UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Special Board

9/15/76

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

BRIEF OF THE CITY OF CLEVELAND IN OPPOSITION TO THE MOTION OF SQUIRE, SANDERS & DEMPSEY TO DISMISS DISQUALIFICATION PROCEEDINGS

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For the NRC Staff

September 15, 1976.

INTRODUCTION

The current Motion of Squire, Sanders & Dempsey ("SS&D") to Dismiss Disqualification Proceedings comes at a relatively late stage of a major antitrust review before the N.R.C. The original applications for nuclear construction licenses were filed by The Cleveland Electric Illuminating Co. ("CEI") as far back as 1969. The City of Cleveland, Ohio ("City") intervened in 1971. Prior to commencement of the hearings before the Licensing Board on December 1, 1975, the City filed its Motion to Disqualify SS&D. This Motion was heard on the merits and SS&D were suspended by the Licensing Board on January 19, 1976 with the Order stayed.

The civil antitrust case of the City against CEI was not filed in the U. S. District Court for the Northern District of Ohio until July 1, 1975. The City did not file its Motion to Disqualify SS&D in Federal Court until December 15, 1975. The hearing on the City's Motion was not held by Judge Krupansky until June 14, 15, and 16, 1976, and his Order and Opinion was not rendered until August 3, 1976.

This followed the hearing and decision of the Special Board on February 24, 1976, and an Appeal to the Appeal Board which rendered its Decision on June 11, 1976.

Thus the Order of Federal Judge Krupansky which SS&D seeks to use as a basis of collateral estoppel comes in a case filed long after the N.R.C. proceedings had been under way. Further, the Motion to Disqualify SS&D was first filed before the N.R.C. and there extensively litigated before a similar motion was heard in the Federal Court in Cleveland.

The Order of Judge Krupansky is now on appeal before the U.S.Court of Appeals for the Sixth Circuit.

I. SS&D CITE NO AUTHORITY FOR THE APPLICATION OF COLLATERAL ESTOPPEL TO DISQUALIFICATION OF ATTORNEYS.

The Brief of SS&D contains much standard material on the doctrine of collateral estoppel but fails totally to relate that general law to the unique circumstances present here. We are here dealing with the NRC's protection of its own proceedings and its interpretation of its own rules of practice. We do not have the usual circumstance of a party litigating against a party. Here an intervenor seeks to disqualify the attorney for the applicant in an antitrust review because of the fact that the attorney previously represented the intervenor extensively in matters substantially related to the antitrust review.

A. SS&D Presents No Authority for Applying Collateral Estoppel to Disqualification of Lawyers.

Nowhere in their Brief do SS&D cite any case or ruling which holds the precise proposition that they need here, namely that a ruling on a motion for disqualification of an attorney by a former client in one forum may serve as collateral estoppel upon a motion for disqualification for that attorney by the former client in another forum. Absent such authority, the NRC should be particularly hesitant about invoking collateral estoppel, particularly because the NRC was the first to obtain jurisdiction of disqualification, the first to litigate it, and the first to rule extensively on legal matters pertaining to it.

B. Absent the Requisite Identity of Parties, Issues, Time Frames and Other Factors, Collateral Estoppel Will Not Apply.

Of the various elements which must be present before collateral estoppel can be considered, one is that collateral estoppel may only be invoked

where the parties to the prior proceeding are identical to those in the second. Collateral estoppel may then be invoked upon one of the parties to the proceeding. McVeigh v. McGurren, 117 F2d 672 (CCA 7th 1941); and see 1B Moore's Federal Practice §0.411[1]. The unique feature of the present matter is that what is being sought is not collateral estoppel between parties, but between the lawyers for one party on the one hand, and a party on the other. Thus, one of the major formal requirements of collateral estopping is missing here. The rationale of collateral estoppel is present, if at all, only in a marginal way. This is generally deemed to be based upon a public policy to avoid duplicate litigation and to achieve finality. Where the issue is disqualification, which is essentially a procedural or ancillary matter, the main litigation continues, whatever the outcome on disqualification. Whatever the ruling on disqualification by either the federal court in Cleveland, Ohio, or the NRC, neither the civil antitrust case in Cleveland, nor these antitrust review proceedings before the NRC would cease to go forward on the merits. Whatever duplicate litigation might be saved is minimal. Additionally, it should be noted that the parties before the NRC antitrust review and the parties in Cleveland are not the same. The Antitrust Division of the U. S. Justice Department has intervened and played an active role before the NRC, but is howhere present in the federal court case in Cleveland. The time periods of the two cases are not identical. Before the NRC there is a cut-off date that bars evidence prior to January 1, 1965. There is no such cut-off date in the federal

court case. There is not a true identity of issues even on the matter of disqualification. The nature of the representation of CEI by SS&D in the federal court case in Cleveland is not identical to that before the NRC. Given the foregoing differences, collateral estoppel should not apply.

C. The Closest Analagous Legal Authorities Indicate that Collateral Estoppel is not applicable in the case of Disbarment or Suspension of Attorneys.

The closest applicable legal precedents may be found in the area of the treatment by various courts of disbarment or suspension proceedings by other courts. In general, the effect of a disbarment or suspension by the highest Court of a state does not automatically justify disbarment by the federal courts. Theard v. United States, 354 US 278 1 Lawyer's Edition 2d, 1342 (1957). This is true even though admission to practice before a federal court is derivative from membership in a state court. A state court's determination is entitled to respect, but is not conclusively binding on the federal court, or is not binding upon the federal court "as the thing adjudged in a technical sense". Selling v. Radford, 243 US 46, 61 L Ed. 585, (1917).

Even as among federal courts, what little authority exists indicates that one federal court will not automatically suspend an attorney from the practice based upon the ruling of another federal court. In re Watt & Dohan, 149 F. 1009,(C.C.Pa. 1907). This case held that the fact that attorneys were indefinitely suspended from practice in the United States Court of Appeals for the Second Circuit, on the ground they had filed a scandalous and insulting brief, was not sufficient in itself to justify

disbarment in the federal circuit court for the Eastern District of Pennsylvania. See also ex parte Tillinghast for Pet 108 7 L.Ed 798, 1830 US.

Similarly, the fact that one has been admitted to practice before one district court in one state, does not automatically entitle that lawyer to practice before other U.S.District Courts in other states. Application of Wasserman, 240 F.2d, 212 (9th Cir 1956). There Wasserman, who had been admitted to practice before the Federal Courts in Arkansas was refused automatic right to practice before the Southern District of California which insisted upon an independent inquiry into his conduct and fitness to practice before it.

In a similar fashion, the disbarment of an attorney in one state does not of itself automatically affect his status as a attorney in another state. Re VanBever, 55 Ariz 368,101 P.2d, 790 (1940) Re Sizer, 134 S.W.2d, 1085, (Mo.App.1939). The Courts generally state that a final judgment of disbarment entered by the highest court of a sister state should be given full faith and credit unless the procedure therein was wanting in due process or the courts of the other state committed palpable error. In particular, the opinion of the California Courts in the case of In re McCue, 211 Cal.57 293 Pac. 47, (1930) is of interest. In that case a former Montana lawyer made application to practice law in California, where his application was challenged on the basis of disbarment proceedings in Montana. Those charges had been ultimately been dropped for want of evidence. The lawyer claimed that the California Courts were prohibited from considering any evidence which might tend to sustain the charges considered in the Montana

courts, or in other words that the Montana Court Judgment be given collateral estoppel effect. California court disagreed because although the Court of Montana disbarment proceeding bound all persons who were parties to the proceeding in their privies, neither the people of the State of California nor any of its officers or agencies were parties to that proceeding or had any interest therein or any right to be heard therein, and would therefore not be bound by the adjudication. Similarly, the Nuclear Regulatory Commission, or for that matter any officer or agency of the federal government was not a party to the Ohio Federal Court disqualification proceeding, had no right to be heard therein, and would not be bound by the adjudication.

Because neither the Federal nor State courts would give the automatic and conclusive collateral estoppel effect to attorney suspensions that SS&D seeks here, the N.R.C. should reject the Motion of SS&D and complete its own disqualification proceeding.

II. THE DOCTRINE OF COLLATERAL ESTOPPEL DOES NOT APPLY TO DISQUALIFICATION OF SS&D BEFORE THE NRC BECAUSE CONTROLLING FACTS AND APPLICABLE LEGAL RULES USED BY THE U. S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO CHANGED FROM THOSE PREVIOUSLY ESTABLISHED BY THE NRC.

SS&D themselves attempt, by a Motion to Dismiss Disqualification Proceedings before the NRC to use collateral estoppel to prevent the NRC from controlling its proceedings. There are however, inherent in the doctrine of collateral estoppel certain fundamental principles which they ignore. In general, the doctrine of collateral estoppel applies only in situations where matters raised in the second proceeding are identical in all respects with those in a prior proceeding, and where the controlling facts and applicable legal rules remain unchanged. Commissioner of Internal Revenue v. Sunnen, 33 US 591 (1947).

As the Court said in that opinion:

> "But where the second action between the same parties is upon a different cause or demand, the principle of res judicata is applied much more narrowly. In this situation, the judgment in the prior action acts as an estoppel, not as to matters which might have been litigated and determined, but only as to those matters in issue or points controvert, upon the determination of which the finding or verdict was rendered. Cromwell v. Sac County, supra (94 US 353, 24 L.Ed. 198) (Other citations omitted). Since the cause of action involved in the second proceeding is not swallowed by the judgment in the prior suit, the parties are free to litigate points which were not at issue in the first proceeding, even though such points might have been tendered and decided at

> that time . . .And if the very same facts and no others are involved in the second case, a case related to a different tax year, the prior judgment will be conclusive as to the same legal issues which appear, assuming no intervening doctrinal change. But if the relevant facts in the two cases are separable, even though they be similar or identical, collateral estoppel does not govern the legal issues which recur in the second case. Thus the second proceeding may involve an instrument or transaction identical with, but in a form separable from the one dealt with in the first proceeding. In that situation, a Court is free in the second proceeding to make an independent examination of the legal matters at issue. It may then reach a different result or if consistency in decision is considered just and desirable, reliance may be placed upon the ordinary rule of stare decisis. Before a party can invoke the collateral estoppel doctrine in these circumstances, the legal matter raised in the second proceeding must involve the same set of events or documents and the same bundle of legal principles that contribute to the rendering of the first judgment. Tait v. Western Maryland R.Co. (U.S.) supra. [289 US 625, 77 L.Ed. 1408, 53 Supreme Court, 706] [Other citations omitted] (Emphasis ours)

A. The Applicable Legal Rules for Disqualification as Previously determined by the Atomic Safety and Licensing Appeal Board were significantly different in numerous ways from the principles later utilized by Judge Krupansky.

Following substantial prior litigation before the Atomic Safety and Licensing Board, which resulted in a suspension of SS&D and a subsequent hearing by the Special Board, the Atomic Safety and Licensing Appeal Board, on June 11, 1976, entered a 35 page decision covering applicable legal principles for disqualification of attorneys before the Nuclear Regulatory Commission. The decision was based upon extensive briefing by both sides based upon federal case law and other authorities. The decision of the Appeal Board, preceded by nearly two months the decision of Judge Krupansky, which was rendered

August 3, 1976. (For a copy of the Judge's decision see SS&D's Motion to Stay Temporarily Further Discovery dated August 6, 1976.)

1. The Appeal Board Held that Canon 9 of the Code of Professional Responsibility Would Be a Separate and Independent Basis for the Remedy of Disqualification. Judge Krupansky Did Not.

> "If the theory of the case should ultimately rest on Canon 9 rather than Canon 4 or 5, however, the remedy sought here would still be proper. 'Disqualification is an appropriate sanction for enforcement of Canon 9' " Telos, Inc. v. Hawaiian Telephone Company Co., 397 F.Supp. 1314, 1315-16 (D. Hawaii 1975).
> (ALAB Decision, June 11, 1976, Page 23)

Judge Krupansky, on the other hand, in his entire 41 page opinion saw no application of Canon 9, save to the situation of Daniel O'Loughlin, the SS&D partner who, for many years was chief counsel of the City Law Department. Judge Krupansky saw no application of the doctrine that "A lawyer should avoid even the appearance of professional impropriety" to any other actions by the numerous other SS&D lawyers involved with City affairs. Beyond that, he engrafted his own special condition upon Canon 9:

> "In those instances wherein disqualification was ordered pursuant to Canon 9, the challenged attorney had performed extensive services in specific matters, or litigation in the same proceeding from which he was subsequently being disqualified."
> Order of Krupansky, J. August 3, 1976, Page 39

2. The Appeal Board Held the City need Show No Breach of Confidences by SS&D. Judge Krupansky Did.

The Appeal Board in its decision of June 11, 1976, expressly overruled the Special Board on the necessity of finding evidence that specific confidences of the client were breached. On page 24 of its decision, the

Appeal Board said as follows:

> "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 interior 'confidences' that were breached. That is not the law. As was said 23 years ago by Judge Winefeld, in T.C.Theater Corp. v. Warner Bros Pictures, 113 F.Supp. 265, 268 (S.D.N.Y. 1953):
>
> > '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 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.' "

On the other hand, Judge Krupansky required the City to demonstrate, as part of its case that Lansdale acquired confidential information from the City:

> "Since the party moving for an order of disqualification of an opponent's counsel, charging alleged conflict of interest must overcome the burden imposed by several inter-related evidentiary hurdles, the City is thus required to prove that: (1) a past attorney-client relationship existed between the City and Bruckel which was adverse to Lansdale's concurrent and subsequent representation of CEI; (2) the subject matter of those relationships was-is substantially related; and (3) Lansdale, as attorney for CEI, acquired knowledge of confidential information from or concerning the City actually actually or by operation of law.
> Order of Krupansky, J. Page 27-28. (emphasis ours)

The Court went on to add a further rule of his own which totally contradicts all existing case law:

> "This Court concludes that equity demands, and the pragmatics of emerging specialization inherent in contemporary legal practice dictates, that this presumption (of disclosure of confidences) be rebuttable.

The Court ended by finding that the City failed in its burden of proof of showing confidential information imparted to Lansdale. Thus, in this critical area, the law applied by Krupansky, J. was diametrically opposed to the law as previously found by the Appeal Board and virtually every other court in the country.

3. The Appeal Board Followed the Disciplinary Rule that Disqualification of One Member of a Firm is Disqualification of the Firm. Judge Krupansky Created a New Rule of His Own.

At none of the levels of the Nuclear Regulatory Commission, whether before the Licensing Board, the Special Board or the Appeal Board, was there any serious question about this basic proposition in the area of disqualification of attorneys. The basic rule is Disciplinary Rule 5-105 D:

> "If a lawyer is required to decline employment or to withdraw from an employment under DR 5-105, no partner or associate of his or his firm may accept or continue such employment." See ALAB Decision, June 11, 1976, Pages 5 and 6.

Judge Krupansky, on the other hand, applies a rule of his own:

> "Imputing to an attorney in the private practice all confidential information obtained, or presued to have been obtained, by other members of his law firm may severally limit the scope of the private attorneys' future career and the effective operation of his career, as well as the individual's right to legal counsel of choice. The analogous rule in the private practice of law should therefore limit the imputation of confidential disclosures, actual or presumed to only those lawyers practicing in the attorney's area of concentration. Absent direct proof to the contrary, the attorney would not be deemed to have shared confidential information relating to matters and services exclusively within the sphere of representation of another department or section of his firm. This vertical responsibility rule is more acutely dramatized in the large, departmentalized law firms characteristically more prevalent in an area of evolving legal specialization. . .

"The record is barren of evidence of actual confidential disclosure between Bruckel of the Public Law Section, and Lansdale of the Litigation Section. The Lansdale-Hauser Memorandum, resulting from the White-Little Hoover Commission, attended by Lansdale and Bruckel does not support a conclusion of actual disclosure for the reasons heretofore discussed in the statement of the facts herein. "
Order Krupansky, J. pages 36, 37.

Previously, the Judge, on page 28 of his Opinion had required that the City prove that:

"Lansdale, as attorney for CEI, acquired knowledge of confidential information from, or concerning the City, actually or by operation of law."

The net effect is that Judge Krupansky forced the City to show that Bruckel obtained confidences from the City through his bond work which he then imparted to Lansdale. This mixed conclusion of fact and law is in direct and total conflict with the prior determination of the Appeal Board, and every reported case.

4. The Appeal Board in Effect held: Disclosure by the Attorney is a Necessary Predicate for Waiver. Judge Krupansky Ignored Disclosure.

The basic rule of multiple representation is that a lawyer may represent multiple clients "If it is obvious that he can adequately represent the interests 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 Appeal Board went on, on Page 34 of its decision, to remind the Special Board that the question of whether there was waiver should be decided within the framework of existing federal case law, citing Emle Industries, Inc. v.Patentex, Inc., 478 F.2d, 562, 573-74 (2d Cir. 1973) and other cases, all of which insist upon the importance of full disclosure by the attorneys. It is clear from

the decision of the Appeal Board that the validity of the SS&D waiver defense depends to a great extent upon the disclosures made by them to the City before undertaking representation of the City in its Municipal Light Plant Mortgage Bonds. The Order of Krupansky, J., on the other hand, nowhere in its entire 41 page length, makes any allusion to the necessity of disclosure by SS&D. In effect, the legal requirement of disclosure by SS&D was written completely out of the law by Judge Krupansky.

5. The Appeal Board and the Lower NRC Boards Found Adversity of Representation was Established and was Not a Serious Issue. Judge Krupansky Changed the Rule to One of his Own and Made It an Issue.

It is one of the fundamental grounds for disqualification of an attorney that he now seeks to represent a second client against a prior client, where the interests of the two clients are adverse. It was virtually conceded by SS&D before the NRC that the interests of the City of Cleveland and CEI were adverse and that it could not there represent CEI unless it prevailed on its theories of waiver or estoppel. In the litigation in Federal Court in Cleveland, the interests of CEI and the City were even more clearly adverse because the City there sought $327,000,000 in damages from CEI and CEI counterclaimed against the City for $5.8 million for purchases of electricity. During the pendency of that suit, SS&D was seeking to represent its client CEI against its client, the City. This basic adversity of position of the clients, however, was tortured by Judge Krupansky into something altogether different.

> ". . .The City is thus required to prove that (1) a past attorney-client relationship existed between the City and Bruckel which was adverse to Lansdale's concurrent and subsequent representation

> of CEI; (2) the subject matter of those relationships was-is substantially related; and (3) Lansdale, as attorney for CEI, acquired knowledge of confidential information from or concerning the City, actually or by operation of law."

The extraordinary standard of law here set up by Krupansky, J. is that the City show that the attorney-client relationship between the City and SS&D Bond Partner Bruckel was adverse to SS&D Partner Lansdale's representation of CEI! This is utter nonsence and totally garbles the meaning of the Code of Professional Responsibility. Needless to say, Judge Krupansky finds that the City does not meet his self-created test of adverse relationship. The true point, however, is that his test has no real meaning and flaunts the true state of the law as determined by the Appeal Board and other federal courts. This simply shows that Federal Judge Krupansky is imposing upon the City a set of rules of his own devising that have no relationship to current rules of law in this area as held by virtually all other federal courts and as previously held by the NRC Appeal Board. As the Supreme Court said above in Sunnen, collateral estoppel must be confined to situations where "the matter raised in the second suit is identical in all respects to that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged." It is clear that the rules on disqualification in Cleveland and before the NRC in Washington could not be more dissimilar. As the first judicial body to have jurisdiction of the matter, the Appeal Board, following the authority of numerous Federal Appellate Courts found the applicable law for disqualification of attorneys before the N.R.C. Judge Krupansky later applied a set of standards purely his own. Under the circumstances collateral estoppel does not apply. Sunnen, supra.

B. The Evidentiary Facts Before the NRC Will be Significantly Different From Those Presented Before Judge Krupansky Because of His Clearly Erroneous Refusal to Permit the City to have Any Documentary Discovery of SS&D in Total Contradiction to Previous Rulings by the Sixth Circuit Court of Appeals and the NRC Appeal Board.

Not the least of the extraordinary problems that theCity confronted before Judge Krupansky, was his total refusal to permit the City to subpoena any documents from SS&D, whether during the limited discovery permitted before his hearing, or at the trial of disqualification on the merits. In discovery proceedings before the hearing, he quashed all attempts of the City to obtain documents from its lawyers with subpoenas duces tecum. (See pertinent extracts of his Order of February 18, 1976 attached). Likewise, at hearing, he refused to permit the City access to one single document of SS&D. (See extract of the Record attached). This shocking refusal to permit a client to have one document from its own attorneys was as diametrically opposed in principle and in outcome as it could be from the position of the Sixth Circuit Court of Appeals in Melamid v ITT Continental Baking Co., 534 F2d 82 (1976) where interrogatories were utilized below and impliedly approved as part of the full evidentiary hearing called for by that court on remand. Judge Krupansky was also totally opposed to the position of the Appeal Board and this Special Board. The Appeal Board, in its decision of June 11, 1976, called for a full evidentiary hearing and specifically held that "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 CFR, §2.740, to insure that the proceeding is determined as expeditiously as possible, albeit consistently with the interests of justice and fairness, with the full opportunity to develop all relevant facts." Consistent with this determination and again, prior to the Order of Judge Krupansky, this Special Board has permitted documentary discovery, which promises to provide an entirely different set of controlling facts once the City is finally permitted to see its own files. The same arguments of privilege and excessive burdensomeness that SS&D urged upon Judge Krupansky as reasons for denying all documentary discovery have been rejected by the NRC.

In sum, the factual basis of the disqualification proceedings before the NRC will be upon controlling facts substantially different from those presented to Judge Krupansky. With the facts differing in the two proceedings, collateral estoppel does not apply.

III. THE NRC HAS ADOPTED THE ABA CODE OF PROFESSIONAL RESPONSIBILITY AS ITS STANDARD OF CONDUCT, WHEREAS THE U. S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO HAS NOT.

An Additional reason for refusing to apply collateral estoppel beyond the numerous differences between the law as the NRC perceives it and Judge Krupansky perceives it, is the fact that the NRC has formally adopted the American Bar Association Code of Professional Responsibility as its standard of conduct in Northern Indiana Public Service Company, ALAB-204, RAI 74-5, page 835. An examination of the local rules of Court on the other hand discloses that the U. S. District Court for the Northern District of Ohio as is the case with a number of district courts, has not adopted the American Bar Association Code of Professional Responsibility. This is an additional reason for refusing to give automatic and total obedience to the judgment of Judge Krupansky.

IV. COLLATERAL ESTOPPEL MAY BE REJECTED OR QUALIFIED IN CASES WHEREIN AN INFLEXIBLE APPLICATION WOULD VIOLATE AN OVERRIDING PUBLIC POLICY.

Over and above the grounds raised above in this Brief, there is an additional basis upon which the Nuclear Regulatory Commission may disregard the opinion of Judge Krupansky. Professor Moore in 1B Moore's Federal Practice §0.405[11], discusses various cases where the Courts have refused an automatic application of collateral estoppel in view of public policy. In Spilker v. Hankin, 188 F.2d 35 (C.A.D.C. 1951), the Court of Appeals refused to give conclusive effect to a prior judgment awarding an attorney a fee based on a note when he subsequently sought to collect on five similar notes, declaring that the judicial policy of scrutinizing attorney fee contracts outweighed judicial finality. Similarly here, the scrutiny of attorney conduct against the applicable rules of attorney conduct of the NRC should outweigh the consideration of finality on an ancillary issue to assure that the NRC's proceedings and procedures are protected. In NLRB v. Denver Building and Construction Trades Council, 186 F.2d, 326 (C.A. D.C. 1950), reversed on other grounds, 341 675 (1951), a labor union seeking to overturn an NLRB finding of an unfair labor practice contended that a prior attempt by the NLRB to obtain a preliminary injunction had been denied by a district court and that the prior denial was res judicata. Although denying res judicata effect for want of finality, the Court of Appeals stated that even if it should properly apply, its use in such case would be inconsistent with the overriding policy of Congress in the area and it would not be given effect. See also Kalb v. Feuerstein, 308 US 433, (1940).

Pursuant to the foregoing cases, there would appear to be an overriding public interest in protecting the procedures of the NRC in this major antitrust review since a failure to rule or rule correctly on the issue of disqualification might upset four years of work by the commission, particularly where the standards of professional conduct of the NRC are clearly very different from those invoked by Judge Krupansky of Cleveland.

CONCLUSION

There are numerous reasons why the holding of Judge Krupansky should be dismissed as an aberration and given no effect before the Nuclear Regulatory Commission. SS&D present no authority for applying collateral estoppel to disqualification of lawyers. The requisite identity of parties, issues, and time frames is lacking. Neither the Federal nor state courts give automatic collateral estoppel effect to questions of suspension of lawyers. The basic legal principles for disqualification previously determined by the Appeal Board were ignored or not followed by Judge Krupansky who created special rules of his own. This Special Board has already refused to follow Judge Krupansky in his denials of all documentary discovery. This factor alone promises to alter the entire factual basis of the two proceedings. Collateral estoppel may be qualified in cases where an inflexible application would violate public policy, which here would include the NRC's interest in maintaining high standards of attorney conduct in practice before it. This Special Board should reject the Motion for Dismissal of SS&D and complete this disqualification proceeding.

Respectfully submitted,

James B. Davis

THE UNITED STATES DISTRICT COURT FILED

TH NORTHERN DISTRICT OF OHI FEB 19 3 15 PM '76

EASTERN DIVISION

CLERK U. S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO

Duces Tecum only

CITY OF CLEVELAND,) CIVIL ACTION NO. C75-56(
)
Plaintiff)
)
v.)
)
THE CLEVELAND ELECTRIC)
ILLUMINATING COMPANY, et al.,)
)
Defendants) MEMORANDUM AND ORDER

KRUPANSKY, J.

In a matter collateral to the anti-trust action brought by the City of Cleveland, plaintiff City has served subpoenas duces tecum upon three attorneys of the law firm Squire, Sanders & Dempsey, which represents defendant CEI in the primary action. On schedules and lists appended to the subpoenas, plaintiff demands production of innumerable documents in terms and language partly specific, but mostly ambiguous. The attorneys subject to subpoena, responding by and through outside counsel, move for a protective order quashing said subpoenas in their entirety, or quashing the duces tecum features thereof, or ordering production of those documents deemed relevant by the Atomic Safety and Licensing Board. At a hearing on February 11, 1976, the Court entertained oral argument on the Motion for Protective Order. Upon consideration, the Motion for a Protective Order is granted, quashing only the duces tecum features of the subpoenas in question.

Rule 45, Fed. R. Civ. P., providing for the issuance of subpoenas duces tecum, is construed in pari

its personal time in examining, reviewing and evaluating the demanded documents. Such Motion to Compel did not materialize until the eighteenth day subsequent to defendant's objections, even though the Court earlier directed plaintiff's attention to its failure to diligently pursue this particular discovery demand. Now, as a result of the subpoenas herein, the documents in question have become the subject of a Motion for a Protective Order, which the Court is disposed to grant.

Upon exhaustive examination and review of the documents subject to claimed privilege, and upon comparison of the documents lists appended to the subpoenas duces tecum and those submitted to the Court by defendant CEI for in camera inspection, the Court finds the lists to be identical and that the documents therein requested are privileged and may not be disclosed to plaintiff.

Accordingly, the Motion for Protective Order is granted and the duces tecum features of the subpoenas in question are hereby quashed.

IT IS SO ORDERED.

United States District Judge

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

CITY OF CLEVELAND,	)	
	)	
Plaintiff,	)	
	)	Civil Action
vs.	)	No. C 75-560
	)	
CLEVELAND ELECTRIC ILLUMINATING COMPANY, et al.,	)	
	)	
Defendants.	)	

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TRANSCRIPT OF DISQUALIFICATION PROCEEDINGS BEFORE THE HON. ROBERT B. KRUPANSKY, JUDGE OF SAID COURT, COMMENCING MONDAY, JUNE 14, 1976, At 9:20 O'CLOCK A.M.

- - - - -

available. And in the event that I am inaccurate, I will be pleased to entertain any corrections.

So, now, let us proceed with the examination of Mr. O'Laughlin.

MR. DAVIS: May I simply address a few arguments to the Court on the question of this subpoena?

THE COURT: Mr. Davis --

MR. DAVIS: All I am attempting to do --

THE COURT: Mr. Davis, we have already gone over this. Please proceed with the examination of Mr. O'Laughlin. Now, let's not rehash it again, Mr. Davis, please.

MR. DAVIS: Without rehashing it, your ruling is on the subpoena?

THE COURT: I am quashing it.

MR. DAVIS: In its entirety?

THE COURT: That's correct, for the same reasons that I have heretofore set forth on two different occasions, as I have already indicated to you, Mr. Davis.

And for your benefit -- Mr. Kainski, may I have that memorandum?

CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing Brief of the City of Cleveland has been made upon the Secretary of the United States Nuclear Regulatory Commission, Washington D. C. 20555, Attention Chief Docketing and Service Section, by mailing the original and twenty (20) copies, and on the following parties listed on the attachment hereto this 14th day of September, 1976, by depositing copies thereof in the United States mail, first class postage prepaid, or by hand delivery.

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