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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

WILLIAM A. CALVO, III,

Respondent,

_____/

SUPREME COURT CASE NO. 78,395

The Florida Bar Case
No. 87-21,392(17C)

ANSWER BRIEF

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PRELIMINARY STATEMENT

In order to ensure a clear record, the following terms of reference will be used throughout this brief: The Florida Bar, appellee herein, will be referred to as "the bar" or "The Florida Bar". William A. Calvo, III, the appellant herein, will be referred to by "Respondent". The transcript of the final hearing shall be referred to by "T." followed by "page" and "lines" where applicable.

STATEMENT OF THE CASE AND THE FACTS

The statement of the case and statement of the facts set forth in Respondent's Brief Appealing Decision of Referee at Final Hearing (hereinafter Respondent's brief) are argumentative, incomplete, misleading and inaccurate in that Respondent mischaracterizes statements of the witness, cites witness testimony out of context, misconstrues statements of himself, the referee, and counsel for the bar, omits relevant portions of testimony that clarify or contradict his summary of the evidence. Therefore, The Florida Bar submits its version of the case and the facts.

On August 9, 1991, The Florida Bar filed its complaint against the Respondent wherein it alleged that he violated disciplinary rules regarding his participation in a scheme to fraudulently close a public offering. On September 14, 1992, final hearing commenced and was concluded on September 18, 1992. At final hearing, the Bar proved through clear and convincing evidence that Respondent violated ethical rules and the referee recommended that he be disbarred.

Respondent was admitted to practice law in the State of Florida on February 24, 1981. In November 1984, Respondent represented Electronics Warehouse (hereinafter Warehouse), a mail order business located in Connecticut that specialized in the sale of electronic products, in connection with a public offering of Electronics Warehouse stock. [T. page 808, lines 22 - 25, page 6, paragraph 1 of Respondent's answer, defenses & mitigating factors, to the bar's complaint (hereinafter

Respondent's answer)] Respondent drafted a post-effective amendment to Warehouse's registration statement which was filed with the Securities and Exchange Commission (S.E.C.). [T. page 597, lines 11 - 25, page 598, lines 1 - 18. The post-effective amendment indicated that Gallagher & Co. (hereinafter Gallagher) was the new underwriter for the offering. Respondent subsequently represented Gallagher in the offering. [Pages 7 - 8 of Respondent's answer]. On November 8, 1984, the S.E.C. declared the post-effective amendment to Warehouse's registration statement effective.

The terms of the amended registration statement required Gallagher, the underwriter, to sell a maximum of 15 million shares and not less than 12 million shares within 90 days of the effective date of the amended registration statement. The offering period was extended to 150 days with the consent of Warehouse and Gallagher. If 12 million shares were not sold within the 150 day period the funds held in escrow were to be returned to the bona fide investors pursuant to the registration statement. The Warehouse offering was termed a "12 million or none" because 12 million shares had to be sold in order for the offering to close. [See exhibit J, the prospectus, and exhibit G, Respondent's letter of April 22, 1985 to Barnett Bank, the escrow bank] Throughout the offering period Respondent consulted and advised both Warehouse and Gallagher with regard to the public offering.

Investors must rely on the prospectus and registrations statement in deciding whether to invest in the offering

company. Therefore, it is vital that the information contained in the prospectus is accurate and complete and not misleading.

As the offering period progressed it became apparent to Respondent, Edward Bremer, Warehouse's principal shareholder, president and director, Gary Granai, Warehouse's counsel in Connecticut and Russell Gallagher, principal of Gallagher and Co., that the of minimum 12 million shares would not be sold to bona fide investors within the offering period. Respondent, Mr. Bremer, Mr. Granai, and Mr. Gallagher conspired to devise a scheme whereby they would fraudulently make it appear that the minimum 12 million shares of Warehouse stock had been sold to bona fide investors. Respondent and the other participants contacted potential lenders for the purpose of obtaining "flash" loans on the day of the closing with the agreement that as soon as the offering was closed the lenders' principal would be returned along with hefty premiums which were paid with the bona fide investors' funds held in escrow. Respondent's firm recommended that Barnett Bank be the escrow bank for the offering. [T. page 878] Respondent's firm prepared the escrow agreement for Barnett Bank, the escrow bank for the offering, which allowed the offering period to extend beyond the 150 day offering period by two weeks. Respondent lunched at a restaurant with Mr. Bremer and Mr. Gallagher, the other participants in the scheme, while they solicited potential lenders by telephone at the table. Respondent met with Mr. Bremer and the

Gallaghers that same evening at a Fort Lauderdale restaurant for the purpose of introducing persons who might be willing to make "flash" loans to Warehouse on the day of the closing.

On March 5, 1985, approximately one month prior to the closing, Mr. Bremer was indicted by a Federal Grand Jury in Maryland on seventeen (17) counts of mail fraud. Mr. Bremer's indictment was a material factor that had to be disclosed to the bona fide investors. S.E.C. v. Electronics Warehouse, 689 F. Supp. 53 (D. Conn. 1988). Respondent made no effort as counsel for Warehouse or Gallagher to make the disclosure.

A few days prior to the closing Respondent spoke by telephone to Marvin Richmond, a "flash" lender, who had agreed to loan $250,000.00 on the day of the closing in exchange for repayment of the principal and a $75,000.00 premium immediately after the closing. Mr. Richmond informed the Respondent that his money would "going in with one hand and coming out with the other." [T. page 451, lines 19 - 22] The Respondent assured Mr. Richmond would be repaid in accordance with those terms.

On April 22, 1985, the Respondent, as counsel for the underwriter, attended the Warehouse closing at the escrow bank and delivered a letter that he prepared which authorized and directed Barnett Bank to release one third of the 1.2 million dollars held in escrow to Mr. Richmond, approximately $160,000.00 to Gallagher, Respondent's client

and friend, $15,000.00 himself and the balance to Mr. Granai's trust account. At the time of the closing Respondent knew that the minimum 12 million shares had not been sold to bona fide investors, that Mr. Bremer was under a seventeen count Federal indictment for mail fraud and that the closing occurred two weeks beyond the true closing date. [Exhibit G] All without the knowledge of the bona fide investors whose funds were held in escrow on the date of the closing. Respondent, in concert with the other participants in the Warehouse offering, purposely concealed from the bona fide investors and public that: 1. "Flash" loans were made on the day of closing to make it appear that the minimum number of shares required to close the offering had been sold; 2. Bona fide investors' funds would be used to pay hefty premiums to the "flash" lenders; 3. Mr. Bremer had been indicted on seventeen counts of mail fraud; 4. The offering period had expired two weeks prior to the date that the closing actually occurred; and 5. The bona fide investors funds would not be returned to them in accordance with the terms of the prospectus even though the minimum 12 million shares had not been sold to bona fide investors in accordance with the prospectus and registration statement.

In Respondent's brief he misrepresented statements made by the witnesses at final hearing by taking the statements out of context, providing incomplete summaries, and ignoring clarifying statements. The following are a few examples of

the actual statements made by the witnesses as compared to the Respondent distorted summaries:

1. Mr. Bremer did not remember if the Respondent stated that April 22, 1985 was incorrect. Compare to page 6, #2 of Respondent's brief.

2. Mr. Granai's plan was to borrow money so that he and Mr. Bremer could purchase stock for themselves. Mr. Bremer believed the plan had to be disclosed in the prospectus. A plan was subsequently formulated to make it appear to bona fide investors that the funds received into escrow from the "flash" lenders were Bremer Advertising's money which was be used to purchase Warehouse stock. Compare to page 6, #3 of Respondent's brief.

3. Mr. Bremer did not recall if he discussed the Crane loan with Respondent. Compare to page 6, #6 of Respondent's brief.

4. Mr. Bremer was of the opinion that Respondent knowingly and willfully provided improper legal advise regarding the Warehouse offering. Compare to page 8, #23 of Respondent's brief.

5. Mr. Bremer could only guess that the dates of the registration statements were accurate. Compare to page 8, #26 of Respondent's brief.

6. The Respondent is not mentioned by Mr. Bremer or Mr. Granai during their conversation; only Mr. Gallagher. Compare to page 9, #1 of Respondent's brief.

7. Mr. Granai was indicating that he spoke with Mr. Ehrlich; not Mr. Bremer. Compare to page 9, #3 of Respondent's brief.

8. Mr. Bremer did not claim that his request that Mr. Gallagher sell stock was illegal or that he though it was illegal. Compare to page 9, #6 of Respondent's brief.

9. Mr. Bremer did not claim that the difference between the minimum and maximum shares that could be sold in the offering represented the stock available for Bremer Advertising to purchase. Compare to page 11, #21 of Respondent's brief.

10. Mr. Bremer indicated that he did not want to pay Mr. Gallagher a commission based on stock that was purchased with the "flash" loan money and not through Gallagher's efforts. Compare to page 11, #24 of Respondent's brief.

11. Mr. Bremer indicated that the statements of the callers were made after he had reported the fraudulent scheme to the S.E.C. The Gallaghers, Mr. Granai, and the Respondent had consulted with an attorney at a meeting and mutually discussed their defenses by the time of the referenced calls. The Respondent has been representing the Gallaghers in the S.E.C.'s disciplinary action against them. Compare to page 11, #31 & 32 of Respondent's brief.

12. Mr. Beasley noted that Respondent could cause a post-effective amendment to be filed since he was special counsel to Warehouse for the offering. Compare to page 12, #1 of Respondent's brief.

13. Mr. Beasley noted that the disbursement to Mr. Richmond should have been disclosed. Compare to page 13, #4 of Respondent's brief.

14. Mr. Beasley did define the an affiliate for Respondent through examples. Respondent was not pleased with the expert's response. Compare to page 14, #12 of Respondent's brief.

15. Mr. Beasley indicated that in the Warehouse case the prudent securities lawyer would have disclosed Mr. Bremer's indictment and if it had in fact been dropped. Compare to page 14, #18 of Respondent's brief.

16. Mr. Beasley stated that affirmative action of the offering company or underwriter can "break the escrow." Compare to page 14, #19 of Respondent's brief.

17. Mr. Beasley did not state that the typical cost of a post-effective amendment in $1,000.00 per sentence. He stated that the cost depends and could be $1,000.00 for one sentence. He further stated that his entire fee to amend the registration statement to disclose the material changes that the Respondent failed to reveal would be $2,000.00. Compare to page 15, #29 of Respondent's brief.

18. Mr. Beasley found it "incomprehensible" that Respondent knowingly allowed his name to be listed in the prospectus as underwriter's counsel if that were not so. Compare to page 16, #34 of Respondent's brief.

19. Mr. Beasley indicated that he never dealt with a situation involving NASD rules regarding an oversubscribed

issues but did have knowledge of "hot issue' rules. Compare to page 16, #38 of Respondent's brief.

20. Mr. Beasley indicated that "people" do not do things in the manner that Respondent and the co-conspirators did because of the risk involved. Compare to page 16, #42 of Respondent's brief.

21. Mr. Beasley stated that Respondent's claimed reliance on the cold comfort letter was an effort to evade the requirements of securities laws and to provide a smoke screen. Compare to page 17, #48 of Respondent's brief.

The examples set forth above represent only a small portion of the misrepresentations contained in only the first eleven pages of the Respondent's entire "summary of facts." The Bar could easily utilize the entire space permitted for its answer brief to expose the Respondent's disingenuous manipulation of witness testimony. While such an exercise would certainly illuminate the Respondent's methodology in preparing his brief, it would not serve to address all the issues before this Court. The record before this Court reveals that which was presented to Referee in an unbiased and accurate fashion and needs no editing.

The task of determining the issues which Respondent deems salient is practically impossible due to his failure to focus on any particular matter and his extremely broad and undeveloped conclusions. The Bar has endeavored to address those issues that appear to be the focus of Respondent's appeal.

SUMMARY OF ARGUMENT

Respondent, in his brief, contends that he should not be disbarred because the referee came to an erroneous conclusion based on disciplinary rules no longer in effect, considering evidence that should not have been admitted and not allowing him representation by his attorney.

Respondent makes several astonishing leaps of logic in his argument but none is more amazing than his contention that since the misconduct occurred in 1985 while the old rules of discipline were in effect, he cannot be charged under the old rules because of the enactment of the Rules Regulating The Florida Bar on January 1, 1987. Respondent maintains that the old rules were repealed as of 12:01 a.m., January 1, 1987, when the new rules regulating The Florida Bar went into effect. However, Respondent fails to produce any evidence which proves that this Court intended to give amnesty to any lawyer who committed misconduct before January 1, 1987, if the misconduct was not revealed until January 2, 1987.

Respondent argues that the referee permitted evidence to be admitted which should not have been. Specifically, the referee took judicial notice of three cases involving Respondent's part in the securities fraud, a Connecticut District Court Case, and Administrative Proceeding Decision and a Federal Circuit Court Case. Not only did the referee clearly have the jurisdiction to do this under section 90.202(2), Fla. Stat. (1991), but during the final hearing Respondent, himself, asked the referee to take judicial

notice of the decision in the S.E.C.'s administrative proceeding. [T. page 844, lines 12 - 13.] His contention that it was improper for the referee to take judicial notice of the subject cases is without basis.

Equally astonishing are his arguments that the referee improperly permitted the Bar's expert, James W. Beasley, to testify concerning the securities fraud, and that Respondent's private reprimand should not have been admitted at final hearing. Again, these arguments are baffling given the statement by Respondent's attorney, "We are satisfied with [Mr. Beasley's] expertise and have no problem with him testifying." [T. page 296, lines 8 - 9] As for the private reprimand being admitted at final hearing, Respondent has evidently forgotten that it was he who brought his disciplinary history to the referee's attention when he testified on direct examination.

Respondent argues that this case should have been dismissed due to delay between the probable cause finding and the bar's filing of the complaint. However it is incumbent upon Respondent to show how this delay harmed him. Not only does Respondent fail to make such a showing, he requested a continuance in the bar's proceedings a less that a week prior to commencement of final hearing.

And, finally, Respondent argues that his attorney, G. Richard Chamberlain, should not have been excluded from the proceeding. Again, this was a matter fully within the control of the Respondent. He submitted Chamberlain's name as a

witness. When the final hearing commenced and Chamberlain submitted a notice of appearance Bar Counsel objected. At that point Respondent had the opportunity to withdraw Mr. Chamberlain as a witness. Respondent, did continued to represent that he would call Mr. Chamberlain as a witness. Therefore Chamberlain was considered a witness and as such could not represent Respondent.

Respondent implies that the referee engaged in ex parte requests with bar counsel which influenced his recommendation that Respondent be disbarred. After final hearing the referee requested that bar counsel forward him a copy of the DR 1-102 of the old rules of discipline. Bar counsel complied with the referee's request by providing a copy of the rule with a cover sheet, a copy of which was forwarded to Respondent's counsel. No effort was made to conceal the referee's request from Respondent. The overwhelming evidence of Respondent's misconduct which was presented at final hearing formed the basis for the referee's findings and recommendation.

The record demonstrates that the referee's rulings were proper and often made without objection from Respondent. The referee presided over a four and one half days of testimony and admitted volumes of transcripts and documents into evidence. The testimony and documentation submitted clearly prove Respondent's knowing participation in the fraudulent Warehouse offering. The testimony presented meets the burden of clear and convincing evidence and that the only sanction appropriate for such egregious acts of misconduct is disbarment.

ARGUMENT

I. THE REFEREE PROPERLY TOOK JUDICIAL NOTICE OF DECISIONAL LAW.

The bar requested that the referee take judicial notice of S.E.C. v. Electronics Warehouse, 689 F. Supp. 53 (D. Conn. 1988), In re William A. Calvo, III, Administrative Proceeding File Number 3-7038 (1990), and S.E.C. v. Calvo, 891 F. 2d 457 (2nd Cir. 1989), pursuant to Section 90.202(2) Fla. Stat. (1991), which states,

> "A court may take judicial notice of the following matters, to the extent that they are not embraced within s. 90.201:
> (2) Decisional, constitutional, and public statutory law of every other state, territory, and jurisdiction of the United States.
> (6) Record of any court of this state or any court of record of the United States or of any other state, territory, or jurisdiction of the United States."

The referee properly determined that the cases met the definition of decisional law for which the judicial notice may be taken. Hawthorne v. State, 470 So. 2d 770 at 781 (Fla. 1st DCA 1985).

Respondent asserts at page 3 of his brief that the referee was prohibited from taking judicial notice of the three cited cases because the standard of proof in the district court proceeding, on which the S.E.C. disciplinary proceeding was based, is preponderance of the evidence, a less rigorous burden than the standard of clear and convincing proof which the Bar must meet. Respondent ignores the fact that in the District Court case, the court granted the

S.E.C.'s motion for summary judgment thereby finding that the Respondent aided and abetted in the perpetration of the fraudulent scheme to make it appear that Warehouse had sold the minimum number of shares to required to close the public offering and thus avoided refunding to the bona fide investors their funds pursuant to the registration statement and prospectus. The S.E.C. demonstrated to the court that there was no genuine issue of fact in dispute with regard to the Respondent's misconduct even when viewing the evidence in a light most favorable to the Respondent. Florida's burden of proof to prevail on a motion for summary judgment is the same. Ralston Purina Co. v. Webb, 310 So. 2d 748 (Fla. 1st DCA 1975); Connell v. Sledge, 306 So. 2d 194 (Fla. 1st DCA 1975), cert. dismd. 336 So. 2d 105 (Fla. 1975). Furthermore, section 90.202(2) does not limit judicial notice to cases with the same standard of proof as the proceeding in which they are applied.

Respondent is not candid with this Court when he objects to the referee taking judicial notice of the cited Warehouse cases, in that he stated under oath at final hearing that he wanted judicial notice taken of In Re William A. Calvo, III (hereinafter 2(e) proceeding). [T. page 844, lines 12 - 13] The administrative judge in the 2(e) proceeding based his determination that Respondent violated securities law based on summary judgment in Electronics Warehouse. The referee could not reasonably take judicial notice of the 2(e) proceeding without taking judicial notice of Electronics Warehouse which

was the foundation for 2(e) findings. Respondent's argument is illogical and inconsistent with his request for judicial notice of In Re William A. Calvo, III. The Warehouse cases clearly rest within the parameters of section 90.202(2). It is therefore a matter of the referee's judicial discretion as to whether or not the cases were pertinent to the bar's disciplinary proceedings. It is difficult to fathom how the findings of the court in Electronics Warehouse would not be pertinent to these proceedings.

II. THE REFEREE PROPERLY EXCLUDED G. RICHARD CHAMBERLAIN FROM FINAL HEARING

The Respondent argues that the referee improperly excluded his attorney and former law partner, G. Richard Chamberlain, from representing him at final hearing.

Mr. Chamberlain and Larry D. Houston, formerly law partners of Houston, Calvo, Chamberlain, & Houston, P.A., executed and submitted their notices of appearance of counsel on the morning of September 14, 1992 at the commencement of final hearing. At no time prior to final hearing did the Respondent indicate that Mr. Chamberlain or Mr. Houston would be his counsel. All documents and pleadings filed prior to final hearing by the Respondent indicated that he was proceeding pro se. On September 10, 1992, the referee conducted a status conference with bar counsel and Respondent for the purpose of determining the witnesses that the parties intended to present at final hearing. During the status conference Respondent listed sixteen (16) witnesses, including

himself, that he intended to present at final hearing, stating,

> "Then I will be calling Laura Gallagher. Probably Russell Gallagher first because I just found out he has to be out of the country on the 16th. Franchesca Daniels, she'll be by telephone from Los Angeles. **G. Richard Chamberlain, he will probably be down. He will be a long one.**"
> (Emphasis added)

Transcript of September 10, 1992 status conference, page 21, lines 11 - 17. Respondent went on to state,

> "...I'm going to call Mr. Chamberlain who is an attorney at [the 2(e) proceeding] and I'm going to ask him questions, and I'm going to use parts of the transcript to ask those questions. And I'm going to elicit from him testimony of certain people, Jack Stein, Father Nicholas, Nick."

Transcript of September 10, 1992 status conference, page 28, lines 17 - 23.

Pursuant to Rule 4-3.7(a), Rules of Professional Conduct, Mr. Chamberlain was prohibited from representing Respondent at final hearing since he was a named witness expected to testify on behalf of the Respondent. The testimony that the Respondent informed the referee he intended to elicit from Mr. Chamberlain did not comport with the four exceptions to Rule 4-3.7. The Respondent indicates in footnote 11 to page 4 of his brief that he declined to call Mr. Chamberlain as a witness in order to preserve his right on appeal. The implication is that the Respondent's intentional failure to call Mr. Chamberlain to testify rendered the referee's decision to exclude the witness to be error. Had the

Respondent merely informed the referee at final hearing that Mr. Chamberlain would not be a witness, the latter would have been permitted to represent the Respondent. Instead, at final hearing, after Mr. Chamberlain was excluded, the Respondent continued to represent his intent to present the witnesses that he had previously listed by requesting to the referee,

> "...I need some signed witness subpoenas to provide witnesses as I indicated in the status conference...."

T. page 12, lines 6 - 8. Respondent seems to fault the bar and referee for relying on his representations on the record at the September 10, 1992 status conference and at final hearing.

Upon learning the identities of the fifteen witnesses that the Respondent intended to present a final hearing, including the Gallagher, the bar determined that Mr. Chamberlain might be called as a rebuttal witness. Only upon conclusion of the Respondent's presentation of the evidence did it become known that he would not call a single witness to testify on his behalf, other than himself. Thus, the bar's anticipated use of Mr. Chamberlain as a rebuttal witness was eliminated. The fact that Respondent chose not to utilize Mr. Chamberlain as a witness hardly renders the referee's decision improper. The Respondent raises another issue that lacks merit and contradicts the record.

III. JAMES W. BEASLEY, JR., ESQUIRE, WAS QUALIFIED TO TESTIFY AS AN EXPERT WITNESS CONCERNING THE DUTIES OF THE UNDERWRITER'S ATTORNEY IN A PUBLIC OFFERING REGULATED BY THE S.E.C.

Respondent argues that the referee erred in permitting James W. Beasley, Jr., Esquire, to testify as an expert at final hearing, although the basis for his objection is unclear. At final hearing the Respondent did object to the presentation of Mr. Beasley's expert testimony regarding the duties of an underwriter's attorney in a public offering, arguing that such testimony would not be relevant. [T. page 294, lines 10 - 25 and page 295, line 1] It is difficult to imagine an area of law where expert testimony would be more helpful to the trier of fact than in a bar proceeding which involved issues concerning securities law and disclosure requirements of the S.E.C. Section 90.702, Fla. Stat. (1991), states,

> "If Scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience or training, or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial."

The issues presented to the referee were complex and technical in nature and unique to the field of securities law. Certainly, the introduction of expert testimony at final hearing complied with the language and spirit of section 90.702.

There is no question that Mr. Beasley was eminently qualified to testify as an expert at final hearing and that the Respondent stipulated to as much. Bar counsel proffered Mr. Beasley's curriculum vitae, which was admitted into evidence as exhibit M without objection from the Respondent. The Respondent's counsel, Mr. Houston, stated,

> "We are satisfied with [Mr. Beasley's] expertise and have no problem with him testifying."

T. page 296, lines 8 - 9.

The Court in Guy v. Knight, 431 So. 2d 653 at 656 (Fla. 5th DCA 1983), ruled,

> "the trial court had the initial responsibility of determining the qualifications and range of subjects on which the expert witnesses were allowed to testify and its determination will not be disturbed on appeal in the absence of a clear showing of an abuse of discretion."

The record fails to demonstrate that the referee abused his discretion in permitting Mr. Beasley to testify as an expert. Respondent's hollow claim is refuted by his stipulation at final hearing.

IV. EVIDENCE OF RESPONDENT'S PRIVATE REPRIMAND WAS PROPERLY ADMITTED DURING FINAL HEARING

The Respondent makes a spurious claim that the referee erred by allowing evidence of Respondent's private reprimand during final hearing. Once again, the Respondent ignores the record in order to forward an untenable position.

On direct examination, the Respondent testified regarding his disciplinary history with The Florida Bar, claiming that

he was preparing for a grievance committee hearing on the day of the warehouse closing. [T. page 651] Respondent continued to reveal that the complaint was a minor matter and that John Marinelli represented him in the grievance. [T. page 652 - 653] Respondent then represented to the referee that there was not a probable cause finding by the grievance committee. [T. age 653] Therefore, further exploration into the matter was permitted on cross-examination by bar counsel. Respondent did not object. [T. page 952 - 956] Respondent's counsel acknowledged that the Respondent opened the door regarding inquiry into his prior discipline [T. page 955, lines 11 - 13] and further indicated that he had no objection to the introduction the documentary record of Respondent's private reprimand. [T. page 955 - 956] Respondent was disciplined for disbursing funds from his escrow account based on a document which should have alerted him to the possibility of fraud. The Florida Bar v. Calvo, Case No. 67,520, The Florida Bar Case No. 17C84117, private reprimand (1986). A situation not unlike the instant case except on a much smaller scale. During cross-examination of the Respondent, bar counsel utilized copies of the referee's report and the reprimand. Respondent's counsel merely objected that the Respondent did not need to make comment on the content of the reprimand and suggested that bar counsel introduce the record of Respondent's prior discipline. Bar counsel obliged and without objection from Respondent, the documents were admitted into evidence. [T. page 955 - 956]

Respondent's claim of error should be directed at his strategy of introducing evidence of his prior misconduct at final hearing. The referee cannot be expected to dissuade the Respondent revealing potentially damaging evidence.

V. DISCIPLINARY RULES 1-102(A)(1) AND (6) ARE APPLICABLE TO MISCONDUCT OCCURRING BEFORE THE EFFECTIVE DATE OF THE RULES REGULATING THE FLORIDA BAR

Respondent argues that old rules of discipline were repealed by this Court's adoption of Rules Regulating The Florida Bar. The Rules Regulating The Florida Bar became effective at 12:01 a.m., January 1, 1987. Rules Regulating The Florida Bar, 494 So.2d 977 (Fla. 1986). This Court's adoption of the current rules did not terminate the applicability of the old rules of discipline to instances of misconduct that occurred before January 1, 1987 and prosecuted by the Bar after the effective date of the current rules. As recently as November 14, 1991, this Court upheld the referee's recommendation for sanction of a respondent who violated old disciplinary rules in 1977 and 1978, although the misconduct was not discovered by the Bar until 1989, subsequent to the adoption of the Rules of Professional Conduct. The Florida Bar v. Adler, 589 So.2d 899 at 900 (Fla. 1991). In footnote 1 this Court specifically recognized the continuing applicability of the old rules to misconduct that predated Rules Regulating The Florida Bar stating,

> "These [old rules] were in effect at the time that Adler's misconduct occurred. This Court subsequently promulgated the Rules Regulating The Florida Bar, which

> integrated all rules pertaining to the bar into a single document."

Id. at 899. Therefore, the Respondent's claim that Disciplinary Rules 1-102(A)(1) and 1-102(A)(6) were repealed and do not apply to his conduct in the Electronic Warehouse offering is without precedent.

The comment to the Rules Regulating The Florida Bar states,

> "These rules adopted by the Supreme Court of Florida July 17, 1986, will become effective at 12:01 a.m. on January 1, 1987. Thereafter the Rules Regulating The Florida Bar govern the conduct of all members of The Florida Bar. All disciplinary cases pending as of 12:01 a.m., January 1, 1987, shall thereafter be processed in accordance with the procedures set forth in accordance with the procedures set forth in the Rules Regulating The Florida Bar."

Being that Respondent's misconduct occurred prior to the enactment of the Rules of Professional Conduct of the Rules Regulating The Florida Bar, the bar properly charged him with violating old rules of discipline. The Florida Bar v. Trinkle, 580 So. 2d 157 (Fla. 1991).

VI. THE REFEREE'S FINDING THAT RESPONDENT VIOLATED DR 1-102(A)(1) AND (6), OLD RULES OF DISCIPLINE, IS SUPPORTED BY THE EVIDENCE PRESENTED AT FINAL HEARING

Respondent's claim that the referee's decision is "based principally" on the district court proceeding ignores the record before this court. Final hearing consumed four and one half days of detailed testimony of the witnesses and the Respondent, closing arguments, and the introduction of

numerous and lengthy documents, transcripts from the S.E.C. investigation and 2(e) proceeding were introduced.

Respondent argues that the referee's finding that he violated DR 1-102(A)(1) and (6) is not supported by the evidence presented at final hearing. This Court has recognized that the findings of the trier of fact are presumed correct in that he or she is uniquely situated to weigh all evidence, observe the witnesses' demeanor, and consider their credibility. In Goldfarb v. Robertson, 82 So. 2d 504 at 506 (Fla. 1955), the Court stated,

> "No authority needs to be cited for the proposition that this court is not entitled to substitute its own judgment for that of the trial court on questions of fact, likewise the credibility of the witnesses as well as the weight to be given to the evidence by the trial court."

The referee's findings of fact are presumed correct unless clearly erroneous and lacking in support. The Florida Bar v. Winderman, 18 Fla. L. Weekly S121 (Fla. 1993); The Florida Bar v. Stalnaker, 485 So. 2d 815 (Fla. 1986); The Florida Bar v. Price, 478 So. 2d 812 (Fla. 1985). The Florida Bar v. Borja, 609 So. 2d 21 (Fla. 1992); The Florida Bar v. Scott, 566 So.2d 765 (Fla. 1990); The Florida Bar v. Aaron, 529 So.2d 685, 686 (Fla. 1988). The referee made his findings of fact after a full evidentiary hearing which spanned five days of testimony.

After an extensive and complete evidentiary hearing the evidence proved that:

1. Respondent was counsel to Warehouse and Gallagher throughout and after the offering period. Respondent provided

advice to the participants, attended conferences, rendered opinions, and provided the assistance of his office and staff to the participants. [T. pages 51 - 52, 68 - 69, 70 - 72, 78 - 79, 93 - 96, 111, 125, 135, 148, 170, 173, 178, 244 - 245, 276, 282 - 283, 823, lines 3 - 25, page 824, lines 1, 18 - 22, page 844, line 22 - 25, page 854, lines 1 - 20, pages 875 - 877, 887, 891, 938; Respondent's answer pages 8 - 17; and Exhibits G & J]

2. Respondent had no objection to being listed a underwriters counsel in the Warehouse prospectus. [T. page 824, lines 18 - 22]

3. Respondent was aware prior to the closing that the April 22, 1985 closing date was in fact two weeks beyond the actual 150 day offering period. Respondent attended a meeting with Mr. Bremer, the Gallaghers, and Franchesca Daniels where the latter calculated the true and correct closing date in the Respondent's presence. [T. pages 57 - 58, 246, 271, 272, 846, lines 1 - 13 and page 880]

4. Respondent participated in the formulation and implementation of the fraudulent scheme to obtain "flash" loans to close the Warehouse offering without disclosing the plan to the bona fide investors. [T. pages 68 - 69, 71 - 72, 77 - 80, 90 - 91, 93 - 96, 104 - 105, 111, 127, 135, 145, 148, 270 - 271, 282 - 283, 887 - 888, 945 - 946; Exhibit G]

5. Respondent attended an evening gathering at Shooter's, a local restaurant, where he introduced prospective

"flash" lenders to Mr. Bremer, the Gallaghers, and Mr. Granai. [T. pages 93 - 95, 865 - 866]

6. Respondent continued to provide "gratuitous assistance and advice to both Gallagher and legal counsel to Warehouse, at their request." Respondent introduced the principals in the offering to Ms. Franchesca Daniels, a financial consultant, David Jordan and Herman Burkhardt, "financial promoters" and set up and attended a luncheon with them for the purpose of soliciting co-underwriters in the offering. [T. page 844, lines 22-25, page 854, lines 1 - 20, and Respondent's answer, page 8, paragraph 10]

7. Respondent assured Mr. Richmond, a "flash" lender, that he would be repaid at the closing along with a $75,000.00 premium at the Warehouse closing. Respondent further promised that he would write a disbursement letter to the escrow bank directing payment of $325,000.00 from the Warehouse closing proceeds to Mr. Richmond. [T. page 434, lines 19 - 25, page 435, lines 6 - 22, page 451, lines 19-22, pages 936 - 937; Exhibit G]

8. Respondent's fee for representing Warehouse and Gallagher was paid from the bona fide investors' funds. [T. page 934]

9. Respondent became aware of the seventeen count indictment against Mr. Bremer for mail fraud prior to closing and took no steps to disclose that material information to the bona fide investors and continued to participate in the

offering and closing. [T. pages 120, 894, 905 - 911, 963 - 963, and Respondent's answer page 9]

10. Respondent's office drafted the escrow agreement for Barnett Bank. [Respondent's answer pages 8 - 9, paragraph 10(a)(2)]

11. Respondent consulted with Mr. Granai regarding the April 22, 1985 closing on April 15, 1985. [T. page 858, lines 5 - 25, page 859, lines 1 - 17]

12. Respondent attended and represented the underwriter at the April 22, 1985 closing at Barnett Bank and delivered his disbursement letter as counsel for Gallagher directing Barnett to disburse approximately on third of the proceeds be delivered to Marvin Richmond, a "flash" lender whom Respondent had never met before. [T. page 440, lines 22 - 25, page 444, lines 18 - 24, page 850, lines 2 - 5; Exhibit G]

13. Respondent breached his duties as counsel for underwriter and Warehouse to the detriment of all, especially the bona fide in investors. [Expert witness testimony. T. pages 297 - 426]

The referee, after evaluating and weighing the four days and one half days of testimony and voluminous documentary evidence, determined that the Respondent violated DR 1-102(A)(1) and (6). His findings are clearly supported by the record. Respondent's loose interpretation and selective reading of statements, of witnesses, some of whom he testified were not worthy of belief, and discounting of the Bar's unrebutted expert witness, serves to support the referee's

findings of fact.[1] Respondent asks this Court to disregard the referee's findings because of the transcribed testimony of the Gallaghers who he was actively representing against the S.E.C. at the time of the final hearing in an action arising out of the same Warehouse offering.

The record paints a picture of deception and recklessness on the part of the Respondent that cannot be obscured by his attempt to whitewash the evidence. The Respondent chooses to ignore or demean that evidence which he finds unpleasant while embracing the irrelevant and incomplete as unassailable. The Respondent fail to demonstrate that the referee's findings are clearly erroneous or that he abused his discretion in these proceedings.

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[1] Respondent points to portions Mr. Granai's deposition to the S.E.C. as evidence that Respondent was not aware of the scheme to procure "flash' loans. Respondent omits the fact that he and Mr. Granai had decided to form a law partnership during or soon after the Warehouse closing. [T. pages 244 - 245] Respondent, Mr. Granai and the Gallaghers met with attorney Jack Stein after Mr. Granai was served a subpoena to testify before the S.E.C. to discuss what went wrong with the Warehouse closing. Mr. Granai was deposed by the S.E.C. after his meeting with Respondent and Mr. Stein regarding the S.E.C. investigation. Respondent testified that Mr. Granai is not a trustworthy individual who lied to the S.E.C. during his deposition regarding the Warehouse matter. [T. pages 793 - 808]

VII. RESPONDENT'S ABILITY TO PREPARE HIS DEFENSE WAS NOT PREJUDICED BY THE BAR'S DELAY IN FILING COMPLAINT

The Respondent also argues that the bar did not comply with Rule 3-7.4(j), Rules of Professional Conduct, by allowing the delay between the date that the committee found probable cause and the date that the bar filed its complaint in this proceeding to occur. Rule 3-7.4(j) does create a statute of limitations governing when the bar must file its complaint but rather uses the term "promptly" as the guide for when a complaint shall be prepared.

The Court previously determined that there is no statute of limitations in bar disciplinary proceedings, stating,

> "the statute of limitations has no application to delinquencies such as have been shown to exist. The court, in such cases, will consider any unexplained, unreasonable delay in presenting the charges, and also whether, by reason of the delay, the accused has been deprived of a fair opportunity of securing proof to meet the accusation; but the proceeding for disbarment of an attorney is not barred by the express terms of the statute of limitations, nor will the courts establish a limitation as to the time in which such proceedings may be instituted, by analogy to the statute of limitations, unless from the nature of the circumstances of the particular case, it appears that it would be unjust or unfair to require the attorney to answer as to such occurrence."

The Florida Bar v. McCain, 361 So.2d 700 at 705 (Fla. 1978).

In The Florida Bar v. Abrams, 402 So.2d 1150 (Fla. 1981), the respondent argued that the referee's report was deficient because it did not reveal that the report was issued eighty

days late or that the proceedings consumed two years to complete. The Court stated,

> "while we agree that the bar must exercise due diligence in prosecuting cases such as this, and are not condoning the unexplained delay in the filing of the referee's report, respondent has not demonstrated that he was prejudiced thereby. In absence of some discernible prejudice, we do not think that the delays warrant finding the report invalid."

Id. at 1152.

The Respondent fails to demonstrate what prejudice he suffered as a result of any delay in these proceedings or identify what, if any, evidence he was prevented from obtaining during the course of the bar's disciplinary proceedings. Any prejudice to the Respondent in these proceedings was caused by his own inattention to his case. The Respondent did not request subpoenas until final hearing had commenced; he did not depose any witnesses during the course of the proceedings; he did not present a qualified expert witness at final hearing; he did no effort to obtain copies of documents in the control of the S.E.C. concerning the Warehouse offering until the week before final hearing; he made no effort to review the documents in the bar's possession or arrange for the materials to be copied,[2] although he was

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[2] Respondent incorrectly indicates that the referee limited discovery to five interrogatories. The record reveals that Respondent propounded over ninety interrogatories on the bar. The bar moved the referee to limit Respondent's interrogatories to thirty and sought protection from answering most of the interrogatories in that he merely (Footnote Continued)

afforded ample opportunity throughout the proceedings; and he failed to call any witnesses to testify on his behalf, notwithstanding his representation to the referee that he would be presenting fifteen witnesses at final hearing. Thus, Respondent cannot demonstrate that the delay prejudiced his ability to defend against the charges set forth in the complaint. See The Florida Bar v. Lehrman, 485 So.2d 1276 (Fla. 1986). In The Florida Bar v. Randolph, 238 So.2d 635 (Fla. 1970), the Court considered the six years that it took for the bar to complete its disciplinary action against the respondent as mitigation but still upheld the finding of guilt and ordered him to be publicly reprimanded and suspended from the practice of law for ninety days.

Respondent complains of the bar's delay in filing its complaint although he has requested a continuance in these proceedings on more than one occasion. During the grievance committee's proceedings the Respondent requested a continuance of the probable cause hearing, which was denied. On September 8, 1992, over one year after the bar filed its complaint, the referee conducted a status conference wherein the Respondent requested a continuance in the proceedings so that he could assist a federal public defender in a federal trial in Denver, Colorado. His request was denied. The Respondent's

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(Footnote Continued)
sought the bar's admission to witness statements contained in various transcripts. The referee granted the bar's motion and directed the bar to answered five of the Respondent's ninety interrogatories. Respondent failed to serve any further interrogatories although he was entitled to do so.

protestations of delay after requesting a continuance in the proceeding is less than compelling. This court held that a two year delay in filing charges against the respondent did not constitute unreasonable delay when the respondent requests for a postponement. The Florida Bar v. Marks, 492 So. 2d 1327 (Fla. 1986).

Respondent's claim of error because the complaint was not signed by the grievance committee chair's is less than compelling. The procedural requirement of the chair's signature, as set forth in Rule 3-7.4(j), Rules of Professional Conduct, is a ministerial or administrative procedure. The chair testified at final hearing, however, that the complaint accurately reflects the committee's finding of probable cause. The omission of the chair's signature from the complaint constitutes harmless error and was cured by the chair's testimony at final hearing.

The Respondent failed to take advantage of the ample opportunity he had to prepare his defense during the thirteen months that the bar's complaint was pending before the referee. The gross lack of preparation by the Respondent in this matter cannot be attributed to delay in filing the bar's complaint and the must squarely rest with the Respondent.

VIII. RESPONDENT'S MISCONDUCT WARRANTS DISBARMENT

As a matter of law, Respondent, William A. Calvo III, violated the federal securities laws. Referee found that Respondent had violated Rules 1-102(A)(1) and 1-102(A)(6) of

the Code of Professional Responsibility, and specifically found him guilty of fraud. Respondent is therefore subject to discipline imposed by the Supreme Court of Florida.

The Florida Supreme Court has held that discipline for unethical conduct must serve three purposes:

> "First, the judgment must be fair to society both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing a penalty. Second, the judgment must be fair to the respondent, being sufficient to punish the breach of ethics and at the same time, encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations."

The Florida Bar v. Neu, 597 So. 2d 266 (Fla. 1992). Therefore, when the issue of a disbarment recommendation is considered in review, it is respectfully submitted that the unique position of the attorney in a securities offering and the potential for great harm be taken into consideration.

At issue here is discipline, but a discussion of the securities laws that the Respondent has violated is necessary to determine a basis for appropriate bar discipline.

Ironically, S.E.C. v. Electronics Warehouse, 689 F. Supp. 53 (D Conn. 1988) affirmed 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) is the case which has set a standard for 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 Security Exchange Act. This case specifically addresses fraudulent schemes. The Referee took judicial notice of this decision. While Respondent did not dispute the existence of fraudulent schemes alleged by the S.E.C., he disputes that he participated in the violations. Respondent erroneously cites S.E.C. v. National Student Marketing Corp., 457 F. Supp. 862 (D.C. 1987) for the proposition that attorneys who knowingly violate securities laws should not be subjected to sanction while ignoring the district court's detailed analysis of Respondent's violations of securities laws in Electronics Warehouse.

The court in Warehouse, following the standards set forth in a 1980 Supreme Court Securities case, stated that violations of Section 17(a)(1) and 10(B) required a showing that the defendant acted with "scienter." Aaron v. S.E.C., 3446 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 Aaron, 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). Reckless has been defined by the court as "highly unreasonable conduct which is an extreme departure from the standards of ordinary care." Blavin, Id. at 711, quoting Ohio Drill & Tool Co. v. Johnson, 625 F.2d 738, 741 (6th Cir. 1980).

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 Article 15 of the United States Code. The S.E.C. is given the power to enforce these provisions through Section 19 of the Securities Act of 1933. Section 20 of the Securities Act empowers the S.E.C. to enjoin violators of the Securities Laws. A person found to have violated these anti-fraud provision of the Securities Acts faces serious criminal prosecution as well as civil liability to injured investors. The essential nature of an S.E.C. 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 Court has also recognized the important position of any attorney with respect to disclosure and opinions concerning the sale of securities. In S.E.C. v. Spectrum, Ltd., 489 F.2d 535, (2d Cir. 1973) 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 functions 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."

Spectrum, at 541.

Through his actions and omissions, Respondent violated the "public trust." Respondent and the other defendants fraudulently extended the offering beyond the period specified in the prospectus; obtained short term loans so as to make it appear that the offering had been completed; repaid those loans from the offering proceeds paid by bona fide investors; and failed to disclose the loan repayments as well as the fact that Mr. Bremer, the president and founder of Warehouse, had been indicted by a federal grand jury on 17 counts of mail fraud.

The cornerstone of the Warehouse offering rested upon the investors' reliance upon full disclosure by all parties involved and Respondent's assurance that the offering was in compliance with the S.E.C. regulations. Because Respondent willingly assisted in concealing the fraudulent scheme, the investors were invested in a sham subsequently lost their funds.

In a securities fraud case, the Second Circuit Court of Appeals addressed the issue of opinion letters upon which investors relied in purchasing securities. S.E.C. v. Spectrum, Ltd., 489 F.2d 535 (2d Cir. 1973). In the Spectrum case, the court stated that the public trust demands more of its legal advisors than "customary" activities which prove to be careless. Id. at 542. Similarly in the present case, the review of the opinion letter by Granai should not have been a "customary" activity.

The Respondent by his knowing acquiescence in the scheme assisted in assuring the public that the offering was in compliance when in fact it was not. The actions by the Respondent evidence the recklessness that the court described in Spectrum concerning securities fraud. 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 the offering. He knew discussed the "flash" loans with Mr. Bremer, Gallagher, and Mr. Granai. He promised Mr. Richmond that he would receive repayment of his principal loan of $250,000.00 and a $75,000.00 premium at the closing in a simultaneous transaction. The the information which the investors were relying upon was misleading, false and incomplete, and in fact contained fraudulent information. He knew that the investors were relying on these disclosures for their investments and as such he should be held accountable for his actions.

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 intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises ... places in any post office or authorized depository for mail matters, 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 and Exchange 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 material fact or any omission to state 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 of 1933. And the use of the 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, Respondent did aid and abet in the use of the mails in furtherance of the securities fraud, when he permitted the misleading prospectus to be sent to investors by U.S. mail without making any effort to thwart the scheme or at least disassociate himself from it.

The Supreme Court of Florida has held that committing mail fraud warrants disbarment. The Florida Bar v. Weinsoff, 498 So. 2d 942 (1986); The Florida Bar v. Hosner, 536 So. 2d 188 (1989); The Florida Bar v. Onett, 504 So. 2d 388 (1987). The court has also held that committing mail fraud warrants a three-year suspension from the practice of law only when substantial mitigating evidence is present. The Florida Bar v. Diamond, 548 So. 2d 1107 (1989).

The Supreme Court of Florida has addressed the issue of discipline in a similar securities fraud case. The Florida Bar v. Levine, 571 So. 2d 420 (1990). Because Levine cooperated fully with the S.E.C. investigation into the companies he represented, the S.E.C. filed no criminal charges against him. However, the State of Florida did file criminal charges. Levine pled and was adjudicated guilty or organized fraud and unlawful operation of boiler rooms in violation of Sections 817.034 and 517.312 Florida Statutes (1989). The S.E.C. alleged that the companies were actual securities, and not partnerships, which Levine failed to register with the S.E.C.

Levine, having pled guilty to securities fraud was automatically suspended for a period of three years pursuant to the felony suspension rule. R. 3-7.2, Rules of Discipline. The Florida Bar thereafter initiated disciplinary proceedings seeking to increase the discipline imposed upon the attorney. The court held that violations of the securities fraud statutes warranted disbarment. Levine.

The Court in Levine found that the Respondent was 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 work. Id. In the present case, the Respondent's only financial benefit was also the receipt of attorney's fees. Notwithstanding this fact, the Court in Levine found that the seriousness of the attorney's actions warranted disbarment. Likewise, the court should disbar the Respondent for his actions.

However, it should be noted that each and every prohibited action by Respondent and other defendants, extension of closing date; non-disclosure of Bremer's indictments; loans made at closing; loans paid off from proceeds; non-disclosure of loans in prospectus; all was done in an effort to close the offering instead of repaying the investors as required by the S.E.C. regulations. If the offering had not closed, Respondent would not have even received his attorney's fees.

It is also important to note that the court in Levine considered the fact that the attorney did not directly participate in any illegal activities as a mitigating factor. Id. Notwithstanding this, the court concluded that disbarment was the appropriate discipline.

In The Florida Bar v. Isis, 552 So. 2d 912 (Fla. 1989), Isis was involved in the same fraudulent scheme as Levine. Levine at 421. Isis was adjudicated guilty of serious fraud,

misrepresentation, deceit, and dishonesty involving large sums of money. The court stated that "disbarment is required based on the serious nature of the felony for which Isis was convicted." Isis at 913.

The court has implicitly stated that fraudulent conduct is a serious charge which warrants disbarment. In The Florida Bar v. Lowe, 530 So. 2d 58 (Fla. 1988), an attorney was disbarred for 15 years based on his fraudulent conduct and criminal conviction. In The Florida Bar v. Simons, 521 So. 2d 1089 (Fla. 1988), an attorney was disbarred for 20 years for attempting to defraud an insurance company coupled with several acts that constituted theft. Finally, in The Florida Bar v. Cooper, 421 So. 2d 1 (Fla. 1983), an attorney who was involved in several fraud schemes was disbarred for 20 years.

All of these cases clearly show that an attorney should be disbarred when he engages in conduct similar to the Respondent's.

In the instant case, the Referee, after reviewing the facts, recommended disbarment. Even though the Referee's function is only to weigh the evidence and determine its sufficiency, this court has noted that "The Referee's recommendation ... carries great weight. The referee had the opportunity to see and hear respondent and weigh the mitigating factors against the seriousness of the offense." The Florida Bar v. Simmons, 581 So. 2d 154, 156 (Fla. 1991). This is exactly what has happened here. The Referee weighed all the evidence, taking into consideration both mitigating

and aggravating factors and, accordingly, he made his recommendation.

There is no rule mandating that this court follow the sanction imposed by the S.E.C. as Respondent suggests. The court should consider the seriousness of the Respondent's violations in determining the appropriate discipline. The Florida Supreme Court has stated that, "In disciplinary cases it is important to look at the offense and the circumstances surrounding it. But it is also 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." The Florida Bar v. Morley, 462 So. 2d 814, 815 (Fla. 1985). 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).

Section 7.1 of the Florida Standards For Imposing Lawyer Sanctions provides guidance for imposing discipline in cases where an attorney has violated a duty owed as a professional. Section 7-1 states that disbarment is appropriate when a lawyer intentionally engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer, or another and causes serious or potentially serious injury to a client, the public, or the legal system. Clearly Respondent engaged in conduct on several occasions which violated a duty with the intent to benefit himself, Mr. Richmond, Mr. Bremer and Gallagher to the

detriment of the investors.

The Referee also found factors in aggravation which may be considered when determining appropriate discipline. Florida Standards For Imposing Lawyer Sanctions, Rule 9.1 (hereinafter referred to as The Standards). The referee found the following as aggravation of any sanction to be imposed by this court:

> 1. Prior Discipline Offense
> Rule 9.22(a) of the Standards notes that "prior disciplinary offense" may be considered as aggravation. On May 15, 1987, Respondent was privately reprimanded for releasing escrow monies on the strength of a document whose form, organization and content should have alerted him to the possibility of fraud. He was found to have violated Article XI, Rules 11.02(4) of the Integration Rule of The Florida Bar.
> 2. Dishonest Motive
> Rule 9.22(b) allows an increase in discipline when a dishonest motive exists. Respondent's actions as a whole constitute dishonest motive. The point of each instance of misconduct was to close a stock offering which the Respondent knew was fraudulent.
> 3. Vulnerability of Victims
> Rule 9.22(h). The very nature of Respondent's misconduct left his victims completely vulnerable. The investors had no idea that their funds would be used to pay exorbitant premiums for "flash" loans and that the company they were investing in would receive a minuscule percentage of the proceeds that it represented would be raised through the offering. The investors suffered substantial losses as a result of the fraudulent scheme. Electronics Warehouse at 69.

> 4. Substantial Experience in the Practice of LawRule 9.22(i). Respondent holds himself out to be a highly qualified attorney in securities law. As such, his argument of lack of knowledge is very hard to believe.

The bar's expert witness described the Respondent's conduct in the Warehouse offering with the following analogy:

> "That would be exactly like the captain of an airplane, an airliner filled with passengers deciding to land the airplane even though every warning light in the cockpit going on was going off, and here you had every possible warning light, every possible red flag or other indicator that there were some extraordinarily serious problems with this offering and the way it was attempted to be closed."

T. page 361 - 362.

Respondent did "land the airliner" with all the bona fide investors on board, victims of his deceit. There is no remorse emanating from Respondent for his misconduct. He refuses to acknowledge the validity and applicability of securities law and ethical rules regarding his actions in the Warehouse offering or that he breached his fiduciary duties [T. pages 903 - 904] The federal court's characterization of Respondent continues to hold true at this juncture in these proceedings:

> "Calvo has made no concession of the wrongfulness of his conduct and loses no opportunity to blame others for the violations.... He has manifested no contriteness and he portrays a callous indifference."

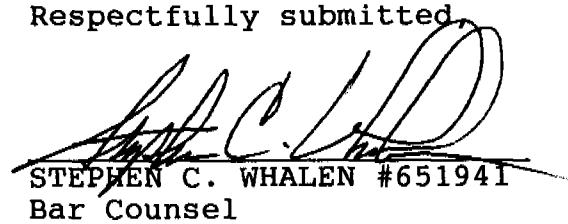
S.E.C. v. Electronics Warehouse, at 69.

CONCLUSION

William A. Calvo, III, knowingly and voluntarily embarked on a course of conduct which led him to become inextricably entwined in a securities fraud scheme which led to the loss of hundreds of thousands of dollars by investors. On numerous occasions Respondent had the opportunity to exercise his duties as an attorney and notify those involved that the scheme was impermissible and fraudulent. Not only did he fail to do so but he played an integral part in it. He drafted documents which were filed with the S.E.C., he failed to make full disclosure to the investors, and he confirmed and facilitated an eleventh hour deal with a "flash" lender which made it appear that the terms of the Warehouse offering had been met in order to close, when in fact the terms were not met. Respondent at the very least could have refused to deliver the disbursement letter to the escrow bank and taken no part in the closing. Instead, Respondent aided and abetted the participants in the scheme to his financial benefit, the benefit of his friends and clients, the Gallaghers, and his former friend and law partner, Mr. Granai, without regard for those unwitting individuals who invested their money in an offering that was held out as a legitimate investment opportunity.

The Bar respectfully submits that the evidence and testimony presented clearly indicates that disbarment is the only appropriate sanction for such egregious misconduct.

Respectfully submitted,



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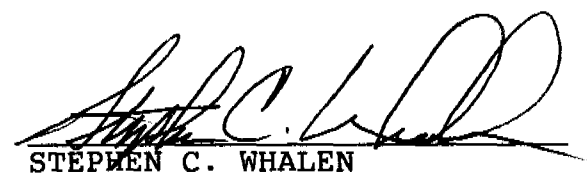
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Response Brief has been forwarded to William A. Calvo, III, at 11355 S.E. 54th Court, Belleview, FL 34421, via U.S. Mail this 23rd day of April, 1993, and a copy to John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300.



STEPHEN C. WHALEN