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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

JEROME L. TEPPS,

Respondent.

_______________________/

Supreme Court Case
No. 76,468

The Florida Bar Case
No. 89-51,415(17C)

ANSWER BRIEF OF THE FLORIDA BAR

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PRELIMINARY STATEMENT

The Florida Bar, Appellee, will be referred to as "the Bar" or "The Florida Bar." Jerome L. Tepps, Appellant, will be referred to as "Respondent." The symbol "RR" will be used to designate the Report of Referee. The symbol "R" will designate all references to the transcript of the final hearing before the Referee. All references to the exhibits of the final hearing will be designated as such.

STATEMENT OF THE CASE AND OF THE FACTS

The facts presented in Respondent Jerome L. Tepps' initial brief are argumentative and incomplete and therefore The Florida Bar hereafter sets forth its own version of the facts.

Jerome L. Tepps, Respondent, was admitted to practice law in the State of Florida in October of 1979. Michael Goldstein was admitted to practice law in the State of New York in 1968. Subsequently, due to a criminal conviction concerning aiding and abetting a securities fraud, Mr. Goldstein's license was suspended by the New York Bar for three years beginning in 1982. At all times material to The Florida Bar Case No. 89-51,415(17C), Supreme Court Case No. 76,468, particularly during the period beginning in April 1983 and ending in December of 1987, Mr. Goldstein was employed by Respondent Jerome L. Tepps as a legal assistant. Mr. Goldstein's central duty during this employment period was to prepare and file form S-18 registration statements with the Securities and Exchange Commission (hereinafter "SEC") (Fla. Bar Exhibit 5; Statement of Michael Goldstein). At the time Mr. Goldstein was hired, Respondent was aware that there was a pending disciplinary proceeding against Mr. Goldstein in New York and further that Mr. Goldstein has not been admitted to practice in Florida. (R. 267-269).

The Respondent appeared and practiced before the SEC from at least January 1986 to January 1987. Respondent's appearance and practice constituted, among other things, the preparation of form S-18 registration statements, periodic reports, and other documents filed with the SEC for several corporations including Shepard Resources, Inc., Pilgrim Venture Corporation, Vanguard Financial, Inc., and

Chatsworth Enterprises, Inc. (R. 136-137).

On January 12, 1988, the SEC filed a civil injunction action against the Respondent and Michael Goldstein, among others. SEC v. Carl Porto, et al., Civil Action No. 88-C-0239 (N.D. Ill. 1988). In this action, the SEC alleged, among other things, that from January 1985 to January 1987, the Respondent and Michael Goldstein were participants and aiders and abettors in a scheme that involved the filing of form S-18 registration statements on behalf of several entities which contained false and misleading information. (Fla. Bar Exhibit 2). The civil action further alleged that Respondent Tepps and Mr. Goldstein were involved in filing false and misleading periodic reports, as well as manipulating the price of the stock of these companies in the aftermath of these false filings and reports. (Fla. Bar Exhibit 2).

On April 13, 1988, Respondent Jerome L. Tepps, without admitting or denying the allegations set forth in the SEC's complaint, consented to the entry of a Final Judgment and Order of Permanent Injunction, which did not contain findings of fact, but which permanently enjoined him from further violations of the securities laws. (Fla. Bar Exhibit 12).

On July 13, 1988, the SEC issued an order instituting administrative proceedings against Respondent Jerome L. Tepps, pursuant to Rule 2(e)(3)(i)(A) of the Commission's Rules of Practice, 17 C.F.R. 201.2(e)(3)(i)(A). On August 9, 1988, the Respondent requested that a hearing be held in this administrative matter. Thereafter, in lieu of that hearing, the Respondent submitted an offer of settlement, which the SEC accepted. (Fla. Bar Exhibit 12). Respondent testified that he had some input into the drafting of the SEC's Order.

(R. 139-139,146). This offer of settlement contained specific language as to the allegations, particularly that the Respondent entered such without admitting or denying the allegations in the SEC's complaint.

On October 25, 1989, the SEC, in conjunction with the offer of settlement made by Respondent Jerome L. Tepps entered an Order and accompanying Opinion suspending Respondent from appearing or practicing before the SEC for a period of five (5) years. (Fla. Bar Exhibit 12).

On August 13, 1990, The Florida Bar filed a formal complaint against Respondent alleging violations of Rule 3-4.3 [misconduct and minor misconduct] of the Rules of Discipline and Rules 4-4.1 [truthfulness in statements to others], 4-8.4(a) [a lawyer shall not violate a disciplinary rule.] and 4-8.4(c) [a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.] of the Rules of Professional Conduct. The Bar's complaint was based on Respondent's actions which led to the SEC's suspension order of October 25, 1989.

On December 14, 1990, The Florida Bar filed with this Referee a motion to limit the issues at trial. This motion was filed pursuant to Rule 3-4.6 of the Rules of Discipline, which states that:

> "A final adjudication in a disciplinary proceeding by a court or other authorized disciplinary agency of another jurisdiction, state or federal, that an attorney licensed to practice in that jurisdiction is guilty of misconduct justifying disciplinary action shall be considered as conclusive proof of such misconduct in a disciplinary proceeding under this rule."

This motion was filed in connection with the SEC's disciplinary order of permanent injunction and suspension, which established that Respondent had aided and abetted in violation of the anti-fraud sections of the

federal securities laws. (Fla. Bar Exhibit 2).

Pursuant to this Court's Order of January 7, 1991, the Referee limited the final hearing in this cause solely to the issue of discipline and further ruled that the Respondent would be allowed to enter evidence of mitigating circumstances surrounding his consent plea made before the SEC.

On April 2, and 3, 1991, a final hearing regarding the appropriate discipline was held before the Honorable Edmund W. Newbold, Referee. At this hearing, The Florida Bar presented evidence in the form of testimony and documentary evidence supporting its position that Respondent should be disbarred. Respondent Jerome L. Tepps presented mitigating evidence in the form of two character witnesses and thereafter requested that the discipline be limited to a public reprimand.

On May 9, 1991, Judge Newbold issued his Report of Referee which concluded that Respondent Jerome L. Tepps had violated the aforementioned Rule of Discipline and Rules of Professional Conduct, and recommended that the Respondent be disbarred from the practice of law.

On or about June 9, 1991, Respondent Jerome L. Tepps filed a petition for review of the Report of Referee issued on May 9, 1991, by Judge Newbold.

SUMMARY OF ARGUMENT

This is a case involving serious securities fraud. The Referee has recommended that the same warranted that the Respondent be disbarred. The Bar is in complete agreement with the Referee.

The Respondent contends that the Referee incorrectly limited the issues at trial, when the Referee found the SEC's Order and Opinion, suspending the Respondent's privilege to practice law before the SEC for five years, to be conclusive proof of the misconduct charged in the Bar's complaint and of the misconduct set forth in the SEC's Order and Opinion. The Respondent's tortured argument is predicated upon his incorrect assumption that the SEC is not a disciplinary agency such that the SEC Order would be conclusive proof of the Respondent's misconduct. All one must do is read the SEC's own rules and regulations to see that the SEC clearly has the jurisdiction to discipline and regulate the attorneys that appear and practice before it. The mere fact that the SEC also has some disciplinary authority over certain non-lawyers in no way diminishes the dignity that should be accorded the SEC's order of suspension.

As the SEC is a disciplinary agency, it's order is conclusive proof of the Respondent's securities fraud violations. The Respondent's Initial Brief asserts that his conduct warrants a much less severe discipline. This proposition is not supported in case law or other authority. Serious fraud merits disbarment, absent a dearth of mitigating factors. The only mitigation presented by Respondent was two character witnesses. This is not enough to outweigh the seriousness of his unethical actions. Therefore, the Court should follow the recommendation of disbarment.

ARGUMENT

POINT I

THE FLORIDA BAR'S MOTION TO LIMIT THE ISSUES AT TRIAL TO DISCIPLINE WAS PROPERLY GRANTED.

On December 14, 1990, The Florida Bar moved this Court to limit the issues at trial to those concerning the appropriate discipline of Respondent. On January 7, 1991, the Honorable Edmund W. Newbold, Referee, granted the Bar's motion, and entered an order whereby the sole issue at trial was limited to discipline and further ruled that the Respondent would have an opportunity to present evidence of mitigating circumstances surrounding his consent plea made before the SEC.

This motion was filed by the Bar pursuant to Rule 3-4.6 of the Rules of Discipline, which states that,

> "A final adjudication in a disciplinary proceeding by a court or other authorized disciplinary agency of another jurisdiction, state or federal, that an attorney licensed to practice in that jurisdiction is guilty of misconduct, justifying disciplinary actions, shall be considered as conclusive proof of such misconduct in a disciplinary proceeding under this rule."[1]

Respondent contends that Rule 3-4.6 is not applicable to the present case and as such that the referee's order granting the Bar's motion was error. Respondent's argument as to the applicability of Rule 3-4.6 is based on his interpretation of the "plain language" of this rule. In arguing the inapplicability of this rule, Respondent has conveniently dissected the rule and thus misinterpreted the "plain language" of the rule.

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[1]Respondent references to Mississippi State Bar v. Nichols, 562 So.2d 1285 (Miss. 1990), whereby a similar disciplinary rule (Miss. Rule 6(c)) is specifically not applicable to the SEC or other federal agencies. Respondent fails to note, however, that Rule 13 of Miss. Rules is the applicable rule concerning "Discipline in Another Jurisdiction" akin to Fla. Rule 3-4.6.

Respondent makes two blanket assertions in concluding that the referee erred in granting the Bar's motion to limit the issues at trial to discipline. First, the Respondent asserts that the SEC is not a court or authorized disciplinary agency within the meaning of Rule 3-4.6. (Respondent's Brief p.13.) Second, the Respondent asserts that the final order of the SEC suspending Respondent is "not a final adjudication of misconduct as contemplated by the Florida rule." (Respondent's Brief p.13.)

Respondent's first argument, that the SEC is not a court or authorized disciplinary agency, contains three underlying contentions. First, Respondent contends that the purpose of the SEC is not the "qualification, supervision or regulation of lawyers;" Second, that the SEC is not "a bar agency or association whose function is the discipline of lawyers;" and Third, that because there is no special license requirement to practice before the SEC, it is not a disciplinary agency within the meaning of Rule 3-4.6. (Respondent's Brief p.13.)

While it is true that the **sole** purpose of the SEC is not the "qualification, supervision or regulation" of lawyers, and it is also true that the SEC's **sole** function is not the discipline of lawyers, a cursory review of the SEC's organization and Rules of Procedure irrefutably establishes that, of the many functional duties of the SEC, the "qualification, supervision and regulation" of lawyers, as well as the disciplining of unethical attorneys, are well within the "purpose" and "function" of the SEC.

The Securities and Exchange Commission is a federal agency empowered by the United States Congress whose "purpose" is to regulate all aspects of securities transactions. The SEC's statutory

authority to regulate all aspects of securities and transactions involving securities is created by the Securities and Exchange Act of 1934, which empowers the SEC to administer the provisions of the Securities Act of 1933 and the Securities and Exchange Act of 1934, among other specifically enumerated laws. These two laws empower the SEC, among other things, to investigate securities frauds, to impose and enforce legal sanctions specified in such laws, and to administer administrative sanctions, injunctive remedies and criminal prosecutions. 17 CFR section 200.1(d), (j). Further, section 201.2(e) of the SEC's Rules of Practice specifically empower the Commission to discipline an attorney for improper or unethical conduct. 17 C.F.R. section 201.2(2). Thus, one "function" of the SEC is certainly the discipline of lawyers who practice before the Commission.

Respondent next asserts that the "plain language" of this rule states that it applies **only** to courts or authorized disciplinary agencies of other jurisdictions **where an attorney is licensed to practice in that jurisdiction**. (Respondent's Brief p.13; emphasis supplied.) Respondent asserts that this rule is only applicable in such jurisdictions where the attorney is specifically licensed to practice. Since the SEC does not specifically require a license to "practice" before it, the Respondent contends that the SEC is not the sort of disciplinary agency that Rule 3-4.6 contemplated. However, a review of the SEC's Rules of Practice clearly shows that the SEC is a disciplinary agency, and is in fact one that was contemplated by Rule 3-4.6, and that this rule is not specifically limited to jurisdictions or agencies requiring a "special" license to practice.

Section 201.2 of the SEC's Rules of Practice specify who may appear and practice before the Commission. 17 CFR section 201.2. Under this rule, both non-lawyers and lawyers may **appear** before the Commission. Section 201.2(a), (b) (emphasis added.) However, appearance by a lawyer in a legal capacity before the Commission is specifically proscribed in subsection (b),

> "A person may be represented in any proceeding by an attorney at law admitted to practice before the Supreme Court of the United States, or the highest court of any State or territory of the United States, or the Court of Appeals or the District Court of the United States for the District of Columbia." Id. (emphasis added.)

The SEC specifically details what encompasses practice before the Commission in section 201.2(g);

> "For the purposes of this rule, practicing before the Commission shall include, but shall not be limited to (1) transacting any business with the Commission; and (2) the preparation of any statement, opinion or other paper by any attorney, accountant, engineer or other expert, filed with the Commission in any registration statement, notification, application, report or other document with the consent of such attorney, accountant, engineer or other expert." 17 CFR section 201.2(g). (emphasis added.)

Thus, although practicing before the commission does not specifically require a particular license, practicing before the Commission in a legal capacity requires that the practitioner be licensed to practice law in one of the jurisdictions outlined in section 201.2(b). Respondent asserts that his license to practice is a 'right' which cannot lightly or capriciously be taken away. (citing Kivitz v. S.E.C., 475 F.2d 956 (D.C. Cir. 1973.)) This "license" to practice before the Commission in a legal capacity is not a 'right' but is merely a conditional privilege which the Commission may suspend or revoke

completely for actions the Commission finds to be improper or unethical.[2] Section 201.2(e) sets out the parameters whereby the Commission may suspend or disbar an attorney for specific acts which the Commission finds to be improper and/or unethical. Section 201.2(e) provides in part:

> "(1) 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 of and opportunity for hearing in the matter (i) not to possess the requisite qualifications to represent others, or (ii) to be lacking in character or integrity or to have engaged in unethical or improper professional conduct, or (iii) to have willfully aided and abetted the violation of any provision of the Federal securities laws (15 U.S.C. 77a to 80b-20), or the rules and regulations thereunder."

The Commission's Rules further provide under Rule 201.2(e)(2) that, "Any attorney who has been suspended or disbarred by a Court of the United States or in any State, Territory, District, Commonwealth, or Possession...shall be forthwith suspended from appearing or practicing before the Commission." This section is analogous to Rule 3-4.6 of the Rules of Discipline applicable to the instant disciplinary proceeding. This rule in and of itself provides support that the SEC is a disciplinary authority and further is an authorized disciplinary agency within the meaning of Rule 3-4.6 of the Florida Bar's Rules of Discipline.

It is uncontested that Respondent met the qualifications to practice

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[2]This position is not unlike that of the Florida Courts. See DeBock v. State, 512 So.2d 164,168 (Fla. 1987); See also Rule 3-1.1 of The Florida Bar Rules of Discipline stating, "A license to practice law confers no vested right to the holder thereof, but is a conditional privilege which is revocable for cause."

law in Florida and was thus granted a license to practice in Florida by the Supreme Court of Florida in 1979. This license qualified Respondent to appear and practice before the Commission. It is also uncontested that Respondent did appear and practice before the SEC within the meaning of these terms defined by the SEC's Rules of Practice. Thus, although the SEC does not require an "SEC license" to practice before the Commission, it is an agency authorized to discipline any lawyer practicing before it, and thus is an "authorized disciplinary agency" within the meaning of Rule 3-4.6.

Respondent's second argument is that the final order of the SEC suspending the Respondent for five (5) years is "not a final adjudication of misconduct as contemplated by the Florida rule." (Respondent's Brief p.13). The Florida Bar's position is that the consent judgment entered into by the Respondent in the SEC's civil proceeding is analogous to a nolo contendre plea. Further, the consent judgment is comparable to an Alford[3] plea, which this Court has previously accepted as a "final adjudication" for purposes of Rule 3-7.2[4], of The Florida Bar's Rules of Discipline.

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[3]North Carolina v. Alford, 400 U.S. 25,37 (1970); "a plea containing a protestation of innocence when...a defendant intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt."

[4]While Rule 3-4.6 speaks in terms of a "final adjudication," rule 3-7.2 is couched in terms of "determination or judgment of guilt," as being conclusive proof of violating the Rules of Professional Conduct. See The Florida Bar v. Cohen, 16 FLW 413 (Fla. 1991); conviction of felony fraud, while conclusive proof of misconduct, warrants disbarment notwithstanding mitigating factors surrounding Alford plea. See also The Florida Bar v. Onett, 504 So.2d 388 (Fla. 1987); conviction of mail fraud, among other counts, conclusive proof of misconduct and warrants disbarment.

In The Florida Bar v. Lancaster, 448 So.2d 1019, (Fla. 1984), the Supreme Court of Florida considered discipline against an attorney for criminal misconduct where the attorney entered a nolo contendre plea. In Lancaster, the Court concluded that, a nolo contendre plea, along with an adjudication of guilt, is sufficient to sustain disciplinary action. Id. at 1022. This Court has also disciplined an attorney who plead nolo contendre to a crime even though there had been no adjudication of guilt, The Florida Bar v. Bunch, 195 So.2d 558 (Fla. 1967). Furthermore, this Court has also disciplined an attorney who plead nolo contendre and stipulated to a ninety-day suspension, The Florida Bar v. Miller, 322 So.2d 502 (Fla. 1975). The Court in Lancaster went on to explain, "Thus the important factor is not whether there has been an actual adjudication of guilt, but whether the attorney has been given a chance to explain the circumstances surrounding his plea of nolo contendre and otherwise contest the inference that he engaged in illegal conduct." Lancaster at 1022.

In the present case, the Opinion and Order entered by the SEC, along with Respondent's consent and stipulation, are analogous to a nolo contendre plea. The Respondent's plea and stipulation with the SEC states that, "without admitting or denying the allegations of the complaint, except as to personal jurisdiction, hereby voluntarily consents to the entry of...final judgment of permanent injunction and other equitable relief against him without further notice."

As the Supreme Court of Florida concluded in Lancaster, the adjudication of guilt is not a prerequisite to the imposition of discipline. The most important factor is whether the Respondent had the opportunity to explain the circumstances surrounding his plea and

otherwise contest the inference of engaging in illegal conduct. The Respondent in the instant case was given the opportunity to explain the the circumstances of his plea or consent judgment and to contest the conclusion that he engaged in illegal conduct. Respondent instead determined that it was in his best interest to consent to entry of a final judgment and stipulation. The Respondent's entry into a consent judgment, and thus a waiver of a trial on the merits, should not prevent The Florida Bar from proceeding in disciplinary matters arising from such judgment.

In The Florida Bar v. Wilkes, 179 So.2d 193 (Fla. 1965), the Supreme Court of Florida held that the foreign judgment of a sister state in disciplinary proceedings is acceptable as proof of guilt. The burden of showing why a foreign judgment should not operate as conclusive proof of guilt in a Florida disciplianry proceeding is on the accused attorney. Id. at 198. The Court in Wilkes went on to elaborate on Integration Rule 11.02(6) (the precursor of Rule 3-4.6), and stated that,

> "By the plainest language the rule makes such a foreign judgment of guilt conclusive proof of such misconduct in a disciplinary proceeding in this state. Proof of guilt of the acts of misconduct adjudicated in the sister state is accomplished by simply proving the entry of the foreign judgment. This eliminates any necessity to retry the bare issue of guilt and makes unnecessary the production in Florida of testimony and evidence on this issue. The rule neither prescribes nor proscribes professional behavior. It relates solely to the question of proof of guilt." Id. at 197.

Accordingly, The Florida Bar's only burden in determining the guilt of the Respondent as to the aforementioned Rules of Discipline and Professional conduct is to prove the entry of the foreign judgment. The Bar has thus met its burden by simply proving the entry of the

final order of the SEC suspending Respondent from practice for a five (5) year period.

The Court in Wilkes further stated that, "Under Rule 11.02(6) we accept the foreign judgment only as proof of guilt." Id. at 198. The Court is not bound to follow the foreign jurisdiction's imposed discipline, only that it should, except in the rare case, accept such judgment as conclusive proof of misconduct. Id. at 197. The Court explained in detail what the rare case would involve;

> "Nevertheless, right and justice require that when the accused attorney shows that the proceeding in the foreign state was so deficient or lacking in notice or opportunity to be heard, that there was such a paucity of proof, or that there was some other grave reason which would make it unjust to accept the foreign judgment as conclusive proof of guilt of the misconduct involved Florida can elect not to be bound thereby." Id. at 198.

Respondent thus has the burden of showing why the SEC's judgment should not operate as conclusive proof of guilt in the present disciplinary proceedings, and thus has the burden of showing that the SEC's proceedings created such a material prejudice that Florida should elect not to be bound thereby.

The Respondent was given an opportunity to defend his actions surrounding the SEC civil injunction action. Respondent chose not to defend himself and thus entered into a consent judgment, which ultimately resulted in the SEC's order of suspension. The Bar asserts that the consent judgment is akin to a nolo contendre plea. Consistent with the language in Lancaster, the Respondent was given the opportunity to explain the circumstances surrounding his plea, and otherwise contest the inference that he engaged in illegal conduct. 448 So.2d at 1022. This Respondent chose not to do. Rather, Respondent

decided that it was in his best interest to consent to the suspension by the SEC. Further, consistent with the Court's ruling in Alford, the Respondent was given the opportunity to protest his innocence on the record in light of "intelligently conclud[ing] that his interests require entry of a guilty plea." Alford, 400 U.S. at 37. This, Respondent had failed to accomplish to the satisfaction of the referee. Thus, the SEC's final order suspending Respondent is a "final adjudication in a disciplinary proceeding by...[an] authorized jurisdiction." As such, the Referee's finding that Rule 3-4.6 is applicable, and thus that the Bar conclusively proved violations of its rules through the SEC's consent judgment, should be upheld. As is well settled in Florida disciplinary proceedings, "A Referee's **findings of fact** and recommendations come to us [Supreme Court] with a presumption of correctness and should be upheld unless clearly erroneous or without support in the record." (emphasis supplied.) The Florida Bar v. Vannier, 498 So.2d 896, 898 (Fla. 1986); The Florida Bar v. Lipman, 497 So.2d 1165 (Fla. 1986); The Florida Bar v. McCain, 361 So.2d 700 (Fla. 1978); The Florida Bar v. Hirsh, 359 So.2d 856 (Fla. 1978).

POINT II

THE REFEREE'S RECOMMENDED SANCTION IS APPROPRIATE

On May 9, 1991, Judge Newbold issued his Report of Referee finding the Respondent guilty of violating Rule 3-4.3 [misconduct and minor misconduct] of the Rules of Discipline and Rules 4-4.1 [truthfulness in statements to others], 4-8.4(a) [a lawyer shall not violate a disciplinary rule.] and 4-8.4(c) [a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.] of the Rules of Professional Conduct. Judge Newbold recommended that

Respondent be disbarred for his involvement in the securities fraud involving the SEC.

Respondent now contends that the recommended discipline is excessive in this case. As previously stated, a referee's findings of fact and **recommendations** are presumed correct. (emphasis added.) Vannier 498 So.2d at 898.

As a matter of law the Respondent violated the securities laws as outlined in the SEC's Order dated October 25, 1989, and thus is subject to discipline for violating the aforementioned Rules of Discipline and Professional Conduct.

As to the recommended discipline of disbarment, a discussion of the applicable securities laws violated by the Respondent and the appropriate standards set forth by these laws and subsequent case decisions is imperative to justify the recommended discipline.

In S.E.C. v. Electronics Warehouse, the Court addressed the appropriate level of knowledge that one must have with respect to violating Sections 17(a) of the Securities Act and Section 10(b) of the Securities Exchange Act, both of which Respondent was found to have violated. S.E.C. v. Electronics Warehouse, 689 F.Supp. 53 (D.Conn. 1988) aff'd by S.E.C. v. Calvo, 891 F.2d 457 (2d Cir. 1989), cert. denied by Calvo v. S.E.C., 110 S.Ct. 3228, 110 L.Ed.2d 674 (1990). In Electronics Warehouse, as in the present case, the accused attorney did not dispute the existence of fraudulent schemes alleged by the Commission. Further, the attorney in Electronics Warehouse, disputed the issue as to whether he had knowingly participated in the violations, the same position that Respondent Tepps takes in the present

disciplinary proceeding.

The Court in Electronics Warehouse, following the standards set forth in a 1980 United States Supreme Court securities case, stated that violations of sections 17(a)(1) and 10(b) require proof that the defendant acted with scienter. Aaron v. S.E.C., 446 U.S. 680 (1980). The Court further stated that a person acts with scienter when he intentionally or knowingly engages in the prohibited activities, see Id. at 696, or acts with reckless disregard for the truth or falsity of a material statement (emphasis added). See S.E.C. v. Blavin, 760 F.2d 706 (6th Cir. 1985). Recklessness has been defined by the Court as "highly unreasonable conduct which is an extreme departure from the standards of ordinary care." Blavin, at 711, quoting Ohio Drill & Tool Co. v. Johnson, 625 F.2d 738, 741 (6th Cir. 1980).

The Court in Electronics Warehouse, also addressed the standard under Section 17(a)(2) and (3) of the Securities Act and concluded that, "a defendant need only be shown to have been negligent in the omission or falsity of a statement of material fact or, as to whether a transaction or practice 'would operate as a fraud or deceit upon the purchaser' of a security, to prove violations of these sections. Electronics Warehouse, 689 F.Supp. at 60, quoting Aaron, 446 U.S. at 697.

The Securities Laws were enacted by Congress in part to protect the investing public. These protections are encompassed in the mandatory registration requirements outlined in Title 15 of the United States Code. The SEC is given the power to enforce these provisions through section 19 of the Securities Act of 1933. Section 20 of the Act empowers the SEC to enjoin violators of these Securities Laws. A

person found to have violated these anti-fraud provisions of the Securities Laws faces both serious criminal prosecution as well as civil liability to injured investors. The U.S. Supreme Court has stated that, the essential nature of an SEC enforcement action is equitable and prophylactic; its primary purpose is to protect the public against harm. See Capital Gaines Research Bureau, Inc., 375 U.S. 180, 193 (1963).

The Courts have recognized the important position of an attorney with respect to disclosure and opinions concerning the sale of securities. In S.E.C. v. Spectrum, Ltd., the Court stated that,

> "The legal profession plays a unique and pivotal role in the effective implementation of the securities laws. Questions of compliance with the intricate provisions of these statutes are ever present and the smooth functioning of the securities markets will be seriously disturbed if the public cannot rely on the expertise proffered by an attorney when he renders an opinion on such matters." S.E.C. v. Spectrum, Ltd., 489 F.2d 535, 541 (2d Cir. 1973).

Through his actions and omissions, Respondent has violated the "public trust." The Respondent was involved in the capitalization of certain blind pool companies. A meaningful definition of what encompasses a blind pool is that,

> "A blind pool is formed when stocks are offered in a hollow company which company's principals have yet to determine where and in what other concerns they will either invest in or acquire. Investors are induced into buying into a blind pool solely on the strength of the principal's knowledge, investing expertise, and assurances of success," (emphasis supplied.) S.E.C. v. Wellshire Securities, Inc., 737 F.Supp. 251, 255 (S.D.N.Y. 1990).

In the present case, with respect to these fraudulent registration statements filed by the Respondent, the SEC's Order of Suspension found that the untrue statements of material fact or omissions of material fact included, among other things, that:

> "(1) some of the persons disclosed as officers or directors of the Issuers either had no affiliation with the companies or were merely figureheads; (2) some of the persons disclosed as being principal shareholders and owning substantial portions of common stock of certain Issuers, in fact, owned no stock; (3) some of the persons disclosed as purchasing common stock of making loans to certain issuers never made any loans to them; (4) some of the persons disclosed as founders of the companies either had no affiliation with certain Issuers or were merely figureheads; (5) persons with no disclosed affiliation with certain of the Issuers, would and did actually control the Issuer companies; (6) persons with no disclosed affiliation with certain Issuers would and did control the Issuers' bank accounts and used funds raised from investors in a manner different from that disclosed; (7) a number of the signatures on the registration statements of certain Issuers of purported officers and directors were forged or otherwise affixed without authorization; and (8) the beneficial ownership of the securities of certain Issuers, both before and after the initial public offering, was and would be concealed by the use of undisclosed nominees or through persons otherwise controlled by the beneficial owners." (Fla. Bar Exhibit 2).

The cornerstone of these blind pool investments rests upon the investor's reliance upon the disclosure in the registration statements. These disclosures provide the investors with some solid basis upon which they can invest their hard earned monies. When the disclosures in the registration statements contain names of principals that have no affiliation with these blind pool companies, or names of principals that purportedly have purchased stock in these companies, when they in fact have not, the investor is truly investing in a "blind" company. Further, when an investor invests in a company based upon the founders of that company, and the purported founders in fact have no affiliation, or when the actual parties in control of the issuer companies are unknown to the investor, he is being asked to put forth monies for an unknown purpose and giving them to unknown persons. Its fair to

assume that investors with knowledge of these facts would not be investors at all.

In a securities fraud case, the Second Circuit Court of Appeals addressed the issue of an attorney in preparing an opinion letter, upon which investors relied in purchasing securities. S.E.C. v. Spectrum, Ltd., 489 F.2d 535 (2d Cir. 1973). In Spectrum, the Court stated that the public trust demands more of its legal advisers than "customary" activities which prove to be careless. Id. at 542. Similarly, in the present case, the filing of a registration statement, which provides the sole basis upon which the public is investing, should not be a "customary" activity. The attorney involved in such must perform the necessary due diligence "investigation" to insure the accuracy of such registration statements so that the public trust is protected. This the Respondent did not do, and the resulting fraud upon the investing public is what the Respondent should be held to answer for.

The actions and inactions of Respondent in assuring that the registration statements reflected only truthful and accurate information is what the investing public relied upon. Respondent's actions in the present case evidence the sort of recklessness that the Court described in Spectrum concerning securities fraud. Id. at 60. Thus, the Respondent cannot claim that the fraud occurred without his knowledge. The facts show, and the Respondent has admitted, that he played an integral part in causing these registration statements to be created and filed. Respondent knew that the information contained in these registration statements was incomplete and inaccurate, and in fact contained fraudulent information and forged or unauthorized signatures. Respondent knew that the investors were relying on these disclosures

for their investments and as such he should be held accountable for his actions.

At present there are few cases in which the Florida Supreme Court has addressed the issue of discipline where securities fraud is involved. However, the Court has addressed the issue of discipline where charges of mail fraud were alleged. The language of the federal mail fraud statutes are analogous to the federal securities fraud statutes. Section 1341 of Title 18 of the United States Code provides in pertinent part that:

> "Whoever, having devised or intended to devise any scheme or artifice to defraud, or for obtaining money or property by means of false pretenses, representations, or promises,... places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service,...or knowingly causes to be delivered by mail according to the direction thereon,...shall be fined ...or imprisoned..., or both."

Section 17 of the Securities Act of 1933 makes it unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails,...(1) to employ any device, scheme, or artifice to defraud, or (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

The Court has stated that fraud in the sale of securities is the core of the offense proscribed by the Securities Act, and the use of mails in furtherance of such evil is incidental and a requirement for

jurisdictional purposes. United States v. Sanders, 266 F.Supp. 615 (W.D. La. 1967). In the present case, the Respondent did use the mails in furtherance of the securities fraud when he caused to be mailed to the SEC certain registration statements that were false and misleading, among other documents. Thus, Respondent's actions are analogous to those required by the mail fraud statute. A review of recent disciplinary cases by the Florida Supreme Court involving mail fraud provides the Court with a basis for evaluating the applicable discipline in the present case.

The Florida Supreme Court has held that committing mail fraud warrants disbarment. The Florida Bar v. Weinsoff, 498 So.2d 942 (Fla. 1986); The Florida Bar v. Hosner, 536 So.2d 188 (Fla. 1989); The Florida Bar v. Onett, 504 So.2d 388 (Fla. 1987). This Court has also held that committing mail fraud warrants a three (3) year suspension from the practice of law, where significant mitigating factors are present. The Florida Bar v. Diamond, 548 So.2d 1107 (Fla. 1989).

In a recent case, the Supreme Court of Florida has addressed the issue of discipline in a case involving securities fraud similar to the fraud committed in the present case. The Florida Bar v. Levine, 571 So.2d 420 (Fla. 1990). In Levine, the attorney plead guilty to violating several securities anti-fraud statutes. The Florida Bar thereafter initiated disciplinary proceedings against Levine seeking disbarment. The Court held that such violations of the federal anti-fraud securities statutes warranted disbarment. Id.

The Court in Levine found that the respondent had been hired as a lawyer and not as a participant sharing in the profits of the fraudulent scheme. Id. at 421. The Court also noted that Levine's

only financial benefit from the fraudulent scheme was the receipt of reasonable attorney's fees for his services. Id. In the present case, Respondent's only financial benefit claimed was also the receipt of reasonable attorney's fees. Notwithstanding this fact, the Court in Levine determined that the seriousness of the attorney's actions warranted disbarment. Likewise, the Court should approve the referee's recommendation of disbarment, notwithstanding the fact that he did not directly seek financial gain from the fraudulent scheme, other than receiving a reasonable attorney's fee.

Although Respondent has not been charged or convicted for violating the federal anti-fraud securities statutes, he has admitted to participating in these activities which constitute criminal acts. The fact that Respondent has not been criminally charge for his actions in the securities fraud does not make him any less culpable for his conduct. In terms of mitigation, the Court in Levine considered the fact that the attorney did not directly participate in the illegal activities. Id. Notwithstanding this mitigating factor, the Court concluded that disbarment was the appropriate discipline. In the present disciplinary proceeding, the Respondent was not found to have directly participated in the illegal activities. However, Respondent's actions warrant the imposition of serious discipline, and this court should approve of the referee's recommendation of disbarment.

In the present case the Respondent voluntarily consented to a final SEC order which imposed a sanction of suspension for a period of five (5) years. Although there is no rule mandating that this Court follow the sanction imposed by the SEC, the Court should consider the seriousness of Respondent's violations in determining the appropriate

discipline. The Respondent was intimately involved in securities frauds on the investing public. The Supreme Court of Florida has dictated that each case warrants separate review and evaluation before discipline, if any, is imposed. The proper discipline must be based on an independent appraisal of the attorney's conduct, and not on the foreign jurisdiction's discipline imposed. The Florida Bar v. Wilkes, 179 So.2d 193, 200 (Fla. 1965). This safeguard is succinctly stated in The Florida Bar v. Moxley; "In disciplinary cases it is important to look at the offense and the circumstances surrounding it. But it also is important to consider the effect of the dereliction of duty on others as well as the character of the wrongdoer and the likelihood of further disciplinary violations." 462 So.2d 814, 816 (1985). In the present case the Bar has not sought to impose the discipline ordered by the SEC. In fact, the Bar has sought to disbar the Respondent with the language of Moxley in mind. The Bar asserts that the seriousness of the offense committed by the Respondent and the circumstances surrounding it, as well as the "dereliction" of the Respondent's duty warrants the imposition of disbarment as recommended by the referee.

The Florida Standards for Imposing Lawyer Sanctions provides guidance for the Court when imposing discipline for Rule violations. Section 5.1 of the Standards provides that disbarment is appropriate when: (f) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously reflects on the lawyer's fitness to practice. Section 5.12 provides that suspension is appropriate when a lawyer knowingly engages in criminal conduct which is not included in section 5.11 and that seriously adversely reflects on the lawyer's fitness to practice. The

Respondent's actions were both intentional and knowing, and they resulted in substantial fraud upon the investing public.

Respondent cites several cases supporting his position that disbarment is an inappropriate and excessive discipline in this case. Several cases cited by Respondent imposed disbarment. The Florida Bar v. Pelle, 459 So.2d 1028 (Fla. 1984); The Florida Bar v. Isis, 552 So.2d 912 (Fla. 1989); The Florida Bar v. Levine, 571 So.2d 420 (Fla. 1990); The Florida Bar v. Bussey, 529 So.2d 1112 (Fla. 1988); and State v. Lewis, 145 So.2d 875 (Fla. 1962). While there may be examples of worse misconduct that resulted in disbarment, the fact remains that the present case involving serious fraud also warrants disbarment.

Other cases cited by Respondent have imposed the lesser discipline of suspension and one case imposed a public reprimand. The Florida Bar v. Fertig, 551 So.2d 1213 (Fla. 1989); (90 day suspension where attorney plead nolo to RICO charges of laundering drug money); The Florida Bar v. Diamond, 548 So.2d 1107 (Fla. 1989); (three year suspension for conviction of mail fraud where abundant character testimony was presented in mitigation); The Florida Bar v. Stoskopf, 513 So.2d 141 (Fla. 1987); (90 day suspension for misdemeanor convictions for failing to report financial interest in foreign bank account); and The Florida Bar v. Levey, 525 So.2d 420 (Fla. 1988); (public reprimand where attorney continued to consult and represent client who's activities were connected to possible criminal activities). Of these cases, Diamond is the only case that presents facts involving fraud, as is present in this disciplinary matter. In Diamond, however, the Court went to great length to note that the Respondent presented

extensive mitigation in the form of character witnesses. Respondent also presented two character witnesses in the form of two retired judges before whom Respondent had appeared. The testimony of Retired Judge Joseph Price concerning Respondent can be summed up in one brief quote from the record;

> "I would like the referee to know that there never was any instance in which I had any reason at all to doubt your truth or your veracity, or that you were anything other than forthcoming and perfectly forthright and candid and honest with the Court and with your dealings with the other lawyers." (R. 330).

Also, the testimony of Retired Judge Louis Weissing can be summed up in a few quotes from the record;

> "Judge Newbold, I know Mr. Tepps as just another lawyer. He was a more than an average active lawyer. He was appearing in court frequently or you would see him walking down the hall. And he had no speciality that I know of....And he was just a good, basic practicing attorney...Never had any problem with Mr. Tepps. He was there, he was always hustling from one hearing to another, did a good workmanlike job. He's not a rocket scientist. He would make mistakes the same as other human beings, but he was an honorable practitioner ...." (R. 331-314).

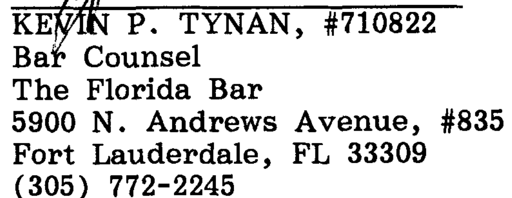
This is not the abundant character testimony present in the Diamond case that the Court took into consideration when it suspended the attorney rather than disbarring him for committing fraud. Thus, the referee's findings of fact and recommendations as to discipline should not be disturbed where the Respondent has not put forth sufficient evidence to warrant mitigation.

CONCLUSION

The Referee properly limited the issues at trial when he ruled that the SEC Order and Opinion was conclusive proof of the Respondent's misconduct. The Respondent's unethical acts consisted of grave securities fraud violations that warrant disbarment. The Referee has recommended that the Respondent be disbarred and this Court should follow the Referee's recommendations.

Wherefore, The Florida Bar requests this Court to uphold the Referee's findings and approve the Referee's recommended discipline of disbarment and award the Bar costs in this proceeding.

Respectfully Submitted,



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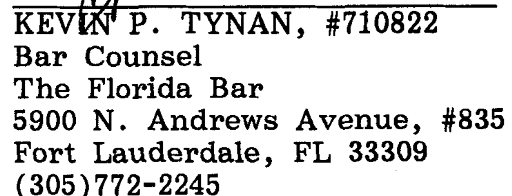
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of The Florida Bar has been furnished to Lewis A. Fishman, P.A., Attorney for Appellant, at 100 South Pine Island Road, Suite 112, Plantation, Florida 33324, and to John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300 by regular mail on this 23rd day of September, 1991.



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