Confidential Release

Case Number:
90-1825-GA-COI
90-785-GA-ATA

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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

[FILED UNDER SEAL]

In the Matter of the Commission Investigation of the Suburban Fuel Gas, Inc. Relating to the Establishment of Rates.	:	Case No. 90-1825-GA-COI
In the Matter of the Application of the Suburban Fuel Gas, Inc. to Establish Initial Rates and Charges for Customers Served from Municipally-Owned Transmission and Distribution Lines Operated Under Long-Term Leases by the Applicant.	:	Case No. 90-785-GA-ATA

DIRECT TESTIMONY OF MARK H. AULTMAN ON BEHALF OF SUBURBAN FUEL GAS, INC.

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1. Q. Please state your name and business address.

A. Mark H. Aultman, 502 South Third Street, Columbus, Ohio 43215.

2. Q. What is your occupation?

A. I am an attorney-at-law with my practice concentrated in the area of legal ethics and grievances.

3. Q. In what states and courts have you been admitted to practice?

A. Ohio; New York; Federal District Court, Southern District of Ohio; United States Supreme Court.

4. Q. What is your background and education?

A. While I have attached my resume as Exhibit MHA-1 to this testimony, I will briefly outline my experience as it relates to the legal ethics and grievance area of the law.

5. Q. Please proceed.

A. I graduated from the University of Virginia Law School in 1968. I am formerly, for two years, chairman of The Greene County (Ohio) Bar Association Ethics and Grievance Committee and formerly grievance counsel, for two years, for the New York State Bar Association and office of Grievance Committee. Most recently, for seven years, I was grievance counsel for the Office of Disciplinary Counsel of the Supreme Court of Ohio. I am an instructor in legal ethics courses accredited by the Ohio Supreme Court Commission on Continuing Legal Education and have authored articles and reviews on legal

ethics and related topics in various journals including The National Law Journal and The Notre Dame Lawyer.

6. Q. For whom are you appearing?

A. Suburban Fuel Gas, Inc., (hereinafter Suburban).

7. Q. For what purpose are you appearing?

A. I was asked by counsel for Suburban to review the facts and circumstances relating to the Motion to Disqualify portion of these proceedings for purposes of assisting in the identification of ethical issues and rendering an opinion, if possible, on those ethical issues. After discussion, I accepted and am appearing here for those purposes.

8. Q. What materials did you review as a part of your engagement?

A. I reviewed the following:

> Deposition of David Pemberton (2/8/91), with exhibits; Deposition of Samuel Randazzo (2/25/91); certain Public Utilities Commission of Ohio (hereinafter PUCO) Entries in these cases (12/13/90, 2/7/91, 2/21/91); Motion of Consolidated Biscuit to Intervene (12/20/90), Motion To Disqualify (1/7/91); Memorandum Contra (1/22/91); and, Reply To Memorandum Contra (1/30/91).

9. Q. From your review of these documents, please review the facts as you understand them.

A. Very well. As I understand the facts, David Pemberton, President of Suburban Fuel Gas, Inc. called Samuel C. Randazzo, attorney, on May 8, 1990, to inquire as to whether or not Mr. Randazzo would represent the company in a PUCO matter involving rates in several villages in northwest Ohio. One of the villages was the Village of McComb, where

Consolidated Biscuit Company is the largest customer of Suburban in the village. Consolidated has been the beneficiary of a special rate provided for in contracts negotiated by the village with Suburban. Mr. Randazzo stated that there were certain potential conflicts of interest that he would have to check into, including consulting with another client, Ohio Gas, before he could agree to representation.

On May 9, 1990, Mr. Randazzo called back and Mr. Pemberton returned his call. Mr. Randazzo told Mr. Pemberton that Ohio Gas would not object to his representation and that he would be willing to represent Suburban. Mr. Pemberton thereafter discussed with Mr. Randazzo areas of particular concern to Mr. Pemberton in the rate filing. This included the strategy of treating it as a "first filing", and according to Mr. Pemberton, whether certain property owned by the municipalities but leased to Suburban could be included in the rate base, and whether costs associated with a line known as the "ARCO line" were includable in the rate base, the great importance of these issues to Suburban and the possibility of a Supreme Court appeal of these issues.

On May 10, 1990, Mr. Randazzo called Mr. Pemberton, he later said in a letter to Mr. Pemberton, "to get a better understanding of the scope of work which you anticipate to be a part of our retention". At least by this time it appeared that Mr. Randazzo had misgivings, which he expressed to Mr. Pemberton, about the "first filing" strategy. At least by May

11, 1990, Mr. Randazzo made clear to Mr. Pemberton that he would not represent Suburban in the matter. On May 11th, Mr. Pemberton wrote to Mr. Randazzo concerning, inter alia, the importance of maintaining client confidences concerning the information he had disclosed to Mr. Randazzo.

On May 10, 1990, Suburban filed a PUCO application, as a "first filing", in case no. 90-745-GA-ATA, concerning the matter. By order dated December 13, 1990, after requests by the Village of McComb and Consumer's Counsel to intervene, the Commission initiated an investigation (Case No. 90-1825-GA-COI) into Suburban's total operations, holding in abeyance the "first filing" application. On December 20, 1990, Consolidated Biscuit, represented by Mr. Randazzo and another attorney in his law firm, filed a motion to intervene in both cases. Immediately upon learning of Mr. Randazzo's representation of Consolidated, Suburban objected, and on January 7, 1991, filed a motion to disqualify Mr. Randazzo and members of his law firm.

Mr. Randazzo or his firm began to represent the Village of McComb in July of 1990 concerning Suburban's ATA filing, although no appearance of record was ever entered by Mr. Randazzo or his firm at the PUCO on behalf of the Village of McComb. Suburban did not learn of that representation until a deposition was taken of Mr. Randazzo on February 25, 1991.

10. Q. Do these facts present a question concerning the ethical obligations of Mr. Randazzo and his firm and whether he should

be permitted to represent clients adverse to Suburban in this matter?

A. Yes, most definitely.

11. Q. Please describe the legal and ethical standards which are applicable in situations such as this:

A. Ohio's Disciplinary Rule 4-101 prohibits using clients confidences or secrets. Ohio's DR5-105 prohibits representing or continuing to represent clients when there are conflicts between the clients. Under Ohio Board of Commissioner's Opinion 89-013 interpreting the Disciplinary Rules, a "lawyer is prohibited from representing a client against a former client when two conditions are met: the interests of the former client and the present client are adverse in some material respect, and the matters involved in the former and the current representations are the same or substantially related" (language taken from syllabus). Both of these tests are obviously met here.

12. Q. Based upon the facts as you understand them, have you formed an opinion as to whether or not the representation by Mr. Randazzo of Consolidated Biscuit and the Village of McComb violates DR4-101 and 5-105?

A. Yes.

13. Q. What is that opinion?

A. Mr. Randazzo's representation and use of confidential information violates, and will continue to violate, if he continues to represent clients adverse to Suburban in these

matters, Ohio's Disciplinary Rules 4-101 and 5-105.

14. Q. Do you also have an opinion as to whether or not Mr. Randazzo should be disqualified?

A. Yes.

15. Q. What is that opinion?

A. Based upon my analysis, he should clearly be disqualified.

16. Q. Please explain the bases for your conclusions.

A. Under Ohio Law, "where a person approaches an attorney with the view of retaining his services to act on the former's behalf, an attorney-client relationship is created, and communications made to such attorney during preliminary conferences prior to the actual acceptance or rejection by the attorney of the employment are privileged communications." Taylor v. Sheldon, 172 O.S. 188 (1961) (quotation from court syllabus). The purpose of the rule is to permit complete freedom of disclosure without fear that facts so disclosed will be used against the client. The fiduciary duties of a lawyer, in particular the duty of confidentiality, extend to preliminary consultations with the lawyer, even though actual employment does not result. Ohio Disciplinary Rules are mandatory (Preface, Code of Professional Responsibility). DR4-101 (A) defines "confidence" as information protected by attorney client privilege under applicable law. Thus under Taylor v. Sheldon all communications made by Mr. Pemberton in phone calls are confidences. "Secret" is defined to include

information the client has requested be held inviolate. Mr. Pemberton's letter of May 11th requests confidentiality, and thus all of the communications are secrets, as well as confidences, under DR4-101.

DR4-101 prohibits: 1) revealing confidences or secrets; 2) using them to the disadvantage of client, and 3) using them for the advantage of the attorney or a third person. It is important to note that under 1) and 3) it is not necessary that the client be disadvantaged; simply revealing or using the information is enough. Also note that under 2) and 3) the violation may be a continuing violation, and occur each time the attorney uses the information, such as revealing it to others who can gain an advantage, or introducing into a court record evidence related to the confidential information.

Under DR 4-101 (C) (1) a lawyer may reveal confidences or secrets but only with the consent of the client after full disclosure (as well as in some other circumstances not applicable here).

Under Ohio's Code the generally applicable disciplinary rules where there are conflicts between former and current clients are DR4-101 (the confidentiality rule), DR5-105 (concerning conflicts between two clients), and DR5-101 (concerning conflicts between a lawyer's own interests and those of a client). Under both DR5-101 and 5-105 a lawyer is required to decline proffered employment if his independent professional judgment will be or (under 5-101) "reasonably may

be" or (under 5-105) "is likely to be" adversely affected. And under both rules the consent of affected clients, after full disclosure, is necessary before the lawyer can proceed.

17 Q. Please continue.

A. Whether or not Mr. Randazzo ever actually represented Suburban, the disclosures made to Mr. Randazzo by Mr. Pemberton were privileged, and thus were confidences and secrets as defined in DR4-101. Mr. Randazzo cannot reveal, or use to the disadvantage of Suburban, or his own or other client's advantage, the confidential information provided. Ohio's Code of Professional responsibility does not provide, as ABA proposed Model Rule 1.9 does, for the disclosure of formerly confidential information after it is generally known, and indeed, Taylor v. Sheldon, indicates that in this situation, Mr. Randazzo has a continuing obligation to maintain client confidences even if the information may be readily obtainable in other ways.

Under 4-101, Mr. Randazzo cannot reveal or use the client confidences without obtaining the consent of Suburban, which has not been given.

Inasmuch as there has been no consent by Suburban (nor was there timely disclosure) the rules which have been and will continue to be violated are 4-101 and 5-105[1]. DR5-105

[1] Under 5-101, the consent of Suburban is not necessary, but Mr. Randazzo would be required to disclose to both Consolidated Biscuit and to the Village of McComb the potential problems that might arise as a result of this discussion with Suburban. (Typically, a lawyer in such a conflict situation can expect that motions to disqualify will result in additional delay and expense in future hearings). As a practical matter, the consent of the subsequent client will often be given because of the perceived advantage in gaining access to the information, and on the limited facts assumed, there is no violation shown of 5-101.

prohibits not just accepting, but also continuing, representation where the conflict exists. Especially if one accepts Mr. Pemberton's version of he and Mr. Randazzo's conversations, DR4-101's prohibition against the use of client confidences will arise each time the issues discussed by Mr. Pemberton with Mr. Randazzo come up in the proceeding, since there will have been an advantage to Randazzo and to Consolidated Biscuit and the Village of McComb, present from the beginning of the case, in knowing what Suburban thought to be the particular weaknesses in its case.

Based upon the above analysis and under the standards in Board Opinion 89-013, concerning disqualification from representing a client against a former client, Mr. Randazzo should clearly not represent Consolidated Biscuit or McComb. Their interests are adverse to Suburban's; case no. 90-785-GA-ATA is the same matter which Mr. Randazzo discussed with Suburban, and case no. 90-1825-GA-COI, I am informed by counsel, is a substantially related matter.

18. Q. Are there other factors to be considered in the question of disqualification?

A. Yes. While a court or agency such as this one does not, in a motion for disqualification, enforce ethical rules in the sense disciplinary agencies do, where violations are clear, it should disqualify unless there are substantial countervailing considerations. As this Commission recognized on its Entry, it must ensure that proceedings before it are

fundamentally fair and that justice is administered in a reasonable matter. A disciplinary proceeding is simply not a good alternative for an aggrieved party in a case such as this because a complainant has no "remedy" in such a proceeding. The remedy in those proceedings is usually a reprimand or other action affecting the professional license. Disqualification is not a possible remedy in a disciplinary proceeding, so it is up to the forum in which the proceeding giving rise to the question is pending to assure that an aggrieved party's rights are protected, and a fair hearing thereby ensured.

While there is authority that an additional factor to be considered in a motion for disqualification is the hardship on the current client, in this situation McComb has been and is represented by other counsel of record[2], and Consolidated Biscuit's motion to intervene, as represented by Mr. Randazzo, was objected to immediately by Suburban. Given the other substantial policies implicated in motions to disqualify (protecting the confidences of clients who are represented by or seek counsel, and avoiding appearances of impropriety and a consequent lack of trust in lawyers and the legal system), the minimal inconveniences to current clients shown in the materials reviewed, particularly where representation of McComb was not disclosed to the Commission or to Suburban for more than six months, are not sufficient to outweigh the

[2] Although I express no opinion at this time as to whether or not Mr. Hackenburg could be disqualified.

substantial interests being protected by disqualification.

19. Q. If Mr. Randazzo is disqualified, what is the effect on his firm?

A. Under DR5-105(D), if one lawyer is required to withdraw from employment, other firm members are likewise required to do so. If Randazzo is disqualified, Richard Rosenberry and other lawyers in the firm of Emens, Hurd, Kegler & Ritter should also be disqualified.

20. Q. Does this complete your testimony?

A. Yes, it does.

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EXHIBIT MHA-1

RESUME

MARK H. AULTMAN
Attorney at law
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EDUCATION

Georgetown University, Washington, D.C., B.A. (Economics), 1964.

University of Virginia Law School, J.D., 1968.

LEGAL ETHICS EXPERIENCE

Currently in private practice in Columbus, Ohio, with practice concentrated in legal ethics and grievances.

Instructor in legal ethics courses accredited by the Ohio Supreme Court Commission on Continuing Legal Education.

Recently grievance counsel for Office of Disciplinary Counsel of the Supreme Court of Ohio for seven years.

Author of articles and reviews on legal ethics and related topics in various journals, including The National Law Journal and the Notre Dame Lawyer.

Formerly Chairman of Greene County, Ohio, Bar Association Ethics and Grievance Committee.

Formerly grievance counsel for New York State Bar Association and Office of Grievance Committee, Rochester, New York.

GENERAL LEGAL EXPERIENCE

Formerly in private practice, Greene County, Ohio, 12 years. General practice including probate, real estate, family law, municipal law, corporate/business and college and university law.

Represented several public entities, including City of Xenia (special legal consultant for urban renewal project necessitated by 1974 tornado), Village of Yellow Springs (Village Solicitor), Greene Metropolitan Housing Authority, and other villages and townships.