
Ohio Edison Company
47 North Main Street
Akron, Ohio 44308

David M. Olds, Esquire
Reed, Smith, Shaw & McClay
747 Union Trust Building
Pittsburgh, Pennsylvania 15219

Mr. Raymond Kudukis
Director of Utilities
City of Cleveland
1201 Lakeside Avenue
Cleveland, Ohio 44114

Wallace L. Duncan, Esquire
Jon T. Brown, Esquire
Duncan, Brown, Weinberg
& Palmer
1700 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Edward A. Matto, Esquire
Assistant Attorney General
Chief, Antitrust Section
30 East Broad Street
15th Floor
Columbus, Ohio 43215

Richard M. Firestone
Assistant Attorney General
Antitrust Section
30 East Broad Street
15th Floor
Columbus, Ohio 43215