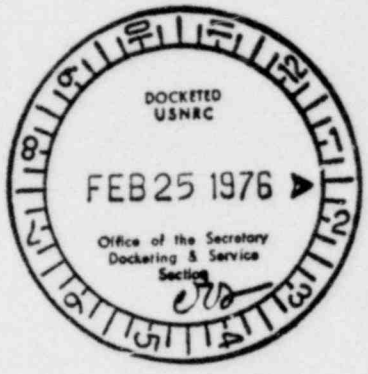
Reg. Files

February 24, 1976

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

THE ATOMIC SAFETY AND LICENSING BOARD



Elizabeth S. Bowers, Chairman
Edward Luton, Member
Thomas W. Reilly, Member

In the Matter of		
THE TOLEDO EDISON COMPANY and THE CLEVELAND ELECTRIC ILLUMINATING COMPANY	Docket Nos.	50-346A 50-500A 50-501A
(Davis-Besse Nuclear Power Station, Units 1, 2 and 3)		
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, ET AL.	Docket Nos.	50-440A 50-441A
(Perry Nuclear Power Plant, Units 1 and 2)		

BOARD RULING IN SPECIAL §2.713 PROCEEDING

This matter comes before this special Atomic Safety and Licensing Board pursuant to the provisions of 10 CFR §2.713(c) of the Commission's Rules of Practice, which requires that "(b)efore any person is suspended or barred from participation as an attorney in a proceeding, charges shall be preferred by the presiding officer against such person and he shall be afforded an opportunity to be heard thereon before another presiding officer."

M

The referring Atomic Safety and Licensing Board issued a "Memorandum And Order...Suspending Counsel From Further Participation As Attorney In These Proceedings" on January 19, 1976, stating the charges and the grounds therefor. On the same date, after the issuance of said Order, this (special) Board was appointed by the Acting Chairman of the Atomic Safety and Licensing Board Panel to conduct the referral hearing prescribed by §2.713(c).

* * * * *

The charged party herein is the law firm of Squire, Sanders & Dempsey (SS&D or the firm), together with its Washington office, Cox, Lanfgord & Brown, which the City of Cleveland (the City) moved to disqualify or suspend from continuing to appear and represent the applicant Cleveland Electric Illuminating Company (CEI), for whom the firm has been general counsel for over 65 years, and to prohibit said firm from aiding or advising any new counsel for applicant CEI, or any other applicant in the subject NRC antitrust proceeding. The charge and motion to disqualify are based upon an alleged "dual representation" and conflict of interests situation, in purported violation of both the American Bar Association's (ABA) Code of Professional Responsibility and the Commission's Rules of Practice, specifically, 10 CFR §2.713(c)(2).

* * * * *

This Board has studied the pleadings, the briefs of counsel, the transcript of the December 31, 1975 oral argument, the pertinent exhibits, the A.B.A.'s Code of Professional Responsibility (including the Canons of Ethics, Ethical Considerations and Disciplinary Rules), and the January 19 "Memorandum and Order of the Board Suspending Counsel..." (both majority and dissenting opinions). Having heard additional oral argument on February 3, 1976, and having reviewed the memoranda submitted by the parties, we find we are in agreement with the conclusion set forth in the earlier dissenting opinion attached to the Davis-Besse hearing board's January 19 "Order...Suspending Counsel...."[1/] that the City of Cleveland (City) should fail in its Motion to Disqualify. We believe it would not serve any useful purpose, nor assist the parties or subsequent appellate bodies, to

---

1/ However, we wholeheartedly agree with the majority's footnote suggestion (slip op., p.6) that 10 CFR §2.713(c) has urgent need of revision. Clearly, there is no need, or practical purpose to be served, by referring to another presiding officer the situations under (c)(1) and (2) wherein the original presiding officer is in no way the charging or complaining party. Obviously, the referral requirement was designed to cover the typical "contemptuous" conduct situation wherein the offending attorney so antagonizes the original presiding officer that his adjudication of a collateral "contempt" charge might seem to be less than objective or impartial.

imaginatively re-state in our own style what the dissenter has already succintly expressed with ample factual references.[2/]

However, we would like to briefly address two legal points that have not been touched upon by either the original majority or the dissent. The first point is the very limited jurisdiction of an Atomic Safety & Licensing Board (ASLB, hearing board or licensing board) in lawyer misconduct matters, when compared with the jurisdiction and prerogatives of a bar association grievance committee or the courts. The second point is the questionable applicability of the ABA's "multiple representation" canons to an NRC proceeding in which there has been no multiple representation or attempted multiple representation by the charged law firm in that proceeding.

JURISDICTION OF LICENSING BOARDS VS. BAR DISCIPLINARY BODIES

The very general, almost impermissibly vague, language of §2.713(c)(2) offers a tempting quagmire for legal interpretation by any reviewing body, administrative or judicial, in

---

2/ Additionally, for a point-by-point factual rebuttal of the six grounds used by the majority as the basis for its charges, which rebuttal we find credible and convincing, see SS&D's Trial Brief (Feb.2, 1976), at 10-22. (See also Feb. 3 oral argument of Gallagher on behalf of SS&D, Tr.4397-4425, and Feb. 9 "Index...Referencing Exhibits Referred To In Argument.")

attempting to compare certain precise conduct against a prescribed general standard, albeit the language decrees a basic standard of professional conduct with which no one could disagree. The problem is further compounded when one realizes that the reviewing authority here is not a court of general jurisdiction and is not vested by law with the ultimate authority for overseeing all unprofessional conduct that might conceivably come within the verbatim description "conform to the standards of conduct required in the courts of the United States." Some such conduct might have to be referred to legally designated professional disciplinary bodies for appropriate investigation and action.

Although there are some examples of prohibited conduct before an administrative hearing board clearly within the proscriptions of (c)(2) and quite appropriate for an NRC Atomic Safety and Licensing Board to deal with, there is a vast area of equally unacceptable conduct that is <u>not</u> within the jurisdiction of such a board to entertain and rule upon, i.e., such conduct, though professionally unacceptable, is simply not within the jurisdiction of an ASLB to adjudicate and rule upon. This latter category is the area wherein either bar association grievance committees, bar admission authorities, or the courts, themselves, have the sole jurisdiction to investigate and take remedial/disciplinary action.

To be sure, even without subsections (c)(3), (4) and (5), it would clearly be appropriate for a hearing board (presiding officer) acting under (c)(2) to suspend an attorney practicing before it in a license proceeding, when that attorney persistently shouts at the presiding officer, refuses to obey the board's procedural rulings and generally (and continuously) disrupts the orderly course of the proceeding.

Conversely, an attorney who allegedly charges unreasonably high or unreasonably low fees (including the fee for the license proceeding in issue) or who occasionally mishandles or mis-deposits escrow funds, would be facing serious charges--but not before an Atomic Safety and Licensing Board. The legal profession's official disciplinary bodies would be the appropriate parties to investigate and hear such charges, i.e., they, and not the ASLB, would have jurisdiction.

We point out these two extreme situations not to indicate that the present facts easily fit either one, but merely to illustrate that the language of §2.713(c)(2) could conceivably encompass both cases, and yet only one of these extreme examples would be within the prerogative of an NRC licensing board (presiding officer) to adjudicate and rule upon. Admittedly, the present case is complicated because it falls somewhere between the two extremes. We believe, however,

that as a general rule, if the "avoidance of even the mere appearance of professional impropriety" (cf. ABA Canon 9) is the gist of the offense charged, the facts then are more appropriate for determination by a bar grievance committee or court than an NRC licensing board. Since the earlier majority seems to throw out the significance of any need for proof of actual injury to the client or specific proof of the passing of confidential, non-public information from one client to another[3/] (vs. information already made public and available from other sources),[4/] we must conclude that the majority is resting its decision to disqualify on the "mere appearance of impropriety" concept. If such an analysis and conclusion had been rendered by a jurisdictionally-competent bar association grievance committee, we would have no procedural quarrel with it. However, we seriously question a licensing board's jurisdiction to adjudicate "appearance of impropriety" cases.

To put it affirmatively, we believe the general language "...failed to conform to the standards or conduct required in the courts" [§2.713(c)(2)] was intended by the Commission to relate solely to unprofessional conduct directly interfering with the conduct of the Commission's license proceedings, and was never intended to open the Pandora's Box

---

3/ See majority slip opinion, at 18, 19, January 19 Memorandum and Order.

4/ For statutes requiring disclosure of adverse information that might affect the value of bonds or other securities

4/ cont'd.
offered for public sale, see Securities Act of 1933, 15 U.S.C. 77, e.g., §§ 77j, 77k, 77q, 77nnn(c), 77www; and Securities Exchange Act of 1934, 15 U.S.C. 78, e.g., §§ 78b, 78i(a)(4), 78l(b)(1), 78m, 78r. See also Fischer v. Kletz (D.C., N.Y. 1967), 266 F.Supp. 180, and SEC v. Frank (2 Cir. 1968), 388 F.2d 486, on the affirmative duty of disclosure by CPA's and lawyers. On Congressional purpose of Federal securities laws to protect and inform investors, including the uninformed, the ignorant and the gullible, see Surowitz v. Hilton Hotels Corp. (7 Cir. 1965), 342 F.2d 596, rev'd. on other grds. 383 U.S. 363; Thill Securities Corp. v. N.Y. Stock Exch. (7 Cir. 1970), 433 F.2d 264; and Associated Securities Corp. v. SEC (10 Cir. 1961), 293 F.2d 738. The statutes and policy thus effectively prohibit a lawyer serving as "bond counsel" from keeping confidential any adverse information he might obtain (and otherwise keep confidential under the usual lawyer-client relationship). The primary fiduciary duty is to the investing public.

of Commission review over all professional conduct or the intricacies of past lawyer-client relationships, particularly where there are already professional grievance committees and courts that have the unquestioned jurisdiction and expertise to explore such "mere appearance of impropriety" relationships, and to fashion a more lasting remedy. We believe the intended emphasis of the Commission's rule is on the presiding officer's power to control the orderly course of an NRC public administrative hearing. It is not, we believe, a general, supervisory role over all attorneys practicing before it to see that complete equity is always being done with their clients, and that all ABA canons are scrupulously being adhered to, even in behind-the-scenes multiple relationships,[5/] involving the interplay of other transactions, other clients, and other non-NRC litigation.

Having said this, we do not wish to be misquoted as finding that there are no conflict-of-interest cases that would justify a presiding officer's invocation of the suspension provisions of §2.713(c)(2). Certainly, for example, if an attorney has actively represented an Intervenor

---

5/ If the only nexus needed to trigger the Commission's review of a lawyer's conformance to all ABA Canons of Ethics is merely his appearance in one Commission proceeding, ASLB's might next prepare themselves to hear cases on the alleged unreasonableness of fees being charged by attorneys appearing before us. (Cf. ABA Canons EC 2-17 thru EC 2-25.)

throughout half an evidentiary proceeding (preparing witnesses, reviewing testimony and strategy) and then he suddenly appears at the hearing as the new trial counsel for the Applicant (the Intervenor's de facto adversary), the case would cry out for barring such attorney from further participation.

WHERE IS THE "DUAL REPRESENTATION" & WHAT IS THE ABA REMEDY?

Going beyond the threshold jurisdiction question, we are further bothered by the questionable applicability of "dual representation" canons to the facts of the present case, wherein no dual representation exists nor has it ever been attempted, in either this NRC proceeding nor in any other earlier "substantially related" proceeding or transaction.[6/]

As stated in the January 19 majority opinion (slip op., at 5): "The essence of the City's position...is that dual representation by the Firm places it in a conflict position in violation of standards of conduct required in the courts of the United States." The majority specifically ties its ruling to ABA Ethical Consideration EC 5-16[7/] and

---

6/ For cases on the "substantial relationship" requirement for true dual representation conflicts, see SS&D's Answer Brief of Lansdale, Dec.12, 1975, at 14-18, and SS&D Trial Brief, Feb.2, 1976, at 6-8.

7/ Majority opinion, slip op. 18,26.

Disciplinary Rules DR 5-101 and 5-105(B), (C).[8] EC 5-16 refers to "those instances in which a lawyer is justified in representing two or more clients having differing interests," and gives notice requirements in "common representation" situations. However, we have great difficulty in seeing how this section is appropriately applied to the facts in issue, particularly after reviewing the several other canons in the entire ABA "Interests of Multiple Clients" section.[9] The general tenor of that entire section seems to be directed to a situation where a lawyer is asked to represent "multiple clients" in the same litigation or the same transaction, and here, insofar as the ASLB hearing is concerned, the subject law firm has never represented, or offered to represent, the City in this NRC proceeding. The same consideration applies to DR 5-105(B) and (C). We are fully aware that the City claims concern about possible unspecified information obtained by the firm through its earlier representation of both the City and CEI in separate matters, other transactions having nothing to do with this

---

8/ Majority opinion, slip op.18,25. ABA DR 5-101(A) requires consent of the client to representation after full disclosure of a situation wherein the lawyer's own "financial or business interests" might impair his professional judgment. DR 5-101(B) is irrelevant to the present dispute. DR 5-105(B) refers to the continuation of "multiple employment," and DR 5-105(C) to representation of "multiple clients."

9/ See ABA EC 5-14 thru EC 5-20.

NRC proceeding, mainly via the firm's recent service as the City's "bond counsel."[10/] But representing CEI in antitrust

---

10/ We are also aware that the nub of the City's complaint is its suspicion that the law firm in question might be giving an "edge" to the City's de facto adversary in this proceeding by transmitting "inside" information to CEI about the City's operations, capabilities or condition, which information may have been obtained from the City in the firm's earlier lawyer-client relationship with the City. However, no such non-public information has been specified and the record discloses no such breaches of confidence, although the City argues that anytime SS&D gave legal advice to CEI that was not completely advantageous to the City -- that constituted a "breach of trust" to the City. Furthermore, the majority opinion avoids resting its charges on any such incident or specific information leak. Rather the Board's charges rest solely on an alleged general violation of specific ABA Ethical Considerations and Disciplinary Rules aimed at "dual representation" or "multiple representation" lawyer-client responsibilities. Even if the sanction of prohibition from legal representation of the non-complaining party were authorized by the ABA rules referred to (it is not), it seems that before destroying such valuable representation, on such a potentially damaging charge, the Board should have required hard evidence of injury-in-fact or at least evidence of specific "confidences" that were breached. We do not consider information already made public because required by law to be given public notice (e.g., financial capacity of the City when it offers bonds for public sale) as any evidence of a breach of trust. Nor do we consider legal advice given to CEI that happened to be adverse to positions the City would like to see taken, to be "breaches of duty" to the City.

It follows that we are in complete disagreement with the earlier majority's view that a licensing board can take such harsh action without such specific evidence and that "as a matter of law...it does not matter whether the information exchanged can be proved or demonstrated to have originated from confidential materials supplied by the client." (Majority, slip op., at 18.) Likewise, the District Court statement cited by the majority (slip op., 19), that "public confidence in lawyers generally would be impeded if we were to permit the Firm to prevail on its argument that information passed from one client to another was non-confidential in nature", would be

and other matters (as general counsel of CEI), at the same time SS&D represents the City in a non-related bond matter, is not "dual" representation.

It is important to note that in ABA EC 5-19, the ABA solution to representing several clients where the lawyer believes their interests are not actually or potentially differing but the client disagrees, is to withdraw from representation of that client (i.e., the City).[11/] The dissatisfied client is given no right to demand that the lawyer cease representing the satisfied client. But the firm has never represented the City in this NRC proceeding, and the Canon does not suggest that the firm must withdraw its representation from both of the so-called "multiple clients" nor from the one that is satisfied with, and desires, the firm's continued representation. So, we are faced with a situation where there is no multiple representation in the

---

10/ cont'd.
unassailable coming from a District Court or a bar association grievance committee in a true "switching sides" case, but what we have here is an Atomic Safety & Licensing Board sitting in judgment on non-nuclear, non-licensing matters that occurred years ago in the State of Ohio -- not only non-NRC matters, but clearly non-Federal matters. The only Federal connection is the penalty -- non-participation in a Federal proceeding -- if this limited Federal agency determines that the interplay of these distant non-Federal transactions were, in its opinion, unethically handled.

11/ See also EC 5-16, the basic section charged, wherein it states: "...it is nevertheless essential that each client be given the opportunity to evaluate his need for representation free of any potential conflict and to obtain other counsel if he so desires." (Emphasis added.)

NRC proceeding,[12] on the one hand, and on the other hand, the City persistently declines to avail itself of its option to terminate usage of the firm in its non-NRC transactions (bond preparation).

As pointed out in the dissent (p.5), this is the largest law firm in the State of Ohio,[13] and it has been representing both parties, as well as a multitude of other clients, in a variety of transactions for 65 years. It is to be expected that many of their former and present clients may at one time or another, institute legal action against other former or present clients. By extension of the rationale of the earlier majority, and its strained interpretation of the "multiple representation" ABA Canons, this firm would be prohibited from representing either party in such subsequent conflicts because at some time in the past the firm had represented both, in one form or another and in different capacities, subject only to the caveat that the non-represented party object with a claim of "multiple

---

12/ See also the first paragraph, first page of the majority's decision which states: "The basis for this Motion is an asserted conflict of interest arising from the Firm's prior dual representation of CEI and the City and its current representation of CEI in these proceedings." (Emphasis added.) See also the majority's reference (slip op., at 8) to three specific past incidents as being the factual basis for the claimed improper "dual representation: charge -- all three occurred years ago (1963, 1972 and 1966) in the State of Ohio, and none involved an NRC proceeding.

13/ 180 lawyers in 1975; City's Brief in Support of Motion to Disqualify, Nov. 20, 1975, at 2.

representation." This flies in the face of EC 5-20, which shows the solution to be withdrawal of representation from only the complaining party. It also flies in the face of the basic factual distinction that such canons obviously apply only where the lawyer is now attempting to represent both clients in substantially the same litigation or proceeding or has switched from one side to another in the same proceeding, which has never been the case in this NRC proceeding.[14/] (And to the extent that the alleged dual or multiple representation conflict occurred earlier in a non-NRC setting, the jurisdiction flies from NRC and returns to the State of Ohio bar disciplinary authorities.)

14/ We find the federal court cases cited in the City's brief relating to lawyers "switching sides" in litigation to be inapposite to the facts of the present case. (City Atty. Davis admits they are different, oral arg., Dec. 31, 1975, tr.2482.) There was never any attempt by SS&D to represent the City in this NRC proceeding nor had the firm ever represented the City before in any substantially similar litigation involving both parties as adversaries (CEI and the City). Furthermore, we find surprising the City's complaint that SS&D applied "pressure" and "threats" to withdraw from representing the City in its bond matters. Not only would such withdrawal end the "dual representation" alleged, but it is exactly the solution the ABA recommends for true dual representation cases wherein one client complains about the situation -- the lawyer is advised to withdraw his services from the complaining client. Likewise, the "waiver" and "consent" requirements clearly apply to the continued representation of the possible complaining client. Without such consent and waiver the lawyer may not continue to represent that client. (ABA EC 5-19.) Nowhere is there any authority for the proposition that the disgruntled client may dictate what other

FINDING AND CONCLUSION

We find no evidence of unethical conduct by SS&D in the record before us. The City should be referred to the bar disciplinary authorities in the State of Ohio if it wishes to further plead and prove its claim of alleged unethical conduct. CEI should be permitted to retain the legal counsel of its choice[15/] in this limited NRC

14/ cont'd.
client the lawyer may represent. Likewise, the "full disclosure" canons have no applicability here, because the record clearly shows that the City (including its law department and law director) had always known that SS&D was the general counsel for CEI, and had always acted as such for 65 years, whereas the City was only the ad hoc "client" of SS&D just for the City's occasional bond work.

15/ Not only is SS&D the counsel of CEI's choice for this proceeding, but SS&D has been CEI's general counsel for 65 years. (Dec. 31, 1975 oral argument, SS&D atty. Gallagher, tr.2527; Lansdale Answer Brief, Dec. 12, 1975, 2, 21-22.) Over the same period, SS&D has rendered legal services to the City, but always on a limited, piece-by-piece ad hoc basis, as have other law firms in Cleveland. (Lansdale Ans., 2-3, 21-22; Dec. 31 arg., admission by City Atty. Davis, tr.2504.) The City has never had any general retainer with SS&D nor any document or agreement of any kind establishing SS&D as the City's own law firm for general counsel purposes or general legal representation. (Feb. 3 oral arg., tr.4442-4443, 4262-4263.) The City has its own Law Department of 20-25 attorneys handling the City's routine affairs but it "farms out" individual legal matters to many private law firms, including SS&D. (Dec. 31 arg., City Atty. Davis, tr.2500, 2508-2509; SS&D atty. Gallagher, tr.2530-2532, 2534.) By the City's own admission, what SS&D is presently doing for the City (bond counsel) concerns "matters not

15/ cont'd.
directly involved in this proceeding," (Dec. 31 arg., Davis, tr.2486) and, in fact, with the City's knowledge, SS&D has, on numerous occasions over recent years, as part of their general practice, represented other individual clients in personal injury claims and other actions against the city, without complaint or objection by the City, although now its attorney claims such representation is merely further example of the firm's "misconduct" which was "waived" by the City in the past. (Dec. 31 arg., City Atty. Davis, tr.2512; see also the list of some fifty matters referred to therein where the City and CEI litigated against each other over many years and in which SS&D always represented CEI -- list prepared by SS&D; see also tr.2537, Ex.B, and Feb. 3 arg., tr.4441-4443.)

The fact that the City has been successful in forcing several other Cleveland law firms to drop their representation of other individual clients merely because such firms had, at one time or another, handled isolated unrelated legal matters for the City, after the City's threat of a similar "ethics" charge, raises some question of the City's own ethics. (Dec. 31 arg., Gallagher, tr.2531-2532; Feb. 3 arg., Bd. questions/Reilly, Davis resp., tr.4443-4444.)

proceeding. The preferred charges under 10 CFR §2.713 should be DISMISSED and the suspension of counsel VACATED.

IT IS SO ORDERED.

(Mr. Luton's separate opinion follows.)

(Special) ATOMIC SAFETY AND LICENSING BOARD

Elizabeth S. Bowers

Elizabeth S. Bowers, Chairman

Thomas W. Reilly

Thomas W. Reilly, Member

Issued at Bethesda, Maryland
this 24th day of February, 1976.

Opinion

Based upon its review of two specific factual situations, the First Board majority has charged the Law Firm with having "failed to conform to the standards of conduct required in the courts of the United States" (10 CFR §2.713(c)(2)). In my view, it is the task of this Licensing Board to examine the situations relied upon by the First Board, with a view toward determining whether the evidence supports the charge preferred.

The standards of the Code of Professional Responsibility [1] are taken by the First Board as establishing the minimum level of conduct that Section 2.713(c)(2) demands. [2] The First Board has determined

---

1/ The Code of Professional Responsibility was adopted by the American Bar Association effective January 1, 1970. The Code replaces the former American Bar Association Canons of Ethics.

2/ The Code of Professional Responsibility consists of nine Canons with associated Disciplinary Rules. In the Code's Preliminary Statement, it is explained that:

> "The Canons are statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession. They embody the general concepts from which the Ethical Consideration and the Disciplinary Rules are derived.
>
> The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance in many specific situations.
>
> The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action."

that certain Code standards have not been met by the Law Firm. In particular, that Board holds that "Ethical Canon 5-16" is "dispositive," although it also relies "in particular upon the provisions of Disciplinary Rule 5-101... and Disciplinary Rule 5-105(b)...." There is no such thing as an "Ethical Canon" under the Code of Professional Responsibility. And since the precise extent and manner of the First Board majority's reliance on DR 5-101 and DR 5-105(b) are not clearly set forth, 3/ the particulars of the general Section 2.713(c)(2) charge are not wholly free from doubt. All matters considered, I understand the First Board majority to specify at least violations of DR 5-101(a) and DR 5-105(b) and (c). 4/

3/ In the "Conclusion" section of the First Board majority's opinion, the Board states that it "hereby prefer(s) charges under Rule 2.713(c)(2)." There then follows a statement of six separate "grounds" for these charges" (my emphasis). Certain of those grounds are stated in terms of "We hold," but, somewhat confusingly, one is stated in terms of "We charge."

4/ DR 5-101 Refusing Employment when the Interests of the Lawyer May Impair His Independent Professional Judgment.

(A) Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.

DR 5-105 Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer.

(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR 5-105(c).

(C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

The Facts

The 1966 Situation

In 1966, Mr. Carl White had the responsibility for preparing a so-called Little Hoover Commission report on the City's Municipal Electric Light and Power Plant (MELP) for the City of Cleveland. One of his concerns in this regard was with ways to alleviate the critical situation of the City's General Fund. A matter to be explored in this connection was the possibility that the Fund could be relieved by a reduction in charges by the City electric department to the Fund for street lighting. Certain legal opinions which had been prepared by John Lansdale [5/] of Squire, Sanders & Dempsey for the Cleveland Electric Illuminating Company had some relation to this prospect. Essentially, those opinions take the position that the trust indenture under which MELP revenue bonds are issued required that more than nominal payment be made for service rendered to the City; but in the absence of such an indenture provision, service could be rendered to the City for governmental purposes without any charge at all so long as charges to private customers were reasonable. The opinions "suggested that the competitive rates of the Cleveland Electric Illuminating Company could probably be taken as a measure of reasonableness." [6/]

5/ John Lansdale was the Squire, Sanders & Dempsey partner engaged in the general representation of the Cleveland Electric Illuminating Company. John Brueckel was the Squire, Sanders & Dempsey partner engaged in the representation of the City of Cleveland with respect to its bond work.

6/ City's Exhibit E, memorandum concerning City's Municipal Electric and Power Plant rates.

Having earlier received this advice from its lawyer, the Cleveland Electric Illuminating Company suggested to Mr. White that he consult Mr. Lansdale about what might be involved in seeking a reduction in charges by the electric department to the General Fund for street lighting. Thus, at Mr. White's request, he and his associate met with Mr. Lansdale and Mr. Brueckel to discuss the substance of these legal opinions. This matter was discussed among the participants and, in addition, Lansdale and Brueckel reviewed a memorandum prepared by White containing White's own thoughts on relieving the General Fund. The memorandum, which was entitled, "Thoughts on Use of Electric Light and Power Plant Utility (MELP) Funds for Alleviation of Critical Situation in General Fund of the City of Cleveland," was seen by Lansdale and Brueckel for the first time at this meeting. 7/ The memorandum contained information with respect to the revenues of the light plant, the costs of its services the dollar amount of its sales to the City, and the charges against the General Fund for such services -- all information furnished to John Lansdale and the Firm by Carl White. 8/

The First Board majority views this 1966 situation as "discussions covering a 'Little Hoover Commission Report' on MELP relating to general fund assessments for street lighting and payment terms under the trust indenture of MELP revenue bonds [in which] Mr. Lansdale directly consulted with Mr. Brueckel, a Squire, Sanders & Dempsey partner who has

---

7/ City's Exhibit E, memorandum, p. 2.

8/ Lansdale affidavit, p. 5.

been engaged in the representation of the City with respect to its bond work." 9/ Further, the First Board majority finds "that in this instance there was specific cross-fertilization within the Firm with respect to matters jointly affecting CEI and the City in which the interests of the parties were or could have been adverse." 10/ The term cross-fertilization is used to mean the "transfer of information obtained in connection with providing services to one client to the attorneys handling the affairs of another client." 11/

The 1972-1973 Situation

In June 1972, Richard D. Hollington, then Law Director of the City of Cleveland, telephoned Daniel J. O'Loughlin of Squire, Sanders & Dempsey in connection with proposed financing of improvements at the Municipal Light Plant. A sale of bonds to retire outstanding notes was then contemplated by the City. Mr. Hollington stated that because of certain disputes 12/ then existing between the City and the Cleveland

---

9/ Memorandum and Order of the Board Suspending Counsel from Further Participation as Attorney in These Proceedings, p. 9.

10/ Id

11/ Memorandum and Order of the Board, p. 17.

12/ According to the evidence, CEI and the City of Cleveland were having serious competitive conflicts by the year 1971. The conflicts involved the marketing practices of each in the solicitation of new customers, and the terms and conditions under which CEI would provide backup electrical power to the Municipal Electric Light and Power Plant. Any interested resident of the area could have become aware of the situation by following the news coverage (Lansdale Affidavit, pp. 7-8).

Electric Illuminating Company, the City would prefer not to retain Squire, Sanders & Dempsey for this bond issue, and he asked O'Loughlin to recommend other Ohio bond counsel. Mr. O'Loughlin suggested either the Bricker, Evatt, Barton & Eckler firm of Columbus, Ohio, or the Peck, Shaffer & Williams firm of Cincinnati, Ohio. Later, O'Loughlin specifically recommended the Bricker firm. Subsequent to this, Hollington telephoned O'Loughlin to say that the Bricker firm had declined the offered employment. Hollington then asked if Squire, Sanders & Dempsey would act as bond counsel with respect to the proposed financing of the municipal system. Because of the continuing disputes between the City and CEI, Mr. O'Loughlin requested Mr. Hollington to obtain the concurrence of Mr. Raymond Kudukis, the City's Utility Department Director, in the proposed representation. In accordance with Mr. O'Loughlin's request, Mr. Hollington asked in writing that Squire, Sanders & Dempsey undertake the bond representation and stated the concurrence of Raymond Kudukis in the request. 13/

Mr. John B. Brueckel of Squire, Sanders & Dempsey had primary responsibility for the original legal draftsmanship of the ordinance which authorized the issue of revenue bonds in the sum of $9.8 million for the construction of improvements to the municipal system and for the retirement of indebtedness incurred pursuant to an earlier bond ordinance. 14/ At about the same time that Mr. Hollington was

---

13/ Affidavit of O'Loughlin.

14/ Affidavit of Brueckel

importuning Mr. O'Loughlin, as set out above, Howard J. Holton, Assistant Secretary of the Sinking Fund Commission of the City of Cleveland (and thereby responsible for debt service) was requesting Mr. Brueckel to handle the proposed bond issue. Before Brueckel responded to Holton, Mr. Hollington was in contact with Mr. O'Loughlin. Squire, Sanders & Dempsey obtained the consent of the Cleveland Electric Illuminating Company before it undertook the bond representation on behalf of the City of Cleveland. The Cleveland City Council adopted Ordinance No. 2104-72 on July 2, 1973, with respect to which Squire, Sanders & Dempsey had provided services as bond counsel pursuant to the City's request.

With respect to this 1972-73 situation, the First Board majority holds as follows:

> "... notwithstanding a recognition by the City and the Firm that there were existing controversies between the City and CEI at the time the Firm undertook the 1972-73 bond representation for the City, there was no full disclosure of possible future effect in the event of a conflict; nor was there consent of the client (the City) that the Firm represent CEI and not the City in the event of such conflict as required by Disciplinary Rule 5-101(a)." 15/

15/ Memorandum and Order of the Board, p. 25.

Further, the First Board majority holds that two documents "in and of themselves demonstrate an abuse of the Firm's client relationship with the City." These are (1) a June 17, 1974 letter from Mr. Lansdale to Donald Hauser, General Attorney of CEI; and (2) a May 12, 1974 memorandum from Mr. Brueckel to Mr. Lansdale. 16/ The June 17 letter encloses the May 12 memorandum and refers to a conversation between Mr. Lansdale and Mr. Brueckel on the subject matter of the memorandum, and states that Mr. Lansdale also conferred with Mr. O'Loughlin about the matter. The memorandum is directed to "the proposed agreement between the City of Cleveland and CEI concerning the supply to the City of electricity generated by nuclear power plants." Brueckel acknowledges in the memorandum that he understands the "desire of CEI... to have the agreement highlight the Municipal Light and Power Plant System (MELP) to the maximum possible degree." The First Board majority finds all of this to be improper "cross-fertilization." The First Board majority expressly "charge[s] that there was an actual transmittal of material relating to the Firm's advice to the City in connection with the 1972-73 bond issue to attorneys within the Firm representing the interest of CEI in adversary proceedings, specifically, the Lansdale letter to Hauser of June 17, 1974 and the attached Brueckel memorandum to Lansdale of May 21, 1974." 17/

16/ First Board Exhibits A and B.

17/ Memorandum and Order of the Board, p. 25.

Jurisdiction of the Licensing Board

Section 2.713(c)(2) of the Commission's Rules of Practice provides that an attorney may be barred from participation in a proceeding if that person has "failed to conform to the standards of conduct required in the Courts of the United States." Are the standards contemplated by that rule those set forth in the ABA Code of Professional Responsibility? I believe that they are, 18/ but with a significant limitation.

An administrative agency that has general authority to prescribe its rules of procedure may set standards for determining who may practice before it. Goldsmith v. U. S. Board of Tax Appeals, 270 U.S. 117, 122. Under the Atomic Energy Act, the Nuclear Regulatory Commission is empowered to "prescribe such regulations or orders as it may deem necessary ... (3) to govern any activity authorized pursuant to this Act" (42 U.S.C. 2201(i)). Additionally, Congress has authorized the Commission to "make ... such rules and regulations as may be necessary to carry out" the statutory purposes (42 U.S.C. 2201(p)). The Commission adopted Section 2.713(c)(2) in the exercise of its rulemaking authority.

18/ In Herman v. Dulles, 205 F. 2d 715, the International Claims Commission of the United States, in the Department of State, revoked the right of an attorney to appear before it upon finding that he had "failed to conform to recognized standards of professional conduct," in accordance with that Commission's rule. The attorney had violated certain canon of ethics of the American Bar Association. The United States Court of Appeals for the District of Columbia held that the rule regarding "recognized standards of professional conduct" made the canon the proper standard by which to measure the attorney's conduct. Application of the rule as thus construed was held to support the revocation action.

Because the rulemaking authority extends only to the lawfully authorized business of the Commission, I am of the opinion that Section 2.713(c)(2) is not intended to embrace attorney conduct where Commission action with respect to that conduct would not reasonably further the agency's mission. Thus, the rule would embrace improper attorney conduct occurring in the presence of a Board at a Commission proceeding; Commission action with respect to such conduct can reasonably be viewed as in furtherance of the agency's business. The concept can probably be extended to some attorney conduct occurring out of the presence of a Board, but which bears substantially and directly on a matter which is before that Board. To state the matter directly: the standards of conduct contemplated by Section 2.713(c)(2) are the standards set forth in the Code of Professional Responsibility, but the Code will apply in a Commission licensing proceeding only to the extent that its application can reasonably be viewed as in furtherance of the Commission's business authorized by law. 19/

Analysis of the Facts

Neither of the two fact situations relied on by the First Board majority is even "substantially related" to the anti-trust proceeding presently before the Licensing Board. Therefore, that Board has no

---

19/ The Commission has no general supervisory power over the attorneys who appear in its proceedings. Improper conduct on the part of such attorneys which is unrelated to the Commission's business can only be, from the perspective of the Commission, the legitimate concern of courts of law and duly authorized bar disciplinary bodies.

authority to grant the City of Cleveland's motion for disqualification on the bases relied upon. The 1966 situation antedates the anti-trust proceeding by a period of several years and bears no relation, substantial or otherwise, to any matter at issue there. Similarly, the facts concerning the 1972-73 bond issue did not occur in the anti-trust proceeding and are simply unrelated to that proceeding. Although the June 17, 1974 letter from Lansdale to Hauser enclosing the May 12, 1974 memorandum from Brueckel to Lansdale is said by the First Board majority to demonstrate "a direct nexus between these proceedings and the information being exchanged," an examination of the facts shows any such connection to be both incidental and insubstantial.

With respect to the 1966 situation, the First Board majority views it all as "discussions covering a 'Little Hoover Commission Report' on MELP relating to general fund assessments for street lighting and payment terms under the trust indenture of MELP revenue bonds [in which] Mr. Lansdale directly consulted with Mr. Brueckel, a Squire, Sanders & Dempsey partner who has been engaged in the representation of the City with respect to its bond work." That statement is unfortunately misleading because it is a generality which is given no contextual setting in the First Board majority's memorandum.

The "discussions covering a 'Little Hoover Commission Report' on MELP" were between Carl White and his associate, and between John Lansdale and John Brueckel, at the request of Mr. White. Mr. White's request for

the meeting grew out of his responsibility for preparing the Little Hoover Commission report. There is no doubt that the discussions related "to general fund assessments for street lighting and payment terms." This is not surprising, since Carl White's interest was in discovering ways to relieve the Cleveland General Fund by reducing charges to that Fund by the City electric department. No evidence indicates that the Squire, Sanders & Dempsey attorneys gave either the City or its Little Hoover Commission "advice [which if followed] would have raised City's electric rates," or support the conclusion in the dissenting opinion that "...Mr. Brueckel participated with his firm in acting for CEI against the competitive interest of City's electric system." 20/ That "Mr. Lansdale directly consulted with Mr. Brueckel" at this meeting is a fair inference, but not a very informative or useful one. Since Lansdale and Brueckel were at the meeting together they undoubtedly talked, i.e., "consulted," with one another. But the First Board majority's conclusion "that in this instance there was specific cross-fertilization within the Firm with respect to matters jointly affecting CEI and the City in which the interests of the parties were or could have been adverse," 21/ appears to be wholly without evidentiary support. That there was a "transfer of information obtained in connection with providing services to one client to the attorneys handling the affairs of another client" is but an inference appearing to rest

---

20/ Dissenting Memorandum, p. 7

21/ Memorandum and Order of the Board, p. 9

on no more than that Brueckel and Lansdale were both at the meeting, and that Lansdale provided general representation for CEI and Brueckel acted as bond counsel to the City from time to time. Just what information is supposed to have passed between Mr. Lansdale and Mr. Brueckel? There is no evidence to indicate that there was any; the First Board makes no attempt to state what it may have been. And yet, that some such information be identified would seem to be logically necessary to any conclusion that such information was either "specifically transferred" between Mr. Lansdale and Mr. Brueckel, or that it was "obtained in connection with" serving a particular client.

The facts concerning the 1972-73 bond issue did not give rise to any duty of "disclosure" on the part of Squire, Sanders & Dempsey to the City of Cleveland. What would the Firm have disclosed? At the time the Firm undertook this bond representation, each of them was aware of the ongoing controversies between the City and the Cleveland Electric Illuminating Company. These controversies involved the solicitation and retention of customers and the conditions under which CEI would provide supplemental electric power to the City. As I understand the situation, it was the existence of these controversies that at first caused the City to request Squire, Sanders & Dempsey to suggest alternate bond counsel, then caused the Firm to be wary of the City's later offer of this employment, and then caused the Firm to obtain the consent of the Cleveland Electric Illuminating Company to the bond representation. Nothing about this situation gave rise, in my view, to any duty on the

part of Squire, Sanders & Dempsey to make any "disclosure" or obtain the "consent" of anyone under any Disciplinary Rule cited by the First Board. The City cannot now posit the existence of a "conflict" giving rise to some duty of disclosure at the time of the 1972-73 bond representation merely on the fact that CEI (whom SS&D represented generally) and the Light Plant were in competition with one another. The Firm had acted as bond counsel for the city on several occasions before, while also generally representing the CEI.

As pointed out above, the First Board majority expressly charges improper "cross-fertilization" with respect to the June 17, 1974 Lansdale letter to Hauser enclosing the May 12, 1974 memorandum from Brueckel to Lansdale. That majority calls it an "actual transmittal of material relating to the Firm's advice to the City in connection with the 1972-73 bond issue to attorneys within the Firm representing the interest of CEI in adversary proceedings...."

I find no evidence to indicate that this correspondence is in any way related to the 1972-73 bond issue. I believe that the analysis of the Brueckel memorandum set out in the Firm's Trial Memorandum is correct:

> "Paragraph 1 of the Brueckel memorandum (Board's Exhibit B) refers to the Cleveland charter and identifies charter requirements. Paragraph 2 states 'you may have to give attention to prior practice that has been followed in preparing contracts' But continues, 'I am not familiar with the forms of these

> contracts' Mr. Brueckel then calls attention to the ordinances granting contracting authority to the director of the department and says: 'This [the ordinances] forms the basis for the suggestions contained in the latter portion of this memorandum.' Paragraph 3 states that there is some historical evidence that the City Council wanted MELP to stand on its own two feet .... The memorandum concludes: 'On the basis of all the foregoing, I would suggest....' The memorandum thus by its very terms is delimiting. It states precisely the basis upon which it reaches its conclusion." 22/

Counsel for the Firm argues that, "The memorandum is proper because it relates to municipal law generally." I agree. The problem with which the memorandum concerns itself appears to be nothing other than the strictly legal one of determining whether the Municipal Electric Light and Power Plant and System is a legal entity capable of entering a binding contract. The ultimate suggestion of the memorandum is that the then proposed agreement between the City and CEI concerning the supply to the City of electricity generated by nuclear power plants be between CEI and "the City, acting on behalf of its Municipal Electric Light and Power Plant and System." I do not find that the memorandum contains any "material relating to the Firm's advice to the City in connection with the 1972-73 bond issue," and none is identified by the First Board. Thus, any

---

22/ Trial Memorandum of Squire, Sanders & Dempsey at Evidentiary Hearing Before Special Board on Disqualification, pp. 15-16.

conclusion that such information was actually transferred between Mr. Lansdale and Mr. Brueckel is not supported by the evidence.

Conclusions

The Licensing Board lacks the legal authority to grant the motion for disqualification on the basis of the conduct relied on, since 10 CFR §2.713(c)(2) does not embrace that conduct. In addition, the facts concerning the situations relied on by the First Board evidence no impropriety on the part of the Firm.

The motion for disqualification should be denied, and the Board's order of suspension vacated.

Edward Luton, Member