11/5/84

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	Docket Nos. 50-445-OL2
TEXAS UTILITIES ELECTRIC COMPANY, et al.	)	50-446-OL2
	)	
(Comanche Peak Steam Electric Station, Units 1 and 2)	)	(Application for Operating License)

BRIEF IN SUPPORT
OF LIPINSKY PRIVILEGE

On October 18 and 19, 1984, counsel withheld one memorandum dated January 9, 1984, and calendar diary notes for November 30, 1983 and December 1 and December 8, 1983 authored by Mr. Joseph J. Lipinsky from the discovery materials produced pursuant to the Atomic Safety and Licensing Board's (Licensing Board) October 4, 1984 subpoena duces tecum. Attorney-client privilege was the basis set forth in counsel's letters for withholding the documents. The attorney-client privilege being asserted by Mr. Lipinsky is based on his representation by Messrs. Reynolds and Watkins of Bishop, Liberman, Cook, Purcell & Reynolds in connection with a deposition taken by NRC's Office of Inspection and Enforcement on January 4, 1984.

The Licensing Board requested a brief supported by an appropriate affidavit establishing the basis for the

attorney-client privilege being asserted by Mr. Lipinsky. The time for filing the brief was set for November 5, 1984. The Licensing Board expressly requested advice as to who retained counsel for Mr. Lipinsky and who paid counsel's fees. This Brief responds to the Licensing Board's request.

The attorney-client privilege is one of the basic tenets of modern law. It shields confidential communications between an attorney and client made for the purpose of furnishing or obtaining professional legal advice and assistance. McCormick, Evidence, § 95; 8 J. Wigmore, Evidence, §§ 2292, 2311 (McNaughton rev. 1961). The privilege "rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." Upjohn Co. v. United States, 449 U.S. 383, 389 (1981), quoting Trammel v. United States, 445 U.S. 40, 51 (1980).

The often-stated prerequisites for a valid assertion of the privilege are (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 a bar of a court and (b) in connection with this communication is

acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of commiting a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client. In re LTV Securities Litigation, 89 F.R.D. 595, 600 (N.D. Texas, 1981); United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358-59 (D. Mass 1950). See 8 J. Wigmore, Evidence, § 2292 (McNaughton rev. 1961).

With respect to (1) above, the client's reasonable understanding of his relationship with the attorneys is the controlling factor. E.F. Hutton & Co. v. Brown, 305 F. Supp. 371, 389 (S.D. Texas 1969); United States v. Ostrer, 422 F. Supp. 93, 97 (S.D.N.Y. 1976). In addition, the relation of attorney and client may be inferred from the conduct of the parties. It is not dependent upon the payment of a fee, nor upon the execution of a formal contract. E.F. Hutton, 305 F. Supp. at 388; United States v. Costanzo, 625 F. 2d 465, 468 (3rd Cir. 1980). Further, it is not uncommon for corporate counsel to represent an individual corporate officer when he is sued as a result of actions he

has taken within the ambit of his official duties. Accordingly, when this occurs, corporate counsel becomes counsel for the individual officer as well, even if the corporation pays his entire fee. E.F. Hutton, 305 F. Supp. at 388. See In re Grand Jury Subpoena Dated July 13, 1979, 478 F. Supp. 368 (E.D. Wisc. 1979).

With respect to (3) above, the privilege extends both to the substance of the client's communication as well as the attorney's advice in response thereto. In the Matter of Fischel, 557 F. 2d 209, 211 (9th Cir. 1977). The privilege attaches to a written communication just as it would to an oral communication. Upjohn Co. v. United States, 449 U.S. 383, 396-97 (1981); 2 J. Weinstein, Evidence par. 503(b)(03) at 503-38 (1977). The privilege also encompasses summaries of meetings, where the substance of the meetings would be covered by the attorney-client privilege. Natta v. Zletz, 418 F.2d 633, 638 (7th Cir. 1969). See Upjohn & Co. v. United States, 449 U.S. 383 (1981) (notes of interviews between employees of corporation and counsel protected by attorney-client privilege).[1/]

1/ The attachment of the attorney-client privilege to the communication, including documents, does not extend to the underlying facts by those who communicated with the attorney. Upjohn, 449 U.S. at 395. As the Court there noted, "The client cannot be compelled to answer the question, 'What did you say or write to the attorney?' (footnote continued on next page)

In this case, Messrs. Reynolds and Watkins and the firm of Bishop, Liberman, Cook, Purcell & Reynolds were retained by Oliver B. Cannon & Son, Inc. to represent Mr. Lipinsky, an employee of the company. (Affidavit of Joseph J. Lipinsky, attached hereto as Attachment 1, ¶ 4.) Mr. Lipinsky accepted them as his counsel. (Affidavit at ¶¶ 2-3.) In the course of their representation of him, there were confidential communications between Mr. Lipinsky and his counsel for the purpose of securing legal advice. (Affidavit at ¶ 5.) The documents in question, a memorandum and notes prepared by Mr. Lipinsky of these communications, were based on and would reveal these confidential communications. (Affidavit at ¶ 5.) No action has been taken by Mr. Lipinsky indicating a waiver of the privilege. Accordingly, based upon the above-stated legal principles, there can be no doubt that the attorney-client privilege attaches to the documents in question. The fact that Mr. Lipinsky's counsel also represents Texas Utilities, for whom Mr. Lipinsky

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1/ (Continued)
but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication with his attorney." Id. at 395-96, quoting Philadelphia v. Westinghouse Electric Corp., 205 F. Supp. 830, 831 (E.D. Pa. 1962). Accordingly, a ruling that the documents in this case are privileged does not prevent inquiry into facts that may be within Mr. Lipinsky's knowledge. Although it may be more convenient to obtain the documents, as the court stated in Upjohn, such considerations of convenience do not overcome the policies served by the attorney-client privilege. 449 U.S. at 396.

provided consulting services, in no way attenuates the privilege. [2/] An attorney may represent two clients on a single transaction so long as the attorney discloses the consequences of the joint representation to all of his clients, and all parties as well as the attorney consent. E.F. Hutton, 305 F. Supp. at 388. If the clients have interests adverse to each other, the potential for disqualification may exist, but the established attorney-client relationship is not eviscerated. See E.F. Hutton, 305 F. Supp. at 392-400. The confidential communications made by each client to the attorney during the period of representation would be covered by the attorney-client privilege.

2/ If clients represented by the same attorney have a common interest, not only are their individual communications to the attorney privileged, but communications in the presence of the other clients with the common interest are also privileged. Sneider v. Kimberly-Clark Corp., 91 F.R.D. 1, 8 (N.D. Ill. 1980); See United States v. McPartlin, 595 F.2d 1321 (7th Cir.) cert. denied, 444 U.S. 833 (1979); 2 J. Weinstein, Evidence, par. 503(b)(06) (1977). Courts have commonly applied this privilege to parties with "common interests" even if those interests were not compatible in all respects. See McPartlin, 595 F.2d at 1337; Weinstein, supra, 503-60. In addition, while a common legal interest has been held to be necessary to support the extension of the privilege, Sneider, 91 F.R.D. at 8, the existence of common business interests as well in no way defeats the privilege. SCM Corp. v. Xerox Corp., 70 F.R.D. 508 (D. Conn. 1976.)

The memorandum and calendar diary notes made by Mr. Lipinsky of the confidential communications with his attorneys clearly fall within the attorney-client privilege and, as such, are not discoverable.

Respectfully submitted,

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