UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

In the Matter of	:	
	:	Docket Nos. 50-329 CP
CONSUMERS POWER COMPANY	:	50-330 CP
	:	
(Midland Plant, Units 1 and 2)	:	(Remand Proceeding)

AMICUS CURIAE BRIEF
OF
THE LAWYERS COMMITTEE STEERING GROUP
OF THE ATOMIC INDUSTRIAL FORUM, INC.

Barton Z. Cowan, Esq.
Chairman, AIF Lawyers Committee

Of Counsel:

John R. Kenrick, Esq.
Ann M. Strickland, Esq.
Eckert, Seamans, Cherin & Mellott
42nd Floor, 600 Grant Street
Pittsburgh, Pennsylvania 15219
(412) 566-6000

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Introduction

The Lawyers Committee Steering Group of the Atomic Industrial Forum, Inc. ("Lawyers Committee") files this brief as amicus curiae in connection with the appeal of the Partial Initial Decision (Remand Proceeding) dated December 22, 1981 ("Decision") of the Atomic Safety and Licensing Board ("Licensing Board") in the above-captioned case. Amicus addresses this brief only to two legal issues involved in this appeal:

1. The appropriate standard to be applied in preparation of direct testimony, with respect to the duty of affirmative disclosure of information in such testimony; and

2. The appropriate standard of conduct for counsel in connection with assistance to expert witnesses in the preparation of their direct testimony.

In its Decision the Licensing Board decreed standards not previously recognized or followed in other administrative or court proceedings. These new standards relate to the entire fabric of Nuclear Regulatory Commission ("Commission") licensing proceedings. Because they could have

far-reaching consequence and are of significance to the bar, amicus sought and received permission to file this brief.[1]

Amicus believes that the standards adopted by the Licensing Board are wrong. With respect to the extent of the duty of disclosure of information in direct testimony, the Licensing Board error appears to stem from a failure to incorporate in its standard the concept of materiality in determining when disclosure is required. As a result, the Licensing Board test for determining what information must be included in direct testimony of a witness does not appear properly to include the requirement that the information be probative. This creates an unacceptably low threshold for inclusion of information in direct testimony, and results in a standard which is impossible of attainment. With respect to the role of counsel in connection with preparation of direct testimony of witnesses, the Licensing Board error appears to stem from a failure to focus on the essential issue - the substance of a witness's testimony. Rather,

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[1] The Lawyers Committee "Motion for Leave to File Brief Amicus Curiae Out of Time" dated April 5, 1982 was granted by Order dated April 8, 1982 of the Atomic Safety and Licensing Appeal Board ("Appeal Board"). Amicus does not address in this brief the factual determinations of the Licensing Board, the conclusions reached by the Licensing Board concerning the actions and intentions of the parties and their counsel in the factual setting below, or the question of imposition of sanctions. Amicus also does not address the question concerning the right of Intervenors Other Than Dow ("Intervenor") to appeal from the Decision.

the focus of the Licensing Board was on the origin of the testimony and the manner of its preparation. This led the Licensing Board to lay down strictures on counsel which are inappropriate and inconsistent with the legal and ethical obligations of counsel. In each area, the standard adopted by the Licensing Board improperly interferes with the attorney-client relationship, is not in accordance with sound administrative practice, and should be set aside.

Interest of Amicus

The Atomic Industrial Forum, Inc. ("Forum") is an association of over 600 domestic and overseas organizations interested in the development of peaceful uses of nuclear energy. Its members include electric utilities, manufacturers, architect-engineers, consulting firms, law firms, mining and milling companies, and others who design, build, operate and service facilities for the production of nuclear fuel and the generation of nuclear power. Consumers Power Company is a member of the Forum. The Lawyers Committee is a standing committee of the Forum whose membership comprises a wide spectrum of lawyers with extensive experience in the law relating to nuclear regulation and practice. Many members are actively engaged in practice before the Nuclear Regulatory Commission and its licensing and appeal boards.

Background

The major issue addressed by the Licensing Board in the remand proceeding which led to issuance of the Decision here on appeal was to resolve certain charges relating to the conduct of one of the parties and its counsel in the prior construction permit proceeding in this case (Decision at 6). Those charges, which arose from an alleged attempt to prevent full disclosure of certain facts to the Licensing Board (see Decision at 8), led to a consideration by the Licensing Board of the extent of the duty in Commission proceedings to disclose information in direct testimony and the appropriate role of counsel in connection with preparation of direct testimony of expert witnesses.

Although the Licensing Board articulation of the "high standards of testimony preparation and other conduct" (Decision at 40) is far from clear, the following appears to amicus to be the essence of the Licensing Board ruling:

1. With regard to the extent of the duty to disclose information in direct testimony:

a. There is a "nondelegable duty to adhere to the highest standards of disclosing relevant information" (Decision at 40; emphasis added).

b. "If there is any question as to whether disclosure of a particular piece of information might be required, that information must be disclosed" (Decision at 29; emphasis added). Accordingly, "[i]f counsel have any doubts whether disclosure of particular material is required, . . . that information should be disclosed" (Decision at 34; emphasis added).

c. Drafts of testimony, at least to the extent they may contain differences from the final version of such testimony, should be "voluntarily and affirmatively disclosed" as part of the direct testimony (Decision at 32).[2]

2. With regard to the appropriate role of counsel in connection with preparation of direct testimony:

a. Counsel may not actively participate in drafting written testimony, except in certain limited circumstances, although counsel may select the questions to be answered by the witness in direct testimony (Decision at 38-39).

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[2] As part of this ruling, the Licensing Board also held (Decision at 31-32) that drafts of testimony are not protected by the attorney's work product privilege - a ruling so clearly erroneous that the Board did not cite and amicus research failed to uncover a single case supporting the position of the Licensing Board. See discussion, infra, at 18-24.

b. "The words [to be included in direct testimony] should, at a minimum, be those of the witness although the attorney may suggest clarification of vague or confusing parts or may suggest omission of totally irrelevant material" (Decision at 38).

c. An apparent exception to the strictures above applies, and the role of counsel may be different, "where direct testimony is the joint product of multiple input, such as that prepared by a panel of technical witnesses" (Decision at 39).

d. An exception also may apply if a witness is not knowledgeable, due to lack of personal involvement, with all of the facts in his written testimony. (See Decision at 39).

Amicus addresses these purported standards in the following sections of this brief and discusses why the Licensing Board erred in adopting them.

Discussion

I. The Proper Standard for Inclusion of Information in Direct Testimony Must Include Materiality.

Amicus submits that in Nuclear Regulatory Commission adjudicatory proceedings, the proper standard to be applied in determining whether information must be included

in direct testimony must involve whether the information is relevant and material to the issue being considered. If information relates to an issue, i.e., is relevant, and is reasonably likely to influence a reasonable agency expert or a licensing board in making a determination on the issue, i.e., is material, the information is to be included in testimony. If information relates to an issue but is not likely to influence the decision-maker, however, it has no probative weight and need not be submitted in direct testimony.

The starting point for consideration of this issue is the Commission Rules of Practice contained in 10 C.F.R. Part 2. 10 C.F.R. § 2.743 provides:

> "(c) Admissibility. Only relevant, material, and reliable evidence which is not unduly repetitious will be admitted. Immaterial or irrelevant parts of an admissible document will be segregated and excluded so far as is practicable."

Thus, the Commission clearly has adopted a standard for admissibility of evidence which includes the concept of materiality as well as relevance.[3]

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[3]It is axiomatic that a party is not required to include in direct testimony information which is not admissible in evidence under Commission rules.

The Licensing Board recognized the applicability of 10 C.F.R. § 2.743(c), including the requirements of both relevance and materiality. After quoting § 2.743(c) in its entirety, the Licensing Board proceeded to refer to and quote from court decisions which "analyze the distinctions involved in defining these concepts" (Decision at 15). Thus, the Licensing Board quoted from the leading case of Weinstock v. United States, 231 F.2d 699 (D.C. Cir. 1956), in which the Court of Appeals for the District of Columbia Circuit made the following distinction:

> "'Material' when used in respect to evidence is often confused with 'relevant', but the two terms have wholly different meanings. To be 'relevant' means to relate to the issue. To be 'material' means to have probative weight, i.e., reasonably likely to influence the tribunal in making a determination required to be made. A statement may be relevant but not material." (231 F.2d at 701; emphasis added).

Previously in its Decision the Licensing Board had noted that "[m]ateriality as defined by the courts generally refers to the probative weight of evidence in the decision-making process, as judged by the facts and circumstances in the particular case" (Decision at 14). The Licensing Board then quoted the following passage from Weinstock:

> "The term 'material' is used in many fields of law; for example, insurance law, bankruptcy, agency, motions for new trial upon

> the ground of newly discovered evidence, and in respect to perjury. . . . The meaning of the word appears to be consistent in these various fields. The test is whether the false statement has a natural tendency to influence, or was capable of influencing, the decision of the tribunal in making a determination required to be made." (231 F.2d at 701-02; see also id. at 702 n.6).

Thus, there can be no doubt the Licensing Board was aware that Commission regulations require evidence to be both relevant and material, that there is a distinction between these two concepts, and that to be material evidence must have probative weight.

Despite this awareness the Licensing Board failed to incorporate in its standard for determining when information must be included within direct testimony the element of materiality. In defining the standard, the Licensing Board said that "the parties had a nondelegable duty to adhere to the highest standards of disclosing relevant information" (Decision at 40; emphasis added). This description of the duty ignores the regulatory requirement that evidence be "relevant, material, and reliable." Thus, despite the cautionary note in Weinstock, the Licensing Board confused "material" with "relevant." Because the standard adopted by the Licensing Board regarding

extent of the duty of disclosure of information to be included in direct testimony is not in accordance with Commission regulations, it must be set aside.[4]

The leading Commission decision considering the standard of materiality is In the Matter of Virginia Electric and Power Company (North Anna Power Station, Units 1 and 2), CLI-76-22, 4 NRC 480 (1976), aff'g ALAB-324, 3 NRC 347 (1976), aff'd sub nom. Virginia Electric and Power Company v. NRC, 571 F.2d 1289 (4th Cir. 1978). In North Anna, the Commission and Appeal Board had occasion to consider the definition of the term "material" within the meaning of Section 186 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2236, which subjected any license issued under the authority of the Act to revocation for any "material false statement." In discussing the meaning of the word "material" the Appeal Board equated the meaning of the word "material" for purposes of Section 186 of the Act with the "meaning normally given to the word in legal

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[4]Even assuming the Licensing Board meant to encompass the elements of both relevance and materiality within the phrase "highest standards of disclosing relevant information" (Decision at 40), the Licensing Board elaboration of its standard effectively eliminated the element of materiality because the Licensing Board apparently would require inclusion in direct testimony of evidence that has no probative weight. See discussion, infra, at 12-17.

parlance" (3 NRC at 358). Citing Weinstock v. United States, supra, and other cases, the Appeal Board stated that the test of whether a statement is material "is whether the statement has a 'natural tendency' or capability to influence" (3 NRC at 359).

On appeal, the Commission upheld the Appeal Board reading of the meaning of the word "material,"[5] declaring:

> "Materiality depends upon whether information has a natural tendency or capability to influence a reasonable agency expert." (4 NRC at 491).[6]

Earlier in its opinion the Commission had stated:

> "On the other hand, VEPCO's suggestion that materiality contain an element of reliance is also unpersuasive. As the Appeal Board opinion makes clear,

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[5]The Commission in North Anna affirmed the Appeal Board decision except for the matter of omissions, finding that material omissions were punishable as "material false statements." In all other respects, the Appeal Board decision was affirmed and the Commission specifically noted that, except as otherwise indicated in its decision, "we rely on the opinion of the Appeal Board in disposing of this case" (4 NRC at 492 n.12).

[6]The "Additional Views of Chairman Palladino" in In the Matter of Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-82-1, 14 NRC ____ (February 10, 1982), also used this standard when the Chairman, in concluding that a material false statement had been made, stated that the statement "had the capability to influence the NRC Staff with regard to the matter [under consideration]" (14 NRC at ____).

> the term 'material' has often been construed by the courts, and they agree that materiality is judged by whether a statement is capable of influencing a decision-maker, not whether the statement would, in fact, have been relied on. The weight to be accorded relevant information is, in the end, the job of the independent regulatory commission, not the applicant." (4 NRC at 487; emphasis added).

This standard of materiality as defined by the Commission is missing from the Licensing Board Decision in the instant case. The declaration by the Licensing Board that "[i]f there is any question as to whether disclosure of a particular piece of information might be required, that information must be disclosed" (Decision at 29) cuts against any argument that by use of the word "relevant" the Licensing Board meant to encompass the standard of materiality discussed by the Commission in North Anna. Similarly, the statement that "[i]f counsel have any doubts whether disclosure of particular material is required, . . . that information should be disclosed" (Decision at 34) represents a declaration by the Licensing Board that the test of relevance, as that term is used in its Decision, does not include the element of materiality.

In the course of witness preparation, counsel frequently may inquire or consider whether information is probative, and hence material. Such inquiry may arise, for

example, from consideration of questions concerning the interpretation or scope of a contention that may have been inexactly or inartfully worded. To say that "any doubts" must lead to inclusion in testimony of information effectively eliminates the ability to interpret the scope of a contention or what is necessary to meet a burden of proof concerning it. At one point in its opinion the Licensing Board recognized that "[t]he test is whether the statement has a natural tendency or capability to influence" (Decision at 15) - the test used by the Commission in North Anna. In the very next sentence, however, the Licensing Board said that "[t]he basic question is whether the representation could conceivably or was potentially capable of influencing or affecting a decision-maker" (Decision at 15; emphasis added). This is not the standard laid down by the Commission.

In North Anna, the Commission noted the lack of any "obvious boundary between material information and trivia" (4 NRC at 487). Recognizing that there will be clear cases of both, as well as hard cases in between, the Commission called for "careful attention to context along with a healthy dose of common sense" to resolve questions of what information is material. As noted by the Commission, "determinations of materiality require

careful, common-sense judgments of the context in which information appears and the stage of the licensing process involved" (4 NRC at 491).

In contradistinction to this Commission call, the Licensing Board in the present case has set forth hard and fast rules which would allow for no judgment whatever on the part of counsel or parties. If the touchstone of inclusion of information in direct testimony were, as stated by the Licensing Board, whether it "could conceivably" influence or affect a decision-maker, and if the standard requires disclosure of information in direct testimony if there is "any question as to whether disclosure of a particular piece of information might be required" (Decision at 29), what is left of the Commission call for careful, common-sense judgments? The Licensing Board error is in attempting to eliminate the exercise of careful, common-sense judgments of counsel and the parties and substitute a requirement that would result in all information, regardless of its probative value, being amassed as testimony. Simply stated, the threshold established by the Licensing Board for inclusion of information in direct testimony is unacceptably and unreasonably low.[7]

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[7] The other Appeal Board opinions cited by the Licensing Board in the Decision do not add to the definition of

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There is yet another dimension to materiality that is missing from the standard as articulated by the Licensing

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materiality established by the Appeal Board and the Commission in North Anna.

In the Matter of Vermont Yankee Nuclear Power Corporation (Vermont Yankee Nuclear Power Station), ALAB-138, 6 AEC 520 (1973), involved the application of the materiality standard for bringing to the attention of the board information which corrected a factual error in a board order. The particular fact involved had not been brought to the attention of the board previously because, although it was relevant, it was not material. Only the factual error in the board order made it material and hence required the disclosure to the board.

Cases such as In the Matter of Duke Power Company (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397 (1976); In the Matter of Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33 (1977); and In the Matter of Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-409, 5 NRC 1391 (1977), basically address the reporting requirement, as imposed in the leading decision in In the Matter of Duke Power Company (William B. McGuire Nuclear Station, Units 1 & 2), ALAB-143, 6 AEC 623 (1973), which places a duty on parties to bring to the attention of the appropriate tribunal information which is relevant and material to the matters being adjudicated. See In the Matter of Georgia Power Company (Alvin W. Vogtle Nuclear Plant, Units 1 and 2), ALAB-291, 2 NRC 404 (1975). The Appeal Board in the McGuire case did state that "[a]ny uncertainty regarding the relevancy and materiality of new information should be decided by the presiding board" (6 AEC at 625 n.15). This notation, however, must be read in the context of the McGuire case, where new information was involved which represented a change from facts previously presented to the licensing board and already in evidence in the case. In such a situation the Appeal Board correctly stated that changes must be disclosed or otherwise an adjudicatory board

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Board. Whether a fact is material must be viewed in the overall context of a proceeding. This necessity of considering context in determinations of materiality can be seen not only in the Commission decision in North Anna, but also in the opinion of the Court in Weinstock v. United States, supra, and of the United States Supreme Court in TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438 (1976). In the latter case, the Supreme Court stated:

> "Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." (426 U.S. at 449; footnote omitted).

Characterizing issues of materiality as being a mixed question of law and fact, the Supreme Court cautioned that

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might be passing on evidence "which would not accurately reflect existing facts." It was in this context that the Appeal Board wrote its footnote. The footnote was never interpreted to mean that in connection with direct testimony all information, which "could conceivably or was potentially capable of influencing or affecting a decision-maker" must be included. Further, amicus respectfully suggests that although the thrust of the footnote is appropriate, the reference to "any uncertainty" may be too broad, and should not be read to extend to the situation involved in preparation of direct testimony.

"the underlying objective facts, which will often be free from dispute, are merely the starting point for the ultimate determination of materiality" (426 U.S. at 450). The test laid down by the Licensing Board in the present case would have the underlying objective facts be the ending point for consideration of what must be included in direct testimony. If the test is to be whether facts could conceivably influence or affect the decision-maker or whether there is any question as to whether information might be required, there is not only no room left for application of common sense, as called for by the Commission, there is also no room left for giving careful attention to context, as both the Commission and the Supreme Court mandate.[8]

The Licensing Board apparently would require that drafts of testimony be "voluntarily and affirmatively disclosed" as part of the direct testimony of a party, at least to the extent they may contain differences from the final version of the testimony. Amicus suggests that any such requirement is improper and, if adopted, would be unusual, if not unique, in American jurisprudence.

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[8] Although application of the appropriate standard for inclusion of information in direct testimony might be difficult to apply in particular cases, this does not justify abandoning the correct standard. As noted by the Commission in North Anna: "But the existence of hard cases does not argue for changing the appropriate rule of law" (4 NRC at 491).

Drafts of testimony are protected by the attorney work product privilege which protects against discovery and production of written statements and mental impressions which constitute the work of an attorney in the preparation of a case for hearing or trial. Hickman v. Taylor, 329 U.S. 495 (1947). In Hickman, the Supreme Court declared the basis for the work product privilege to be "the general policy against invading the privacy of an attorney's course of preparation," a policy which the Court said was "well recognized" and "essential to an orderly working of our system of legal procedure" (329 U.S. at 512). In Upjohn Co. v. United States, 449 U.S. 383 (1981), the Supreme Court reaffirmed the "strong public policy" underlying the work product privilege (449 U.S. at 398). That strong public policy applies no less to Commission proceedings than it does to proceedings before grand juries and the federal courts.

In rejecting the argument that drafts of testimony are covered by the attorney work product privilege, the Licensing Board stated:

> "Drafts of testimony, if they are properly prepared, reveal mental impressions of the witness rather than those of the attorney. The testimony, after

> all, is to be the sworn statement of the witness, not the attorney." (Decision at 31).

There are at least two problems with this rationale. First, it confuses testimony which is to be the sworn statement of the witness with drafts of testimony which are not the statement of the witness. Drafts of testimony are just that - drafts. In adjudicatory hearings before administrative agencies or trials in the federal and state courts of this country, only sworn testimony is admitted. Whether as precursors either to submission of written direct testimony or to presentation of oral direct testimony, drafts are not evidence. Drafts may include information which has not yet been checked or verified, as well as thoughts, ideas, or facts that eventually may be deleted as unreliable, non-probative, or cumulative. Drafts are not intended to be the sworn statement of the witness unless and until they are finalized as the actual testimony itself.

Second, and more important, a statement that drafts reveal mental impressions of the witness rather than those of the attorney fails to recognize the reality of proper hearing preparation. The lawyer who does not prepare properly for trial may be subject to suit and disciplinary action. Part of such preparation is the preparation of testimony, and it is common that such testimony first be

prepared in draft form. Depending on the style of counsel, the significance of the case, and a host of other factors, even testimony which may be given orally on direct examination may be written in advance so that all possible facets of the proposed direct questions and answers can be considered.

Parties, counsel and witnesses work together to assemble information which will be offered in evidence. The thoughts and hypotheses mooted in this collegial effort are surely not all "evidence." Not all testimony proposed or discussed at the preparatory stage is relevant, accurate or material. Some of it may be misleading or foolish. The Licensing Board ruling would sidetrack and delay proceedings by requiring that all of the chaff, not just the kernel, be put into the record. It would admit to the record the unformed, immaterial thoughts and the tentative, untried conclusions of those assembling the evidence. One result would be to give weight to erroneous propositions; another would be to inhibit the process of developing truly probative evidence.

Even the Licensing Board recognizes the appropriateness of counsel asking questions of proposed witnesses as part of the preparation process. Such questions, especially in the earlier or drafting stages for testimony, represent

and reveal the mental impressions of the attorney, his legal theories, planned strategy, and perhaps even the degree of preparation of his case. To say that drafts of testimony prepared as a response to such questions do not reveal the mental impressions of the attorney ignores this practice.

As noted by the Sixth Circuit in In re Grand Jury Subpoena Dated November 8, 1979, 622 F.2d 933, 935 (6th Cir. 1980), there is a "zone of privacy" for the investigation, preparation, and analysis of a case. The suggestion of the Licensing Board that drafts of testimony must be included as part of direct testimony would seriously and substantially invade that zone of privacy. The Licensing Board attempted to distinguish the Grand Jury Supoena case by observing that: "Most submissions, unlike testimony, are not the sworn statement of a witness. They are more likely to be briefs or argument" (Decision at 31 n.59). The flaw in this distinction is that drafts of testimony also are not the sworn statement of a witness.[9]

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[9] Amicus questions whether even under its own terms the Licensing Board distinction is valid. Submissions to an agency frequently include statements under affidavit which are prepared by counsel, as well as briefs and argument.

In order for counsel to prepare a case effectively and to plan strategy, there is a necessity for full and frank communication between attorney and client. This necessity was recognized in the recent decision of Upjohn Co. v. United States, supra, where the Supreme Court observed that such full and frank communication between attorneys and their clients promoted "broader public interests in the observance of law and administration of justice" (449 U.S. at 389). The Supreme Court went on to state that "sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client" (449 U.S. at 389). Part of the process by which lawyers become fully informed by their clients is the process of preparing direct testimony and, in particular, the process of drafting such testimony. This process would be seriously interfered with if drafts of testimony are required to be included as part of the direct evidence.

Mandating the inclusion of drafts as part of direct testimony also would violate the attorney-client privilege, as well as the work product privilege. The scope of the attorney-client privilege, the oldest privilege for confidential communication known to the common law, recently was discussed fully by the Supreme Court in the Upjohn case.

In that case, counsel for a pharmaceutical company, as part of an investigation into the matter of questionable payments by the company to foreign government officials to secure government business, sent a questionnaire to its foreign managers seeking detailed information concerning such payments. Written responses of the managers were received by the general counsel. Subsequently, in the course of a tax investigation, the Internal Revenue Service demanded production, inter alia, of the questionnaires and written responses. The Supreme Court held that the attorney-client privilege applied and that the responses did not have to be furnished. In so ruling, it noted that the privilege was designed to encourage full and frank communication between attorneys and their clients, stating:

> "the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice. . . . The first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant. See ABA Code of Professional Responsibility, Ethical Consideration 4-1:
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> > 'A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to

> separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.'
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> See also Hickman v. Taylor, 329 U.S. 495, 511 (1947)." (449 U.S. at 390-91; emphasis added).

The Licensing Board requirement that drafts of testimony be included as part of direct evidence where they are different from the final testimony would cut against the professional responsibilities of a lawyer to be fully informed of all the facts so as to be able to exercise his or her independent professional judgment to "separate the relevant and important from the irrelevant and unimportant."[10]

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[10] The development of testimony usually takes place after discussion among counsel and client concerning the nature and scope of the issue to be addressed, the extent of the information available to address a contention, the relevance and materiality of the information, and the appropriate manner of presentation of the information. Because of the nature of the process and the substantial quantity of information available on any particular subject, testimony by its very nature must be selective; that is, those facts which are probative on the ultimate issue must be ascertained and incorporated into the testimony from among the literally hundreds and sometimes thousands of items of information available. It is not uncommon in some areas for a license applicant to have tens, and sometimes hundreds, of engineers and scientists working on technical areas which may relate

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In sum, (1) the Licensing Board erred when it articulated a standard for inclusion of information in direct testimony which did not properly include the necessity that the testimony be material; (2) the Licensing Board erred when it articulated a standard whereby "any question" or "any doubt" as to whether a piece of information might be required triggers disclosure; (3) the Licensing Board erred when it established as part of the test for determining whether information is required to be included in direct testimony a question of whether information "could conceivably" influence or "was potentially capable of influencing or affecting" the decision-maker; and (4) the Licensing Board erred when it required inclusion in direct testimony of drafts of such testimony to the extent they contain differences from the final version of such testimony.

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to a contention. Similarly, the Commission Regulatory Staff may have numerous individuals working in a technical area either directly or through contracts with the national laboratories. One of the difficulties with the Licensing Board standard is that any or all of the information known to such persons could be included within the scope of information which "could conceivably or was potentially capable of" influencing or affecting the decision-maker. Amicus submits that the Licensing Board standard is impossible of attainment.

Amicus urges the Appeal Board to make it clear that the proper standard to be applied in determining whether information must be included in direct testimony includes whether the information is relevant and material to the issue being considered. Amicus also urges the Appeal Board to make it clear that the proper definition of materiality, as included within the standard, is that laid down in the Commission ruling in North Anna, to wit, that information is material, and hence should be included, if it has a natural tendency or capability to influence a reasonable agency expert or the Licensing Board. Amicus further urges the Appeal Board to permit careful attention to context and careful, common-sense judgments to enter into the process of determining when information must be included in direct testimony, and to allow counsel and the parties to continue to have an appropriate and active role in separating the relevant and material from the irrelevant and immaterial.

II. The Appropriate Role of Counsel in Assisting Experts in Preparation of Direct Testimony Is to Participate to the Fullest Extent Consistent with Ethical Obligations.

Amicus submits that in Nuclear Regulatory Commission adjudicatory proceedings, as in judicial proceedings, the appropriate role of counsel in connection with the

preparation of direct testimony, whether of experts or others, is to provide as much assistance as possible consistent with an obligation not to present false, fraudulent, or misleading testimony. Under this broad standard counsel may properly do all of the following: suggest language as well as the substance of testimony, suggest inclusion in testimony of information not initially secured from a witness, actively participate in the drafting of such testimony, prepare a witness to furnish such testimony, assemble the testimony in the format most useful to the board, and do whatever else is feasible or necessary to prepare a witness for examination or cross-examination.

In its Decision, the Licensing Board established a standard for the conduct of counsel in connection with the preparation of direct testimony that is at variance with the above standard and which, unless modified, would contravene the ethical and legal obligations of a lawyer to his or her client. The Decision requires that counsel not participate actively in drafting of written testimony, except in certain limited circumstances, although counsel may select the questions to which the witness is to respond. Apparently, all the Licensing Board would permit beyond the asking of questions to the expert would be for counsel to "suggest clarification of vague or confusing parts" or to

"suggest omission of totally irrelevant material" (Decision at 38-39). The Licensing Board carved out an apparent exception to this rule, indicating the role of counsel might be different "where direct testimony is the joint product of multiple input, such as that prepared by a panel of technical witnesses" (Decision at 39). One other exception may apply if a witness is not knowledgeable from his own direct personal involvement with all of the facts encompassed in his sworn testimony. (See Decision at 39). Amicus believes these severe limitations on the role of counsel in connection with the preparation of direct testimony are improper.

The principal source of error on the part of the Licensing Board with regard to the appropriate role of counsel in connection with the preparation of direct testimony appears to stem from its failure to focus on the essential issue with regard to testimony, to wit, the substance of the testimony. Rather, the Licensing Board misdirected its attention to the origin of the information contained in the testimony and the manner of its preparation. This improper focus apparently stems from two underlying assumptions of the Licensing Board, each of which is erroneous: First, the Licensing Board appears to assume that if a lawyer participates in the drafting of direct testimony (other than by selecting questions, suggesting

clarification of vague or confusing parts, or suggesting the omission of totally irrelevant material), the testimony may somehow be inaccurate, misleading, or otherwise not the testimony of the witness who swears to its truthfulness. The unexpressed fear seems to be that the attorney may disserve the administrative process by violating accepted ethical standards. Second, the Licensing Board appears to assume that an attorney is to perform only a sharply limited function in connection with the presentation of direct evidence and that, essentially, testimony should flow directly from the mouth of the witness to the ears of the adjudicator without any significant input of or role for counsel. As a result, the Licensing Board has limited severely participation of counsel in the drafting of direct testimony, and the opportunity of counsel to serve his or her client in connection with the preparation of such testimony.

In Geders v. United States, 425 U.S. 80 (1976), the Supreme Court considered the problem of impermissible influence on testimony, or "coaching," by counsel, and held that a federal judge improperly deprived a defendant of the right to assistance of counsel guaranteed by the Sixth Amendment when counsel was prohibited from consulting with

his client during an overnight trial recess which came between the direct and cross-examination of the defendant.[11] The trial judge had been concerned about possible improper influence of defendant's testimony, or "coaching" of the witness. In the opinion of the Court, Mr. Chief Justice Burger noted that this problem, if it arises, can be dealt with in ways short of putting a barrier between client and counsel. Use of cross-examination, including examination as to the extent of any such coaching, was one method suggested for probing into the possibility of improper influence.

In a concurring opinion in the Geders case, Mr. Justice Marshall observed:

> "If our adversary system is to function according to design, we must assume that an attorney will observe his responsibilities to the legal system, as well as to his client. I find it difficult to conceive of any circumstances that would justify a court's limiting the attorney's opportunity to serve his client because of fear that he may disserve the system by violating accepted ethical standards." (425 U.S. at 93).

This statement is equally applicable to the decision on appeal in the present case. Amicus submits that except

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[11] The decision of the Supreme Court in the Geders case was unanimous, with one Justice not participating.

in rare circumstances limiting counsel's opportunity to serve by allowing inquiry into the method of preparation of, or the origin of language in, testimony should not be allowed.[12]

The Licensing Board seems to have interpreted a Supreme Court footnote in the Geders case as prohibiting any influence by an attorney on testimony (Decision at 39 n.89). In Geders, the Supreme Court had noted that:

> "An attorney must respect the important ethical distinction between discussing testimony and seeking improperly to influence it." (425 U.S. at 90 n.3; emphasis added).

The Supreme Court went on to cite Ethical Consideration 7-26 of the American Bar Association Code of Professional Responsibility (1975) and Disciplinary Rule 7-102 of the Code.

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[12]When a witness presents sworn testimony, the testimony is that of the witness no matter who prepares the initial or subsequent drafts or who provides the information they contain. It is the accuracy of the testimony that is to be ascertained and not the methodology by which it was prepared.

This confusion between concern for the accuracy of testimony and the method of its preparation sometimes has led to improper exploration in Commission licensing proceedings into the manner in which the Commission Regulatory Staff performed its work. The strictures on counsel set forth by the Licensing Board would promote such collateral attacks. Further, if carried to its logical conclusion, the Licensing Board standard could open the way for inquiry into and interference with other aspects of the relationship between counsel and client beyond that involved in the preparation of direct testimony.

Although those rules and considerations clearly prohibit fraudulent, false or perjured testimony and subject lawyers to disciplinary action concerning the same, they do not in any manner bar a lawyer from seeking to influence testimony so long as such influence is not improper.

Contrary to the Licensing Board ruling, the Code of Professional Responsibility mandates active counsel participation in preparation of testimony. Ethical Consideration 7-15 provides that in administrative agency proceedings a lawyer "has the continuing duty to advance the cause of his client within the bounds of the law." Ethical Consideration 7-19 declares that the advocates "zealous preparation and presentation of facts and law" (emphasis added) is necessary to permit the hearing tribunal to render impartial judgments. The Licensing Board Decision would stifle the zealous preparation which is part of the professional duty of counsel.

Disciplinary Rule 7-102(A)(6) which prohibits a lawyer from participating "in the creation or preservation of evidence when he knows or it is obvious that the evidence is false" clearly infers that the lawyer's participation in the creation and development of accurate and truthful testimony is entirely proper. Obviously, the American Bar Association and the courts in adopting Disciplinary Rule

7-102(A)(6) considered the appropriate limits on the role of counsel in preparation of testimony.[13] Their conclusion as to the limits of such role is directly contrary to the conclusion of the Licensing Board.

Opinion No. 79, dated December 18, 1979, of the District of Columbia Bar Legal Ethics Committee is directly on point.[14] That opinion, which resulted from an inquiry arising out of the case now before this Appeal Board, delineated the ethical limitations on a lawyer's participation in the preparation of testimony. Opinion No. 79 explored the following: (1) the ethical limitations on a lawyer's suggesting actual language in written testimony; (2) the ethical limitations on a lawyer's suggesting that testimony include information not initially furnished to the lawyer by the witness; and (3) the ethical limitations on a lawyer's preparing a witness for presentation of testimony under live examination. For all cases, the Ethics Committee laid down the following single principle:

> "[A] lawyer may not prepare, or assist in preparing, testimony that he or she knows,

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[13]The American Bar Association Code of Professional Responsibility has been adopted in most jurisdictions in the United States.

[14]The Licensing Board Decision makes no reference to Opinion No. 79.

> or ought to know, is false or misleading. So long as this prohibition is not transgressed, a lawyer may properly suggest language as well as the substance of testimony, and may - indeed, should - do whatever is feasible to prepare his or her witnesses for examination." (Legal Ethics Committee Opinions at 170).

In illuminating this principle the Ethics Committee stated that the proper focus should be on the substance of a witness's testimony, not on the manner of the lawyer's involvement in its preparation. Whether particular words originate with a lawyer or the witness is immaterial so long as the substance of the testimony is not, so far as the lawyer knows or ought to know, false or misleading. Suggestion of particular language is permissible and inclusion of facts initially suggested by the lawyer rather than by the witness is wholly without significance. The governing consideration for ethical purposes is whether the substance of the testimony is something to which the witness can truthfully and properly swear. The touchstones in testimony preparation are truth and genuineness, and a lawyer who, having an opportunity to do so, does not actively prepare a witness for testimony would not be doing his or her professional job properly.

Amicus believes that imposition of the standard suggested by the Licensing Board seriously interferes with

the right to counsel accorded every participant in Commission adjudicatory proceedings. Such standard would apply not only to counsel for applicants, but also would extend to proscribe activities of counsel for the staff and for intervenors. The right to the effective assistance of counsel cannot have meaning if in the most important aspect of the hearing process - conveyance of information to the trier of fact - the role of counsel is curtailed.

Significant problems will arise if the rules of conduct and the strictures on counsel suggested by the Licensing Board are upheld. Counsel, in attempting to interpret when his or her activities go beyond suggesting clarification of vague or confusing parts or omission of totally irrelevant material, might well place himself or herself in jeopardy under the Licensing Board standard. As noted by the Supreme Court in Upjohn Co. v. United States, supra:

> "[I]f the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all. The very terms of the test adopted by the court below suggest the unpredictability of its application." (449 U.S. at 393).

The language of Upjohn applies to the present situation. The test adopted by the Licensing Board with regard to the appropriate role of counsel in connection with preparation of direct testimony is at best murky. The Licensing Board wants testimony to be "at a minimum" in words that are those of the witness. What does this mean? If an attorney "may suggest clarification of vague or confusing parts," what will be the line of demarcation for determining vagueness or confusion? If an attorney "may suggest omission of totally irrelevant material," when will material be totally irrelevant? When is it partially irrelevant? Is there a difference and what is it?

If, as the Licensing Board suggests, the role of counsel may be different "where direct testimony is the joint product of multiple input, such as that prepared by a panel of technical witnesses," how is the role different and what should be the proper role of counsel in such a situation? If an exception to the rule applies if a witness is not knowledgeable from his own direct personal involvement with all of the facts encompassed in his sworn testimony, what is the standard in such situations to which counsel must adhere? The very terms of the standard suggested by the Licensing Board demonstrate its ambiguity and the unpredictability of its application.

Amicus urges the Appeal Board to make it clear that the proper role of counsel in connection with the

preparation of direct testimony is not limited in the manner decreed by the Licensing Board. Amicus submits that in connection with the role of counsel the Appeal Board should bring the focus back to the testimony itself, and should adopt as its cornerstone the standards as enunciated by the District of Columbia Bar Legal Ethics Committee in Opinion No. 79. The principle laid down in that Opinion is consistent with rulings of the United States Supreme Court in regard to the appropriate role of counsel and represents a formulation which is in keeping with long-standing practice before courts and administrative agencies and the Code of Professional Responsibilities. Amicus urges the Appeal Board to state clearly that so long as the prohibition against preparation or assistance in preparation of false or misleading testimony is not transgressed a lawyer properly may suggest language, as well as substance, of the testimony, may participate in its drafting, and may do whatever else is necessary to prepare the witness for examination.

Respectfully submitted,

/s/ Barton Z. Cowan
Barton Z. Cowan, Esq.
Chairman, AIF Lawyers Committee

Of Counsel:

John R. Kenrick, Esq.
Ann M. Strickland, Esq.
Eckert, Seamans, Cherin & Mellott
42nd Floor, 600 Grant Street
Pittsburgh, Pennsylvania 15219
(412) 566-6000

Dated: April 15, 1982

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

In the Matter of	:	
	:	
CONSUMERS POWER COMPANY	:	Docket Nos. 50-329 CP
	:	50-330 CP
(Midland Plant, Units 1 and 2)	:	

CERTIFICATE OF SERVICE

I hereby certify that copies of the "Amicus Curiae Brief of the Lawyers Committee Steering Group of the Atomic Industrial Forum, Inc." were served upon the persons listed on Attachment 1 to this Certificate of Service by deposit in the United States Mail (First Class), postage prepaid, this 15th day of April, 1982.

/s/ Barton Z. Cowan
Barton Z. Cowan, Esq.
Chairman, AIF Lawyers Committee

Service List

CONSUMERS POWER COMPANY
(Midland Plant, Units 1 and 2)

Christine N. Kohl, Esq., Chairperson
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Gary J. Edles, Esq.
Atomic Safety and Licensing Appeal Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. W. Reed Johnson
Atomic Safety and Licensing Appeal Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

* William J. Olmstead, Esq.
William D. Paton, Esq.
Office of the Executive Legal Director
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Docketing and Service Section
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

William C. Potter, Jr., Esq.
Fischer, Franklin, Ford, Simon & Hogg
1700 Guardian Building
Detroit, Michigan 48226

R. L. Davis, Esq.
Michigan Division
Legal Department
Dow Chemical Company
Midland, Michigan 48640

* Myron M. Cherry, Esq.
One IBM Plaza, Suite 4501
Chicago, Illinois 60611

* Gerald Charnoff, Esq.
Shaw, Pittman, Potts & Trowbridge
1800 M Street, N.W.
Washington, D.C. 20036

* Copy also served by Federal Express