6-30-75

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)	)	

MEMORANDUM OF
POINTS AND AUTHORITIES OF
DEPARTMENT OF JUSTICE WITH REGARD
TO THE DECISION OF THE SPECIAL MASTER

Pursuant to the Order of Chairman Rigler of June 25, 1975, the Department of Justice submits this memorandum of points and authorities in support of its challenges to findingsof privilege by the Special Master. The Department incorporates by reference its arguments in opposition to Applicants' Claims of Privilege contained in the Reply Memorandum of the Department of Justice on Applicants Claims of Privilege, submitted May 2, 1975.

I

In its List of Challenges to the Special Master's Findings of Privilege the Department has challenged the findings of attorney-client privilege as to those documents for which Applicants either failed to claim the privilege (Category 2) or waived the privilege entirely (Category 4). In the classic statement of the attorney-client privilege, made in United States v. United Shoe Machinery Corp., 87 F. Supp. 357, 358-59 (D. Mass. 1950), Judge Wyzanski stated that: "The privilege applies only if . . . (4) the privilege has been (a) claimed and (b) not waived by the client." It is clear from this language that for the privilege to be upheld it must be specifically claimed; the mere lack of waiver of a claim of privilege by a party does not constitute the positive assertion necessary to bring the document within the privilege. It was held in Magida v. Continental Can Co., 12 F.R.D. 74, 77 (S.D.N.Y. 1951) that "where there has been a waiver of privilege, clearly expressed, the deponent cannot object to questions concerning the privileged matter. The waiver need not be expressed in writing nor in any particular form, but the intent to waive must be expressed either by word or act or omission to speak and act." (emphasis added).

This rule, requiring a specific claim of privilege, is consistent with the theory behind its application. The purpose of the attorney-client privilege is to promote full disclosure and communication between attorney and client. 8 Wigmore, Evidence §2290, at 554 (McNaughten rev. 1961). (hereinafter cited as Wigmore). On the other hand, the privilege acts as a bar to full examination of all the evidence bearing on the litigation.

To accommodate each of these opposing interests insofar as possible, the privilege "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. See also, 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).

Because the privilege is to be narrowly applied, it follows that the party seeking to withhold evidence through use of 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., 50 F.R.D. 117 (M.D. Pa. 1970). In order to sustain its burden of proof, the party claiming the privilege 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. 88, 94 (M.D. Pa. 1974). It is apparent in the present situation that if the Applicants did not claim the privilege, or if they specifically waived it, they could not have met their burden of establishing factually that the documents were within the privilege. The Department requests the Master to so hold with respect to the documents in Categories 2 and 4.

II

The Department of Justice has also challenged those documents which the Master held to come within the "work product" exclusion; although no claim of "work product" had been made with respect thereto (Category 3), and those documents as to which the "work product" privilege had been waived (Category 5). The "work product" exclusion is intended to promote full preparation of a case by an attorney, free from the fear that his thoughts and mental impressions will later be discovered by his opponents. Hickman v. Taylor, 329 U.S. 495 (1947). As with the attorney-client privilege, a party claiming protection under the "work product" exclusion has the burden of proving that documents claimed as protected fall within the exclusion. McNeice v. Oil Carriers Joint Venture, 23 F.R.D. 15 (E.D. Pa. 1958); Hazell v. Pennsylvania R. Co., 15 F.R.D. 282 (E.D. Pa. 1953). Since Applicants have failed to claim the exclusion, it is difficult to believe that they have sustained the burden of proof required for its application. Further, the fear that mental impressions would be revealed, an essential element of the privilege, cannot have been present where Applicants felt no need to make a claim of exclusion.

Under these principles the Master should hold that the documents in Categories 3 and 5 are not validly to be deemed privileged.

III

Finally, the Department of Justice has challenged findings of privilege for those documents, claimed as protected under the attorney-client privilege, where neither the author nor the

recipient is an attorney (Category 6). It is essential element of the privilege that only communications between an attorney and a client are privileged. United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358-359. (D. Mass. 1950). Documents which on their face are not privileged do not become so 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 the Second Circuit noted 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.

Thus, those documents neither written by nor addressed to an attorney cannot be privileged, regardless whether they may eventually have found their way into an attorney's files.

IV

As noted in the List of Challenges, the Department of Justice joins in the challenge to those documents challenged by the City of Cleveland in Category 2, Part A of their List of Challenged Documents for the reasons given by the City of Cleveland.

In conclusion, the Department urges appli. tion of the principles set forth above and in the Reply Memorandum of the Department of Justice on Applicants' Claims of Privilege to the proceeding concerning the Master's granting of claims of privilege.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of MEMORANDUM OF POINTS AND AUTHORITIES OF DEPARTMENT OF JUSTICE WITH REGARD TO THE DECISION OF THE SPECIAL MASTER have been served upon all of the parties listed on the attachment hereto by deposit in the United States mail, first class, airmail or by hand delivery, this 27th day of June 1975.

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