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CORPORATE EMPLOYEE INTERVIEWS AND THE ATTORNEY-CLIENT PRIVILEGE

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When a corporate client becomes involved in a situation potentially requiring litigation, the first inclination of the corporation's attorney is to interview employees in order to determine exactly what happened and to gauge the various facets of a possible lawsuit. The results of these investigations are usually contained in a written memorandum. Some time later, the lawyer may be confronted with an opponent's discovery order compelling him to produce that memorandum, and may find, to his surprise, that under certain circumstances neither the attorney-client privilege nor the work product rule protects this memorandum from discovery.

Whether an attorney's memorandum may be discovered will depend upon whether (1) the corporation's attorney-client privilege may be asserted, or (2) the individual's attorney-client privilege may be asserted, or (3) the attorney's work product rule is applicable, and, if so, whether sufficient "good cause" has been shown to warrant discovery. Although recently presented with an opportunity to clarify this aspect of privileged communications, the Supreme Court merely affirmed without opinion (in a 4-4 decision) a Seventh Circuit case taking a new approach to the attorney-corporate client question.[1] This article will explore the problems involved in the assertion of the attorney-client privilege in the corporate context, as well as those issues arising in the area of review of district court discovery orders.

I. ASSERTION OF THE ATTORNEY-CLIENT PRIVILEGE BY THE CORPORATION

Rule 26 of the Federal Rules of Civil Procedure states quite clearly that discovery extends only to matters "not privileged." This rule has been interpreted so as to define "privilege" in its usual evidentiary sense.[2] In *United States v. United Shoe Machinery Corp.*, Judge Wyzanski set forth the definitive rule regarding the attorney-client privilege:

> 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

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[1] Harper & Row Publishers, Inc. v. Decker, U.S. , 91 S. Ct. 479 (1971), aff'g 423 F.2d 487 (7th Cir. 1970).

[2] United States v. Reynolds, 345 U.S. 1, 6 (1953).

> bar of a court, or his subordinate, 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 committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.[3]

Although the attorney-client privilege applies to corporations,[4] the corporation's privilege cannot apply to all communications made by every employee. Thus, the courts have found it necessary to develop standards by which to determine which employee statements are protected.

A. *The Control Group Test*

In the leading case of *City of Philadelphia v. Westinghouse Electric Corp.*[5] (*Westinghouse*), the attorney-client privilege was asserted on behalf of Westinghouse and an employee who was interviewed by the corporation's attorneys subsequent to his appearance before a grand jury. The court held that the attorney-client privilege as applied to corporate communications was limited to communications "made for the purpose of securing legal advice or assistance . . . for the person or corporation making the communication":[6]

> Keeping in mind that the question is, Is it the corporation which is seeking the lawyer's advice when the asserted privileged communication is made?, the most satisfactory solution, I think, is that if the employee making the communication, 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, then, in effect, he is (or personifies) the corporation when he makes his disclosure to the lawyer

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[3] 89 F. Supp. 357, 358-59 (D. Mass. 1950).

[4] Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314, 323 (7th Cir.), cert. denied, 375 U.S. 929 (1963). At the district court level, Judge Campbell held that the attorney-client privilege was not available to a corporation. 209 F. Supp. 321, 324 (N.D. Ill. 1962); 207 F. Supp. 771, 773 (N.D. Ill. 1962). The decision was reversed by the Seventh Circuit, and since that time there has been no serious doubt that the privilege is available to corporations. 320 F.2d 314 (1963). See also Bell v. Maryland, 378 U.S. 226, 263 (1964) (appendix to opinion of Douglas, J. (concurring opinion)).

[5] 210 F. Supp. 483 (E.D. Pa. 1962).

[6] Id. at 484.

> and the privilege would apply. In all other cases the employee would be merely giving information to the lawyer to enable the latter to advise those in the corporation having the authority to act or refrain from acting on the advice.[7] (Emphasis added.)

The *Westinghouse* decision is based in part upon a disagreement with language in *United Shoe*[8] suggesting that the attorney-client privilege extends to a broad class of corporate employees. The court believed that this statement of the privilege conflicted with the rule in *Hickman v. Taylor*,[9] which the court interpreted as distinguishing between statements by employees and statements by the corporation.[10] The court in *Westinghouse* failed to perceive that *Hickman* was primarily based not upon the corporate status of the individuals making the statements, but rather upon the nature of the statements themselves (e.g., ordinary business records of the corporation). It does not necessarily follow from the *Hickman* decision that the attorney-client privilege does not extend to communications by employees to corporate attorneys. In fact, the most that can be deduced from *Hickman* is that where an employee communicates to a corporate attorney descriptions of what he saw as a *witness*, those communications are not protected by the corporation's attorney-client privilege. Clearly there is a practical, and arguably a legal, distinction between such communications and those of an employee concerning the performance of the duties of his employment. The *Westinghouse* "control group" test has also been roundly criticized because it unreasonably narrows the number of corporate employees eligible to communicate in confidence with corporate attorneys. Because an attorney investigating a complex case will want to interview many employees, he is placed upon the horns of a dilemma. He must "choose between advising his client on the basis of a partial or restricted factual disclosure or, by obtaining all the necessary facts from all employees of whatever level, running the risk of becoming an informer."[11] The rule thus appears to be at odds with the traditional rationale for the attorney-client privilege: "to promote freedom of consultation of legal advisers by clients [by removing] the apprehension of compelled disclosure by the legal advisers."[12]

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7 Id. at 485.

8 89 F. Supp. at 360.

9 329 U.S. 495 (1947).

10 210 F. Supp. at 485.

11 Willis, The Inroads of Pre-Trial Discovery on Attorney Client Privilege, 1966 N.Y.S.B.A. Antitrust Law Symposium 109, 122.

12 8 Wigmore, Evidence § 2291 (McNaughton rev. ed. 1961). See also Simon, The Attorney-Client Privilege as Applied to Corporations, 65 Yale L.J. 953, 953-55 (1956).

Moreover, the *Westinghouse* reasoning results in the curious anomaly that the more serious the problem faced by a corporation, and the more serious the litigation, the fewer corporate employee-attorney communications will be privileged.[13] Because the privilege is limited to those employees capable of exercising some control in a corporate decision influenced or determined by counsel's advice, where complex and important issues are involved, only communications by the persons having "the very highest authority"[14] are protected. The attorney dealing with an alleged violation of the antitrust laws, for example, is thus faced with a "Hobson's choice." If he interviews employees not having "the very highest authority," their communications to him will not be privileged. If, on the other hand, he interviews *only* those with "the very highest authority," he may find it extremely difficult, if not impossible, to determine what actually transpired. Furthermore, this control group test ignores the fact that middle management executives, while not having the final word on major corporate issues, nevertheless play a major role in the decision-making process. Their advice may be sought by upper echelon company executives, or they may in fact make decisions which are subsequently perfunctorily approved by their superiors.[15]

The reasoning in *Westinghouse* was rejected by the Seventh Circuit in *Harper & Row Publishers, Inc. v. Decker*.[16] There, in granting a writ of mandamus to review the district court's discovery order, the court concluded "that the control group test [used by the trial court] is not wholly adequate,"[17] and that:

> [T]he corporation's attorney-client privilege protects communications of some corporate agents who are not within the control group . . . .
>
> It is clear that we are not dealing in this case with the communications of employees about matters as to which they are virtually indistinguishable from bystander witnesses; employees who, almost fortuitously, observe events which may generate liability on the part of the corporation . . . .
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> We conclude that an employee of a corporation, though not a member of its control group, is sufficiently identified with the corporation so that his communication to the corporation's attorney is privileged *where the employee makes*

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[13] See Lasky, Lawyer-Client Privilege, 38 Calif. S.B.J. 427, 440 (1963).

[14] 210 F. Supp. at 486.

[15] See Maurer, Privileged Communications and the Corporate Counsel, 28 Ala. Law. 352, 367-69 (1967).

[16] 423 F.2d 487 (7th Cir. 1970).

[17] Id. at 491.

> *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.*[18] (Emphasis added.)

The court thus expressly rejected the *Westinghouse* concept of an attorney-client privilege limited to corporate officials with the power to act upon legal advice, holding instead that where an employee communicates with the corporation's attorneys at the behest of his superiors, regarding the performance of his duties of employment, the corporation's attorney-client privilege is applicable.

Unfortunately, the Seventh Circuit's opinion in *Harper & Row* stands as a lonely monument to reason in a sea of confusion. The Supreme Court has begged the question, while generally the lower federal courts have been swept along by the *Westinghouse* decision and the idea that "it is common knowledge that the scope of discovery in civil antitrust cases is broad."[19] In *Garrison v. General Motors Corp.*,[20] for example, the plaintiffs sought inspection of documents relating to discussions between several attorneys and the senior project engineer, assistant chief engineer, chief engineer and division manager of defendant's Saginaw Steering Gear Division referring to patent validity and infringement. Citing *Westinghouse*, the court held that only those communications made by the division manager and chief engineer were privileged.

The control group test was also applied in *Natta v. Hogan*[21] to exclude from the control group a "group leader-research division," a "research chemist," and the "director-patent liaison," while including the manager and assistant manager of Phillips Petroleum Company's patent division.

> [T]he test is whether the person has the authority to control, or substantially participate in, a decision regarding action to be taken on the advice of a lawyer, or is an authorized member of a group that has such power.[22]

The Supreme Court's silent affirmance of *Harper & Row* does little to clarify the law. Unless *Harper & Row* is more widely adopted, therefore, whether the communication was made by a member of the

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[18] Id. at 491-92.

[19] In re Special 1952 Grand Jury, 22 F.R.D. 102, 106 (E.D. Pa. 1958); See also United States v. Kelsey-Hayes Wheel Co., 15 F.R.D. 461, 465 (E.D. Mich. 1954).

[20] 213 F. Supp. 515 (S.D. Cal. 1963).

[21] 392 F.2d 686 (10th Cir. 1968).

[22] Id. at 692.

"control group" of the corporation will remain a key factual inquiry whenever discovery is sought.

Although *Westinghouse* explicitly rejected a determination based solely upon the rank of the employee within the corporation,[23] subsequent cases have used corporate rank as a factor in determining whether control is present, and have found communications from the secretary of a trade association,[24] executives,[25] and the executive assistant to a vice-president[26] to be privileged. Apart from the apparent propensity on the part of the courts to include high-ranking executives within the control group, *actual*, rather than apparent, control will be the determinant. In order to establish the privilege, a factual basis for authority to act upon legal advice may have to be shown.[27] An affidavit establishing the witnesses' exact duties within the corporation, including a statement to the effect that consultation with counsel and action upon that advice are part of the duties of employment, would be helpful.

B. *Confidentiality*

It should be noted at this point that even if an individual is found to be part of the corporation's control group, *all* of the criteria of the attorney-client privilege must be established before the privilege may be asserted. With regard to corporations, the most important, as well as the most easily violated requirement, is that of confidentiality. A communication not made in confidence (e.g., with strangers present), or a written communication distributed generally throughout the corporation, will not be privileged. In addition, a communication which was originally confidential, and thus privileged, may lose that status upon subsequent communication to other persons. Indeed, it has been held that a corporation may lose the privilege by filing a document in its general files.[28] One of the key facts, perhaps dispositive, in *Westinghouse* was the court's finding that the communications were not made in confidence. The attorneys had advised the persons making disclosures that, while their communications were "privileged," should any violations of company policy thereby be revealed, they would be passed on to the proper company officials.

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[23] 210 F. Supp. at 485.

[24] Philadephia Housing Authority v. American Radiator & Standard Sanitary Corp., 291 F. Supp. 247 (E.D. Pa. 1968).

[25] 8 in 1 Pet Prods. v. Swift & Co., 218 F. Supp. 253 (S.D.N.Y. 1963).

[26] Leve v. General Motors Corp., 43 F.R.D. 508 (S.D.N.Y. 1967).

[27] Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., 291 F. Supp. 247, 251 (E.D. Pa. 1968).

[28] See, e.g., United States v. Kelsey-Hayes Wheel Co., 15 F.R.D. 461, 465 (E.D. Mich. 1954).

The court's reaction was quite clear: "This disposes of any possible claim that the communications were confidential."[29]

The question of confidentiality most often arises in the context of an exchange of memoranda among attorneys for co-defendants or potential co-defendants. In *Continental Oil Co. v. United States*,[30] the only federal case to deal directly with this question, executives of both Standard Oil and Continental Oil were summoned before a grand jury, and were interviewed by counsel both before and after their testimony. Attorneys for Standard and Continental exchanged memoranda summarizing the interviews in order to apprise each other of the nature and scope of the grand jury inquiry. The court held that the exchange of documents did not constitute a breach of confidence so as to abrogate the attorney-client privilege. The court relied upon a Minnesota case holding that where documents are exchanged between attorneys engaged in maintaining substantially the same cause on behalf of different parties to the same or similar litigation, the communications are privileged.[31] The court rejected the government's contention that because there was no indictment at this stage of the proceedings there could be no joint defendants and thus no attorney-client privilege. The court stated that the attorney-client privilege exists "irrespective of litigation begun or contemplated,"[32] and that "[t]he grand jury is an arm of the court and its *in camera* proceedings constitute a 'judicial inquiry.' "[33]

Under the control group test, therefore, an attorney's memorandum summarizing an interview with a corporate employee may be protected by the corporation's attorney-client privilege if the corporation, through a member of its control group, is seeking legal advice. Members of the control group must possess *actual* authority to act upon that advice, no matter what their corporate rank; however, persons in the very highest corporate positions will probably be presumed to possess that authority. In addition, the debriefing interview must be conducted without the presence of strangers, and any resulting memoranda must remain strictly confidential.

Because of the complexity of modern corporations and lawsuits, the control group test unreasonably restricts the lawyer representing the corporation. The *Harper & Row* "scope of employment" standard presents a more workable alternative, without unduly restricting those who are attempting discovery.

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[29] 210 F. Supp. at 484.

[30] 330 F.2d 347 (9th Cir. 1964).

[31] Schmitt v. Emery, 211 Minn. 547, 2 N.W.2d 413 (1942).

[32] 330 F.2d at 350, citing 8 Wigmore, Evidence § 2294 (McNaughton rev. ed. 1961); Alexander v. United States, 138 U.S. 353, 358 (1891).

[33] 330 F.2d at 350, citing Levine v. United States, 362 U.S. 610, 617 (1960).

II. Assertion of the Individual's Attorney-Client Privilege

If it can be demonstrated that the communication in question was made in furtherance of an attorney-client relationship between the employee and his attorney, the privilege will, of course, apply. Whether or not the individual privilege is applicable will be a question of fact to be determined on a case-by-case basis. In *Continental Oil Co. v. United States*,[84] the court found no inconsistency in the fact that the attorneys who took statements of witnesses represented not only the defendant corporations, but also the witnesses as individuals. It was sufficient that "they were called upon to advise and represent the persons from whom such statements were taken."[85] The court was silent, however, as to exactly what constituted the advice and representation.

In *Harper & Row*, the Seventh Circuit accepted the finding of the district court that no personal attorney-client relationship existed because the record failed to show that the attorneys (1) rendered personal legal advice to the witnesses, (2) advised them on personal matters, or (3) billed them for services rendered.[86] Apparently, had the three criteria been met, a personal attorney-client relationship would have been found to exist.

There are several problems inherent in the assertion of the individual attorney-client privilege where the attorney is representing both the corporation and the individual. The first is the question of confidentiality. Even where there is no explicit understanding between the attorney and the individual that the information which the individual discloses may later be reported to his corporate superiors,[87] it may still be asserted that where the attorney's first loyalty is to the corporation, a confidential relationship with the individual cannot consistently exist. This result, however, seems unsatisfactory. It would prevent an attorney from representing two clients, both of whom have similar or identical interests, and both of whom may be prosecuted jointly under the antitrust laws. It may be convenient for all parties for one attorney to represent both the corporation and the individual employees. Should it be revealed to the attorney during the course of his investigation that the interests of the individual and the corporation are divergent, it is his ethical duty to request that he be permitted to withdraw as counsel for one of them, presumably the individual,

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[84] 330 F.2d 347 (9th Cir. 1964).

[85] Id. at 349.

[86] 423 F.2d at 490.

[87] See, e.g., City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483 (E.D. Pa. 1962).

advising his client to consult another attorney. Where the individual employee is informed beforehand that this parting of the ways may take place, and agrees nevertheless to be represented by the corporate attorney, the confidentiality problem should be no barrier to the assertion of the attorney-client privilege.

The second question involves the extent to which the individual attorney-client privilege should be applied. Clearly, every employee on the corporate payroll may not be deemed a client. Only where the circumstances of the case make it reasonable to conclude that the individual would logically retain his own attorney should the assertion be accepted. A clear case would involve an individual who might be liable personally under the antitrust laws for criminal penalties. It is natural to assume that such an individual would require his own counsel to represent him.

Finally, the fact that the individual is not billed separately for the attorney's services should not be a bar to his assertion of the privilege. Payment of a fee is not a prerequisite of an attorney-client relationship, and it is not reasonable to assume that the corporate attorney would require one in such circumstances.

It should be noted that if the individuals are not themselves party defendants to a lawsuit, they will be unable personally to assert the attorney-client privilege. However, the attorneys might assert their obligations to the individuals, even though they appear only on behalf of the corporation.[38]

III. Work Product Protection

Should the attorney-client privilege, either individual or corporate, be unavailable or rejected, the memorandum of the lawyer faced with a motion for discovery may be protected by the attorney's work product rule.[39] There is no question, for example, that a memorandum debriefing a grand jury witness is part of the attorney's work product. "Where an attorney personally prepares a memorandum of an interview of a witness with an eye toward litigation, such memorandum qualifies as work product even though the lawyer functioned primarily as an investigator."[40]

In *Ledge Hill Farms, Inc. v. W.R. Grace & Company, Inc.*,[41] a Robinson-Patman Act violation was asserted by a customer against a manufacturer for alleged preferential treatment of another customer. In a previous suit by a third customer, defendant's house counsel in-

[38] Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 490 (7th Cir. 1970).

[39] Hickman v. Taylor, 329 U.S. 495 (1947).

[40] 423 F.2d at 492. See also United States v. Aluminum Co. of America, 34 F.R.D. 241, 242-43 (E.D. Mo. 1963).

[41] 1963 Trade Cas. ¶ 70,765, at 78,086 (S.D.N.Y.).

terviewed potential witnesses and prepared memoranda for the use of trial counsel. Work product protection was accorded these interviews and memoranda, despite the fact that they had not been taken in "specific contemplation of the instant suit."[42] They were protected because they were taken in contemplation of *any* litigation which might arise out of the same general facts. The plaintiff's "flat assertion that it cannot obtain the information"[43] is not sufficient to vitiate the "work product" privilege.

Hickman v. Taylor held that the work product exemption is subject to a showing, on the part of the trial opponent, of "good cause" for the production of documents or other materials. The court stated, "where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had."[44] The burden of showing good cause is on the party seeking discovery. Thus, in *Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.*,[45] it was said that where uncontroverted affidavits are filed in support of a claim of work product protection, in order "to overcome [the] *prima facie* showing that the documents are entitled to protection from discovery based on work product, they must first convince the court that the documents are essential to the preparation of their case."[46] Rejected in *Commonwealth Edison* was plaintiff's contention that the unique character of the electrical conspiracy cases was, in itself, sufficient to show good cause for the production of documents otherwise protected by the work product rule. The court held that particularized good cause was necessary.

> In other words, he must show that there are *special circumstances* in his particular case which make it *essential* to the preparation of his case and in the interest of justice that the statements be produced for his inspection or copying.[47]

Despite the use by the Supreme Court in *Hickman v. Taylor* of the word "essential" in characterizing the good cause necessary for production of an attorney's work product, most federal courts have adopted a balancing test for determining whether such good cause has been shown:

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[42] Id. at 78,087.

[43] Id. at 78,088.

[44] 329 U.S. at 511.

[45] Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 211 F. Supp. 736 (N.D. Ill. 1962).

[46] Id. at 740.

[47] Id. at 741, citing Alltmont v. United States, 177 F.2d 971, 978 (3d Cir. 1949), cert. denied, 339 U.S. 967 (1950).

> The privilege of the lawyer's work product and the showing of good cause sufficient to overcome it are interdependent, and when as here, the factors supporting the claim of privilege, are weak, the requisite showing of good cause is correspondingly lessened.[48]

Good cause has been held not to exist because a witness may be hostile or may refuse to make a statement;[49] nor is it made out upon mere surmise or suspicion that impeaching material might be found in prior statements.[50] On the other hand, in *Harper & Row*, the Seventh Circuit sustained the district court's finding that good cause was shown by material discrepancies and by failure to recall significant facts when a particular witness' grand jury testimony was compared with his deposition.[51] And, although the court would have preferred more specific findings, since on a motion for writ of mandamus the movant must show that he is clearly entitled to relief, where a six-year period has elapsed between grand jury testimony and pre-trial depositions, "*lack* of good cause [has] not been made to appear sufficiently for issuance of a writ of mandamus."[52] In addition, good cause has been found where witnesses were unavailable,[53] and

> [w]here . . . it appears that one party has exclusive control over the circumstances surrounding an event and exclusive or superior opportunity to know or ascertain the facts, we believe that good cause exists to require that party's disclosure of such portions of any report as might contain the statements of witnesses or facts personally observed by the investigator even though, as here, the identity of potential witnesses has already been disclosed. . . .[54]

The foregoing appears consistent with several other cases holding that good cause is not made out where the party seeking discovery has independent means of ascertaining the information contained in the

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48 United States v. Swift & Co., 24 F.R.D. 280, 284 (N.D. Ill. 1959).

49 Tandy & Allen Const. Co. v. Peerless Cas. Co., 20 F.R.D. 223 (S.D.N.Y. 1957); United States v. Deere & Co., 9 F.R.D. 523 (D. Minn. 1949).

50 Hauger v. Chicago, Rock I. & P. R. Co., 216 F.2d 501 (7th Cir. 1954); Hudalla v. Chicago, M., St. P. & P. R. Co., 10 F.R.D. 363 (D. Minn. 1950).

51 423 F.2d at 492. Cf. Consolidated Edison Co. v. Allis-Chalmers Mfg. Co., 217 F. Supp. 36, 38 (S.D.N.Y. 1963), where release of portions of grand jury testimony was allowed on the ground that "there are either material discrepancies on important factual issues between . . . Grand Jury testimony and deposition testimony or significant facts that the witness failed to recall at the deposition."

52 423 F.2d at 492.

53 Williams v. Northern Pac. Ry. Co., 30 F.R.D. 26, 28 (D. Mont. 1962).

54 People of the State of California v. United States, 27 F.R.D. 261, 262 (N.D. Cal. 1961).

material sought.[55] Along the same lines, where the party seeking discovery is merely uncertain about the exact happenings of particular meetings, good cause will not be made out. The purpose of the broad discovery allowable in federal courts is not to abrogate completely the adversary nature of a trial. A lawyer must still build his own case, and only when information is unavailable to him from sources other than his adversary should discovery be allowed.[56]

In *Ceco Steel Prod. Corp. v. H.K. Porter Co.*,[57] defendants, in deponing a vice-president of plaintiff, questioned him concerning a conversation at a meeting with plaintiff's trial counsel and assistant general counsel, attended by three employees of plaintiff's insurer. The witness refused to answer on grounds of work product and attorney-client privilege, and his refusal was upheld by the court. According to the court, to ask the witness to report the conversation was, in effect, to seek possible statements of counsel which the witness may have heard. The witness' "own statements may reflect what plaintiff's counsel thought were the strong and weak points in Ceco's case." The court continued:

> Where there is, as here, uncertainty as to what in fact transpired at a given meeting and no *ineluctable showing of necessity*, the policy underlying the work product protection which guards against the mischief (e.g., lawyers called to testify for the purpose of impeaching the statements of their witnesses made in preparation of trial) and unfairness (e.g., the opinion of an attorney on the merits of his client's case or defense) in forcing disclosure of the contents of such a meeting will prevail. . . .
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> Frustrated discovery cannot be used as a basis for delving into areas which . . . ought to be protected, for this would make an absolute out of discovery.[58]

Rule 26(b)(3) of the Federal Rules of Civil Procedure, effective July 1, 1970, provides:

> [A] party may obtain discovery of documents and tangible things otherwise discoverable . . . and prepared in anticipation

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[55] See, e.g., Roebling v. Anderson, 257 F.2d 615, 620 (D.C. Cir. 1958); Hogan v. Zletz, 43 F.R.D. 308, 314 (N.D. Okla. 1967).

[56] Justice Jackson, concurring in Hickman v. Taylor, responded to the argument that a lawsuit was no longer a "battle of wits between counsel" stating: "[A] common law trial is and always should be an adversary proceeding. Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary." 329 U.S. at 516.

[57] 31 F.R.D. 142 (N.D. Ill. 1962).

[58] Id. at 144.

> of litigation or for trial by or for another party or by or for that other 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 court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

The new rule's standard of "substantial need" is an apparent distillation of prior case law interpretations of *Hickman v. Taylor*. In addition, there is a specific articulation of the requirement that unavailability of other sources be shown. It was the drafters' intent to codify the *Hickman* rule, incorporating case law refinements.[59] Thus, no substantial change of direction in the work product area can be foreseen.

IV. Review of District Court Discovery Orders

A significant question still exists regarding whether a district court order for the production of documents claimed to be privileged may be appealed. Such an order clearly is not a final decision under 28 U.S.C. § 1291. As an interlocutory decision, it is reviewable only if the district court judge certifies[60] that the issue should be reviewed by the court of appeals, or through the writs of mandamus or prohibition. Should the district court certify the issue, there will, of course, be no question about the right to appeal. It is where the court refuses to make such a certification that problems arise.

In *Harper & Row*, the Seventh Circuit granted a mandamus "because maintenance of the attorney-client privilege up to its proper limits has substantial importance to the administration of justice, and because an appeal after disclosure of the privileged communication is an inadequate remedy."[61] The Supreme Court apparently agreed by hearing the case. Earlier decisions, of course, took a different view. The court in *Westinghouse* refused to certify the attorney-client privilege issue for interlocutory appeal on the ground that there was no "controlling question of law" within the meaning of 28 U.S.C. § 1292(b). The Third Circuit was petitioned for a writ of prohibition and manda-

[59] Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery, 48 F.R.D. 487, 497 (1970). Advisory Committee's Note to Amend Rule 26.

[60] 28 U.S.C. § 1292 (b) (1964).

[61] Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 492 (7th Cir. 1970).

mus, which was denied; the Supreme Court denied certiorari.[62] Since the merits of the attorney-client privilege issue were not raised in either the Third Circuit or the Supreme Court, it is logical to conclude that the denials were based upon the non-availability of mandamus or prohibition in such a situation.

Several other cases have considered the question of the appealability of a district court's refusal to quash a subpoena duces tecum calling for the production of privileged material. The Ninth Circuit, in *Continental Oil Co.*, concluded that such an order was appealable, "either by way of appeal . . . or by way of mandamus or prohibition."[63] However, the Ninth Circuit recently reversed its position on the same issue, and held that relief under the All Writs Act[64] was not appropriate because such relief was limited to "exceptional cases amounting to a judicial usurpation of power."[65] Again, the Supreme Court denied certiorari. Prior Supreme Court cases support the conclusion that relief under the All Writs Act is appropriate only in extraordinary cases, and clearly inappropriate to review an order refusing to quash a subpoena duces tecum.[66] *Harper & Row* may have overruled these cases, albeit sub silentio.

If neither mandamus nor prohibition were available to review a discovery order, the only method for bringing such an issue before an appellate court, other than certification by the trial judge, would be to refuse to produce the documents and appeal from the resulting default judgment or contempt citation. Obviously, these alternatives are far from pleasant, and every effort should be made to insure that sufficient precautions are taken so that a district court ruling on a discovery motion will be in favor of maintaining the privileged status of the documents.[67]

CONCLUSION

Since the Supreme Court chose not to speak with regard to the corporate attorney-client privilege, the control group test promulgated in *Westinghouse* must still be reckoned with. The *Harper & Row* "duties of employment" test, while eminently more sensible, and af-

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[62] 210 F. Supp. 483 (E.D. Pa.), mandamus and prohibition denied sub nom. General Elec. Co. v. Kirkpatrick, 312 F.2d 742 (3rd Cir. 1962), cert. denied, 372 U.S. 943 (1963).

[63] 330 F.2d at 349.

[64] 28 U.S.C. § 1651 (1964).

[65] Bolker v. United States, 418 F.2d 215, 217 (9th Cir. 1969), cert. denied, 397 U.S. 919, rehearing denied, 397 U.S. 1003 (1970).

[66] See, e.g., Will v. United States, 389 U.S. 90, 97-98 (1967); Cobbledick v. United States, 309 U.S. 323 (1940).

[67] Even if mandamus is available, the party requesting it must show that he clearly is entitled to relief, and may have to show "lack of good cause [for production] sufficient for issuance of a writ of mandamus." 423 F.2d at 492.

firmed by the Court, has not been widely adopted. It is likely that many district courts and state courts will continue to adhere to the control group standard.

The real problem facing the practicing lawyer revolves around those employees who cannot realistically assert the individual privilege, and who, in all likelihood, will not be considered to be part of the control group. As to this genre of employee, an affidavit should be prepared, stating that the communication is being made at the direction of the employee's corporate superiors, and that the subject matter of the communication is "the performance by the employee of the duties of his employment." In this manner, should litigation result, and should the forum court choose to adopt the *Harper & Row* rationale, the communication will be protected by the corporation's attorney-client privilege.

Where neither the corporate nor the individual attorney-client privilege can be asserted, the rules regarding the attorney's work product become relevant. Under both the existing Federal Rules and the amended Rules which became effective July 1, 1970, the party seeking discovery must make a showing that there is "substantial need" for the materials sought, and that an alternate source is unavailable, in order to overcome the protection of the work product rule. However, the parameters of substantial need can be determined only on a case-by-case basis.

Review of a district court discovery order is difficult notwithstanding the court's apparent acceptance of mandamus as a device for appeal. It is thus important to establish a foundation for the assertion of the attorney-client privilege and work product protection well before a lawsuit has been initiated.

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