IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

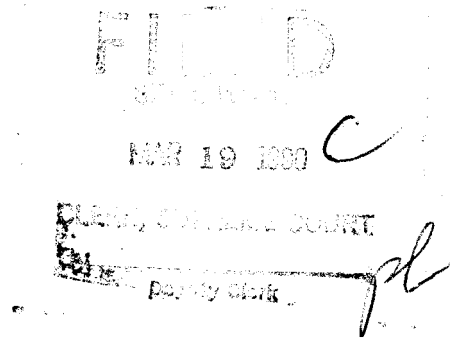
Complainant,

v.

HOWARD A. LEVINE,

Respondent.

Case No. 72,327



ANSWER BRIEF

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QUESTION PRESENTED

Whether the Referee was warranted in imposing three years' suspension and passage of the entire Bar examination where Respondent had been convicted pursuant to entrance of Alford pleas of guilty and had demonstrated other mitigating circumstances.

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OTHER AUTHORITIES

STATEMENT OF THE CASE AND OF THE FACTS

While Respondent has no quarrel with the acuuracy of the Bar's statement of facts, he would like to elaborate on facts brought out during the hearing on November 13, 1989, that pertain to the indictments, Alford pleas, and mitigating circumstances which the referee found persuasive in determining proper discipline.

Respondent was admitted to The Florida Bar in 1970 and has no prior disciplinary record. After graduation from Northwestern Law School he began working with Florida law enforcement agencies as in-house counsel. Transcript of Referee Hearing, November 13, 1989 (hereinafter referred to as TR) 9. He also was a member of the Illinois Bar. In 1975 he went into private practice while still aoting as house counsel for the Ft. Lauderdale Police Department on a contract basis. TR 11. In 1981, Respondent formed his own company and left the legal arena. Eventually he became a management consultant for the Potamkin Corporation in a non-legal position. Id.

In 1984, Respondent moved to Oklahoma to manage the business aspect of his brother's law practice. TR 15. His brother had recently aoguired the representation of the FDIC in that area and was inexperienced in managing a law office. Id. Respondent became more involved in the practice and was admitted pro hoc vice to the Oklahoma Bar to defend Alvin Petroleum Company in a suit brought by the Oklahoma Securities Commission. TR 16. Through this representation, Respondent

met Alvin Broerman, who later was to form the companies that were investigated by the Securities and Exchange Commission (SEC).

The SEC investigation concerned companies that were established to market and form oil drilling partnerships. The Heritage Company would find potential investors who would attend meetings to organize the partnerships. TR 21. At these meetings, the investors would hear of potential drill sites and would decide what sites to lease from the Pennington & Scott company. TR 87. The investors would also choose which of two drilling aompanies they would use, Kituhwa Energy Corporation or Rimrock Drilling Company, according to the bids presented by these companies. TR 28. The investment fund8 would be turned over to a management committee once the investors decided to form the partnership in the course of their oil drilling venture. Id.

Respondent's involvement with these ventures began in March of 1985, when he introduced Mr. Broerman and Robert Murdock, who had expressed an interest in meeting one another to form various business ventures. Respondent did this in hopes that, if the ventures were successful, he and his brother would be retained as counsel. TR 23. The SEC found that he did not benefit in any other way from these introductions. TR 37.

Respondent was involved with these ventures from April 1985 through May 1986. Respondent wrote the legal papers that

formed the marketing, leasing, and drilling companies, consistent with the laws of the Comanche nation, Oklahoma and Florida. TR 23. Respondent charged aa hourly rate of $150 for legal services and a consulting fee for setting up and running the offices of the companies when the owners could not do so. Id.

Respondent had no role in the investment, marketing or formation of these partnerships. TR 30. He also was never involved in deciding the terms or conditions of the partnerships or in promotions to investors. Id. His role was only to preside over the formative meetings of the partnerships. TR 28. He held himself out as a lawyer, but made it alear to the investors that he was a representative of the companies, and any legal matters would be referred to outside counsel. Id.

These investors, who ware generally professionals, such as doctors and lawyers, were found by Broerman through his marketing companies. TR 30. The investmeat money was kept in a company account until enough was gathered to form the partnership. Id. No money from the companies entered the trust account of the law office. Id.

In early 1986, the SEC began its investigation of the Companies, alleging that they were actually securities and not partnerships, and that Respondent had failed to register them with the commission. TR 32. Respondent had previously researched this issue and had taken CLE seminars on

securities. TR 31. He found that the definition of securities was vague but that generally case law supported the position that these entities were partnerships, not securities, because of the degree of control the investors had over the profits. TR 100.

The SEC settled the civil case it brought against Respondent with a permanent injunction prohibiting him from ever violating securities law and a 82000 payment as restitution. TR 34. The SEC found that all money reoeived by Respondent was earned through fees and charges, consistent with his law practioe, and that all cash flow into the law firm was proper. Id. The SEC brought no criminal or disciplinary actions against Respondent, despite its authority to do so. TR 36, 96, 97.

The SEC suit was followed by the Oklahoma civil and criminal actions, and by the Florida criminal suits, which alleged that Respondent was involved in a scheme to defraud investors by promising risk-free ventures. Although he maintained his innocence throughout all proceedings, Respondent ultimately entered Alford pleas because the physical, emotional, and financial tolls were more than he and his family could bear. TR 46, 120.

In Oklahoma, Respondent reoeived a 30 month sentence with three years probation, but the Governor commuted his sentence after 5 months, and suspended his fins. TR SO. All but two weeks of his sentence was spent in a work-release program.

Id. In Florida, Respondent received a 30 month sentence to run concurrent with the Oklahoma sentence. TR 49-52. After his Oklahoma sentence was commuted, Respondent servedapproximately eight more weeks in prison in Florida. He is currently on probation. Id.

In Illinois Bar disciplinary proceedings, Respondent voluntarily had his name stricken from their rolls, which allows him to reapply for reinstatement in three years without taking the Bar exam. TR 104, 105.

At the final hearing in the case at bar, Peter Shaeffer testified as a learned securities lawyer and as Respondent's trial attorney. Mr. Shaeffer graduated from New York University Law School in 1972 and worked for the SEC in New York and Chicago. TR 83. In 1980, he became the senior trial attorney in charge of complex investigations and litigation. Id. He has been published in Insights, a magazine for the National Securities Bar and has given numerous conferences on securities and stock matters. TR 84. In 1985, he entered private practice in the area of securities, defense from SEC investigations, and civil, administrative and commercial litigation. TR 83.

Mr. Shaeffer testified that the area of the law on which the SEC investigations, and later the Oklahoma and Florida charges, were based is vague, but that there is

> more law in support of the fact that general partnership interests are not securities than to the contrary.... TR 98.

He further testified that there were cases on point supporting Respondent's position that these companies were general partnerships. Id. His research showed that if the company was formed under the state's general partnership laws, by statute, the investor had the right and ability to control the company. TR 100. He concluded that, in following the Third Circuit, general partnerships could not be securities. TR 102.

Regarding his representation of Respondent, Mr. Shaeffer pointed out that Respondent waived his Fifth Amendment rights and voluntarily testified before the commission. TR 86. He fully cooperated with the SEC. Id.

Part of this cooperation was turning over all financial records, including copies of all checks and registers, to the SEC for an in-depth investigation of the law firm accounts and Respondent's personal account. TR 90. This accounting covered the period from April 1985 to May 1986. The investigation concluded that the funds in Respondent's account were traceable *to* the law office and reflected earned fees and travel compensation. TR 90.

The majority of the $96,595 in costs and fees earned by Respondent during the thirteen-month period at issue resulted from Respondent's work with the FDIC, which comprised the bulk of the law firm's practice and had nothing to do with the matters that led to his SEC and criminal problems. TR 30, 94, No other sources of income were found. TR 94.

Bonnie Levine, wife of Respondent, testified that the Alford pleas were necessary to preserve their family. She and Respondent have been married almost six years and have a three year old son. TR 120. She testified that the family was financially ruined and the overall health of everybody in the family had deteriorated. Respondent has undergone medical, psychological, and psychiatric treatment. TR 120, 121. Mrs. Levine testified that the financial and emotional ruin caused by the litigation forced Respondent to plead guilty despite his constant protestation of innocence. TR 120. Currently, they are living apart, only seeing each other on weekends, because they cannot both get jobs in the same area. TR 122.

After hearing the above testimony, the referee found Respondent guilty of the charge8 brought by The Florida Bar and recommended that he be suspended for three years, nun pro tunc August 17, 1987. Referee Report (hereinafter refereed to as RR) 2. He further recommended that Respondent pass the entire Bar exam before reinstatement. Id.

The Referee noted that, while Respondent steadfastly maintained his innocence, he had entered Alford pleas. RR 3. The Referee also noted that Respondent was aware of the seriousness of the charges against him and was prepared to accept discipline without protest. Id. He further found that Respondent had no prior disciplinary reaord. Id.

On February 1, 1990, The Florida Bar filed its Petition for Review to contest the discipline imposed by the Referee.

SUMMARY OF THE ARGUMENT

The Referee was correct in imposing a three year suspension, proof of rehabilitation, and successful completion of the Bar examination as discipline against Respondent.

The purposes of discipline as set forth by this Court in Pahules are met by the recommended discipline. The public is protected, the lawyer is encouraged to reform, and the profeasion is protected and deterred from like conduct.

The Referee also properly weighed the mitigating circumstances when evaluating the discipline. Neither the SEC nor the Bar could show that Respondent benefited in any improper manner from the ventures involved. Respondent also had no prior disciplinary record and had fully cooperated with the Bar and all other law enforcement agencies.

Another persuasive factor was that the convictions were secured with Alford pleas, under protestations of innocence, The reasoning in The Florida Rar v. Pavlick applies where this Court found that felony convictions obtained with guilty pleas under Alford did not merit disbarment if the Referee made findings demonstrating respondent's innocence.

The case at bar differs greatly from cases presented by the Bar in support of disbarment. Most notably, this case is distinguishable from The Florida Bar v. Isis, which involved a lawyer charged in the same case as Respondent, but whose enterprises were completely separate from Respondent's. The Court found in Isis that there was no valid Alford plea,

making Pavlick inapplicable. Furthermore, Isis had a record of prior discipline, having been previously suspended for three months. The discipline imposed by the Referee was warranted and proper. He considered all pertinent factual and mitigating factors. Three years suspension coupled with passing the bar exam follows the precedent set by this court for imposing lawyer sanction.

ARGUMENT

THE REFEREE'S RECOMMENDED DISCIPLINE OF THREE YEARS SUSPENSION AND PASSAGE OF THE ENTIRE BAR EXAMINATION WAS APPROPRIATE AFTER CONSIDERATION OF RESPONDENT'S ALFORD PLEA AND OTHER MITIGATING FACTORS.

After this Court's Referee had the opportunity to weigh all the evidence and the mitigating factors, and after observing Respondent, he concluded that a three-year suspension and passage of the entire Bar examination was the appropriate discipline for Respondent's misconduct. The Bar has appealed alleging that the nature of Respondent's misconduct warrants disbarment, disregarding the mitigating factors that the Referee found persuasive.

In recommending discipline, the Referee specifically considered Respondent's guilty plea was made under North Carolina V. Alford, 400 U.S. 25 (1970), (where it was held that there could be reasons whereby a defendant may plead guilty while still maintaining his innocence for the record). RR 3. In the event of an Alford plea, this court's reasoning in The Florida Rar V. Pavlick, 504 So.2d 1231 (1987) supports the Referee's conclusion that disbarment in the instant case is inappropriate. In Pavlick the court found that a felony conviction secured under an Alford plea does not mandate disbarment. Furthermore, the Referee may consider as a mitigating factor the circumstances of the plea. Pavlick, P. 1234.

The Referee also noted that Respondent had no prior disciplinary history during his nineteen years' membership in the Bar and that he recognized that his conduct merited discipline. It is noteworthy that Respondent admitted all factual allegations and did not contest the charges against him. RR 3. The only issue before the Referee was the appropriate discipline.

In addition to the mitigating factors alluded to by the Referee, it has never been proven by any agency that Respondent had any personal or financial gains from these ventures beyond his properly earned reasonable legal fees.

In The Florida Bar v. Pahules, 233 So.2d 130, 132 (1970), this court outlined the purposes of lawyer sanctions. First, the discipline is to protect the public while not depriving it of competent lawyers. Second, the discipline has to sufficiently punish the lawyer while encouraging rehabilitation. Third, the discipline should serve to deter other lawyers from like conduct.

The discipline imposed by the Referee meets the three precepts set forth by this court. Three years' suspension, proof of rehabilitation before reinstatement and passage of the entire Bar examination would demonstrate that the lawyer is legally competent to practice and serve the public. Proof of rehabilitation will require Respondent to prove his current fitness and that no such conduct will be repeated. Lastly, the three year suspension, the longest that can be

imposed, passage of all of the Bar examination and the criminal penalties already imposed on the Respondent is certainly sufficient punishment to deter any other lawyer from contemplating like conduct.

The recommendation by the Referee in this case is the sternest discipline that can be imposed short of disbarment.

Although not specifically noted by the Referee in his report, he probably considered the mitigating factors set forth in Rule 9.32 of the Standards for Imposing Lawyer Sanctions. Fla. Rar. J., p. 126 (Sept. 1989). Among those mitigating factors are the absence of a prior record [Rule 9.32(a)], absence of a dishonest motive [Rule 9.32(b)], full cooperation and disclosure to the Bar [Rule 9.32(e)], and genuine remorse [Rule 9.32(l)].

Respondent's nineteen-year history in The Florida Bar without disciplinary sanction and his long history as a lawyer for law enforcement agencies are certainly important mitigating factors. It certainly lends support to Respondent's assertions that he did not intend to break any laws.

More importantly, however, is the absence of any evidence showing an improper benefit to Respondent for his role in the alleged criminal conspiracy. (He was only named in two of the 210 counts of the Florida indictment). The SEC found, after an audit of both Respondent's lawyer and personal accounts, that his only revenue from the conspiracy consisted

of reasonable earned fees. Furthermore, the revenue from Heritage and its related ventures did not constitute the majority of the earnings for the firm that employed Respondent. TR 38, 94. Mr. Shaeffer testified that during the thirteen-month period audited by the SEC, Respondent's total income was $96,595, of which $12,725 consisted of out-of-pocket expense reimbursements. TR 94.

The Referee noted that Respondent was prepared to accept punishment for those actions that may have seemed improper, although always maintaining his innocence. RR 3. The Referee may have also considered that Respondent had been very cooperative with the Bar by not contesting the charges and acknowledging the propriety of a sanction.

It stands to Respondent's credit that he was also cooperative with other law enforcement agencies during all the proceedings. TR 86. He waived his Fifth Amendment rights to testify before the SEC and voluntarily produced all books and records. Ultimately, the SEC did not choose to bring criminal charges against Respondent. TR 36, 96.

The Bar demands disbarment despite abundant case law supporting the Referee's decision. In The Florida Rar v. Fertig, 551 So.2d 1213 (1989), this Court imposed only a 90 day suspension upon a lawyer for laundering drug money. The lawyer was involved in helping his partner and a olient by taking the money to different foreign banks, delivering it to couriers, and setting up businesses to launder the money. Id.

at 1214. This Court found that the respondent in that case had been very cooperative with he Bar and had demonstrated rehabilitation since his numerous illegal acts had ended some six years earlier. Id. Similarly, Respondent's last wrongful act occurred in early 1986.

In The Florida Bar v. Chosid, 500 So.2d 150 (1987), this Court imposed discipline of three years suspension for filing a false income tax return. Mr. Chosid received a discipline more lenient than that imposed in the instant case (he did not have to take the Bar exam) despite the fact he had a prior disciplinary history.

In The Florida Bar v. Sickmen, 491 So.2d 274 (1986), this Court found that defrauding an insurance company and conspiracy to commit mail fraud warranted three years suspension and passage of only the ethics portion of the Bar examination. In dissent, Justice Ehrlich noted that the respondent should have to pass the entire Bar examination. Id. at 275. Such a recommendation was made in the instant case, alleviating Justice Ehrlich's concerns about competence after absence from practice for three years. Id.

In The Florida Bar v. Rosep, 495 So.2d 180 (1986), this court imposed three years suspension for possession with intent to distribute cocaine. In that case, his addiction and demonstrated rehabilitation were considered as mitigating factors. Id. at 181. The Court also noted the fact that

disbarment would deprive the legal community of respondent's participation if he proves full rehabilitation. Id. at 182.

In The Florida Bar v. Giordano, 500 So.2d 1343 (1987), this court imposed a three pear suspension to run concurrent with the three year automatic suspension for felonies where the respondent was charged with possession with intent to distribute cocaine.

The above cases, particular1y those involving participation in drug-related felonies, include misconduct more serious than that committed by Respondent. Yet the discipline imposed in each instance was less than disbarment.

Cases cited by he Bar to support a reversal of the Referee's recommendation are all distinguishable from the case at bar. More importantly, none involved a Referee's reference to the entry of an Alford plea. For example, in The Florida Bar v. Wilson, 425 So.2d 2 (1983), the respondent had pressured an inmate client into smuggling drugs to him from the jail. The Bar charged him with two felony convictions involving moral turpitude. Id. at 3.

Most significantly, in deciding Wilson, The Court stressed that had there been mitigating circumstances, the discipline may have been different. Id. However, none were presented, unlike the case at bar. (The Court also noted that the absence of a prior disciplinary record was not a mitigating factor where Mr. Wilson had only been a member of the bar for six months. Id.)

In the Florida Bar v. Haimowitz, 512 So.2d 200 (1987), the respondent was convicted of six felonies, including conspiracy to use the postal service for a fraudulent scheme, mail fraud, and obstructing interstate commerce by extortion. The Referee found him guilty of six disciplinary violations and recommended disbarment. Id. at 201. This Court noted that no briefs were filed and made no mention of mitigating factors in imposing the recommended discipline. Id.

In The Florida Bar v. Weinsoff, 498 So.2d 942 (1986). this Court disbarred the attorney for three years for his felony convictions of one count of conspiracy to commit mail fraud and nine counts of mail fraud. The accused lawyer in that case had submitted an unconditional guilty plea and a consent judgment to three years disbarment which the Referee honored. Id. at 943.

For all intents and purposes, the discipline imposed in Weinsoff is the same as that recommended by the referee in the case sub judice. Removal from practice for three years, passage of the whole Bar exam, and proof of rehabilitation before reinstatement.

The Florida Bar v. Simons, 521 So.2d 1089 (1988) involved acts of theft and attempts to defraud an insurance company. The Court disbarred the respondent for 20 years as it noted that the respondent had never answered the Bar's complaint and, in fact, never appeared at the hearing or before the Court. Id. at 1090.

Finally, the Bar relies on The Florida Bar v. Isis, 552 So.2d 912 (1989), in support of disbarment because Hr. Isis was named in the same information charging Respondent. Although the record is silent as to the extent of Mr. Isis' involvement in criminal ventures, Respondent submits that it was far worse and more involved than Respondent's conduct. In fact, Mr. Isis' enterprises had nothing to do with Respondent's ventures. TR 40.

Unlike Isis, the referee in the case at bar specifically referred to Respondent's Alford plea. This is a major distinction. Hr. Isis' claim of an Alford plea was not supported by the Referee's findings. Id at 913. Further, the Isis Court found no mitigating circumstances. As aggravation, the Court considered the fact that Isis had a prior three-month suspension for unethical conduct. Id.

There is an even more important distinction between Isis and the instant case. In Isis the referee recommended either a three-year suspension or disbarment. The Referee in Mr. Levine's case, however, specifically recommended a discipline: suspension for three years.

The Bar also notes The Florida Bar v. Onett, 504 So.2d 388 (1986) as a case supporting Respondent's disbarment. Onett had been found guilty in federal court of mail fraud, obstruction and conspiracy to obstruct interstate oommerce through extortion, and two counts of perjury. Id at 389. The Court held that convictions are determinative of guilt for

disciplinary proceedings and found Onett's claims of violations of due process groundless as the Referee can not retry a criminal case to evaluate discipline. Id. at 390.

The Bar relies on Onett in determining that all conviotions are conclusive of guilt. However, as Pavlick demonstrated, they are not conclusive of discipline.

This Court should note that neither of the other two bars to which Respondent belonged disbarred him. The SEC brought no disciplinary proceedings whatsoever. TR 36, 97. In Illinois, Respondent was allowed to voluntarily remove himself from the Bar for three years and he will be eligible for reinstatement without having to take the Illinois Bar exam. TR 104, 105.

Respondent never oontested the Bar's charges and freely admitted his culpability. His research had showed that the distinction between securities and general partnerships as it pertained to the ventures was unclear. TR 31. However, he continued with the ventures and was prepared to defend hi8 position if necessary. Id.

In The Florida Bar V. Hirsch, 342 So.2d 970 (1977), this court held that disbarment was the most severe penalty available. This Court relied on the following wise words of Henry S. Drinker, legal scholar, regarding punishment:

> Ordinarily, the occasion for disbarment should be the demonstration, by continued course of conduct, of an attitude wholly inconsistent with the recognition of proper professional standards. Unless it is clear that the lawyer will never be one

> who should be at the bar, suspension is preferable .... Id. at 971.

Respondent in the case at bar has been a member of the Florida Bar for twenty years, had an excellent record with several law enforcement agencies and has no prior disciplinary history. His involvement with the ventures lasted at most thirteen months.

Drinker further notes that:

> [O]ne who has been consistently straight and upright can properly be trusted not to repeat an isolated offense .... Id.

Many factors may be considered in mitigation of disbarment which the Bar chooses not to notice. Among these are the remoteness of Respondent's involvement in the companies, that his gains were limited to reasonable and earned legal foes, and that the definition of general partnership interests in the area of securities law is unclear. Other factors inolude the the absence of prior discipline and cooperation with all law enforcement agencies, particularly the SEC.

Of major importance is Respondent's limited participation in the enterprises that were illegal. He did not participate in the marketing of the partnerships at all. He certainly did not gain untoward financial benefit. The primary reason for Respondent's pleading to the criminal charges was his financial and emotional inability to fight identical criminal actions in two states.

The Referee's recognition of Respondent's **Alford** pleas which distinguish this case from **Isis** is very significant. The Referee was correct in recommending three year suspension with rehabilitation and passage of the entire Bar examination. The discipline fulfills this court's criteria set forth in **Pahules** and allows Respondent to once again become an asset to the legal profession and a benefit to the public.

CONCLUSION

Respondent respectfully requests that this Court uphold the Referee's findings and impose three years suspension with proof of rehabilitation as discipline, and require the successful completion of the entire Bar examination for refnstatement.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief has been mailed to JAMES N. WATSON, JR., Esquire, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 this 19th day of March, 1990.

JOHN A. WEISS
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