Supreme Court of the United States

OCTOBER TERM- 1970

In the Matter of:

Docket No. 113

BERNARD M. DECKER, UNITED STATES DISTRICT JUDGE, ET AL.,

Petitioners

vs.

HARPER & ROW PUBLISHERS, INC., ET AL.,

Respondents.

Place Washington, D. C.

Date December 16, 1970

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

TABLE OF CONTENTS

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BENHAM

IN THE SUPREME COURT OF THE UNITED STATES

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vs	)	
HARPER & ROW PUBLISHERS, INC., ET AL., Respondents.	)	

The above-entitled matter came on for argument at 11:40 o'clock a.m., on Wednesday, December 16, 1970.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

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On behalf of Petitioners

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On behalf of Respondents

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument in Number 113: Decker against Harper and Row.

ORAL ARGUMENT BY LEE A. FREEMAN, JR., ESQ.

ON BEHALF OF PETITIONERS

MR. FREEMAN: Mr. Chief Justice and may it please the Court:

This case arises in the midst of several anti-trust actions which have been brought on behalf of public schools and libraries of parochial schools, seeking damages for an alleged price-fixing conspiracy among numerous publishers and jobbers in the sale of library editions of children's books to institutional schools and libraries.

This conspiracy is alleged to have lasted from 1959 until 1967 when the defendants entered into a consent decree with the Federal Government.

The damage proceedings on behalf of the schools and libraries had been pending for approximately three years and were consolidated before Judge Decker in the Northern District of Illinois under Section 1407.

Pursuant to order of court, the plaintiffs initiated extensive discovery efforts, taking more than 100 depositions of various personnel of the defendant. These efforts to obtain the evidence and the facts were frustrated by the evasion, recalcitrance and prevarication of the witnesses

who the plaintiffs sought to depose.

As the District Court found, the witnesses were deliberately evasive; the witnesses exhibited a remarkable lack of memory concerning the critical events alleged in the conspiracy; there was a great discrepancy between the grand jury testimony of these witnesses and the testimony that they offered at deposition four y e ars later.

There was also feigned ignorance by these witnesses concerning the incriminating correspondence they had either sent or received.

The lapse of time between the conclusion of the Federal Government's proceedings, the grand jury investigation and the depositions taken in these treble damage actions, has obscured the recollection of these witnesses and has prevented and frustrated the plaintiffs from getting the facts. Part of this delay has been attributable to the defendants since this is the second time that the defendants have sought to mandamus Judge Decker. The first attempt was denied by the Court of Appeals and certiorari wasdenied by this Court.

Faced with this problem the plaintiffs moved for the production of what has been labeled now, "Debriefing statements," which were taken from the grand jury witnesses by defense counsel. It developed from the testimony of witnesses that the defense counsel had stood outside the door of the grand jury room while the Federal Government was conducting a

grand jury investigation and as the witnesses left the grand jury room the defense counsel would take them somewhere else and sit down and either with a tape recorder or stenographer or with handwritten notes, would ask the grand jury witnesses what questions they had been asked by the grand jury; what answers they had given; what type of evidence they felt the grand jury already possessed.

As the affidavits submitted by the defense counsel show, this was an effort simply to reconstruct the testimony that had been given by the witnesses called before the grand jury in order to trap the grand jury investigation and advise the corporate clients as to what had occurred before the grand jury and how best to meet the evidence that was being developed.

Inherently this effort was not limited to corporate employees or to any other type of employee of the particular defendant; this effort extended over all of the grand jury witnesses: whatever grand jury witnesses would consent to sit down with counsel and tell him what had occurred before the grand jury. Those statements were taken and transcribed by the attorneys and used to advise their corporate clients.

Upon the motion the District Court ordered that the defendants produce these debriefing statements and that if any defendant claimed that such statements were privileged, either under the attorney's personal client privilege, attorney-corporate client privilege or under the Work Product Doctrine,

to set forth the precise circumstances and facts under which the debriefing statements were taken and the basis on which the privilege was claimed.

The defendants did submit descriptions and affidavits concerning the nature of these debriefing statements. They appear in our appendix. In none of these affidavits was any claim made that the witness interviewed sought legal advice or that the attorneys rendered legal advice to the witnesses after they left the grand jury room. There was no evidence from any of the affidavits filed by defense counsel that any confidential attorney-client relationship between the witnesses interviewed and the defense counsel who conducted the grand jury witness interviews.

It was conceded, I believe, on this record that these materials were collected in order to advise the corporate clients as to the matters that had occurred before the grand jury.

On this record the District Court rejected the assertion that these debriefing statements were protected by the personal attorney-client privilege, with one exception; where the defense counsel's affidavit had made out a case for assertion of the personal attorney-client privilege.

Also rejected the assertion of an attorney-corporate client privilege, calling it_____. Only attached communications made by corporate officials having the authority

to seek legal advice and to act upon that advice on behalf of the corporation.

The District Judge further found good cause, substantial need for the production of these documents, overruling the claim of work product.

On a writ of mandamus the Court of Appeals did not disturb the findings of the District Court, with the exception that the Court of Appeals held that the attorney-corporate client privilege should extend to all the debriefing statements taken from employees of whatever rank inside the corporation.

Our first point in this proceeding is that the use of the writ of mandamus by the Court of Appeals was inappropriate. In ordinary production of the grand jury statements, the District Court didfollow and apply substantial Federal precedent already on the books and applied in other jurisdictions of: Philadelphia v. Westinghouse, Garrison versus General Motors, Natta v. Hogan.

The proposed rules of evidence, as the Court of Appeals recognized, provided for a control group test precisely identical to that applied by Judge Decker. Not only that, but the law of Illinois in which this Court sits, has adopted a control group test. Indeed, there was an indication in an opinion by another panel of the Seventh Circuit that the Seventh Circuit itself followed the control group test: Rucker v. Wabash Railroad, speaks in terms of the privilege not applying

due to the fact that the employees were not of sufficient rank to qualify as spokesmen for the corporationin that case.

The discovery order simply did not satisfy the prerequisites for the use of mandamus. There has been no charge here that the District Court exceeded its jurisdiction or abused its judicial power. The most that can be explained is that the District Court erred in ruling on a significant legal issue within its jurisdiction and we do not believe that the writ of mandamus should not be used by the Court of Appeals to substitute its judgment on a disputed question of law, regardless of the fact that it may be significant.

Congress has provided specific circumstances for the review of interlocutory orders and a pretrial discovery rule is not one of them. The opinion, as we have cited in _____, expresses a strong legislative and judicial policy against piecemeal appeals.

There has been no showing on this record that there will be any irreparable harm or any error that cannot be corrected in the normal course of appeal resulting from the production of these debriefing statements.

There is no claim that trial strategies have been revealed; there is no claim that the impressions or conclusions of counsel have been turned over. Indeed, the District Judge was very carefuly in weighing the evidence as to each debriefing statement and returned to the defendants the only debriefing

statement for which it was claimed a work product protection of conclusions of counsel.

Only in the one instance where the document was substantially, in the impressions of counsel, rather than simply a narration of fact. In that one instance the District Judge returned the document to counsel asserting the work product claim.

Indeed, this case illustrates the possibility of abuse that flows from piecemeal appeals of interlocutory orders since this is the second interlocutory order which has been reviewed and the case has been pending for a substantial time. Plaintiffs have been delayed and impeded in the pursuit of discovery by these interruptions.

We contend that while mandamus is not appropriate, for the Seventh Circuit to employ and we ask this court to decide that mandamus is not appropriate as a matter of judicial decision supervision, that this Court, the Supreme Court should still undertake to review the substantive issue that is the attorney-corporate client -- scope of the attorney-corporate client privilege.

Q Are we bound to?

A Well, the Seventh Circuit has created a conflict among the circuits as -- before the Seventh Circuit [illegible] precedent was all moving the same way and now there is confusion created by the Seventh Circuit ruling. I don't think

that confusion could be erased by a decision that mandamus inappropriate. There would still be a pronouncement of absurd in _____ that they take that view of the privilege.

Moreover, the proposed rules of evidence that are being now drafted, considered this very point: the scope of the attorney-corporate client privilege and we believe it's more appropriate for that issue to be decided in the litigated context rather than passed on in this Court's supervisory role when it reviews these rules and submits them to Congress for approval.

Of course, we feel that we are supported by these rules since the proposed draft has come out in our favor and has adopted the control group test as applied by Judge Decker.

In short, we feel that this case in the Seventh Circuit in the context it was presented to the Seventh Circuit did not present a sufficiently exceptional circumstance to warrant the use of the writ of mandamus.

Q Do you think that this falls within the --

A Oh, absolutely, and I think that this is a much stronger case than Will(?) to rule that mandamus is inappropriate. In Will there was no opportunity for the Government to secure a review of the ruling that they sought to review by a writ of mandamus.

It's very similar since --

Q That was a bill of particulars, wasn't it?

A Yes. Judge Will ordered the Government to turn over a list of witnesses and the Government said that it would prejudice their case and subject the witness to possible retaliatory action if the list was turned over and perhaps result in dismissal of the indictment.

The court assumed that there would be no review even from the dismissal and the indictment still held mandamus to be inappropriate.

Q Is there some rule as to the scope of the attorney-client privilege with respect to agents of an individual person; i.e., assume a sole proprietorship and the proprietor has a lot of employees, one of whom is a truck driver who is involved in an accident and the truck driver has a conference with the proprietor-employer, with respect to predicted litigation. And later this lawyer's records are subpoenaed; the records of that conference.

Now, obviously that truck driver is not in a control group, because we are dealing with a sole proprietorship. Is it settled as to the scope of the attorney-client relief in --

A Well, I think that's the issue here. I don't --

Q I thought this was confined to corporations.

A No, but in this, as you have stated it, I do not believe under the traditional terms of the privilege that

privilege would extend to that truck driver unless he were also a potential defendant, unless he were consulting that opinion in a joint capacity, the truck driver being a potential defendant --

Q He might have his own lawyer, but I'm talking about the privilege as between the sole proprietor and his lawyer as to --

A No; I think the rule would be exactly the same for a single proprietorship or a corporation, depending upon the size of the organization and the relationship of that individual.

Q In my case the agent has no control whatsoever as to the decisions to be made by the proprietor.

A I think the traditional rule is, when we speak of traditional agency terms, the agent has to be simply a transmitting agent or necessary to transmit the information to the attorney.

The truck driver who is talking to the lawyer on behalf of the owner of the truck is not seeking legal advice on behalf of that owner. He is --

Q He is reporting to the proprietor, the truck owner's lawyer.

A Yes, sir.

Q With respect to predictable litigation involving the owner and the employer. And so we're dealing with

the privilege, if any, as between the owner-employer-sole proprietor and the employee.

A And the fact that the truck driver is an employee of the sole proprietor, in our view, makes it no different than any other witness --

Q I didn't mean to ask you view so much as to -- my question was: is the law settled in that area?

A No; I don't believe the law is settled in that area. I believe that this decision would have an effect upon the law in that area as well.

Q You don't see any distinction?

A No --

Q Between whether or not the employer is a corporation or partnership or a sole proprietor; do you?

A No; I don't think that there is any distinction in terms of the application of the _____just as there was no distinction in U. S. v. White with respect tothe coverage of the privilege against self-incrimination. I believe that Justice Murphy held you have to look atthe purpose of the organization and whether it be a labor union or trade association or partnership or if that purpose is so associated with an individual purpose then it would be protected, whereas if it were a collective purpose or a business purpose it would not be protected.

We feel that the control group test, as applied by

the District Court strikes an appropriate balance for the need for discovery by a litigant and the rationale for the attorney-client privilege, the rationale which underlies the traditional attorney-client privilege.

I believe all commentators recognize that the privilege results in a suppression of information and needs to be confined within the narrowest possible limits, consistent with its purpose.

Consistent with its purpose the control group test recognizes the privilege with respect to communications through counsel for the purpose of securing legal advice by both corporate officials having the authority to direct the corporate action taken on that advice.

The function of the privilege is to protect counsel -- to permit counsel to give advice to the client and for the client to act upon that advice, and we believe that logically that privilege should only extend to corporate officials who respond to the attorney's function as an attorney.

The person who acts on the advice is therefore protecting his communication.

The control group people, those people who can act on the attorney's advice, are really the only people who occupy a confidential relationship with the counsel. They are the people who seek the advice; they are the people who implement the advice.

The Respondents have argued that it very important for the counsel to give adequate legal advice to secure all of the facts and I believe this relates to your question, Mr. Justice Stewart. But, we do not believe that the need to secure the facts constitutes a rationale to apply the privilege and in this instance it may be far more important for counsel for Harper & Row to secure the facts from the witnesses who have testified from wholesalers as to the enforcement and maintenance of a price conspiracy than to interview their own employees.

There may be far more damaging evidence developed before the grand jury from other witnesses than from a corporate employee.

We would distinguish sharply then, the distinction -- the fact-gathering function of an attorney from the function of giving legal advice and we believe that it is only a function of giving legal advice which authorizes the privilege to apply to that communication.

(Whereupon, at 12:00 o'clock p.m. the argument in the above-entitled matter was recessed to resume at 1:00 o'clock p.m. this day)

ITH

1:00 o'clock p.m.

MR. CHIEF JUSTICE BURGER: Mr. Freeman, you may continue.

ORAL ARGUMENT (Continued) BY LEE A. FREEMAN, JR., ESQ.

ON BEHALF OF PETITIONERS

MR. FREEMAN: In this case we are talking about materials which have been assembled by corporate counsel. These materials reflect factual information which should otherwise be available by the ordinary processes of discovery; that is, from corporate records or from the testimony of the witnesses themselves.

Unlike an individual, a corporation has no privilege against self-incrimination and, accordingly, the plaintiff should be able to go forward and accumulate this evidence from the oral depositions of the witnesses and from review of the documents that exist in the corproate files.

Q Mr. Freeman, I thought perhaps all you wanted to find out was what these witnesses testified to before the grand jury.

A No, it is much more than that, Mr. Justice White, because, as the debriefing memos or statements which we have received show, many of the witnesses did not tell the full story before the grand jury; the grand jury did not explore many of the areas which are significant to our case. These are rather subtle matters, and when ---

Q Your purpose just isn't to pick up conflicts between what the witnesses said to the grand jury and what they told counsel?

A No. Well, that is one of the purposes, the conflicts between what they told the grand jury and what they told counsel, but they also told counsel more.

Q Would that be enough of a reason?

A Yes. That goes to the good cause of discovery. I think that would be enough of a reason, but we have much more in this case.

For instance, there are meetings which occur every month among the publishers, the publishers' sales manager's meetings. In the depositions, the witnesses say they do not attend the meetings. Before the grand jury, they go and say that they attended the meetings but discussed baseball. To their counsel, they go and say, "We all agreed to cut this jobber off because he cut prices."

There is a great difference in degree between the versions of the story which appear in depositions in the grand jury and in relating of the counsel, as well as the fact that there has been a great lapse of time between the grand jury investigation and the depositions we are taking in this case. It has been four ---

Q Let me get back to one thing you responded to Justice White, that you wanted these at least in part to find

out whether there was any conflict between their testimony before the grand jury and some that might be given at another time. Can't you get that if you are entitled to it, by getting the grand jury minutes?

A That would be the discrepancy between a grand jury testimony and a deposition testimony. We do have that. We have the grand jury minutes.

Q Well, then, why do you need to find out what they testified to before the grand jury? I thought that's what you were narrowing on in responding to Justice White.

A Well, there are two points that we need to explore. We need to find out, first, whether the witnesses told the truth before the grand jury; whether they fully elucidated the facts before the grand jury.

Second, we need to know what areas the grand jury missed. Indeed, the debriefing statements which we quoted in our brief illustrate that the witnesses came out of the grand jury and said the examiner was right to the point of asking a crucial question, but he did not ask that question. If he had asked that question, whether I would refuse to supply a discounting jobber, I would have had to answer "yes."

Well, from those kind of statements in the debriefing statements, we can then proceed and redepose the witnesses and either impeach them or refresh their recollections with that information. It is quite significant to us, in the context of

this case, in a price fixing case where decisions turn on very subtle factors, and the information as to what occurred behind closed doors in a darkened room among conspirators, what phrases were used by those conspirators is very significant, and that is why we needed the debriefing statements.

Q Well, if you've got the grand jury minutes, isn't that the better evidence of what they said in the grand jury?

A Well, I think -- no, it is the best evidence of what they said in the grand jury. The debriefing memos, however, are the best evidence of what they withheld or concealed from the grand jury, and what they would have said in front of the grand jury had they been asked certain questions.

And this occurred five years ago. This occurred in '65, '66. This occurred when their memories were fresh. This occurred when they were in less adverse circumstances, and these debriefing statements do record facts which are otherwise not acceptable to the plaintiff.

Q What you really want to do is to match up their grand jury testimony with what they told their lawyers in these so-called debriefing statements?

A Yes, that is ---

Q That's the guts of ---

A Yes, that is the main purpose. Beyond that, they are also useful as discovery tools to discover what, in

fact, the witness knew beyond the questions asked in the grand jury. I believe the debriefing statement submitted to this Court runs 24 or 25 typed pages. I tape recorded it, and it does contain numerous incidents testified to by the witness which were not explored before the grand jury, and these are things which in many instances the witness can honestly fail to recall. In many instances the witness will simply not undertake to recall these factors in deposition.

Q What would you say as to a person who did not testify before the grand jury, and who you with good reason would suspect that the lawyers for the defendants would want to interview? Do you think you can get his statement?

A It depends upon the showing. I think that goes a good cause. Any discovery, of course, is predicated upon a showing of good cause. In this case, Judge Decker found substantial need. If, during depositions, the witnesses exhibit the evasiveness, recalcitrance and the complete disavowal of their prior written communications, then yes, indeed, I believe we would be entitled to see this information which was collected by counsel, being factual information and collected by counsel at a time when the witness was much closer to the events and had a much broader recollection of the events.

Q Well, supposing a witness gets on the stand. That is the first knowledge that you have that he is going to be a witness against you, and he testifies and then you say,

"Did you testify for the grand jury?" He says, "No."

"Well, did you make a statement to your lawyer?"

"Yes."

Could you get that statement?

A Again, I believe it would depend upon the attitude of the witness and the need which the plaintiff showed for that information. It would also depend upon whether that information was available from other sources, from other witnesses, from documentary evidence. I think it is a balancing test, and it is something that the District Court would have to administer and rule upon.

I do not think that point goes to the privilege. I think that point goes to whether or not the plaintiffs would be entitled to secure that information, whether or not they have made a substantial showing.

Q I should have added one thing to my hypothetical: If the witness was an employee of the corporation.

A I don't think that would make any difference if he were outside the control group as the control group has been defined by the lower courts.

Q Did I understand you to say, Mr. Freeman, that this question is covered by the proposed rules of evidence for the United States District Courts and Magistrates?

A By the preliminary draft of that proposal's Rule 5-Rule 3A.

Q Which does more or less adopt the control group test?

A Which provides the client as the person who can speak on behalf of the corporation and take action on behalf of the corporation.

Q And that is in the preliminary draft. Does that suggest at least the possibility that the issues and questions in this case might better be dealt with through canvassing by that committee, and later adoption or non-adoption by this Court and by the Congress, rather than in a particular litigated case, and that maybe we made a mistake to grant such an area in this case?

A No. In both instances, I believe that canvassing has occurred. I believe the standing committee solicits comments from members of the bar and from practicing lawyers, and makes its recommendations to this Court on the basis of the material it has collected.

In this case we have had extensive participation by amicus curiae, and I believe that in this instance it would be perfectly appropriate and perhaps even better for the Court to decide this issue in a litigated context, rather than simply the rules take effect by the inaction of Congress.

Q First of all, by approval by this Court.

A Yes, they would be by approval by ---

Q If that work is going on simultaneously under

the rule-making power of the Court acting at present through its committee, isn't that the place for it to be?

A I am not certain I can satisfactorily respond to that question. I believe that it is appropriate to decide it here. I believe in Hickman B. Taylor the issue was decided here and Hickman B. Taylor, of course, showed the way for later revision of the Federal Rules.

Indeed, the newly adopted Federal Rule 26 embodies the Hickman B. Taylor ruling in a work product. In fact, I think there would be litigation surrounding the meaning of the rules were the rules to be promulgated in that controversy, and that litigation could be settled here without the necessity of later judicial controversy.

Q What happens to all the work that the committee has done in this area?

A I think the Court could adopt the rule submitted by the standing committee ---

Q If you prevail, the Court would decide as if they were here and then adopt the proposed rule?

A Yes, since they both go the same way.

Q I take it you like all the rules then, not just this one?

A Excuse me?

Q I take it you like all these rules of the committee.

A I think the committee has made the proper choice with respect to its proposed drafts, at least so far as I ---

Q You've just concentrated on this one, now?

A Yes. I would like to save the remaining time for rebuttal.

Q Very well.

Mr. Brown, you may proceed.

ORAL ARGUMENT BY H. TEMPLETON BROWN, ESQ.

ON BEHALF OF RESPONDENTS

MR. BROWN: Mr. Chief Justice and may it please the Court:

I am afraid that I agree with counsel for petitioners on only two points. I do agree that this issue should be decided by this Court in the context of a litigated matter rather than by a committee. I further agree that the application of the attorney-client privilege applies with equal force to an agent, whether he be the agent of a sole proprietor, partnership, association, or a corporation.

At the outset, I should state that many of the statements, if not most of the factual statements made by Mr. Freeman have been made out of context and have no relevance to the issue that is presented to this Court. The ruling made by Judge Decker was made purely on the basis of a ruling of law. None of the facts that are involved in the controversy had

anything to do with his ruling.

He also ruled in other areas, such as whether or not there was good cause to grant the production of grand jury minutes and whether or not the work product rule applied, and whether or not there was a personal attorney-client privilege. None of those are germane to the question that is presented here.

Q Isn't it true that he did permit the production of some of the debriefing statements?

A I think there may have been a limited number to which no objection was raised.

Q Yes, and those are in the record now?

A Those would be.

Q Those were submitted sealed to the judge. He made his ruling, but the ones that were ordered for his use are now available?

A There was no objection to them.

Q And they are now available?

A That is correct.

Q Would you suggest that the contents of those debriefing statements in terms of what they cover and what they do not cover are irrelevant to decision of this case?

A Yes, I would.

Q Why?

A Well, in the first place, it seems to me that

an attorney-client privilege has to be determined at the time that a communication takes place. There is no such question, despite the argument by Mr. Freeman.

Q I know, but what goes into deciding whether the privilege applies?

A Well, I would like to come to that in the course of my argument, that the question is what is the nature of the communication, under what circumstances was the communication had, what is the purpose of the privilege, does the attachment of the privilege protect the interest of the public?

These matters are not matters -- this is not the work product doctrine. This isn't a question of changing of an after-the-fact decision, based upon the question of whether or not there is good cause. This is a completely different animal.

As I say, the decision of Judge Decker, the decision that is before here for consideration by you, is purely a question of law and what happened in that court is not in any sense germane to his decision or to the importance of the decision here.

I suppose every case is of extreme importance to the attorneys who are involved, and my own remarks will have to be viewed accordingly. The widespread concern of the bar, however, over the outcome of this proceeding, as evidenced by the amicus briefs filed by the American Bar Association and other

prominent bar associations, I think gives compelling evidence that the decision of this Court will have a very significant effect upon the manner in which corporate legal representation will hereafter be conducted in this country.

Q Were the representatives of the bar associations, were their voices heard before the committee entrusted with developing the new Federal Rules of Evidence?

A Well, let me advert to that, Mr. Justice White. The draft that you heard was a preliminary draft of a proposed rule. Now, I do not know what comments have been received by the committee since that time, but the preliminary draft of a proposed rule is a far cry from the drafting of a rule and I am certain that the committee has been flooded with comments, and since that date nothing further has come out.

However, the view of the bar which appears to be a unanimous view, as indicated by the Association of the Bar of New York, The American Bar Association, the Illinois Bar Association, the Commonwealth of Virginia, and others, would indicate that as far as the bar is concerned a completely different and contrary view is held.

Q You don't know yet whether the bar associations, as associations, have ---

A Well, I think that they have, but it would be really hearsay as far as I am concerned as to what they have done. I have not participated, myself, in any actions taken by

the bar associations in connection with the committee. I understand that positions have been taken, and that they are rather drastically opposed to the preliminary draft of the proposed rule.

Personally, I tend to approach this from the standpoint of a practicing attorney who for about 45 years has been rendering legal advice to clients, and protecting them and their interests in court and before administrative agencies, and I look at it from a practical rather than from a theoretical viewpoint. I think that to put the question in proper context, namely, what is the application of this privilege to a corporation, I have to devote a few moments to a discussion of what the origin and nature of the privilege is.

Of course, the attorney-client privilege is not a rigid, inflexible rule of evidence or of law. It is a rule founded upon justice and reason, which has accommodated itself and must continue to accommodate itself to changing conditions. When it was first enunciated about 300 years ago, it was a privilege available only to the attorney.

As early as 1801, however, it was stated by Lord Elvin to be the privilege of the client and the public, and so it has come to be regarded ever since, a privilege protecting not only the interest of the client but the interest of the public as well.

Originally, it was a privilege limited to pending

litigation, then to contemplated litigation, then to other litigation, and as it accommodated itself to expanding conditions it finally became a protection to legal advice without limitation. Now, originally it was directed toward communications between an attorney and an individual client, and the reason is obvious. In the 16th and 17th Centuries there was very little but individual clients.

Again, it has accommodated itself in this respect to a changing world, and it has become increasingly directed toward the protection of confidential information between an attorney and a corporate client. I think the reason for this recent direction becomes clearer when consideration is given to the question of just what the purpose of the privilege is and just how that purpose can be best accomplished.

The purpose, I would judge, is undisputed. It is universally accepted not only in this country but in all other countries of the civilized world of whose judicial systems I have any knowledge. That it is in the interest of the public that every person, whether an individual, an association, or a corporation, should be encouraged to seek professional advice in the guidance of its affairs; that with the benefit of such advice he will be more apt to conform his conduct, whether personal or corporate, to the standards imposed by society.

I think it is further generally accepted that in order to accomplish this objective, communications between attorney

and client, whether verbal or in writing, must be free and uninhibited. For, human nature being what it is, what it always has been, and what I suppose it always will be pending the coming of the millennium, the ordinary individual seeking legal advice or providing information upon which legal advice will be predicated either for him or for a corporate employer, he will be more willing to speak freely knowing that the attorney cannot be required to become an informer against him if he knows that he is protected by the attorney-client privilege and that the communication must be held in confidence.

Today, as everyone knows, the corporations are assuming an ever-expanding role in our society. Today a corporation is supposed to do more than provide a good product and profits for its stockholders. It is supposed to have an interest in the protection of the environment, in the protection of civil rights, and in other matters that are important to the common welfare.

It certainly is no less important that a corporation conform its actions, which have greater weight today than the actions of individuals, to the law of the land and in the best interests of society than that the individual do so. Now, this general acceptance of this proposition is well established. To the best of my knowledge, Mr. Freeman, Sr., is the only person who has ever thought to contest the propriety of the application of the attorney-client privilege to a corporation. He did that

in 1962, and we happened to be on opposite sides of the table at that time, as well.

His effort, however, met short shrift at the hands of the Seventh Circuit Court of Appeals in the case of American Gas Radiant Burners vs. American Gas Association, certiorari denied by this Court in 1963.

Today counsel concedes, although I think it is with obvious reluctance, that there has to be an attorney or at least -- not has to be, I overstate -- that there is an attorney-client privilege of some sort, but they would render it wholly impotent with the restriction which is suggested. Namely, that an attorney be permitted to communicate in confidence with only a miniscule number of persons in any corporation, forming what is described as the control group.

Counsel argues that to go further would constitute an extension of the privilege. He relies basically on the decision of Judge Kirkpatrick in the case of City of Philadelphia vs. Westinghouse. Nothing could be further from the facts. The control group test when enunciated by Judge Kirkpatrick in 1963 sprang full-blown from his own brow. Prior to that date it was known to neither man nor court.

On the contrary, the rule as advocated by the respondents here had been consistently applied prior thereto. I think it is important that neither Judge Kirkpatrick nor any of the limited number of courts which have followed him, nor

counsel here, have given any rationalization of the application of the control group test. I think you will find that every argument that has been made to date is an argument against the propriety of the attorney-client privilege itself, rather than a limitation of its application.

In none of the cases cited by petitioners was any analysis made of the results which would be expected to flow from the adoption of this test. The question is whether or not it would affect the giving of professional advice and the interest of the public in making sure that that advice was given.

Furthermore, in none of the cases following the Kirkpatrick decision was the validity of the control group test even a contested issue with the possible exception of the Day case in Illinois, where the court opinion does not make the position to the parties entirely clear. The question in each of these cases was merely whether, assuming the validity of the control group test, it could properly be applied to the communications which were there under consideration.

It would appear to me that Judge Kirkpartick's opinion appears to have resulted from the giving of an undue emphasis to the giving of advice, rather than the obtaining of information, and the feeling that advice need be given only to the limited group dictating policy. The likelihood that a limited group of people may dictate over-all policy in a

corporation is -- I conceive it to be of no significance as far as the interest of the public in having every employee through whom a corporation acts act with full knowledge of the law and the consequences of his own action.

Now, the control group test would make it impossible not only to receive information from the employee, but to give advice to the employee. This is directly contrary to the law as it has been known.

I think perhaps at this juncture I might answer the question that Mr. Justice White asked. This is what Dean Wigmore has to say with respect to the availability of the privilege to an agent. He says, "This, of course, includes communication through an interpreter, and also communication through a messenger or any other agent of transmission, as well as communications originating with the client's agents and made to the attorney."

As far as I know, no one has heretofore ever taken the position that there was any distinction between the agent of a sole proprietor or a partnership, and the agent of a corporation. It is inconceivable to me that in the interest of the public there could be any distinction. If it is in the interest of the public that every person in a -- that every person act with full knowledge of the consequences of his action, then why should the protection of the privilege be limited only to a very small number? Why should it be denied to the person

who may be most in need of the advice?

Now, you may say that it may be argued that if you give the advice to a president it ultimately filters down through channels of communication and ultimately gets in some form to the person mounted on the firing line, who really needs the information to conform his action and the actions of persons whose actions he is directing. But, if the privilege is of value, and the advice is of value, then the advice should be available in the form in which it is most effective, and I do not see how anyone could argue that advice given to the president of a company has more to do with the action taken by a sales manager who is in charge of a sales group, than advice given directly to the sales manager, where he can ask questions, where he can get an interpretation, where he really knows what the significance of the advice is.

If the attorney-client privilege has any value, it has value on an ever-expanding and broader scale, and not on an ever-limiting and smaller scale. If the information given to an attorney is obtained by an employee in the course of and as a result of his employment, I can see no legal, logical or practical reason why the position occupied by the employee or the extent of his ability to dictate the use to be made of a resulting opinion, should be a matter of any importance, or should be a matter of significance as far as the public interest is concerned.

If it is well-informed advice that a person should have, then that advice should be obtained from the source where it is best and most accurately available. I think it is apparent that the president of a large company very rarely knows the details of the day-to-day operations of the company. This is information that you ordinarily would have to track from a number of broadly-based sources.

The salesman or the sales manager may best know whether or not there are pricing practices which may be suspect under the Robinson-Patman Act, whether those prices may be justified on the basis of meeting of competition, or something else.

Q An employee of a corporation, or the employee of an individual, certainly anticipates that he might be called as a witness in a suit against his employer, and his employer knows that too, I suppose. If he has some relevant information, he knows that he is going to have to testify to it and he is going to have to swear to tell the truth, and is supposed to tell the truth.

And, if he knows that he is going to tell on the stand the true story, obviously it is going to be the same story that he is going to tell his lawyer. Now, what is the big problem?

A Well, I would say, Mr. Justice White, that if the matter is as simple as the one that you have stated, that

you might just as well discard the attorney-client privilege.

Q Well, I still ask you ---

A Well, the significance ---

Q I just ask you what the significance of the privilege is.

A The significance, it seems to me, is this. I will speak from the basis of experience.

If I am trying to study the pricing practices of a company in order to determine whether or not there may be some implications under, let's say, reciprocal trade relation problems, formerly considered to present no problem, now considered to present a problem that is, as yet, unresolved. Or, if I am looking at a Robinson-Patman Act question, I don't just ask the employee a simple question, "Recount to me what you did," or that.

You act as much as an inquisitor as you do as a scribe. This is a very large part ---

Q That all may be true, but the problem is only going to come up, isn't it, when there might be a variation between what the employee would tell counsel and what he would say on the stand? Is that what worries people?

A Well, let me -- I think that the best thing I can do, Your Honor, is to refer to authority that I have always considered to be very persuasive to me.

In U.S. vs. Louisville and Nashville Railroad Company,

this Court said:

"The desirability of protecting confidential communications between attorney and client is a matter of public policy, is too well known and has been too often recognized by textbooks and courts to need extended comment now. If such communications were required to be made the subject of examination and publication, such enactment would be a practical prohibition upon professional advice and assistance."

Q I understand that, and I have read that before. Again, just tell me what deterrent effect is there going to be on an employee in communicating with counsel, which seems to be the main point here? What deterrent effect is there going to be if he anticipates that he is going to be a witness and is going to have to tell the truth on the stand?

A I think, as I said before, that this gets back to a question of human nature as much as anything else, and regardless of how humans should act I am quite certain from my own experience that they do not talk as freely and as candidly if they feel that the communication is not privileged, as they would otherwise do.

Q This is really in some ways, you think, a handmaiden of the privilege against self-incrimination, maybe?

A No, I do not. I think that the privilege against -- well, let me say that they have been discussed together, but as far as I am concerned they are entirely separate things,

entirely separate.

Q And, none of the same values underlie the attorney-client privilege, you don't think?

A Well, some of the same values underlie it, yes, but as far as the privilege against self-incrimination is concerned, it obviously doesn't apply to a corporation.

If you take the argument, it seems to me -- or, the question, I beg your pardon -- that has been propounded to me and carry it to its logical extreme, then what is the value, why should you have the privilege against self-incrimination if the employee is going to have to, except in a criminal case.

Q That is the meat of it. The reasons are the values that underlie the privilege.

A And that is precisely what I think is true here, in this ---

Q Well, what are those values that underlie the attorney-client privilege that you are talking about, that indicate that although he is going to have to say the same thing on the stand, nevertheless the lawyer shouldn't have to say what he told him.

A Well, I will be perfectly frank. If I felt that every time that I spoke to an employee or to a client that I recognized that at some future date I could be placed on the stand and my deposition be taken and I asked, "Mr.

Brown, what did you say? What was said to you?" it may cover a plethora of subjects because in the course of a deposition you are not strictly limited as to questions of relevancy. This is a search for information.

If I felt that that were the way that I were going to have to practice, I would find it very difficult.

Q So it's really as much of this argument goes to the impact on counsel as on the client?

A I did not intend to mean it as such, because I think that if I do not feel free -- I mean, I hope that I am of some benefit to my client, that it isn't just a question of protection after the fact, after something has been done. I think that any good attorney hopes that his advice acts as a prophylactic as well as a defense, and I do not think that I would be in an equal position to accomplish that without the protection of the attorney-client privilege.

To me it is inconceivable that a person should be required to supply his adversary with a paid investigator. That is what it amounts to, because you are probing not only the information that he receives, you are probing the advice that he gives.

Q Are you really saying that anything that undermines full candid disclosure by client to lawyer is to that degree -- inhibits the whole process?

A I am saying that, and I had thought that this

was generally recognized. I had thought that the value of the privilege was no longer open to question and that the only question was -- I beg your pardon, sir.

Q If the values are there, I would think that it would be a help to restate them, which you are now doing.

A Yes, well ---

Q I welcome those, and one of your points is that you don't think you ought to be a built-in impeachment mechanism for the opposition?

A I certainly do not. I would find that very distasteful. Maybe I don't have too long to practice, so maybe it wouldn't bother me as much as some of my younger friends.

Furthermore, of course this would leave a corporation in the anomalous position of being responsible for the actions of its employees, having their information imputed them, and yet not being able to get in confidence the information that would enable the corporation to control its activities.

I can see that my time is becoming somewhat limited, so I'll lead to as much as I can of what remains. Counsel has both on brief and here suggested problems that he feels would be created by an extension of the privilege. Now, bear in mind, actually I thought what we were arguing here was the question of the extension of the privilege. It is quite apparent that we really are getting back to the genesis of it and the basis

of it.

But, these are largely, I would say, completely without substance and figments, largely, of counsel's imagination. The argument is made that this would somehow suppress evidence. It doesn't suppress anything. Every scrap of information that an employee has before the communication remains available thereafter. If ---

Q ---

A I am talking about it. That is correct. I mis-spoke myself. I thank you very much, Your Honor.

What I was starting to say was that obviously the privilege itself suppresses no information, that every scrap of information that a person has before remains available. Every document that he has, the corporation has, that he has any knowledge of remains available.

Every avenue of discovery that existed prior to the time of the communication remains open. I will skip over a part of what I had in mind. I think I have already adverted to the opinion of the Court counsel makes the point that in his opinion that the restriction of the privilege which he seeks would not place any impediment in the way of securing legal advice, and it wouldn't discourage its use. All I can say is that I agree 100 percent with the former opinion of the Supreme Court. I think that it would have a very great impediment.

Q May I ask you ---

A Certainly.

Q What is the purpose in introducing the sales manager ---

A Certainly. It is only the communication that might never have taken place but for the existence of the privilege.

Q ---

A That is not, unless -- oh, there are qualifications, obviously, if it is waived, or if it is all factual matter rather than a legal matter. There are these various exceptions, but basically that is entirely true. Not at all, sir.

I think that there are some suggestions or inferences which counsel has made which get into the factual area, that under the anti-trust laws there should be some general rule. Now, neither this nor any other of the factual statements had anything to do with the opinion below. As I indicated, the factual statements that were made by Judge Decker related to his ruling on the release of grand jury minutes, his finding on the work product doctrine, and his finding upon a personal attorney-client privilege.

Q What do you think about the jurisdiction or mandamus point?

A Well, I'll have to touch it very briefly, obviously, and I will have to rely for a more detailed discussion

on the brief.

I will state about five things. I think that the importance of the question is made clear, as it is indicated by the interest of the attorneys throughout the country and the various bar associations. There was no other effective remedy that was available in this instance. The court below not only refused to certify, but refused to return the impounded documents, so that had respondents chosen to they could have refused to produce them and gone up under contempt.

Obviously, a ruling after the documents were released would not be an adequate remedy. The information is gone.

Of even more importance to me, failure to review the order of the trial court would have left unresolved in the event of a verdict for the defendant, or a settlement, an issue which was stated by the court of appeal to have substantial importance to the administration of justice. I think also particularly compelling is the fact that the court of appeals in Radiant Burners in 1963 cited with approval the decisions of Judges Lehy and Wizantsky in the Zenith Radio and United Shoe Machinery cases, stating that in those cases the problem posed, "Where a corporation must act through its officers and employees was competently met."

In both of those decisions the privilege was held to protect communications between an attorney and employees of a corporation who were not claimed to be, and in fact obviously

were not members of a control group. An appellant court generally has it within its power to grant mandamus in exceptional situations, and I would say that assuredly that power exists where it is exercised for the purpose of compelling a lower court to adhere to principles which the appellant court has enunciated.

I see the warning sign, and in closing may I say that I consider this to be as important an argument as it has ever been my privilege to make and I only trust that I have adequately presented the position of the many attorneys who through their bar associations have shown their concern in the resolution of an issue which in their opinion will have a very serious bearing upon their ability to serve the best interests of their clients and of society. Thank you.

Q Thank you, Mr. Brown.

Mr. Freeman, you have two minutes left.

REBUTTAL BY LEE A. FREEMAN, JR., ESQ.

ON BEHALF OF PETITIONERS

MR. FREEMAN: I will touch briefly on a few points. We submit that it is not possible, as defendants wish, to mechanically apply the individual attorney privilege to the corporate context. This Court has already drawn its distinction between individuals and corporations for purposes of their privilege against self-incrimination, and to decide the scope of the attorney-client privilege, we must look at the purpose

of the privilege.

If the purpose of the privilege is to encourage frank disclosure to the attorneys, that purpose is not fulfilled by applying the privilege to subsidiary or lower-echelon employees. The privilege is not necessary to secure report from these employees. In this situation, the attorney stands in no different posture than any ordinary corporate executive. If the employee is asked to submit a report, he will submit a report.

The fear the corporations will stop employing attorneys, or that attorneys will not properly prepare their cases for corporate clients, is also relatively remote. This rule has been in effect, the control group rule, in the Eastern District of Pennsylvania for eight years. It has been applied throughout the electrical conspiracy cases by Judge Kirkpatrick, Judge Ryan, Judge Christianson. It was applied by Judge Fullum in the Philadelphia Electric vs. Anaconda Brass case.

In that case, Judge Fullum held there was no privilege but refused to disclose the debriefing statements because he found there was no good cause for their discovery. Indeed, all of the arguments which have been raised by the defendants in support of the privilege are really arguments which go to good cause, and they were arguments which were answered by Hickman B. Taylor, the idea that an attorney will be a witness against his client, the idea that an attorney will be a source

of information for his adversary, the idea that the discovery of work product will reward the slothful attorney and penalize the industrious attorney.

It hasn't happened. It hasn't occurred. Courts require quite a substantial showing of need before they open opposing counsel's files to their adversaries, and I think that is sufficient protection to all of the fears which the defendants imagine. It really boils down to a balancing of interests.

We submit that contrary to respondent defendant's representation, the material is not otherwise available to the plaintiff. We must look at the contents of these debriefing statements to determine what kind of material is being suppressed and what justification there is for applying the privilege to all employees, when there are such strong reasons for securing this information to make a proper resolution of judicial controversy.

Thank you.

Q Thank you Mr. Freeman. Thank you Mr. Brown. The case is submitted.

(Whereupon, at 1:45 o'clock p.m. the argument in the above-entitled case was concluded.)