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SID J. WHITE
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CLERK, SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,)
Complainant,)
vs.) CASE NO. 76,468
JEROME L. TEPPS,)
Respondent.)
_____)

ON RESPONDENT'S PETITION TO
REVIEW THE REPORT OF THE REFEREE

ATTORNEY TEPPS' INITIAL BRIEF

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PRELIMINARY STATEMENT

Attorney Jerome Tepps is the Respondent in this complaint by The Florida Bar requesting discipline. Over Respondent's objection, the Referee conducted a hearing solely on the issue of discipline, and recommended that Respondent be disbarred. Respondent now seeks review of the Referee's Report in this Court. This Court has jurisdiction, pursuant to Article V, Section 15 of The Florida Constitution.

All references are to the transcript of the hearing before the Referee, designated by "R" and the page number, or to the documents filed as exhibits to the Record by the Bar or by Respondent, designated by their title.

STATEMENT OF THE CASE AND FACTS

Jerome Tepps was admitted to practice law in Florida in 1979 and is now thirty-six years old. Since his admission he has engaged in the general practice of law, primarily as a sole practitioner, and was described by two judges of the Circuit Court of Broward County as a good, basic, practicing attorney who never misled them, and who was always forthcoming and forthright, candid and honest with the court and with other attorneys (R.312,314,330). As Respondent testified, he had no particular specialty and, prior to hiring Michael Goldstein as a paralegal, did no work before the Securities and Exchange Commission (SEC) (R.127). Respondent met Goldstein within a year or so of opening his own practice. Goldstein had been working as a paralegal doing securities work for another law firm when that firm lost its major underwriting client and was forced to let Goldstein go. Goldstein approached Respondent about joining Respondent's firm as a paralegal, enabling Respondent to add securities work to his fledgling practice. Respondent knew that Goldstein at that time had an application for admission to The Florida Bar pending, and also had a pending bar disciplinary matter in New York (R.128-130).

Goldstein went to work for Respondent's law firm and, according to a statement Goldstein gave the SEC in 1987, spent 70% of his time doing securities work under Respondent's supervision (R.267-269). As Respondent testified, Goldstein drafted securities documents and Respondent reviewed them. Respondent relied on

Goldstein's securities expertise, but took responsibility for the paperwork that left the office being correct based on what he actually knew or should have known. (R.135,137). Respondent admitted that he may have been less than perfect in supervising Goldstein, but he did supervise Goldstein and did not let Goldstein do whatever he wanted (R.137-138). In fact, as a result of the same events that are the basis for this disciplinary proceeding, Respondent was previously disciplined for failure to properly supervise a paralegal, was privately reprimanded, and placed on one (1) year's probation, which he successfully completed. In addition, Respondent fired Goldstein. (R.133,224,225).

At some point, a woman named Mary Armeni came to the firm as a result of her knowing Goldstein, to have some securities work done. Respondent met Armeni and turned the work over to Goldstein (R.148-149). Armeni told Goldstein that she was the administrator for several blind pool companies - Pilgrim, Sheppard, Vanguard and Chatsworth - and that she was the liaison between those companies and the law firm or firms that would handle the securities work. It was arranged that Respondent's firm would represent Pilgrim and Sheppard and that another lawyer, Barry Kaplan, would represent Vanguard and Chatsworth using the paralegal services of Goldstein and the computer software of Respondent's firm (R.158-160,255-261,280-281). Goldstein got the information he needed to prepare the registration statements from Mary Armeni, sent out officer and director questionnaires and received back signed registration statements from the officers and directors. In addition, the firm

hired the Washington Service Bureau to do the necessary background checks on the named officers and directors. Finally, Goldstein met named officers of Pilgrim and Sheppard at the bank closings (R.194,214,270-274,283-284).

Goldstein, who did not testify before the Referee because of his announced intention to invoke the protections of the Fifth Amendment to the United States Constitution, advised the SEC in a statement he gave them in 1987 that during the registration process of these companies, he spoke with a former client of his, Carl Porto, about these companies, although Porto had no apparent connection to them, other than as someone who does mergers (R.6,275-277,282).

After these blind pool companies were registered to raise small amounts of money, the SEC began an investigation targeting Carl Porto and others which revealed, among other things, that Porto was involved in these companies but not named on the registration statements. Respondent testified that even if he had done a more thorough investigation than his firm conducted, that such diligence would have not revealed Porto's involvement to him because Porto and the named officers had lied (R.163-164,167). The SEC, as part of its investigation, in January, 1988, filed a civil injunctive complaint in the United States District Court of the Northern District of Illinois naming Carl Porto and others, including Goldstein and Respondent (R.26,30, Bar Exhibit 2 to the record).

The SEC's complaint alleged that Respondent prepared false and misleading registration statements and other documents in his capacity as counsel to the issuing companies (R.37-38,45). Respondent was not alleged to have any involvement in these companies other than in his capacity as counsel for the issuer, for which he received a reasonable fee (R.72,169). Indeed, the chief investigator for the SEC testified that each of these four offerings raised only the minimal amount of $125,000.00 each; that his investigation revealed that people had agreed to lend their names to the companies for a fee; that at the closings on these offerings the correct people were present; and, that well after the closings, the people who attended the closings as officers were still acting as officers on behalf of the companies, particularly as to the retention of legal counsel to protect their and the companies' interests (R.73,79,81,89-91,96). Finally, the SEC investigator testified that he had no knowledge whatever of any document finding that Respondent knowingly, willingly, negligently or recklessly submitted false documents to the SEC (R.97-98).

Although there was no such finding, in April, 1988, Respondent elected to consent to the entry of a Final Judgment and Order of Permanent Injunction, enjoining him from violating or aiding and abetting any violation of the Securities Acts of 1933 and 1934. This judgment on its face recites that it was entered into by Respondent "...without admitting or denying the allegations of the complaint ...and without trial, argument or adjudication of any fact or law herein..." Final Judgment, Exhibit "A" to Complaint of

The Florida Bar. Respondent testified before the Referee that he made a business and moral decision to consent to this injunction; it would be very costly to defend this action in Chicago and it would take substantial time away from Respondent's practice, both of which he could ill afford (R.202-204). But most importantly, Respondent said:

> "But I also wasn't really anxious to fight with the federal government on something where what they were asking for was something that I could live with, which was that I wouldn't violate securities laws in the future.
>
> Because certainly this was an instructive experience, an educational experience where I wasn't going to be even near the line. That was my feeling, that I would never cross or even walk near whatever line it is that separates legal from improper conduct.
>
> So, I did allow an injunction to be entered and I of course was impressed with the fact that I wasn't admitting anything and I wasn't denying anything, and the government seemed very satisfied with that. There was no discussion really about that I should admit I did something wrong, or that I should promise to testify in court, or anything like that.
>
> I felt that they felt I was not as careful as I should have been. I guess they felt that at a minimum. But based on the result that was approved by the government, the SEC, I thought was a good way to resolve things." (R.204, line 10 - 205, line 8).

Of course, as Respondent soon learned, "things" were not in fact "resolved". Instead, following the entry of the consent judgment, the SEC instituted an administrative proceeding against both Goldstein and Respondent pursuant to Rule 2(e)(3) of the Commission's Rules of Practice, 17 C.F.R. 201 (e)(3), to suspend both Goldstein and Respondent from appearing or practicing before

The Commission.[1] This administrative proceeding was instituted in July, 1988, and was concluded by an offer of settlement resulting in an opinion and order of the Commission dated October 25, 1989 (Exhibit "B" to the Complaint of The Florida Bar), which denied both Goldstein and Respondent the privilege of appearing or practicing before the Commission for five years, or sooner with Commission approval.

The substance of the Commission's opinion was that Respondent and Goldstein had filed registration statements and other documents with the Commission which investigation revealed to have contained untrue statements of material facts or omitted material facts which should have been stated. There was never any hearing at which evidence was adduced, nor was there any finding of fact, that Respondent herein prepared or filed any documents fraudulently.

Instead of conducting a fact finding hearing, the Commission, and subsequently, The Florida Bar, both relied on a provision of the SEC regulations to establish their position that Respondent engaged in fraudulent conduct. That provision states that a person who consents to the entry of a permanent injunction without admitting the facts set forth in the complaint will be presumed, for the purposes of paragraph 2(e)(3), to have been enjoined for the misconduct alleged in the complaint.

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[1]Goldstein had previously consented to the entry of a permanent injunction against him in May, 1988, in the same civil action brought by the SEC in the United States District Court.

Based on that administrative regulation of the SEC, the Commission, with Respondent's consent, suspended Respondent's privilege to appear or practice before the SEC for up to five years. Then, based on the action of the SEC, The Florida Bar instituted this complaint against Respondent, alleging that he violated Rule 3-4.3, Rules of Discipline and Rules 4-4.1 and 4-8.4, Rules of Professional Conduct, in that he participated in the preparation of fraudulent SEC documents and that he filed SEC documents without authorized signatures.

Over Respondent's objection, the Referee granted the Bar's motion to limit the proceedings to the issue of discipline based on the Bar's contention that the opinion and order of the SEC was:

> "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."

Rule 3-4.6, Rules Regulating The Florida Bar. See, Referee's Orders of January 7, 1991, and February 15, 1991. Thus, a hearing was held before the Referee solely on the issue of punishment.

At the hearing, Respondent established that he had never been charged with any crime nor pleaded to any criminal act of any kind. Respondent maintained that neither the order of the United States District Court enjoining him from violating the securities law nor the order of the SEC suspending him from practice with his consent constituted any finding that he committed any fraudulent or negligent act (R.16-19). As noted earlier, the chief investigator

of the SEC admitted that he had no knowledge of any document that established that Respondent knowingly submitted false documents to the SEC (R.97-98). And, to establish that Respondent was prudent in relying on the individuals who came to his office and represented themselves as principals in these companies, Respondent introduced the sworn and signed statements of the officers and directors that he was furnished and the copies of letters that he received indicating that those people were indeed involved in these companies (Respondent's Exhibits "C" through "J"). In addition, Respondent introduced a letter from the Washington Service Bureau establishing that a check of the officers and directors of these companies was conducted at Respondent's behest and revealed no litigation or administrative proceedings against any of them by the SEC (Respondent's Exhibit "B").

Further, even though the Bar's expert securities lawyer testified that he thought that Respondent's conduct regarding due diligence departed from the standard of care mandated by the SEC and by the case law on attorney's liability, that expert admitted that due diligence is not expressly required by any statute, but stems from the provisions regarding the liability of an attorney to third parties (R.109,121).

In final argument, the Bar argued for disbarment contending that the opinion of the SEC established fraud by Respondent. Respondent, on the other hand, argued that the Bar failed to establish the charges in the complaint, failed to establish that there was any fraudulent act or intent by Respondent, and, at most,

established negligence, although he was never so charged. See, Final Arguments and Respondent's Memorandum as to Standards for Imposing Lawyer Sanctions.

QUESTIONS PRESENTED

WHETHER THE ORDER OF THE SECURITIES AND EXCHANGE COMMISSION SUSPENDING RESPONDENT FROM APPEARING BEFORE THE COMMISSION FOR FIVE YEARS OR LESS, ENTERED UPON CONSENT WITHOUT A HEARING OR FINDINGS OF FACT, CONSTITUTES A FINAL ADJUDICATION OF DISCIPLINE BY A FOREIGN JURISDICTION WITHIN THE MEANING OF RULE 3-4.6 OF THE RULES REGULATING THE FLORIDA BAR SUFFICIENT TO SUPPORT THE DISBARMENT OF RESPONDENT?

WHETHER DISBARMENT IS THE APPROPRIATE DISCIPLINE WHERE RESPONDENT CONSENTED TO AN INJUNCTION IN A CIVIL SUIT BROUGHT BY THE SECURITIES AND EXCHANGE COMMISSION WHERE NO COURT OR REFEREE MADE ANY INDEPENDENT FINDING OF MISCONDUCT?

SUMMARY OF ARGUMENT

The Referee erred in refusing to conduct a hearing on the issue of Respondent's misconduct and only considering the issue of discipline. The order of the SEC, which suspended Respondent from practice before the commission based on the agency's own regulation presuming misconduct, without making any independent finding of misconduct, is not a final adjudication of misconduct by a foreign jurisdiction within the meaning of Rule 3-4.6 of the Rules Regulating The Florida Bar.

Assuming arguendo that this Court finds no error in the Referee's refusal to hold a hearing at which The Florida Bar would have to prove the allegations in their complaint, this Court should nevertheless refuse to impose the discipline of disbarment. Disbarment is excessive, unwarranted by the facts of this case and a punishment more severe than is necessary to punish Respondent, deter others and protect the public.

POINT ONE

THE REFEREE ERRED IN GRANTING THE FLORIDA BAR'S MOTION TO LIMIT ISSUES AS THE ORDER OF THE SEC IS NOT DISCIPLINE BY A FOREIGN OR FEDERAL JURISDICTION WITHIN THE MEANING OF RULE 3-4.6, RULES REGULATING THE FLORIDA BAR.

At the hearing below, The Florida Bar moved to limit the issues to discipline alone, contending that the administrative proceedings instituted by the SEC constituted:

> "[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 [that] shall be considered as conclusive proof of such misconduct in a disciplinary proceeding under this rule."

Rule 3-4.6, Rules Regulating The Florida Bar.

The Bar is wrong. The SEC order in question here is not, and ought not to be held to be, a final adjudication of a court or other authorized disciplinary agency under Rule 3-4.6. First, the SEC is not a court or authorized disciplinary agency of another jurisdiction. The SEC is a federal administrative agency whose purpose is not the qualification, supervision or regulation of lawyers, nor is the SEC a bar agency or association whose function is the discipline of lawyers. The plain language of Rule 3-4.6 precludes a finding that the SEC is an authorized disciplinary agency of another jurisdiction; the rule plainly states that it applies to courts or authorized disciplinary agencies of other jurisdictions where an attorney is licensed to practice in that jurisdiction. **The SEC does not license attorneys to practice before it. Indeed, the SEC does not even require that one be an**

attorney to practice before it. Since the SEC has no independent bar governing the admission, supervision and regulation of attorneys who are independently licensed to appear before the Commission, it is not an authorized disciplinary agency within the meaning of the Rules Regulating The Florida Bar.[2]

Not only is the SEC not an authorized disciplinary agency under Rule 3-4.6, but the order of the SEC suspending Respondent for a period of five (5) years or less is not a final adjudication of misconduct as contemplated by the Florida rule. The order of the SEC suspending Respondent was based entirely on an offer of settlement negotiated between Respondent and the SEC after Respondent agreed, without admitting any misconduct, to be permanently enjoined from violating the securities laws in the future. The Florida Bar contends that Respondent's offer to settle a civil action without admitting any wrongdoing whatsoever, and where no independent fact finder found any wrongdoing, is the equivalent to a nolo contendere plea to criminal charges. This is an extraordinary and unwarranted leap, based on the Bar's misapprehension as to the applicability of The Florida Bar v. Lancaster, 448 So.2d 1019 (Fla. 1984).

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[2]The SEC does of course have internal regulations defining practice before it which apply equally to attorneys, accountants, engineers, or other experts, as well as rules which provide for suspension from the privilege of practicing before the Commission. See, 17 CFR Secs. 201.1 and 201.2. The mere existence of these regulations is not sufficient to declare the SEC to be an authorized disciplinary agency of another jurisdiction under Florida Bar rules, where the SEC rules exist independent of any bar licensing authority and apply to citizens other than lawyers.

In Lancaster, this Court held that a nolo contendere plea by an attorney to a misdemeanor, with an adjudication of guilt, was sufficient to sustain discipline provided that the attorney was given a chance to explain the circumstances surrounding his plea and contest the inference that he engaged in illegal conduct. In the instant case, however, there has never been a crime charged, there has never been an adjudication of guilt of a crime, and there has not even been either an admission of wrongdoing or an independent finding of wrongdoing in this civil case which might form the basis for a finding that discipline was warranted. The Bar's argument has been that since Respondent had an opportunity to contest the civil action for a permanent injunction filed by the SEC, he waived his right to have an independent fact finder determine if he ever committed any misconduct warranting discipline, even though he never admitted any wrongdoing. This is so, the Bar argues, because an internal regulation of the SEC says that, for purposes of the SEC suspending individuals who practice before it, a person who consents to the entry of a permanent injunction against him, without admitting the facts set forth in the complaint, is presumed to have been enjoined because of the misconduct alleged in the complaint. 17 CFR 201.2(e)(3)(iv). The Bar's contention here runs afoul of well settled law in this area.

In The Florida Bar v. Wilkes, 179 So.2d 193 (Fla. 1965), this Court held that under the predecessor to Rule 3-4.6:

> "...the introduction in evidence of a properly authenticated judgment of discipline entered by a sister state shall operate as conclusive proof of guilt of the acts of misconduct adjudicated in that judgment...",

but that:

> "...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 misconduct involved Florida can elect not to be bound thereby". 179 So.2d at 198.

Under the rule of law established by Wilkes this order of the SEC cannot be considered a judgment of discipline that adjudicated acts of misconduct. Rather, at best, the order of the SEC enters a suspension based only on the presumption of misconduct. While a presumption might be constitutionally sufficient to temporarily limit the right of a lawyer, accountant, engineer or other expert to appear at an administrative agency, more is required to permanently deprive a lawyer of his livelihood by disbarment. To hold that a lawyer may be disbarred, without an independent finding of misconduct, because a federal administrative agency's internal regulation presumed wrongdoing from his offer to settle a civil case, even though that offer specifically did not admit wrongdoing, would undermine the basic due process protections that Florida's lawyer regulation system is otherwise so careful to preserve.

Because Respondent has been denied any meaningful opportunity to have a hearing on the issue of whether he engaged in any misconduct that ought to be disciplined, this matter should be remanded to the Referee for a hearing on whether or not Respondent violated the Disciplinary rules as charged. Even if this Court is of the opinion that Respondent waived his right to a hearing on the issue of the permanent injunction by his agreement to be enjoined,

with no admission of fraud or other wrongdoing, this Court should find that the order of the SEC, and its internal regulation presuming misconduct on which the order was based, was not a final adjudication in a disciplinary proceeding by an authorized disciplinary agency of another jurisdiction that Respondent was guilty of misconduct justifying disciplinary action against him. Therefore, the order of the SEC should not be considered as conclusive proof of misconduct by Respondent, and The Florida Bar should be bound to prove the allegations of misconduct in its complaint before discipline is imposed.[3]

This the Bar has not accomplished. By its complaint the Bar has charged Respondent with participating in the preparation of fraudulent SEC documents (Count I) and with filing SEC documents without authorized signatures (Count II). The Bar has alleged that his conduct violates the Rule of Discipline 3-4.3 (misconduct and minor misconduct) and Rules of Professional Conduct 4-4.1 (truthfulness in statements to others: In course of representing a client a lawyer shall not knowingly: (a) make a false statement of a material fact or law to a third person, or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 4-1.6), and 4-8.4

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[3]It is interesting to note in this regard that the Mississippi State Bar provides that civil judgments based on fraud or dishonesty, are grounds for suspension or disbarment, but that provision specifically excludes civil judgments of the SEC or other federal agencies from being the basis for such discipline. See Mississippi State Bar v. Nichols, 562 So.2d 1285 (Miss. 1990).

(misconduct, a lawyer shall not: ...(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation...).

In short, the Bar has charged Respondent with knowing, intentional acts of fraud and/or deception, but has not proved knowledge or intention to defraud in Respondent's filing the SEC documents, as opposed to negligence or improper supervision of a paralegal. Instead, the Bar has been granted the equivalent of summary judgment on the issue of liability based on nothing more than a presumption of misconduct, arising out of an SEC regulation that by its own terms applies only to suspension proceedings within the SEC. In Kivitz v. Securities and Exchange Commission, 475 F.2d 956 (D.C.Cir. 1973), the petitioner - attorney sought to set aside an order of the SEC suspending his right to practice before the commission for two (2) years. In reversing the order of the SEC and dismissing the proceedings as to Kivitz, the court spoke in language particularly appropriate in the instant case:

> "This was a non-public proceeding arising under Rule 2(e)(3) of the Commission's Rules of Practice, 17 CFR 201.2(e). We do not say that an administrative agency may not so proceed, (citations omitted). But we have always viewed an attorney's license to practice as a `right' which can not lightly or capriciously be taken from him. (citations omitted).
>
> This disbarment case involves a lawyer's reputation in the community, his livelihood, his self-esteem - his `right'. It is not concerned with some specialty developed in the administration of the Act entrusted to the agency.

475 F.2d at 962.

Similarly, in the present disbarment case Respondent's "right" and privilege to practice law in Florida is being capriciously

taken from him based on a presumption that is nothing more than an administrative convenience for the agency. As in Kivitz, in this case it offends fairness and due process of law to elevate an administrative regulation beyond its intended scope - within the agency - and use it to justify the disbarment of a Florida lawyer in the absence of an independent finding of misconduct.

POINT TWO

DISBARMENT IS INAPPROPRIATE AND EXCESSIVE DISCIPLINE ON THE FACTS OF THE CASE

In the event that this Court determines that the Referee did not err in denying Respondent a hearing on whether the charges of misconduct were proved, Respondent asserts that the discipline imposed by the Referee was inappropriate and excessive on the facts of this case.

When viewed in the worst light, the evidence against Respondent established: That he employed a paralegal to do securities work for his firm; that, as to four companies that Respondent's firm represented or referred to other counsel, documents were filed with the SEC that contained inaccurate information; that Respondent supervised the work of the paralegal, Michael Goldstein, although he was clearly not as knowledgeable regarding securities law as was Goldstein, a former lawyer who had been house counsel for a public company and who had worked for several law firms that specialized in securities work; that Respondent performed a limited "due diligence" check on the people who represented to him that they were the principals in these companies and the investigation revealed no problems; that Respondent relied on the signed and sworn statements of those same people that they were the officers and directors of these companies, and did not arrange to meet personally with each and every named individual director or officer of these companies; that after these companies were registered as public offerings

Respondent learned that there were principals involved in these companies who had not been named in the registration documents who, if the SEC had known of their involvement, registration would have been denied; that the SEC brought a civil complaint for a permanent injunction against Respondent alleging that Respondent filed fraudulent documents; that Respondent agreed to the entry of an injunction permanently enjoining him from violating the securities laws without admitting any wrongdoing on Respondent's part; that as a result of that injunction, and in a negotiated settlement that also admitted no wrongdoing, Respondent was suspended from appearing before the SEC for five years, or less with the approval of the Commission; that the opinion and order of the SEC suspending Respondent also named and suspended Michael Goldstein and treated both individuals jointly throughout; that the opinion and order of the SEC presumed misconduct under the SEC's regulations, but made no independent finding of misconduct by Respondent; that based on the presumption of misconduct by the SEC, The Florida Bar brought these disciplinary charges against Respondent and was allowed to proceed directly to the issue of punishment, <u>without being required to prove that Respondent actually engaged in the misconduct charged</u>; that on the issue of punishment, the SEC investigator testified that Respondent's sole role in the events alleged by the SEC to be a fraudulent scheme was as the attorney of the issuer, preparing the documents that set the events in motion; that the Bar's expert witness testified that he believed that Respondents' conduct departed unreasonably from the standard of care of a good

standard of care of a good securities attorney; that Respondent testified that he took his apparent clients at their word that they were the principals of these companies, he investigated those individuals and found they had no SEC problems, and no greater investigation of those people would have revealed that they had agreed to lend their names to the companies for payment, because they deliberately deceived him; that Respondent also testified that he had no interest in these companies other than as a lawyer and that he received only a reasonable fee for the services his firm performed; that Respondent agreed to the permanent injunction because he never intended to violate SEC laws in the first place and had no hesitation about agreeing that he would never violate the SEC laws in the future; that as a result of these same events, Respondent was previously issued a private reprimand by The Florida Bar for failing to properly supervise a paralegal, he successfully completed his discipline, and fired the paralegal, Goldstein; that thereafter Respondent agreed to the SEC suspension of five years or less, in part because he had fired Goldstein and had no intention of engaging in securities work again under any circumstances; that two respected Broward County Circuit Court Judges testified as character witnesses for Respondent, that they knew him to be honest, hard working, pragmatic, and a good, dependable general practitioner.

This evidence, even viewed in the light least favorable to the Respondent, fails to establish that Respondent fraudulently filed erroneous documents with the SEC or intentionally filed documents

without the authority of the signatories. Thus, disbarment is an excessive discipline in this case.

It is well settled that the purpose of lawyer discipline is threefold: to punish the offender, to deter others who might be tempted to emulate the offender, and to protect the public. The Florida Bar v. Pahules, 233 So.2d 130 (Fla. 1970); The Florida Bar v. Larkin, 370 So.2d 371 (Fla. 1979); The Florida Bar v. Saphirstein, 376 So.2d 7 (Fla. 1979); The Florida Bar v. Musleh, 453 So.2d 794 (Fla. 1984). This Court's judgment as to discipline:

> "...must be just and fair both to the public and to the accused attorney; it must be sufficient to punish a breach of ethics and at the same time encourage reformation; finally, it must be severe enough to deter others who might engage in similar violations."

Larkin, 370 So.2d at 372.

To determine what is just and fair discipline in this case, this Court must consider the discipline ordered in other cases. For instance, a review of the other cases in which disbarment has been upheld establishes that disbarment would be excessive in this case. In The Florida Bar v. Pelle, 459 So.2d 1028 (Fla. 1984), this Court disbarred a lawyer who failed to tell his client that he had securities owned solely by her, got her permission to sell them by misrepresentation, sold them without telling her and forged an endorsement to convert the proceeds of the sale. In addition, Pelle failed to protect funds entrusted to him as an escrow agent, converted funds which belonged to a client, failed to comply with a subpoena from the grievance committee and violated an order of this Court relative to his receipt of trust funds. Pelle's conduct

clearly contrasts with Respondent's in this case; Pelle defrauded his clients, converted funds belonging to his client's and violated his public trust, whereas Respondent herein was, at most, negligent in failing to investigate the bona fides of his clients who turned out to be paid agents of others who wished to conceal their identity. Similarly, in State v. Lewis, 145 So.2d 875 (Fla. 1962), this Court disbarred Lewis as a result of his conviction of fraudulently concealing the assets of a bankrupt estate, a felony. In contrast, Respondent here has not even been charged with a crime, much less convicted of a felony.

In The Florida Bar v. Isis, 552 So.2d 912 (Fla. 1989) and The Florida Bar v. Levine, 571 So.2d 420 (Fla. 1990), this Court disbarred Isis and Levine following their felony convictions for conspiracy to commit organized fraud and unlawful use of boiler rooms, and for organized fraud and unlawful operation of boiler rooms, respectively. In Isis' case this Court noted that he pleaded no contest to a serious felony charge, involving large sums of money. By contrast, Respondent here has not been charged or convicted of a crime, and, as the SEC investigator testified, while a public stock offering can involve a great deal of money, the amount of money involved in these blind pool offerings was minimal (R.54,73). In Levine's case, this Court noted that Levine was Isis' co-defendant in the criminal cases and that he was the lawyer for the fraudulent scheme but did not share in the profits of the scheme except to the extent of receiving a reasonable attorney's fee for his work. This Court ordered Levine disbarred because of

the seriousness of his state and federal felony convictions and sentences.

Once again, it is apparent that Respondent here should not receive the same extreme discipline of disbarment as was held necessary for Levine, since here Respondent was never charged with or convicted of a crime, did not participate in or reap any benefit from any fraudulent scheme, but merely functioned as a lawyer, relied on his clients' representations that they were the principals in the companies they asked him to take public, and received no benefit other than a reasonable attorney's fee. There has been no suggestion in this proceeding that Respondent has anything approaching the culpability that Isis or Levine were found to have. Indeed, if Respondent's situation were even remotely similar to that of Isis and Levine, it stretches credulity to believe that the SEC or federal or state authorities would not have sought criminal charges as they did in the Isis and Levine cases.

Similarly, in The Florida Bar v. Bussey, 529 So.2d 1112 (Fla. 1988), this Court ordered the lawyer disbarred after he was found in a civil suit to have misappropriated to his own use more than two million dollars from a bank for which he was a fiduciary. This Court felt that the extreme sanction of disbarment was necessary here because of the vast amount of money taken by a lawyer from his client and to deter others from similar misconduct. By contrast, in the instant case there has been no money taken by Respondent from his client or another, much less two million dollars. The extreme sanction of disbarment is simply not warranted.

PAGE(S) MISSING

Indeed, Respondent's conduct here is more akin to the conduct in The Florida Bar v. Levey, 525 So.2d 420 (Fla. 1988), where the attorney admitted that he continued to advise a client on apparently legitimate business matters when he knew, or should have known, that the client's business affairs were connected to possible criminal activity on the part of the client. For his role in acting as the lawyer for the apparently legitimate business interests, Levey received a public reprimand.

Clearly, the cases are legion in which this Court has issued discipline substantially less extreme than disbarment in the face of misdemeanor and felony convictions, and in the face of misconduct greater than what this Court may find was committed by Respondent. On the particular facts of this case, Respondent maintains that disbarment is an excessive, unnecessary discipline that does not meet the needs of the Bar, the public or the Respondent.

CONCLUSION

WHEREFORE, the Referee's report should not be confirmed and this matter should be remanded to a Referee for a hearing on the issue of misconduct. In the alternative, this Court should refuse to impose the extreme sanction of disbarment and order such lesser discipline as it deems warranted.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail this 5th day of September, 1991 to John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 and Kevin P. Tynan, Bar Counsel, 5900 N. Andrews Avenue, Suite 835, Fort Lauderdale, Florida 33309.

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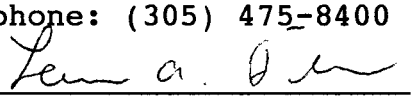
By 
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