ADMINISTRATIVE PROCEEDING
FILE NO. 3-10007

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
February 28, 2001

In the Matter of	:	
	:	
CLARK T. BLIZZARD,	:	
RUDOLPH ABEL,	:	PREHEARING ORDER
CHRISTOPHER P. ROACH, and	:	
EAST WEST INSTITUTIONAL SERVICES, INC.	:	

The hearing in this proceeding was scheduled to commence March 26, 2002, in Boston, Massachusetts.[1] A prehearing conference was held today. The following parties appeared: the Division of Enforcement (Division) by Linda B. Bridgman and Sandra J. Bailey, Esqs.; Clarke T. Blizzard by Marc B. Dorfman, Esq., of Foley & Lardner; Rudolph Abel by Daniel I. Small, Esq., of Butters, Brazilian & Small; and Christopher P. Roach, pro se, and on behalf of East West Institutional Services, Inc. (East West). Additionally, Richard D. Batchelder, Jr., Esq., of Ropes & Gray appeared concerning a subpoena directed to the law firm.

Respondents Roach and East West

On February 6, 2002, the Division filed a Motion for Default as to Respondents Roach and East West, pursuant to 17 C.F.R. § 201.155(a). On February 20 the undersigned ordered them to show cause by February 27 why they should not be held in default and why specified sanctions requested by the Division should not be imposed against them. At today's prehearing conference Mr. Roach stated that he would accept the default against himself and East West.

Respondent Abel

Previously, the Division and Respondent Abel had reached agreement in principle on a settlement. The settlement recently failed, however, necessitating some adjustment in the prehearing schedule as to Respondent Abel. His prehearing brief will be due March 15.

[1] The proceeding was originally captioned Michael J. Rothmeier, Clarke T. Blizzard, Rudolph Abel, Donald C. Berry, Christopher P. Roach, Craig Janutol, and East West Institutional Services, Inc. It has ended as to Respondents Rothmeier, Berry, and Janutol, who settled. The Commission issued Orders Making Findings and Imposing Sanctions as to each of them on April 13, 2000.

On February 27, 2002, the Division filed an Emergency Motion to Disqualify Respondent Abel's Counsel from Representing *Both* Abel and The Witnesses Against Him on the Grounds of Conflict of Interest. The Division argued that counsel's representation of Mr. Abel and several witnesses whom the Division intends to call to testify at the hearing is unethical and a conflict of interest in violation of Rule 1.7(b) of the American Bar Association Model Rules of Professional Conduct (ABA Model Rule 1.7(b)). The Division requested the undersigned to enter an order disqualifying counsel from continuing to represent Mr. Abel and the witnesses.

The motion was denied. The Securities and Exchange Commission's (Commission) Rules of Practice, 17 C.F.R. §§ 201.100 - .630, which govern Commission administrative proceedings, do not authorize an administrative law judge to take such a drastic action. See 17 C.F.R. § 201.102(e) ("The Commission may . . . deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found by the Commission after notice and opportunity for hearing in the matter . . . (ii) . . . to have engaged in unethical or improper professional conduct.") (emphasis added). Only the Commission can institute such a hearing. See 17 C.F.R. § 201.300. Compare 17 C.F.R. § 201.102(e) with 17 C.F.R. § 201.180 (authorizing an administrative law judge to summarily suspend counsel for the duration of a proceeding for "contemptuous conduct" and requiring an adjournment of the hearing to allow the party whom the suspended counsel represented to obtain new counsel).

The Division's motion examined ABA Model Rule 1.7(b) and related cases at some length. It appears, however, that counsel had complied with his duty under that rule. Finally, since the Division's motion was denied, counsel's motion to extend the time to respond to it is moot.

Respondent Blizzard and Ropes & Gray

Respondents in this proceeding were associated with the predecessor to Fleet Investment Advisors, Inc. (FIA). FIA questioned practices that it discovered and retained the law firm of Ropes & Gray to investigate. FIA also advised the Commission, which commenced its own investigation, which led to this proceeding. During the course of Ropes & Gray's investigation, Michael Fee, a member of the firm, interviewed Respondent Blizzard on April 19, 1996. The Division intends to call Mr. Fee as a witness in the hearing to testify about Respondent Blizzard's statements in the interview. It may also seek to introduce Ropes & Gray's May 2, 1997, report about the interview, as Exhibit 108.

The February 15, 2002, Order on Application to Quash Subpoena (February 15 Order) modified a subpoena directed to Ropes & Gray, issued pursuant to 17 C.F.R. § 201.232, at the request of Respondent Blizzard. The subpoena was modified in response to Ropes & Gray's Application to Quash and numerous responsive pleadings, which thoroughly discussed issues of attorney-client and work-product privileges and waiver of the privileges. As modified, the

subpoena sought production of contemporaneous notes and memoranda, redacted of opinion, of the April 19, 1996, interview if Mr. Fee testifies, so that Respondent Blizzard may cross-examine effectively.

At the request of Ropes & Gray, the undersigned clarified the ruling in the February 15 Order. At the prehearing conference the Division confirmed that it intends to call Mr. Fee to testify about Respondent Blizzard's statements at the interview. Mr. Batchelder represented that Mr. Fee would not claim the attorney-client or work-product privilege when asked about Respondent Blizzard's statements at the April 19, 1996 interview. Thus, as the February 15 Order held, he will waive the privileges as to notes, redacted of opinion, as well. This resolution reduces the burden on Ropes & Gray to the greatest extent possible, consistent with Respondent Blizzard's need for the notes to cross-examine effectively. The date for the notes to be produced is March 6, 2002.

Mr. Batchelder noted that on February 25, 2002, Ropes & Gray provided Notice of Intention to Petition for Review of the February 15 Order on Application to Quash, pursuant to 17 C.F.R. § 201.430. He argued that there is an automatic stay of the subpoena return date, citing 17 C.F.R. §§ 201.430(a), .430(b) and .431(e). As he agreed, that argument assumes that the administrative law judge's authority to issue subpoenas derives from 17 C.F.R. § 200.30-9. The administrative law judge's authority to issue subpoenas derives from 17 C.F.R. §§ 201.111 and .232, however. See also 17 C.F.R. § 201.431(e) Revision Comment (e), 60 Fed. Reg. 32738, 32778 (June 23, 1995). If Ropes & Gray does not comply with the subpoena, conflict over the production of the notes may be resolved in the federal courts if Respondent Blizzard applies to a person authorized to seek enforcement through an ex rel. proceeding. See Section 209(c) of the Investment Advisers Act of 1940.

The undersigned confirmed that Mr. Fee will be permitted to testify whether or not Respondent Blizzard obtains the notes. To rule otherwise would be inconsistent with the Commission's Rules of Practice and precedent. See City of Anaheim, 71 SEC Docket 191, 193-94 & nn. 4-8 (Nov. 16, 1999) (holding that administrative law judges should be inclusive in making evidentiary determinations in its proceedings).

Hearing Date

Finally, the hearing was postponed to commence April 2, 2002, in light of religious holidays, and to avoid waste of public and private resources, consistent with 17 C.F.R. §§ 201.161 and .200(c).

IT IS SO ORDERED.

Carol Fox Foelak

Carol Fox Foelak
Administrative Law Judge