UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of

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

HEARING MEMORANDUM IN OPPOSITION TO TRIAL MEMORANDUM OF SQUIRE, SANDERS AND DEMPSEY AT EVIDENTIARY HEARING BEFORE SPECIAL BOARD ON DISQUALIFICATION

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HEARING MEMORANDUM IN OPPOSITION TO
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I. AFFIDAVITS, ADMISSIONS IN BRIEFS, AND UNDISPUTED FACTS ALL DEMONSTRATE THAT SS & D IS GUILTY OF SECRETLY CAUSING PREJUDICE TO THE CITY'S INTERESTS BY ADVISING CEI FOR MANY YEARS ON MATTERS SUBSTANTIALLY RELATED TO THIS NRC PROCEEDING.

The canons and the case law all are based upon the fundamental principle that if there is even the possibility of professional judgment being affected by an attorney's own financial business or personal interests the attorney must be disqualified.

> DR5-101 (. 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. (Emphasis ours).

To the same affect is a further disciplinary Rule DR5-105,

DR5-105 (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 DR5-105 (C) (Emphasis ours).

These are not merely aspirational ethical considerations but disciplinary rules which set the minimum level of permissible conduct by attorneys.

These disciplinary rules and their predecessor canons have been flagrantly disregarded for years by SS & D based upon what has recently been discovered, and in what has just been admitted in their briefs before this Board!

A. The Principle Issues In This NRC Antitrust Review Deal With CEI's and CAPCO's Economic Pressures To Eliminate MELP.

The background of issues in this NRC proceeding against which the actions of SS & D are to be understood needs to be briefly recalled. A more detailed statement may be found in the City's prehearing Brief of November 26, 1975.

The MELP electric system is a small island within the City of Cleveland completely surrounded by the system of CEI. It is an issue in this case that for years CEI has sought to eliminate by purchase or otherwise the competitive system of MELP. The various means that CEI has utilized for years to eliminate MELP also form issues in this case. These include the following: (1) CEI has sought to maintain its monopoly in the

retail, wholesale and regional power exchange markets by denying MELP any membership in CAPCO, a power pool of five major privately owned utilities in Ohio; (2) CEI has consistently refused to sell its power at wholesale to MELP; (3) CEI has refused to wheel power from outside sources across its lines to MELP; (4) CEI has consistently attempted to cause MELP to fix prices by raising its rates to those of CEI, thereby destroying one of the few competitive advantages MELP possessed; (5) CEI for years sought to deny MELP reliability of service by denying it a synchronous interconnection except upon conditions it knew MELP could not accept; lack of reliability on the part of MELP would drive MELP's customers into the arms of CEI; (6) CEI has sought through a variety of means to increase financial burdens upon MELP such as by forcing it to accept greater costs for street lighting in Cleveland and pass these costs on to its residential customers; (7) CEI has sought to deny MELP the benefits of coordinated operation and development of its plant by refusing it membership in CAPCO; (8) CEI has sought to exclude MELP from participation in the very nuclear generating units being licensed in this proceeding, except upon terms it knew MELP could not accept. In addition to the foregoing there are other issues involving (9) the City's ability to finance its electric system: (10) the reliability of MELP as a factor precluding its membership in CAPCO; (11) the City's financial ability to pay for interconnection agreements or transmission facilities. This list is by no means all inclusive.

B. <u>For Many Years SS & D Lawyers Have Been Secretly Advising CEI Upon Aspects Of The Above Issues.</u>

1. In Exhibit "G" of the City's Brief In Support Of Motion To Disqualify of December 1, 1975 may be found some extraordinary documents. They show

that on February 18, 1965, John Lansdale, SS & D partner, was writing to Ralph M. Besse, then President of CEI (and now once again an SS & D partner) about a possible arrangement for interconnection between CEI and MELP. At that time the City very much wanted such an interconnection to improve its reliability of service and its ability to hold customers. CEI did not wish to give the City an interconnection to help it out. The scheme devised by SS & D lawyers to permit CEI to avoid the interconnection was to tie the interconnection to a demand that the City increase its rates to the same level as the company's rates. SS & D and CEI well knew that the City could never accept such a condition because it would destroy the principle competitive advantage the City had over CEI, namely, that its rates were lower because it paid no taxes. Here in the February 18, 1965 letter was Lansdale admitting that because of the FPC's jurisdiction over sales at wholesale, the legal right of CEI to make such condition was doubtful.

> "The Federal Power Commission's jurisdiction over sales at wholesale might cast doubt upon our ability to make such condition in an interchange agreement effective." (Exhibit G)

Lansdale also betrays the full awareness of SS & D and CEI that the City could never agree to their condition.

> "You will note that while we did not believe the City could agree to tie its rates to the company's rates, we saw no reason why the company could not make the continued maintenance of its interconnection conditional upon the maintenance of such a rate level."
> (Exhibit G)

Thus, in full awareness that SS & D's client, the City, needs the interconnection yet cannot tie its rates to CEI's rates SS & D partner Lansdale proposes linking the offer of the interconnection to this condition on the City's rate. The offer of interconnection is rendered a sham.

Who was the lawyer writing the underlying opinion? None other than Ralph Gibbon, head of the Public Law Section of SS & D, which did the City's bond work over the last 65 years. These documents demonstrate a flagrant betrayal of the City's interests as far back as February 18, 1965 without the City's knowledge but at a time when the City was paying SS & D to represent it. These documents have a direct impact on a number of the issues before this NRC namely, efforts by CEI to increase MELP's rates; efforts by CEI to deny the City a much needed interconnection; efforts by CEI to decrease the City's service reliability; efforts by CEI to cause the City to lose customers; efforts by CEI to deny MELP membership in CAPCO because of unreliable service, contributed to by CEI refusal of an interconnect, even though CEI had major interconnects with its CAPCO partners to maintain its own reliability. The prejudice of these documents to the City is overwhelmingly clear once the factual background is understood. Likewise the nexus to this proceeding is clear.

2. In Exhibit E attached to the City Brief of December 1, 1975, is set forth a memorandum to the file dated October 26, 1966 composed by Mr. John Lansdale of SS & D. The very existence of this document was confidential and unknown the City until it surfaced in NRC discovery proceedings. What is the meaning of this extraordinary document?

As the Lansdale Memorandum itself makes clear, in 1966 MELP was providing electricity for City street lighting at a cost of $671,000.00 but the cost of service actually exceeded this sum by $780,000.00, thus there was an indirect subsidy to MELP operations from the General Fund of the City of Cleveland of an alleged $780,000.00. The plan of CEI then as now was to increase MELP rates to residential customers and thereby destroy MELP's major competitive advantage. It is

also clear from the Lansdale memorandum that "the Light Plant received $1,200,000.00 in excess of cost of service from private consumers". Thus the thrust of this confidential memorandum and the thrust of what was happening was that Lansdale was helping advise the Little Hoover Commission how to increase MELP rates to private residential customers under the guise of relieving the street lighting burden on the City's General Fund. Such a scheme was particularly damaging to the City because CEI policy could thus be foisted upon the City by an apparently neutral and outside body, The Little Hoover Commission. This is clear evidence of a SS & D lawyer working to undermine established City policy while other members of his firm were on the City payroll. This Memo also destroys the Affidavits of Brueckeland Lansdale that they had never acted adversely to their client, the City. Here is Brueckel in a conversation with Lansdale and Mr. White of The Little Hoover Commission. This was Brueckel the City's Bond lawyer advising on the terms of the trust indenture under which the revenue bonds of MELP are issued. This is the same Brueckel who years later prepared the 1972-1973 MELP Bond Issue. Nothing in the record of this case in any way suggests that any of this was known to the City. In their trial brief, SS & D attempt an explanation of this meeting. Unfortunately, there is no evidence before this Panel to back up their claims, and if there were it would be undercut by Lansdale's own memorandum. Small wonder the Atomic Safety & Licensing Board majority felt this document was so significant. Here are SS & D lawyers, Lansdale and Brueckel directly involved in one of the key antitrust issues of this case, namely, CEI's efforts to increase the City's rates to its private residential customers.

3. In the spring of 1966 SS & D served as Bond Counsel for the City in connection with a series of bond issues including a $1 Million Street Lighting Improvement Bond Issue. (Exhibit A, Page 6 of the City Brief dated December 1, 1975.)

We have seen above that the financing of the City's Street Lighting System was directly tied into rates charged by MELP to its residential customers. As bond counsel for the City, SS & D were here obtaining information about an area of City financing that had a direct relationship with operations of MELP.

4. Sometime in early 1968, SS & D served as bond counsel to prepare $6 Million of Electric Light and Power Plant and System Bonds. (Exhibit A, Page 8 of City Brief, dated December 1, 1975). In order to prepare a $6 Million Bond Issue for MELP, SS & D necessarily had access to all relevant financial information from MELP at a time when MELP's financial condition was obviously a critical part of its relationship with CEI. Here were SS & D obtaining information and insight into issues now before the NRC. namely the City's ability to finance its electric system and the City's financial ability to pay for interconnection agreements or transmission facilities.

5. SS & D does not deny that their John Brueckel prepared the 1972-1973 MELP Bond Issue of $9.8 Million. They do not attempt to deny that CEI lawyer Donald Hauser appeared before Cleveland Council and managed to amend Mr. Brueckel's Bonds by inserting a change that would require them to be sold first on the outside market, where the City had contemplated from the first that it would sold to one of its own internal Sinking or Treasury Funds. Brueckel in his Affidavit nowhere claims he tried to resist these damaging Hauser-CEI amendments.

These bonds could never be and never were sold to the public at a negotiated sale. Several years later in 1975, the issue was partially sold to the Treasury Investment Account as originally planned in 1972. It had taken three years to sell the first bond. In the meantime, MELP suffered from a loss of critically needed captial funds to make repairs to its equipment. Its competitive position deteriorated rapidly. This episode bears directly upon those issues involving the City's ability to finance its electric system, MELP, and the City's financial ability to pay for interconnection agreements or transmission facilities. Here again the City charges SS & D not merely with a possible conflict of interest, but with direct sabotage of its interest.

SS & D attempts to explain all of this away by claiming that the City then knew of existing conflicts with CEI; that it "was dealing at arms length" with SS & D in the person of the then capable Law Director Richard Hollington (SS & D Trial Memorandum, Page 20). This itself is an extraordinary statement by lawyers engaged by a client. Here are lawyers attempting to claim that they were dealing "at arms length" with their client! This is a contradiction in terms. Lawyers must give a client complete and undivided loyalty or not represent it at all. Then comes one of the most extraordinary statements ever used by a lawyer to excuse his own misconduct at Page 22 of the SS & D Trial Memorandum.

> "Briefly restated, the conflict was not a future one but an existing one, it existed at the time of SS & D's employment in 1972. It was a conflict created by General Counsel for the City when he filed proceedings before the Federal Power Commission and the Nuclear Regulatory Commission. Any effects which sprang from the conflict were effects created and caused by general counsel for the City in insisting on the employment of SS & D when they themselves had created the conflict

situation." (Emphasis ours)

The admissions in this statement of SS & D when fully appreciated should be sufficient grounds in and of themselves for disqualification. HERE SS & D ADMITS THAT THERE WAS A CONFLICT OF INTEREST. In effect they are saying that this existing conflict of interest was created by the City and that they were free to betray the interest of their client, the City, as they in fact did by sabotaging the 1972-73 Bond Ordinance. These admissions are shocking and almost unbelievable. The claim that the City brought about conflicts by inducing this "employment" is totally false. SS & D had already been employed for the City for decades. SS & D was guilty of conflicts of interest against the City that precede this 1972 bond episode, such as Items 1, 2, 3 and 4 above. Here SS & D completely fails to recognize its ethical responsibilities. They now admit that there was a conflict of interest between their existing representation of CEI and any attempt to do work for the City in 1972 on a MELP Bond Issue. Under the above cited disciplinary rules, if this was so, it was simply impossible for them to represent the City even if asked by the City Law Director. It was their fundamental duty as attorneys to recognize this duty and withdraw. What they did was grossly improper. Without the slightest attempt at a full and meaningful disclosure, they attempted to paper over their problem by getting a brief letter from the then City Law Director requesting their employment. That letter did nothing to change their fundamental duty to disclose and withdraw.

6. In Exhibit A, attached to the Majority Memorandum of the Atomic Safety and Licensing Board are a letter from John Lansdale, SS & D partner, dated June 17, 1974 to Mr. Donald H. Hauser, Corporate Solicitor of CEI, and an underlying

Memorandum dated May 21, 1974 from Mr. John Brueckel to Mr. Lansdale. It should be noted that copies of this memorandum also went to Mr. Daniel O'Laughlin and Mr. Morris Knopf, Attorneys in the SS & D Public Law Section who were highly involved with City financial matters. Here is a SS & D memorandum that dealt directly with an agreement between MELP AND CEI concerning the supply to the City of electricity generated by nuclear power plants. One could not ask for a document more critically connected with the issues in this proceeding. Once again, this was done secretly by SS & D without the knowledge or consent of its client, the City.

7. In Exhibit U attached to the City's supplemental brief dated December 10, 1975 appear notes by CEI corporate solicitor Donald Hauser dealing with a series of meetings at CEI. His notes of the August 8, 1973 meeting disclosed the following:

> At a meeting in the company on August 8, 1973, at which Messrs. Rudolph, Ginn, Williams, Hauser, Lansdale, Charnoff, Davidson, and Lester attended, it was decided that the Company should refuse the request of AMP-Ohio to Wheel Pasny Power or Wheel Power from any other third party. It was decided that the company should refuse to agree to Cleveland becoming a member of CAPCO. . .
> (Emphasis ours)

This extraordinary document has never been denied by SS & D or even explained by them. Although this document was discussed in detail before this panel they chose not to say a word about it in rebuttal. There is in fact nothing they can say about it. THIS PROVES CONCLUSIVELY AN OUTRIGHT BETRAYAL BY AN SS & D LAWYER OF THE CITY'S POSITION. Within a few months of the time John Bruckel of SS & D had been working on the 9.8 million dollar bond issue and before that bond issue had been sold or completed here was another SS & D partner, Lansdale, participating in a decision at the highest

level of CEI, the inevitable impact of which was to damage the sale of these very same bonds and deny MELP hydroelectric power from PASNY, a critically needed source of cheap power. In the clearest terms here is Mr. Lansdale further participating to deny MELP membership in CAPCO which would improve MELP's system reliability and allow it the benefits of coordinated operations and development. Following this decision by CEI executives and in an attempt to justify it, another SS & D lawyer, James P. Murphy, on August 16, 1973 submitted a legal opinion justifying the action. (Exhibit V). Here then were SS & D attorneys betraying fundamental interests of the City which are direct issues in this NRC proceeding. This was all done secretly and only came to the City's attention shortly before December 10, 1975. This is the clearest imaginable example not of a possible conflict of interest but an actual conflict of interest deeply prejudicial to the City's interests by SS & D lawyers.

II. SS & D'S FAILURE TO MAKE FULL DISCLOSURE OF POTENTIAL CONFLICTS TO THE CITY MEANS THAT THE CITY WAS NEVER IN A POSITION TO MAKE AN INTELLIGENT WAIVER OF ITS RIGHTS AND NEVER DID SO.

We return once more to those two disciplinary rules which control in this case.

> DR5-101A. Except with the consent of this 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. (Emphasis ours)
>
> DR5-105C. In the situations covered by DR5-105(A)(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. (Emphasis ours)

Unless a client is given full disclosure by his attorney of the possible effects that could result when the same attorney is exercising his professional judgment on behalf of another client, the first client has no way of knowing that a possible conflict of interest exists or its possible impact.

Never once in the 65 year history of the attorney-client relationship between the City and SS & D has SS & D disclosed to the City the possibly adverse affect of its employment and services to CEI.

SS & D has yet to come forward with any proof that it at any time made any disclosure, much less full disclosure, to the City that its efforts on behalf of CEI might adversely affect its efforts on behalf of the City. They have never even claimed, in any of their briefs, or memoranda, or even in their proffer, that any disclosure was ever made. They have merely stated that the City was involved in controversies with CEI. Even this claim is misleading.

There was a duty upon SS & D to disclose to the City the full implications of its activities on behalf of CEI well back in the 1960's or far earlier than the episode with the 1972-1973 bond issue. The fact that the City in desperation turned to SS & D in 1972 does nothing to excuse SS & D misconduct reaching as far back as 1965 and beyond. The fact that the City in desperation after trying to obtain other bond counsel turned once again to SS & D in 1972 does not excuse the misconduct of SS & D. In 1972 SS & D owed to the City of Cleveland a full disclosure of all those actions of its partner John Lansdale and others who had been working on behalf of CEI to eliminate

MELP. It was in 1972 that SS & D owed the duty to the City to disclose such items as the Lansdale letter to Ralph M. Besse of CEI dated February 18, 1965 (ITEM 1), and the Lansdale memorandum dated October 26, 1966 (ITEM 2). In 1972 SS & D should have disclosed to the City the extraordinary fact that it considered that its "primary commitment" was to CEI.

> "There can be no question of the total commitment of SS & D to the legal and business affairs of CEI. Its legal representation of CEI over the years has not been special or limited, but has been general in character; and its loyalty and primary commitment to that client has been unqualified."
>
> In contrast SS & D's representation of the City of Cleveland has been special and limited, not general in character."
> (Answer Brief of John Lansdale, Jr., December 12, 1975) (Emphasis ours)

Even more extraordinary, SS & D should have disclosed what it now discloses on page 26 of that same Brief:

> "The City argues in its supplement brief that SS & D and the person of John Lansdale, Jr. has provided CEI with legal advice adverse to the interests of the municipal electric light and power plants; and, particularly, that he has provided legal advice on antitrust and competitive matters.
>
> This is correct.. Mr. Lansdale and Squire, Sanders & Dempsey have acted in all respects as outside general counsel for CEI providing those services typically provided by general counsel, including advice and opinions on antitrust matters, competitive business matters, and matters of a general legal nature." (Emphasis ours)

Here is another totally extraordinary quotation from an SS & D Brief which in and of itself should be conclusive grounds for their disqualification. THEY ADMIT THAT ONE OF THEIR PARTNERS WAS ACTING ADVERSELY TO

THE CITY ALL THESE YEARS. It is law that if any member of a law firm cannot properly accept professional employment, neither the firm or any member or associate thereof may accept the employment.

> DR5-105D If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment. **Silver** Chrysler Plymouth v. Chrysler Motors Corp., 518 F. 2d 751 (2d Cir. 1975) and see the many other cases cited at page 36 of the City's Brief in support of Motion to Disqualify. December 1, 1975.

Lansdale's providing CEI with legal advice adverse to the interests of MELP then and there should have disqualified SS & D. No one appreciated or understood this better than SS & D itself. The canons as correctly pointed out by the Atomic Safety and Licensing Board demand that the lawyer recognize his ethical responsibilities and act accordingly. It was not incumbent upon the client, the City, to guess at such matters. The failures to disclose of SS & D going back over many years now mean that it must suffer the penalty of a disqualification. Even the isolated episode of the 1972-1973 bond issue took place without the necessary disclosure by SS & D. Nothing in the entire history of the relationship between SS & D and the City can explain or excuse this misconduct.

III. THE FACT THAT DANIEL J. O'LAUGHLIN NOW AN SS & D PARTNER WAS CHIEF COUNSEL OF THE CITY LAW DEPARTMENT COVERING A PERIOD OF YEARS AT ISSUE IN THIS PROCEEDING IS BY ITSELF SUFFICIENT GROUND FOR DISQUALIFYING SS & D.

Daniel J. O'Laughlin, now a partner at SS & D, was for some 14 years a member of the City of Cleveland Law Department. During four (4) of those years from 1964 to 1968 he was Chief Counsel of the Civil Branch of

the City Law Department and as such had general supervision of all civil legal affairs of the City. This meant that all the legal affairs of the City's MELP came under his direct supervision. As such he had direct access to all the legal affairs of MELP during the period January 1, 1965 (the cut-off date established by the Commission) until Mr. O'Laughlin left the City to join SS & D in 1968. Since leaving the City Mr. O'Laughlin has been a member of the public law section of SS & D and has been frequently consulted on financial matters of the City of Cleveland. (See Affidavit attached).

What is critical to understand at this juncture is that it was one thing for the City to continue to use Mr. O'Laughlin's municipal law expertise down through the years after he left the City when this was being done for the benefit of the City. It is an altogether different proposition to permit a firm of which Mr. O'Laughlin is a partner to represent a major corporate client CEI directly against the interests of the City in this antitrust review.

It is not necessary to presume that Mr. O'Laughlin has had contact with Mr. Lansdale and others actively representing CEI in matters adverse to the City of Cleveland. This has been discovered in this NRC proceeding. See Exhibit H to the City's Brief In Support Of Motion To Disqualify and in particular Document 7 dated May 21, 1974 from J. Bruckel to J. Lansdale, D. O'Laughlin and M. Knopf, and Document 2029 dated February 25, 1972 from A. Obermyer and D. O'Laughlin to L. Howley and D. Hauser of CEI.

These documents have been claimed as privileged and never seen by the City. The mere appearance of these documents on the privilege list however demonstrates certain contacts between Mr. O'Laughlin and representatives of CEI.

A case almost completely on all fours with the situation of

Mr. O'Laughlin is Chugach Electric Association v. U. S. District Court, 370 Fed. 2d 441 (9th Cir. 1966). In that case attorney Edgar Boyko had represented the Chugach Electric Association as general counsel in the years 1954 to 1956 and was a consultant until 1957. Years later Mr. Boyko sought to act as the trustee in bankruptcy of Mrak Coal Company. In the capacity of Mrak's trustee in bankruptcy, Mr. Boyko brought an action charging the Chugach Electric Association with violations of federal antitrust laws in efforts to maintain its monopoly position as the sole company in the area generating sales of electric power. He alleged among other things that Mrak's bankruptcy resulted from Chugach's antitrust violations. The trial court had refused to disqualify Boyko for three reasons: 1) that the activities on which the present case was predicated began after Boyko left Chugach; 2) there was no showing that Boyko, while acting as general counsel for Chugach, received or had access to secret or confidential information; 3) that Chugach failed to establish a substantial relationship between the issues in the present case and the subject matter of Boyko's full representation.

The Court of Appeals disqualified Boyko with the following statements:

> "A likelihood here exists which cannot be disregarded that Mr. Boyko's knowledge of private matters gained in confidence would provide him with greater insight and understanding of the significance of subsequent events in an antitrust context and offer a promising source of discovery. This likelihood is enhanced by recognition of the fact that the allegations of a Complaint are not always an accurate appraisal of the relevant period of time in antitrust cases. Discovery and trial proof frequently introduce ramifications rendering earlier events

is important to note that none of the City's cases are discussed in any brief of SS & D. SS & D has now had many weeks and the full resources of its giant staff to find any cases that support its position. They have found, essentially, seven cases which they cite in their trial memorandum. One of these, The Acorn Printing Co. v. Brown, 385 S.W. 2d 812 (C.A. Mo. 1964), case is not a federal case at all. In addition, its facts are so totally dissimilar to the present case as to be no authority at all. There, Acorn Printing sued Joplin Investors as one defendant, and other defendants Brown and Whitaker for printing services. One MacIntosh, who was Chairman of Joplin, who well knew that attorney Patton represented Acorn, contrived to have Patton represent Joplin Investors, in an effort to have Acorn push liability off on the other defendants Brown and Whitaker. Here was not a question of a motion to disqualify a lawyer, but the actual seeking and employment of that lawyer to represent the interests of Joplin under very special circumstances. The case must be confined to its own very special set of facts and is no authority whatever for the propositions for which SS & D quote it extensively.

The case of Universal Athletic Sales Co. v. American Gym, Recreational and Athletic Equipment Corporation, Inc.., 357 F. Supp. 905 (W.D.Pa. 1973), is likewise no authority in this case. The facts immediately distinguish it from the present circumstances. The District Judge himself explains the circumstances:

> "In this case, we are asked by plaintiff to disqualify defendant's counsel who has represented defendant throughout this litigation and for whose services defendant has paid. The reason given is a co-defendant, to wit: defendant Larry Salkeld, has resigned or been discharged from his position as President of the defendant, now finds himself at odds with the defendant corporation. He apparently to some extent

> has sought shelter ... the tents of the enemy. If we allow this, we are opening the door to numerous attempts to disrupt relations between a corporation and its counsel by the simple device of having one of the individual defendants become hostile to the corporate defendants and then demand that the corporate defendant's counsel be disqualified."

This was a unique case as the Judge himself stated later on at page 908:

> "First, this case is unlike any other reported case that we have discovered since here the conflict arises in the original lawsuit itself. This is not a case where an attorney represented one client in a former piece of litigation and thereafter takes a lawsuit against him in which confidential information derived from the first case can possibly be used."

The Court concluded that there was no demonstration that a conflict either actually or possibly existed in the instant case. Nevertheless, the Court left the whole matter open and agreed that should an actual conflict of interest develop during the course of the litigation, it would consider a petition to remove counsel.

The case of Gottwals v. Rencher, et al., 98 P. 2d 481 (S. Ct. Nev. 1940), is mis-cited in SS & D's brief as "98 F. 2d 481. This is not a federal case at all. It is further totally distinguishable from the present case in that the Court there found that there was both an express waiver and an implied waiver of the representation of one of the defendants by attorney Morse. The facts further disclose that the only contact between the plaintiff and Morse was minimal.

In the case of Shelly v. The Maccabees, 184 F. Supp. 797 (E.D.N.Y. 1960), the SS & D brief quotes the West headnote to make it appear that the crux of the decision was confidential information. Actually, the Court went upon the issue of whether or not prior representation was substantially related to

the issues involved in the instant action. Let us quote exactly from the opinion:

> "I agree with the defendant's contention that as set forth in Marco v. Dulles, D.C., 169 F. Supp. 622, at page 629, '(4) It is unnecessary on a motion to disqualify for a former client to show that his former attorney is in the possession of specific secrets or confidences.' As Judge Weinfeld said in T. C. Theater Corp. v. Warner Bros. Pictures, Inc., D.C.S.D.N.Y., 113 F. Supp. 265, 268, the rule is 'that where any substantial relationship can be shown between the subject matter of a former representation and that of a subsequent adverse representation, the latter will be prohibited.' Judge Weinfeld said, further, at page 268, 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 actior wherein the attorney previously represented him, the former client." (Emphasis ours).
>
> "(5) In the case at bar, however, the retainers of Manning Hollinger and Shea by 'The Maccabees' were of a most limited and specific nature. They represented 'The Maccabees' only in the proceeding to transform it from a fraternal benefit insurance society into a mutual insurance company, and in the investigation conducted by the Insurance Department of the State of New York, matters totally unrelated to the instant case, wherein they represent the plaintiff Shelley in an action for the breach of certain contracts and for conspiracy to induce the breach thereof; nor have they ever represented any of the individual defendants therein."

Shelly v. The Maccabees, supra, is only the most limited authority for requiring that a former attorney have access to confidential information. The real basis of the decision was that the attorneys previously represented the complaining party on matters totally unrelated to the instant case. To the limited extent that this case seems to require confidential information, it has long since been by-passed by more recent and more authoritative cases cited in the City's initial brief.

The citation of the case of Harry Rich Corporation v. Curtis-Wright Corporation, 233 F. Supp. 252 (D.C.N.Y. 1964) is bizarre. In the first place, all that is reported is part of a hearing with no final order.

In the next place, if the case is authority for anyone, it is authority for the City. What the SS & D brief completely omits is the following quote from the trial judge:

> "A second situation, however, can be envisioned wherein information is disclosed by Jones, who is either actually or potentially a client, but is not, for whatever reason, informed by counsel of the latter's general retainer by Smith whose interests in the particular matter may possibly conflict with his own. In such an instance, a disclosure by Jones, no matter how inocuous and irrespective of availability of the same information from outside sources, should preclude counsel from representing Smith in the particular matter. Citing T.C. Theater Corp. v. Warner Bros. Pictures Corp., 113 F. Supp. 265."

What is also omitted from the SS & D brief is the balance of the paragraph that they quote at page 254:

> "In the second case, the client is entitled to regard counsel as unswervingly dedicated to his cause, i.e., as in the normal attorney-client relationship with him, even if no financial arrangements have been made between them, and even if the lawyer has not definitely agreed to take the matter. In the interest of promoting public confidence in the attorney-client relationship, any disclosure, no matter how trivial, and whether or not of information otherwise easily obtainable, will be sufficient to disqualify counsel from acting further."

The case of Silver Chrysler Plymouth Inc. v. Chrysler Motors Corporation, Inc., 518 F. 2d 751 (Ca. 2 1975), is fully distinguishable. All that case held was that one former young associate of an 80-man firm whose involvement with Chrysler had been limited to briefs and formal discussions on procedural matters or research on specific points of law need not be disqualified when some years later he sought to represent a dealer against Chrysler. It was a matter of great importance in the decision that the lawyer in question, Shriver, was only a young associate who worked on matters not substantially related to the issues in the instant litigation. The Court said:

"But there is reason to differentiate for disqualification purposes between lawyers who become heavily involved in the facts of a particular matter and those who enter briefly on the periphery for a limited and specific purpose relating solely to legal question. In large firms, at least, the former are normally the more seasoned lawyers and the latter the more junior."

This case is totally unlike the present case where numbers of the top partners of SS & D have represented the City on virtually all its financial affairs including MELP bond financings for 65 years.

In summary, none of the seven (7) cases cited by SS & D are respectable authority for the proposition that in order to disqualify a lawyer a client must show that he has imparted confidential information to him. The opinion of the majority of the Board is correct. An impossible burden is placed upon a client when he must sort out and distinguish all those things which he told his lawyer that were confidential as opposed to non-confidential. The burden becomes totally impossible when there is a relationship such as existed between the City of Cleveland and SS & D which stretches back 65 years and involved numerous SS & D lawyers and numerous City officials now long departed.

If the client must constantly keep separate the confidential matters he discloses to his lawyer from the non-confidential, in the expectation that "non-confidential" matters may be later used against him by the lawyer, then the whole lawyer client relationship is undermined. SS & D's position is ruinous to that relationship. The law is absolutely against them. Marketti v. Fitzsimmons, , 373 F. Supp. 637 (W.D. Wis. 1974).

V. THE NUCLEAR REGULATORY COMMISSION HAS FULL POWER TO DISQUALIFY AN ATTORNEY FROM ONE OF ITS PROCEEDINGS ON THE AUTHORITY OF N.R.C. RULE 2.713 (b) AND FEDERAL CASE LAW.

The Nuclear Regulatory Commission functions through its Rules of Practice. Rule 2.713 pertains to practice before the Commission. 2.713 Appearance and practice before the Commission in adjudicatory proceedings.

(a) Representation. A person may appear in an adjudication on his own behalf or by 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. An attorney appearing in a representation capacity shall file with the Commission a written notice of appearance which shall state his name, address of the person on whose behalf he appears.

(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.
>
> (80 Stat. 385, 81 Stat. 195; 5 U.S.C. 555, 500) ¼27 F.R. 377, Jan. 13, 1962, as amended at 35 F.R. 11459, July 17, 1970; 37 F.R. 15131, July 26, 1972)

The standards of conduct of an attorney before a court of the United States is therefore, the standard used to measure the conduct of an attorney appearing before the NRC. One Federal court, the 2nd circuit, and one Federal Agency, the Patent Office, have formally adopted the Code of Professional Responsibility, as being the standard for conduct of attorneys admitted to practice before them.

That a formal Code of Conduct has not been adopted by a Federal Agency is not an impediment to controlling the conduct of persons appearing before it. If an agency is given general statutory power to promulgate rules and regulations for the proper execution of its functions, it has the authority to regulate the conduct of persons practicing before it. Schwebel v. Orrick, 153 F. Supp 701 (DC D Ct. 1957)

The Schwebel case was a challenge by an attorney to disciplinary proceedings being undertaken by the SEC. The attorney contended that 1) no statutory authority existed which would enable the SEC to discipline him; and 2) if an implied statutory power "to make rules and regulations as may be necessary for the execution of the functions vested in them (15 U.S.C. Sec. 78w (a))" granted it the authority, the SEC had failed to establish a bar from which to

disqualify the attorney, and the SEC lacked authority to take any disciplinary action.

The Court, however, refused to honor the attorney's contention and held:

> "In the exercise of its jurisdiction to determine the legal question of the authority of the administrative body to maintain the threatened action, the Court holds that the Securities and Exchange Commission has implied authority, under its general statutory power to make rules and regulations necessary for the execution of its functions to establish qualifications for attorneys found guilty of unethical or improper professional conduct (citing Goldsmith v. U.S. Board of Tax Appeals, 270 U.S. 117 (1926)), and that the Commission has adequately implemented this authority by its Rule II (b) and (c). It is not essential that a roster of the bar be maintained but is sufficient that the Commission has prescribed by regulation the qualifications for admission to practice before it." (citing Camp v. Herzog, 104 F. Supp. 134 (U.S.D.C. D.C. 1952)).

The Nuclear Regulatory Commission, with Regulation 2.713 (a) has prescribed the qualifications for admission to practice before it.

Regulation 2.713 (b) has set the standard of conduct required in the Courts of the United States.

Regulation 2.713 (c) provides for disciplinary action by the Commission.

The only question that remains is the meaning of "the standard of conduct required in the Courts of the United States."

The case of Cord v. Smith, 338 F. 2d 516 (9th Cir. 1954), explain the standards of conduct of an attorney practicing before a Federal Court. An attorney attempted to use California case law and standards to sustain his con-

tention that his actions involved in representation of his client did not involve a conflict of interest. The attorney represented Smith in a suit involving a contract that he had arranged between Smith and Cord while he was the attorney for Cord. The attorney claimed that state case law sustained his proposition that his actions were not such that a conflict of interest was present in the case as he had been authorized to communicate with Smith at the time of his employment by Cord and that no confidential information or communication was involved.

The Court refused to base any judgment upon the technical requirements of prior California case law concerning confidentiality. It held that under the Erie Railroad Doctrine, the Federal Courts were not compelled by California case law to permit, before the Federal Courts, actions by an attorney that might be sanctioned by that state.

> "When an attorney appears before a federal court, he is acting as an officer of that court, and it is that court which must judge his conduct"

The Court held, and very firmly:

> "An attorney who has represented one party in a transaction may not thereafter represent the other party in an action against his former client, arising out of or closely relating to the transaction."

Further, it stated:

> "This rule does not depend for its operation upon subsidiary decision as to whether the attorney would or might be using or misusing confidential information derived from his former client" Cord, supra, at 524.

It did, however, address the question of the conduct of an attorney before the Federal Courts and stated that the following principles applied: It quoted Judge Cardozo in Meinhard v. Salmon, 249 N.Y. 458, 464, 164 N.E.

545, 546 (1928):

> "Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to trustees there has developed a tradition that is unbending and inveterae. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the disintegrating erosion of particular exceptions . . . Only thus has the level of conduct for fiduciaries been kept at a level higher than that troden by the crowd."

The Cord Court agreed that no court should tolerate conduct which violates the Canons of Professional Ethics of the ABA - the predecessor of the ABA Code of Professional Responsibility, and disqualified the attorney.

The Court in E.F. Hutton & Co., vs. Brown,, 305 F. Supp. 371 (S.D. Tex. 1969) also examined the standards of conduct for attorneys practicing before the Federal Courts and noted that while most states and bar associations have adopted the Code of Professional Responsibility,, the Code was not necessarily statute in the entire country, although it had been held to be quasi-statutory and having the force of statute in cases in which it applied. By rule of court, some Federal Courts have adopted the Canons of the ABA or the state bar and other Federal courts had found many state court decisions in the area of attorney conduct highly persuasive.

The Hutton court disqualified both Texas and New York law firms from appearing on behalf of the plaintiff and was guided in its decision by the Canons but not limited to the minimum standards imposed by the Canons. It refused to be bound by "hair-splitting nicety" of the Canons and felt

free to look into the entire course of conduct of the two firms and found serious error of professional judgment. "The conflict alone is suificient to require disqualification." Thus were both firms disqualified.

The City submits that the minimum standard of conduct of the Federal Courts and of this Board is the ABA Code of Professional Responsibility relied upon by the Majority of the Atomic Safety and Licensing Board.

SS & D in their Trial Memorandum quibble at length with "Ethical Canon 5-16 as an improper basis for the decision of the Majority. They ignore pages 17 and 18 of the Memorandum and Order of the Board which make clear that the Board is relying on Ethical Considerations 5-16, 5-15 and Disciplinary Rules 5-101(a) and 5-105(b) and (c).

VI. CONCLUSION

The facts before this Board present an overwhelming case for disqualification. The City's lawyers for 65 continuous years, SS & D, now seek to represent CEI directly against the City's MELP in litigation. All the knowledge of the City's financial affairs gained by numerous SS & D partners over many years is now to be used against it.

This is a total conflict of interest and a violation of Disciplinary Rules 5-101 (A) and 5-105 (B) & (C) of the Code of Professional Responsibility.

The City has proved, not possible, but actual prejudice to its interests by SS & D in a number of instances. Some of these instances occurred long before the 1972-73 bond episode, where SS & D seeks to shift the blame for their misconduct to the City.

The City has proved actual prejudice by SS & D relating to numerous issues before the NRC in these proceedings, including refusal to give MELP an

interconnection; refusal to let it join CAPCO; schemes to force it to price fix by raising rates; refusal to let MELP wheel hydroelectric power; and sabotage of its bonds to deny it critical financing.

The City has proved all these matters despite frantic and so far successful efforts by its own lawyers to deny it access to 50 privileged documents prepared by SS & D for CEI dealing with the City's own MELP.

SS & D do not even pretend they ever made an honest or full disclosure to the City of their secret misconduct. They are too busy concealing it by helping CEI claim privilege for them.

What is truly incredible is that they have lived with a pattern of misconduct so long they are incapable of seeing it.

How else can one explain the extraordinary admissions in their own briefs that their "loyalty and primary committment to that client (CEI) has been unqualified."

or

"they were dealing "at arms length" with their client the City"

or

"the conflict (between CEI and the City) was not a future one but an existing one"

or

"John Lansdale Jr. has provided CEI with legal advice adverse to the interests of the municipal elective light and power plant...This is correct."

Even the Minority opinion of the Board conceded at page 11; "Nevertheless, there was a direct and substantial conflict of interest."

If the minority opinion and SS & D both concede SS & D's flagrant

conflict of interest in its past dual representation of CEI and the City the further damage the City will suffer from its attorneys in direct litigation with them will be ruinous to the entire future of its electric light operation. They must be disqualified now.

Respectfully submitted,

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