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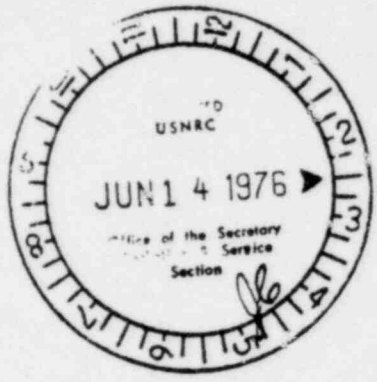

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Alan S. Rosenthal, Chairman
Richard S. Salzman
Jerome E. Sharfman

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

Mr. Michael R. Gallagher, Cleveland, Ohio, argued for Squire; Sanders and Dempsey.

Mr. James B. Davis, Cleveland, Ohio, argued for the City of Cleveland; with him on the briefs were Messrs. Vincent C. Campanella, Director of Law and Robert D. Hart, First Assistant Director of Law of the City and Reuben Goldberg, Arnold Fieldman and David C. Hjelmfelt, of Washington, D. C.

Mr. Joseph Rutberg, argued for the Nuclear Regulatory Commission Staff; with him on the brief were Messrs. Benjamin H. Vogler, Roy P. Lessy, Jr. and Jack R. Goldberg.

DECISION

June 11, 1976

(ALAB-332)

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Opinion of the Board by Mr. Sharfman, in which Mr. Rosenthal and Mr. Salzman join:

This case involves a motion to disqualify a law firm from representing a party in a proceeding before a Commission Licensing Board because of its prior representation of another party to that proceeding in allegedly related matters. Basically, the issues are whether the law firm's continued representation in this proceeding would violate accepted standards of professional ethics and whether the proceedings before the Licensing Boards were properly conducted.

The case is one of first impression under Section 2.713 of the Rules which govern practice before the Commission in adjudicatory proceedings (10 C.F.R. §2.713). That Rule provides in part:

> (b) Standards of conduct. An attorney shall conform to the standards of conduct required in the courts of the United States.
>
> (c) Suspension of attorneys. A presiding officer may, by order, suspend or bar any person from participation as an attorney in a proceeding if the presiding officer finds that such person:
>
> (1) Is not an attorney at law in good standing admitted to practice before any court of the United States, the District of Columbia, or the highest court of any State, territory, or possession of the United States;

> (2) Has failed to conform to the standards of conduct required in the courts of the United States;
>
> (3) Is lacking in character or professional integrity;
>
> (4) Engages in dilatory tactics or disorderly or contemptuous conduct; or
>
> (5) Displays toward the Commission or any of its presiding officers conduct which, if displayed toward any court of the United States, would be cause for censure, suspension, or disbarment.
>
> Any such order shall state the grounds on which it is based. Before 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.

The vice alleged here would fall within the ambit of subsection (c)(2) of the regulation.

The underlying proceeding involves antitrust issues arising under Section 105c of the Atomic Energy Act, 42 U.S.C. §2135(c). The City of Cleveland, a party adverse to the Cleveland Electric Illuminating Company ("CEI"), moved to disqualify the Cleveland law firm of Squire, Sanders & Dempsey ("SS&D"), along with its Washington

affiliate, from acting as attorneys for CEI or any other applicant in this proceeding. The grounds were that SS&D had represented the City for many years as bond counsel, sometimes in matters affecting the City's Municipal Electric Light Plant ("MELP") which is a competitor of CEI; that the firm had also represented CEI on past occasions and in this proceeding and, in so doing, advanced interests adverse to the interests of MELP; that SS&D never made full disclosure to the City of the conflicts of interest inherent in its representation of CEI in matters adverse to MELP as required by Disciplinary Rule 5-105 of the American Bar Association's Code of Professional Responsibility; 1/ and

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1/ That rule provides:

> (A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR 5-105(C).
>
> (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.

(FOOTNOTE CONTINUED ON NEXT PAGE)

that the City never consented to SS&D's representation of CEI in such matters. The City also argued that Mr. Daniel O'Loughlin, a partner in SS&D, had been an important official of the City's Law Department before coming to SS&D and, in that capacity, might have obtained information which would be useful to CEI in the present antitrust proceeding or had responsibility for matters substantially related to this proceeding. The City therefore argued that the representation of CEI by SS&D in the antitrust proceeding is in violation of the Code of Professional Responsibility and should be proscribed. SS&D took the position that there is no substantial relationship between the matters handled by SS&D as bond counsel for the City and its representation of CEI in the antitrust proceeding before the Commission.

1/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

(D) If a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no partner or associate of his or his firm may accept or continue such employment.

It also raised the defense that the City had consented to the dual representation and had therefore waived its right to object to it.

The motion to disqualify was made to the Licensing Board which is hearing the antitrust proceeding ("the Antitrust Board"). It was argued before that Board on the basis of briefs, documents and affidavits submitted by the parties but without any evidentiary hearing. SS&D took the position that the Antitrust Board had no power under Section 2.713(c) to grant the motion; that, if it found the motion to be meritorious, it had to prefer charges against SS&D and refer the matter to a Special Board before which SS&D would have a right to be heard. Its avowed purpose before the Antitrust Board was to establish that the motion was without substance and did not warrant the preferment of charges. (Answer Brief, pp. 1-2; Tr. 2516, 2558). The City took the position that the Antitrust Board had the power to dispose of the motion itself under the general powers conferred on it by Section 2.718 of the Rules of Practice (10 C.F.R. §2.718). Neither side asked for an evidentiary hearing before the Antitrust Board.

On January 19, 1976, the Antitrust Board issued a decision which evaluated the evidence, held that SS&D should be disqualified from representing CEI in this proceeding and preferred charges against SS&D. NRCI-76/3 236. It further held that neither Section 2.713(c) nor equitable considerations require or permit SS&D to be suspended from participation in this proceeding "until such time as the presiding officer (or Atomic Safety and Licensing Board) which will review and pass upon the charges now filed advises us with respect to their validity." Board member Smith dissented. Although agreeing with the majority that the Antitrust Board has the responsibility to make findings and issue the order of suspension under Section 2.713(c), he believed that the Board should not make any findings prior to the hearing before another presiding officer. He also disagreed with the majority's opinion on the merits.

A special Licensing Board ("Special Board") was promptly appointed to hear the charges preferred by the Antitrust Board. On January 23rd, it issued a notice stating that it would hear oral argument on February 3rd. The notice added that the procedure would be the same as that which had been followed for the oral argument before the Antitrust Board. Nonetheless, on February 3rd,

SS&D asked to be permitted to make an evidentiary case (Tr. 4255-57) and, although the City had moved to limit the hearing to oral argument, the Special Board initially decided (Tr. 4271-72) to permit SS&D to put in its evidence. During the rest of that morning, the Board received oral and documentary evidence from SS&D. After the lunch recess, the Board changed its mind; it decided to limit the parties to oral argument and struck all of the evidence it had received in the morning. (Tr. 4342-69). SS&D then made an offer of proof as to what its evidence would have shown. (Tr. 4369-91). The remainder of the proceedings before the Special Board consisted of oral argument.

The Special Board issued its decision on February 24, 1976. NRCI-76/3 259. It first held (id. at 262-63) that Section 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 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.

It went on to hold that there is no multiple representation in this proceeding and that, even if there were prohibited multiple representation in it, the proper remedy would be for SS&D to withdraw from representation of the City. Id. at 263-66. It further held that, even if disqualification were an appropriate remedy, it could not be applied in the absence of "hard evidence of injury-in-fact or at least evidence of specific 'confidences' that were breached." Id. at 264 n. 10. For these reasons, the Special Board found no evidence of unethical conduct by SS&D "in the record before us" and ordered the preferred charges dismissed and the suspension of counsel vacated. Id at 266-67. Board Member Luton wrote a separate concurring opinion in which he (1) agreed with the majority's holding that the Commission lacks jurisdiction over this matter, (2) concluded that the alleged improprieties relied on by the Antitrust Board are not substantially related to this antitrust proceeding and (3) found that the facts evidence no impropriety on the part of SS&D. Id. at 267-76.

On March 19, 1976, the Antitrust Board issued another order. LBP-76-11, NRCI-76/3 223. It held that, while the Board which prefers charges under Section 2.713(c) must "give great deference" to the Special Board's decision prior to

taking any action on an order of suspension, final authority on the question of suspension rests with the initial Board. It opined that the Special Board was correct in not permitting the parties to introduce any evidence in addition to what had earlier been presented to itself. It disagreed with the Special Board's conclusion that the Commission lacks jurisdiction to suspend attorneys on the grounds of prior representation of parties adverse to the client which it now represents before the Commission. It also disagreed as a matter of law with the Special Board's statement that there had to be proof of injury or "specific proof of the passing of confidential, nonpublic information from one client to another" before relief could be granted. Finally, it disagreed with the Special Board's conclusion that there is no "evidence" of unethical conduct by SS&D. The Antitrust Board therefore ordered SS&D suspended but stayed its order pending review by this Board.

The Antitrust Board provided for such review by certifying four questions to this Board under 10 C.F.R. §2.718(i). By our order of March 19, we accepted the certification, broadened the scope of review by adding

three additional questions[2/] and also permitted the parties

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2/ The Board's questions were:

> (1) Whether the jurisdiction of the NRC under Rule 2.713 extends to situations covering attorney conduct outside of the NRC forum which has an impact on representation within that forum.
>
> (2) Whether the Special Board has the ultimate authority to put into effect or to vacate an order of suspension under Rule 2.713.
>
> (3) Whether a showing of either actual injury or specific exchange of information of a confidential nature is required to enforce a finding of attorney misconduct based upon the exchange of some information supplied by one client of an attorney to another client of that attorney whose interests are adverse to the original client.
>
> (4) Assuming the answer to question two is negative and three is affirmative, whether in the circumstances now before us the order of disqualification may be upheld.

Our questions were:

> (1) When the City of Cleveland requested the firm of Squire, Sanders and Dempsey to represent it respecting the issuance of municipal bonds to finance construction of a new City power plant, what explanations were given to the City by the firm about potential conflicts of interest which might arise because the firm also represented its competitor, the Cleveland Electric Illuminating Company?
>
> (2) Precisely when, by whom, and to whom were those representations made and what significance attaches to them?
>
> (3) What (if any) bearing does the fact that the City's lawyers retained the firm have on the application of the Canon to this case and, in particular did it affect the firm's obligation to "explain

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to "raise any additional points in favor [of] or against the result below even though not encompassed within the certified questions."[3/]

I.

THE ROLES OF THE RESPECTIVE LICENSING BOARDS

Much of the procedural difficulty in this case has arisen from the fact that Section 2.713(c) requires two different licensing boards to play a role in a proceeding for suspension or disbarment of an attorney from a particular case before the Commission. Our first task, therefore, is to clarify what their respective roles should be.

2/ (FOOTNOTE CONTINUED FROM PREVIOUS PAGE
fully to each client the implications of the common representation and to accept or continue employment only if the clients consent"?

3/ While we need not reach the issue here, the courts have held that orders granting or denying motions to disqualify attorneys are considered to be final orders for purposes of appeal. Fullmer v. Harper, 517 F.2d 20 (10th Cir. 1975); United States v. Garcia, 517 F. 2d 272 (5th Cir. 1975); Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 496 F.2d 800 (2d Cir. 1974) (en banc); Greene v. Singer Co., 509 F.2d 750 (3rd Cir. 1971); Yablonski v. United Mine Workers of America, 454 F.2d 1036 (D.C. Cir. 1971)(dictum), cert. denied, 406 U.S. 906 (1972). Contra, Chugach Electric Ass'n v. United States District Court, 370 F.2d 441 (9th Cir. 1966), cert. denied, 389 U.S. 820 (1967) and Cord v. Smith, 338 F.2d 516 (9th Cir. 1964) which held that orders on disqualification motions are interlocutory and hence not appealable as of right but reviewed them anyway by means of extraordinary writ.

The first problem arises from the requirement that the initial board must prefer charges against the attorney or law firm. The procedure for such a preferment would be fairly obvious if the basis for suspension were contumacious conduct of the attorney in the course of a hearing before the initial board. The initial board, having already seen what happened in its presence, would merely record the relevant events and the conclusions which it had reached based on them. It would then refer the matter to the special board. However, where, as in the case at bar, the facts alleged in support of the motion to disqualify did not occur in the presence of the initial board, the question arises as to whether or not it should make some sort of factual inquiry or determination. The problem with doing that is that it needlessly prolongs the proceedings. As the special board clearly must have a hearing under the Rule, having the initial board receive and weigh evidence, even if it is done without a formal hearing, requires two successive fact-finding procedures and creates the possibility (which materialized in this case) of having two boards which find facts differently and come to opposite conclusions. Nothing is served by such a procedure but confusion and delay. The policy reasons which might

underlie the requirement of a hearing by a special board in a case not involving contumacious conduct, such as the greater objectivity which a board having nothing to do with the main case may have or the freeing of the initial board to continue with the conduct of the main proceeding while the motion is being adjudicated,[4/] are not served by having the initial board also act as a factfinder.

How, then, are we to give meaning to that portion of the Rule which requires the preferment of charges by the initial board? Clearly, the rule requires some kind of preliminary analysis of the moving party's position before the preferment of charges. But that need not and, if the goal of expeditious adjudication is to be served, should not involve a weighing of the evidence. The first board should simply determine whether the allegations made by the moving party, if true, would make a case for disqualification.[5/] Its function would be like that of

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4/ This might not always be the case. In some situations, equity may require that the main proceeding be halted pending resolution of the disqualification motion.

5/ In this task, it would be guided by the ABA Code of Professional Responsibility, as interpreted by the Federal Courts.

a United States district court in deciding whether a complaint states a claim upon which relief can be granted on a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. If it decides that the allegations do state a claim for disqualification, it should merely refer the motion to a special board, without commenting on the merits of the claim or on the probity of any documents or affidavits which may have accompanied the motion papers. It need not compose any "charges" of its own, for that would serve no useful purpose and might prevent the moving party from being able to delineate its own motion. This interpretation of Section 2.713(c) avoids the convening of a special board to hear motions which are unmeritorious on their face but eliminates the delay and needless expense to the parties of duplicative fact-finding proceedings.

Under Section 2.713(c), the charged attorney or firm is entitled to be heard. (We will deal later with the question of what kind of a hearing that must be.) At the conclusion of the hearing, the special board should proceed to decide the motion on the basis of the evidence adduced before it. Its decision must be based on a preponderance of that evidence. Charlton v. Federal

Trade Commission, ___ F.2d ___, 38 Ad. L. 2d 379 (D.C. Cir. 1976). In its decision as to the law, the special board is not bound by the conclusions of the initial board as to the legal sufficiency of the allegations; a preliminary decision is, of course, not res judicata.

The two Boards in the case at bar differed as to which of them had the final say on the disqualification motion. The Antitrust Board's position is supported by a literal reading of Section 2.713(c) for, when it begins by saying that "a presiding officer may, by order, suspend * * *", the Rule seems to be talking about the regular board which is sitting in the case, as distinguished from the special board which holds the hearing. However, this must be taken to mean only that the initial board, which has the main case before it, must enter the order of suspension. It does not mean that the initial board should control the decision. If, as appears to us to be the case, the purpose of the Rule is to have a special board take the evidence, it follows that the special board is the appropriate tribunal to decide the merits. That being so, to construe the Rule so as to give the initial board the power to overrule the special board's decision would be inconsistent with that purpose.

We therefore hold that the special board must render a decision disposing of the disqualification matter in its entirety and that the initial board's function thereafter is limited to the carrying out of the ministerial duty of promptly entering an order giving effect to the special board's decision.

It follows from what we have said that the Antitrust Board should not have decided the motion in its initial decision (although we think it fair to treat that decision as a determination that the allegations of the motion were legally sufficient and warranted a referral to the Special Board) and that it should not have acted inconsistently with the Special Board's decision after it was rendered. The question remains, however, as to whether the Special Board's decision was correct. We therefore proceed to a consideration of that question.

II.

ERRORS OF LAW IN THE SPECIAL BOARD'S OPINION

The Special Board made three significant errors of law in its majority opinion. We will discuss them seriatim.

A. The Commission's Jurisdiction Over Professional Conduct Which Affects Commission Proceedings

The Special Board held that it lacked jurisdiction over a motion seeking to disqualify an attorney for a party in a Commission proceeding by reason of prior representation of an opposing party in substantially related matters not involving the Commission. The Board said (NRCI/76-3 at 262-63, footnote omitted):

> 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 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, involving the interplay of other transactions, other clients, and other non-NRC litigation. 6/

Other than for its own analysis, the Special Board cites no authority for its position. In our judgment, its analysis is faulty. It is well settled that an administrative agency "has implied authority under its general statutory power to make rules and regulations necessary for the execution of its functions * * * and to take disciplinary action against attorneys found guilty of unethical or improper professional conduct." Schwebel v. Orrick, 153 F. Supp. 701, 704 (D.D.C. 1957, aff'd per curiam on other grounds, 251 F.2d 919 (D.C. Cir.), cert. denied, 356 U.S. 927 (1958); accord, Herman v. Dulles, 205 F.2d 715 (D.C. Cir. 1953). Section 2.713(c) of the Commission's rules provide for the suspension of an attorney from participation in a proceeding if he "[h]as failed to conform

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6/ Counsel for SS&D conceded before us the Commission's jurisdiction over "attorney conduct outside the NRC forum which has an impact on representation within that forum" so long as "there is a 'substantial relationship' between prior attorney conduct and the NRC proceeding." (Brief of April 1, 1976 at pp. 22-23).

to the standards of conduct required in the courts of the United States." The cases are legion in which the federal courts have entertained motions to disqualify an attorney in a particular case "if he formerly represented an adverse party in a matter substantially related to the pending litigation." ABA Formal Opinion 342 (Nov. 24, 1975), reprinted in 62 A.B.A.J. 517 (April 1976), and the authorities cited in Part II C of this opinion. The Commission, therefore, certainly has jurisdiction (i.e., authority) to grant the same type of relief on a meritorious motion to disqualify an attorney that the federal courts are accustomed to grant and a Licensing Board hearing the motion under Section 2.713(c) has the duty to apply the same standards that would be applied "in the courts of the United States."

The Special Board's conclusion that the subject matter of the City's motion has nothing to do with the antitrust proceeding before the Commission reveals a basic misapprehension of the problem. To be sure, it is not for the Commission to punish SS&D for some past asserted wrongdoing, such as its alleged advancement of the interests of CEI before Cleveland's Little Hoover Commission in 1966 (even were we to assume that that was improper).[7/] However,

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7/ See the Antitrust Board's initial opinion, supra, at 240-41 and the concurring opinion of Special Board Member Luton, supra, at 269-70 and 273-74.

SS&D's representation of CEI in the antitrust proceeding before the Commission is indeed something that the Commission may and should deal with if, because of a prior representation of the City in a substantially related matter, such representation would violate the standards of conduct applicable in the federal courts. The Commission clearly has the power to regulate practice before it and indeed has done so by promulgating a standard of conduct in its Rules of Practice. 10 C.F.R. §2.713(b) and (c)(2). Had the Commission wanted to limit attorney suspension to cases of contumacious conduct, it would have expressly so limited its rule. Moreover, contrary to the view of the Special Board, we fail to see how the theoretical basis for the decisions of the federal courts in attorney disqualification cases (whether it be the avoidance of the appearance of impropriety or of impropriety itself) has anything at all to do with the Commission's power to enforce the same standards of attorney conduct which are enforced by those courts.

B. The Remedy

The Special Board also erred in concluding that even if a violation of the Code of Professional Responsibility were shown, disqualification of SS&D from the representation

of CEI in this proceeding would be an improper remedy under the ABA Code. Rather, it is the remedy universally applied in matters of this nature in the federal courts, as the ABA's own summary of existing case law demonstrates (Formal Opinion 342, supra, at 517, footnote omitted):

> A lawyer violates D.R. [Disciplinary Rule] 4-101(B) [of the Code of Professional Responsibility] only by knowingly revealing a confidence or secret of a client or using a confidence or secret improperly as specified in the rule. Nevertheless, many authorities have held that as a procedural matter a lawyer is disqualified to represent a party in litigation if he formerly represented an adverse party in a matter substantially related to the pending litigation. Even though D.R. 4-101(B) is not breached by the mere act of accepting present employment against a former client involving a matter substantially related to the former employment, the procedural disqualification protects the former client in advance of and against a possible future violation of D.R. 4-101(B).

The ABA opinion goes on to explain the reason why disqualification is the appropriate remedy as follows (id. at footnote 6):

> If this device of a procedural disqualification based upon the substantial relationship of the subject matter of the two employments were not used, the remedy would be either, first, an after-the-fact disciplinary action in which the issue is whether a particular confidence or secret was actually revealed or used improperly, or second, a procedural disqualification based upon the fact issue of whether confidences or secrets were actually revealed in the first employment that are so relevant

> that they are likely to be revealed or used during the second employment. The 'substantially related' test is less burdensome to the client first represented and is less destructive of the confidential nature of the attorney-client relationship. See Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562, 571 (2d Cir. 1973), in which it is pointed out that an inquiry, on a procedural motion to disqualify, into actual confidences 'would prove destructive of the weighty policy considerations that serve as the pillars of Canon 4 of the code' and that if the procedural disqualification were not used as a prophylactic measure, a lawyer might unconsciously or intentionally use a confidence or 'out of an excess of good faith, might bend too far in the opposite direction, refraining from seizing a legitimate opportunity for fear that such a tactic might give rise to an appearance of impropriety.' Cf. E.C. 5-14, C.P.R.

If the theory of the case should ultimately rest on Canon 9 rather than Canon 4 or 5,[8/] however, the remedy sought here would still be proper. "Disqualification is an appropriate sanction for enforcement of Canon 9." Telos, Inc. v. Hawaiian Telephone Co., 397 F. Supp. 1314, 1315-16 (D. Hawaii 1975).

8/ The Code of Professional Responsibility consists of Canons, Ethical Considerations and Disciplinary Rules. "The Canons are statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers * * *". Preliminary Statement to Code. Each Canon is interpreted by Ethical Considerations which "are aspirational in character" and Disciplinary Rules which are mandatory. Ibid. Canon 4 states: "A lawyer should preserve the confidences and secrets of a client". Canon 5 states: "A lawyer should exercise independent professional judgment on behalf of a client". This canon covers conflict of interest situations. Canon 9 states: "A lawyer should avoid even the appearance of professional impropriety".

C. The Necessary Elements of a Case for Disqualification of an Attorney

The Special Board held in footnote 10 of its opinion that, even if the remedy of disqualification were authorized, it should not be granted without "hard evidence of injury-in-fact or at least evidence of specific 'confidences' that were breached". That is not the law. As was said 23 years ago by Judge Weinfeld in T.C. Theatre Corp. v. Warner Bros. Pictures, 113 F. Supp. 265, 268 (S.D.N.Y. 1953):[9/]

> I am not in accord with Mr. Cooke that Universal is required to show that during the Paramount litigation it disclosed matters to him related to the instant case. Rather, I hold that the former client need show no more than that the matters embraced within

9/ Accord, Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751 (2d Cir. 1975); Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562 (2d Cir. 1973); Richardson v. Hamilton International Corp., 469 F.2d 1382, 1385 (3rd Cir. 1972), cert. denied, 411 U.S. 986 (1973); American Can Co. v. Citrus Feed Co., 436 F.2d 1125 (5th Cir. 1971); Chugach Electric Ass'n v. United States District Court, 370 F.2d 441 (9th Cir. 1966), cert. denied, 389 U.S. 820 (1967); Cord v. Smith, 338 F.2d 516 (9th Cir. 1964); Consolidated Theatres, Inc. v. Warner Bros. Circuit Management Corp., 216 F.2d 920, 924-25 (2d Cir. 1954); Cannon v. U.S. Accoustics Corp., 398 F. Supp. 209 (N.D. Ill. 1975); Marketti v. Fitzsimmons, 373 F. Supp. 637, 639 (W.D. Wisc. 1974); Motor Mart, Inc. v. Saab Motors, Inc., 359 F. Supp. 156 (S.D.N.Y. 1973); E.F. Hutton & Co. v. Brown, 305 F. Supp. 371, 394-95 (S.D. Tex. 1969); Shelley v. The Maccabees, 184 F. Supp. 797, 800 (E.D.N.Y. 1960); Marco v. Dulles, 169 F. Supp. 622, 629-30 (S.D.N.Y. 1959), appeal dismissed, 268 F.2d 192 (2d Cir. 1959); Fleischer v. A.A.P., Inc., 163 F. Supp. 548 (S.D.N.Y. 1958), appeal dismissed sub nom. Fleischer v. Phillips, 264 F.2d 515 (2d Cir.), cert. denied, 359 U.S. 1002 (1959).

the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matters or cause of action wherein the attorney previously represented him, the former client.10/

10/ Judge Weinfeld set forth the reasons for the rule as follows (113 F. Supp. at 268-69, footnotes omitted):

> The Court will assume that during the course of the former representation confidences were disclosed to the attorney bearing on the subject matter of the representation. It will not inquire into their nature and extent. Only in this manner can the lawyer's duty of absolute fidelity be enforced and the spirit of the rule relating to privileged communications be maintained.
>
> To compel the client to show, in addition to establishing that the subject of the present adverse representation is related to the former, the actual confidential matters previously entrusted to the attorney and their possible value to the present client would tear aside the protective cloak drawn about the lawyer-client relationship. For the Court to probe further and sift the confidences in fact revealed would require the disclosure of the very matters intended to be protected by the rule. It would defeat an important purpose of the rule of secrecy -- to encourage clients fully and freely to make known to their attorneys all facts pertinent to their cause. Considerations of public policy, no less than the client's private interest, require rigid enforcement of the rule against disclosure. No client should ever be concerned with the possible use against him in future litigation of what he may have revealed to his attorney.* * * In cases of this sort the Court must ask whether it can reasonably be said that in the course of the former representation the attorney might have acquired information related to the subject of his subsequent representation.

Lest there be any doubt, we hasten to emphasize that the "substantially related" test enunciated in T.C. Theatre does not shift the burden of proof from the former client to the attorney sought to be disqualified. Fleischer v. A.A.P., Inc., supra note 9, at 553. "On the contrary, the former client must show that there is a 'substantial relationship' between the issues in the present case and the subject-matter of the former representation". Ibid.

We reject the argument made by SS&D in this proceeding, and accepted both by Antitrust Board Member Smith (NRCI 76/3 at 257) and t[illegible]ity of the Special Board (id. at 264 n. 10), that the alleged disclosure by SS&D to CEI of information about the City was clearly proper because it was not confidential. As was stated in Marco v. Dulles, supra note 9, at 630:

> The disclosure or use of confidences is forbidden 'even though there are other available sources of such information'. Canon 37. And this is true '[a]lthough all of the information obtained by the attorney from his former client may be available to his present client * * *'. Fleischer v. A.A.P., Inc., supra, 163 F. Supp. at page 551.

In the same vein, the court held in Doe v. A. Corp., 330 F. Supp. 1352, 1356 (S.D.N.Y. 1971), aff'd per curiam sub nom. Hall v. A Corp., 453 F.2d 1375 (2d Cir. 1972):

> Canon 4 * * * looks beyond technical considerations of secrecy in the evidentiary sense and shields all information given by a client to his attorney whether or not strictly confidential in nature. The sole requirement under Canon 4 is that the attorney receive the communication in his professional capacity.

Finally, we feel constrained to point out that, if the question as to whether there is a substantial relationship between the subject matter of the former representation and the issues in the present case is a close one, it should be resolved in favor of the former client in order to avoid even the appearance of impropriety. Fleischer v. A.A.P., Inc., supra note 9, at 553; United States v. Standard Oil Co., 136 F. Supp. 345, 364 (S.D.N.Y. 1955) (dictum). As the Second Circuit said in Emle Industries, Inc. v. Patentex, Inc., supra note 9, at 571:

> Nowhere is Shakespeare's observation that "there is nothing either good or bad but thinking makes it so," more apt than in the realm of ethical considerations. It is for this reason that Canon 9 of the Code of Professional Responsibility cautions that "A lawyer should avoid even the appearance of professional impropriety" and it has been said that a "lawyer should avoid representation of a party in a suit against a former client, where there may be the appearance of a possible violation of confidence, even though this may not be true in fact." American Bar Association, Standing Committee on Professional Ethics, Informal Opinion No. 885 (Nov. 2, 1965).

III.

THE RIGHT TO AN EVIDENTIARY HEARING

The question remains as to whether we can proceed to determine this matter on the record as it stands or whether we must remand for further proceedings. The answer to that question depends on whether or not SS&D was entitled to an evidentiary hearing before the Special Board. SS&D claims that it was entitled to such a hearing under the Due Process Clause of the Constitution, the Administrative Procedure Act and Section 2.713(c) of the Commission's Rules of Practice.

The Supreme Court long ago held that one may not be rejected for practice before an administrative agency without "such a notice, hearing and opportunity to answer * * * as would constitute due process". Goldsmith v. United States Board of Tax Appeal, 270 U.S. 117, 123 (1926). However, the law is not clear as to the precise form of hearing which due process requires even in cases involving the rights of attorneys to practice in the courts.[11/] But we need not

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11/ Compare the three opinions in Mildner v. Gulotta, 405 F. Supp. 182 (E.D.N.Y. 1975) with the opinions of Justices Douglas and Goldberg in Willner v. Committee on Character & Fitness, 373 U.S. 96 (1963) and with the holding of the Seventh Circuit that an attorney in a disbarment proceeding should have"the opportunity to be heard in person and to present evidence and to confront and cross-examine adverse witnesses". In re Ming, 469 F.2d 1352, 1356 (7th Cir. 1972).

attempt to define the precise contours of due process in this case because Section 2.713(c) itself provides expressly that an attorney charged with misconduct "shall be afforded an opportunity to be heard thereon". We hold this to mean that he is entitled to a full evidentiary hearing with all parties having the right to present evidence and conduct cross-examination.

Attempts to suspend or bar attorneys from practice in a Commission proceeding -- or any administrative proceeding for that matter -- present issues of great sensitivity and importance. They reflect upon the honor and professional integrity of the attorneys whose suspension is sought. They could result in depriving a party of the right to be represented by the law firm which is his first choice. They seek to prevent abuse or betrayal of the attorney-client relationship. The correct resolution of cases of this type is important to the integrity of the adjudicative process. Moreover, the application of the appropriate legal criteria to the facts in such cases would be greatly aided by the detailed evidence and the opportunity to observe the demeanor of witnesses which a full evidentiary hearing provides. In a matter of this gravity, the time

and effort required for such a hearing is amply justified.[12/]

If the attorney or firm charged with misconduct does demand a hearing, the moving party has the burden of proof and must go forward initially with the presentation of its evidence.[13/] The charged party then has a right to present its own evidence and the moving party may put in a case in rebuttal. Of course, the fact that the charged party has the right to a hearing does not mean that there must be a hearing in all cases. For example, the charged party may waive that right. If it does so, then all of the facts alleged by the moving party must be accepted as true. In any event, it is clear in the case at bar that SS&D insisted on having a hearing. True, SS&D initially offered to waive it when pressed to by the Antitrust Board

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12/ As we hold that SS&D was deprived of its right to a hearing under our Rules, it is not necessary for us to consider its claim based on the Administrative Procedure Act.

13/ See Part IIC of this opinion. The Commission's discovery rules would be applicable as in any other case but the special board should use its power to limit discovery under 10 C.F.R. §2.740 to ensure that the proceeding is determined as expeditiously as possible, albeit consistently with the interests of justice and fairness, with a full opportunity to develop all relevant facts.

Chairman at the first oral argument in the interest of saving time. But counsel for the City insisted on his right to conduct discovery and submit more documents (Tr. 2557-65). In the circumstances, we conclude that SS&D's offer to waive a hearing was implicitly conditioned on a similar agreement by the City to have the case submitted to the Special Board on the existing record. As such, the offer lapsed when it was rejected by the City.

Both the City and the staff urge us to decide this case based on what there is in the existing record and on the proffers of evidence made by SS&D's counsel to the Special Board, even if we should decide that SS&D had a right to a hearing which it did not waive. We decline to pursue to that course. As the Second Circuit recently observed:

> '[E]thical problems cannot be resolved in a vacuum.' [Citation omitted]. Thorough consideration of the facts * * * is required.14/

Also instructive is Fullmer v. Harper, 517 F.2d 20 (10th Cir. 1975). There, a motion to disqualify an attorney had been denied on the basis of offers of proof and oral argument.

14/ Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751, 753 (2d Cir. 1975).

In remanding for an evidentiary hearing, the Court of Appeals ruled (id. at 21-22):

> In our view the verified motion to disqualify raises ethical questions that are conceivably of a serious nature. In such circumstance a written response should be required. The trial court should then hold a full evidentiary hearing on the issues posed by the motion to disqualify and the response thereto, which hearing should include the taking of testimony. A motion of this type should not be resolved on the basis of mere colloquy between court and counsel. At the conclusion of such hearing the trial court should then make specific findings and conclusions, to the end that this court will then have a record before it which will permit a meaningful review, should review be sought.

In this case, the record is sparse on such questions as what work SS&D did for the city as bond counsel in 1968, 1972 and 1973; how this work is related to the present antitrust proceeding; what work Mr. O'Loughlin or his subordinates did for the City; the extent to which Mr. O'Loughlin was responsible for his subordinates' work and whether his or their work was substantially related to the present antitrust proceeding; what explanations of existing or potential conflicts of interest were made by SS&D to the City in either 1968 or 1972; what the City's state of knowledge with respect to such conflicts was when it retained SS&D as bond counsel in 1968 and 1972; and what

was the scope, nature and extent of the consent (if any) given by the City in each of those years to SS&D's then-existing and potential future conflicting representation of CEI. We expect that, on the remand to the Special Board which we are now directing, the parties will offer evidence and the Board will make findings with respect to these issues.

IV.

THE WAIVER DEFENSE

SS&D's primary defense in this case seems to be that the City had full knowledge of its representation of CEI but nevertheless consented to the dual representation, thus waiving any right it might have had to object to it later. This defense is based on Disciplinary Rule 5-105(c) of the Code of Professional Responsibility which provides that, in those cases where the representation of multiple clients is prohibited because of possible conflict of interest, the lawyer may nevertheless represent them "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". We have already alluded to the factual issues which we think the Special Board must address with respect to this defense. In addition, we would remind the Special Board that the ultimate issue of whether or not there was a waiver broad enough to cover SS&D's representation of CEI in this proceeding should be decided within the framework of existing federal case law on this question. See, e.g., Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562, 573-74 (2d Cir. 1973); Consolidated Theatres, Inc. v. Warner Bros. Circuit Management Corp., 216 F.2d 920, 927 (2d Cir. 1954); Marketti v. Fitzsimmons, 373 F. Supp. 637, 641 (W.D. Wisc. 1974); E. F. Hutton & Co. v. Brown, 305 F. Supp. 371, 400 (S.D. Tex. 1969).

The case is remanded to the Special Board for further proceedings consistent with this opinion.[15/] In view of the already advanced stage of the antitrust proceeding, we urge the Special Board to give it expedited consideration.

15/ We have not given yes or no answers to the Antitrust Board's specific certified questions because we preferred to deal with the issues at greater length and in our own terms within the framework of our opinion. Our own certified questions can only be dealt with after an evidentiary hearing.

It is so ORDERED.

FOR THE ATOMIC SAFETY AND LICENSING
APPEAL BOARD

Eleanor E. Hagins

Eleanor E. Hagins
Secretary to the
Appeal Board

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)		
)		
THE TOLEDO EDISON COMPANY, ET AL.)	Docket No.(s)	50-346A
CLEVELAND ELECTRIC ILLUMINATING)		50-440A
COMPANY)		50-441A
)		
(Davis-Besse Nuclear Power)		
Station, Unit No. 1; Perry)		
Nuclear Power Plant, Units 1&2))		

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document(s) upon each person designated on the official service list compiled by the Office of the Secretary of the Commission in this proceeding in accordance with the requirements of Section 2.712 of 10 CFR Part 2 - Rules of Practice, of the Nuclear Regulatory Commission's Rules and Regulations.

Dated at Washington, D.C. this
15th day of June 1976.

Peggy A. Downing
Office of the Secretary of the Commission

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

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