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In the Supreme Court of Florida
Supreme Court Case Number 78,395

THE FLORIDA BAR
Complainant

- against -

WILLIAM A. CALVO, III
Respondent

Florida Bar Number 0315494

RESPONDENT'S BRIEF APPEALING

DECISION OF REFEREE AT FINAL HEARING

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(the "ABA Report"); page 13, 30, 31, 42, 44.

Association of the Bar of the City of New York, *Report by Special Committee on Lawyer's Role in securities transactions*, 32 The Business Lawyer 1879 (1977); page 13, 31, 30, 43, 44.

Kenneth J. Bialkin, Securities and Exchange Commission Standard of Conduct for Lawyers, 37-3 *The Business Lawyer* 915 (1982); page 31.

Block & Ferris, *Securities and Exchange Commission Rule 2(e) - A New Standard of Ethical Conduct or an Unauthorized Web of Ambiguity*? 11 Capital University Law Review 501 (1982); page 31.

Maureen H. Burke, The Duty of Confidentiality and Disclosing Corporate Misconduct, 36-2 *The Business Lawyer* 239 (1981); page 31.

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Downing & Miller, *The Distortion and Misuse of Rule 2(e)*, 54 Notre Dame Lawyer 774 (1979); page 31.

Ferrara, *Administrative Disciplinary Proceedings Under Rule 2(e)*, 36 The Business Lawyer 1807 (1981); page 31.

Hazen, THE LAW OF SECURITIES REGULATION; West Publishing Co., 1985, citing to pages 214 through 217, page 15.

Loss, Fundamentals of Securities Regulation; Little, Brown and Company, 1983, citing to pages 1034, 1035, 1234 through 1242, and 1256, page 15, 43.

Report of the Special Ad Hoc Committee of the ABA's Section of Corporation, Banking and Business Law, *Securities and Exchange Commission Standard of Conduct for Lawyers: Comments on the Securities and Exchange Commission Proposal (Release No. 33-6344)*, 37 The Business Lawyer 915 (1982); page 31.

Statement of the Section of Corporation, Banking and Business Law in Response to Securities Exchange Act Release No. 16045 (July 31, 1979), 35 The Business Lawyer 605 (1980); page 29.

Sommner, 11 Part 1A BUSINESS ORGANIZATIONS - The Federal Securities Act; Matthew Bender, 1992, citing pages 7A-11 through 7A-14, 9-20 through 9-20.2, 9-21 through 9-23, 7A-116 through 7A-119, page 15, 42.

Sommner, 11 Part 2A BUSINESS ORGANIZATIONS - The Federal Securities Act; Matthew Bender, 1992, citing to pages 4-343, 4-344, 4-231 through 4-234.11, page 15.

STATEMENT OF THE CASE

NATURE OF THE CASE: The underlying action is a Florida Bar disciplinary proceeding based on allegations that Respondent violated Rules 1-102(A)(1) and 1-102(A)(6) of the old Rules of Discipline, in effect until midnight on December 31, 1986, and thereafter continuing in effect with reference to any disciplinary proceedings brought under the old rules prior to December 31, 1986, but pending *on such date*. The subject rules were not included in the rules governing the practice of law in the State of Florida which replaced them.[1]

The Florida Bar's investigation was initiated during the second half of 1987 and appears to have led to a determination by Grievance Committee 17(c) during June of 1989 that further proceedings were called for. Notwithstanding the requirements of Rule 3-7.4 concerning prompt filing of complaints after grievance committee proceedings and the requirement that the proposed complaint be timely presented to the presiding officer of the grievance committee for signature, prior to its filing, the Florida Bar initiated the current proceedings more than two years after the grievance committee decision,[2] and has never had the subject complaint executed by the presiding officer of the grievance committee. While the complaint did not contain a specific request for relief, Complainant, during final argument, for the first time requested that Respondent be permanently disbarred from the practice of law in the State of Florida.

COURSE OF PROCEEDINGS BELOW

1. **Motion to Limit Issues at Final Hearing**: The Referee hearing the disciplinary proceeding initially found Respondent guilty of violating all of the disciplinary rules cited in Complainant's original complaint, without a hearing, based on Respondent's having been found by the SEC to have violated his obligations under Rule 2(e) of the SEC's Rules of Procedure. Respondent successfully appealed such decision.

2. **Pre-Hearing Motions for Dismissal**: During the appeal of the Referee's initial decision,

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1. The original complaint also alleged violations of Rules 3-4.3, 4-4.1 and 4-4.8 of the current Rules of the Florida Bar; however, shortly prior to the final hearing, Bar counsel discovered that he had not been authorized to bring a proceeding under those rules and with the permission of the Referee, voluntarily dismissed the counts pertaining thereto.

2. At that time, more than one year had elapsed since the expiration of a two year suspension imposed on Respondent by the Securities and Exchange Commission (the "SEC") pursuant to Rule 2(e) of the SEC's Rules of Procedure, despite the fact that grievance proceedings had been initiated by the Florida Bar prior to the SEC's 2(e) hearing.

Complainant discovered that its complaint improperly included numerous counts which had not been considered by the grievance committee, and made a motion to partially, voluntarily dismiss its complaint, whereupon Respondent made a motion to dismiss the Complaint in its entirety because the remaining counts pertained to repealed rules which had not been included in the re-enacted code, and thus, based on this Court's decision in State ex rel. Arnold v Revels, 109 So.2d 1 (Fla., 1959), a case specifically involving disciplinary proceedings against an attorney; and, Gevant v Florida Real Estate Comm., 166 So.2d 230 (Fla., 1964), a case involving attempted discipline of a real estate broker, the subject rules could not be used as predicates for an action against Respondent. In addition, Respondent alleged that the complaint should have been dismissed in its entirety because: (1) the Florida constitution guaranteed Respondent the right to due process in these proceedings and that Complainant's failure to comply with its obligations under Rule 3-7.4 pertaining to prompt filing of the complaint and execution of the complaint by the presiding officer of the grievance committee violated such rights;[3] and (2) that Complainant should have been barred from bringing the subject proceeding based on the doctrine of laches. The Referee granted Complainant's motion but denied Respondent's motion. Respondent filed a notice of appeal to this Court which was dismissed without prejudice upon motion of Complainant.

3. **Discovery**[4]: During September of 1991, Respondent served upon Complainant a request for production of documents and admissions. Because Respondent deemed Complainant's response inadequate, he filed a motion to compel production of documents and admissions on November 19, 1991. On December 25, 1991, Respondent served his first set of interrogatories on Complainant and filed a motion requesting permission to file more than 30 interrogatories and to require response at least 10 days prior to final hearing. On January 23, 1992, the Referee denied Respondent's motion to compel admissions and the next day Complainant moved for a protective order pertaining to the requested interrogatories, which the Referee granted, requiring a response to only five interrogatories.

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3. See Florida Bar v Randolph, 238 So.2d 635 (1970), where addressing the issue of unwarranted delays, this Court held that "while the time provisions of the predecessor to current rule 3-7.11(a) are directory rather than jurisdictional, still, responsibility for proceeding with diligence rests with the Bar. When it fails in the regard, the penalizing incidents which the attorney suffers from the unjust delay might well supplant more formal judgments as a form of discipline, even when the record shows that the attorney's conduct merits discipline.

4. The Court is asked to note that the following matters involved clear violations by Complainant of Rule 4-3.4 of the Rules Regulating the Florida Bar.

4. Evidentiary Rulings

Judicial Notice: In contemplation of the final hearing, Respondent filed a Request for Mandatory Judicial Notice on August 31, 1992, principally of the court record of proceedings involving the underwriters in the Warehouse case in the United States Court of Appeal for the 11th Circuit, the United States Supreme Court and, in an action ancillary to the Warehouse injunctive action[5] in the United States District Court for the District of Connecticut, and on September 4, 1991, Complainant filed its own Motion Requesting Judicial Notice. The Referee denied Respondent's request for mandatory judicial notice based on Complainant's arguments and granted Complainant's motion for judicial notice over Respondent's objection that the differences in standard of proof in the cases which Complainant sought to introduce with the "clear and convincing" standard applicable to the pending proceeding made their introduction improper and prejudicial.[6]

Request for Permission to Introduce Excerpts from Prior Sworn Testimony of Non-Parties and of Taped Telephone Transcripts Provided by Complainant's Chief Witness to FBI: On September 12, 1992, Respondent requested permission to introduce excerpts from the sworn testimony of witnesses deposed by the SEC in the Warehouse investigation and case, as well as from telephone conversations taped by Complainant's chief witness, Edward Bremer, provided by him to the FBI and transcribed by the United States Justice Department. The Referee, at the request of Complainant, denied Respondent's request but indicated that he would accept complete copies of depositions and the complete Bremer Tapes, if they could be obtained by Complainant from the SEC.[7] At the final hearing, the Referee permitted Respondent to read selected portions of the Bremer tapes into the record in conjunction with cross examination of Mr. Bremer, and to read into the record selected portions of the deposition of Bremer's attorney, Gary Granai. However, Complainant elicited the Referee's agreement that he would only provide such materials whatever weight the Referee found appropriate.

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5. SEC v Electronics Warehouse, Inc., 689 F.Supp. 53 (D. Conn. 1988).

6. Especially in light of this Court's rejection of the Referee's decision on Complainant's Motion to Limit Issues at Trial.

7. Respondent had been unable to secure any cooperation from the SEC. Complainant obtained some, but not all, of the requested depositions, as a result of which Respondent was precluded from introducing significant evidence in his favor.

Final Hearing

Exclusion of G. Richard Chamberlin[8]: Respondent had been required because of financial constraints to represent himself prior to the final hearing; however, he secured the agreement of his former Warehouse counsel to lead a team comprised of Mr. Chamberlin, Respondent and, for technical assistance, Larry D. Houston, a member of the law firm with which Respondent is employed, to defend him at the final hearing. Mr. Chamberlin was fully familiar with the case, having been involved in related proceedings for more than four years; however, Mr. Houston was almost totally unfamiliar with the details of the case.

When Respondent appeared with counsel at the final hearing, Complainant sought to disqualify both Mr. Chamberlin and Mr. Houston because, until that time, Respondent had represented himself. Failing in that argument, he objected to Mr. Chamberlin on the grounds that Respondent intended to call Mr. Chamberlin as a witness (he was to testify as to the finding by the United States Court of Appeals for the 11th Circuit in the Gallagher case that Respondent had issued no closing opinions). Respondent argued that Bar rules do not prohibit legal counsel for a party from giving testimony *if such restriction is unduly prejudicial to the client*, and that in the instant case, the exception should apply.[9] Respondent further indicated that Mr. Chamberlin was more important as an attorney than as a witness, and that, put to the choice, Respondent would not call Mr. Chamberlin as a witness. At that point Complainant stated that he, without prior notice to the Referee, Respondent or Mr. Chamberlin, intended to call Mr. Chamberlin as a rebuttal witness and insisted that the rule be invoked prohibiting witnesses from hearing prior testimony.[10] The Referee acquiesced in Complainant's demands and Mr. Chamberlin was precluded from representing Respondent. Neither party thereafter called Mr. Chamberlin as a witness,[11] nor did Complainant attempt to talk to Mr. Chamberlin or secure his attendance by subpoena.

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8. Final Hearing Transcript (hereinafter referred to as "FHT), Pages 3 to 8.

9. See Rule 4-3.7(a)(4).

10. Respondent had been precluded from calling attorneys for Complainant as witnesses, upon objection by Complainant. The Court is asked to note the provision of Section 90.616(c) of the Florida Rules of Evidence and note that Mr. Chamberlin was certainly "a person whose presence [was] ... essential to the presentation of a party's case."

11. Respondent declined to call him as a witness in order to preserve his rights on appeal.

Denial of Motion to Dismiss[12]: At the commencement of the final hearing after Mr. Chamberlin's forced departure, Mr. Houston, on behalf of Respondent, moved to dismiss the Complaint in that none of the allegations therein had anything to do with Rules 1-102(A)(1) and 1-102(A)(6) of the old Rules of Discipline, which contemplated activities not otherwise covered by any other disciplinary rules (*e.g.*, drunkenness, child abuse, terrorism, *etc.*). The Referee denied Respondent's motion.

The Hearing: Complainant introduced the following evidence at the final hearing: 1. The decision of Judge Peter Dorsey in the case of SEC v Warehouse, Inc., 689 F.Supp. 53 (D. Conn. 1988); and the decision of Judge Regensteiner in In re.: William A. Calvo, III, SEC Admin. Proc. No. 3-7038 (1990), on both of which Complainant placed heavy evidentiary reliance, alleging that they should be treated as having met a standard of proof akin to "beyond a reasonable doubt."[13] 2. The testimony of Edward Bremer, Marvin Richmond and Joe Caruncho. as witnesses to proceedings, and, the testimony of James Beasely,[14] as an expert as to applicable law.[15]

Respondent testified in his defense, introduced the Bremer tapes during cross examination of Mr. Bremer and introduced excerpts of the prior testimony of Gary C. Granai by reading into the record. He introduced the testimony of the following persons at his 2(e) hearing: Laura Gallagher (one of the principals in Gallagher & Company), Cyndi Noyes Calvo, Father Nicholas Nick, Jack Stein, Esquire, Regis C. Vogel, Jr., and Saul B. Lipson, and the sworn testimony of Donald Ehrlic taken by the SEC. He also introduced documentary evidence submitted to the grievance committee concerning participation of the law firm of Robert Beer and Stephen Wilkes as legal counsel in the Warehouse offering after his law firm's initial participation.

At the insistence of Complainant, the entire transcript of each deposition or testimonial proceeding relied on by Respondent was made a part of the record; however, Respondent was unable to introduce excerpts from other depositions or sworn investigative transcripts because the Referee's evidentiary ruling limited such evidence by a requirement that the total transcript be introduced and

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12. FHT, Pages 9 to 12.

13. FHT, Pages 15, 16 (see lines 17 to 19), 17. See response of Respondent at FHT, Page 22 (lines 11 et. seq.), 23 and 24.

14. Over Respondent's objection.

15. The Court is requested to note that Mr.Beasely's claimed status as an expert violated Rule 4-7.6 of the Rules Regulating the Florida Bar, and thus, his testimony should have been excluded.

the SEC failed to provide all the documents requested by Respondent through Complainant. Over the objections of Respondent, Complainant also introduced materials concerning a private reprimand of Respondent in 1985.[16] On or about December 10, 1992, after several ex parte requests[17] for additional information or materials from Complainant, the Referee entered his findings and recommended that Respondent be permanently disbarred.[18]

STATEMENT OF THE FACTS

I. Testimony of Complainant's Witnesses

A. Mr. Bremer's testimony indicated that: (1) Respondent provided names of people who could assist in legitimate stock sales, FHT, Pages 52, 54. (2) Respondent believed that April 22, 1985, was the proper offering termination date, FHT, Page 63. (3) First, that Granai came up with a plan to borrow funds to close the offering,[19] then that Bremer had bee the one to come up with the plan, FHT, Page 80. (4) Bremer did not discuss the loan plan with Respondent, rather, it was disclosed to Respondent by Mr. Granai, FHT, Page 80.[20] (5) Respondent was not present during loan discussions at Rolands because he had to return to his office early, however, his associate, Nina Gordon, stayed, FHT, Page 86. (6) Bremer did not discuss the Crane loan with Respondent, FHT, Page 75. (7) Bremer claimed that Granai told him [hearsay] that Respondent would introduce them to heavy hitters on the evening of April 19, 1985, at Shooters, a Fort Lauderdale restaurant, FHT, Page 92.[21] (8) Bremer claimed Respondent appeared with Messrs. Richmond and Stern at a restaurant, together, at a lunch prior to closing, discussing mutual Chicago acquaintances, FHT, Page 104.[22] (9) A fellow

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16. The submission, prior to a determination of guilt, violated section 3-7.6(k) of the Rules Regulating the Florida Bar.

17. Violating Rule 4-3.5(b) of the Rules Regulating the Florida Bar.

18. The Court is asked to note that the Referee failed to comply with the requirements of Rule 3-7.6(k)(1) of the Rules Regulating the Florida Bar in conjunction with filing of his report.

19. FHT, Page 66, 67.

20. The court is asked to note that Mr. Granai's testimony as to the nature of the plan and the setting for its disclosure to Respondent varied drastically from the Bremer account.

21. But see the affidavits of the persons allegedly met at Shooters, Messrs. Bobby Baldrica and Jim Scherer, annexed as exhibits to this Brief. Please also note the transcript of testimony by Donald E. Ehrlic to the SEC, Respondent's exhibit 3 at the Final Hearing, starting on pages 81 to 83 and 88, 89, 90 (referring specifically to Respondent), 91 and 92 of the subject exhibit.

22. Both Respondent and Mr. Richmond denied ever having met until after the closing started, see their testimony infra.

by the name of Kolinosky was waiting at the closing for a large wire to come in, FHT, Page 108.[23] (10) Respondent informed everyone when Richmond's money came in and initiated the closing, FHT, Page 105.[24] (11) The information in the so-called "disbursement letter" was provided to Respondent by either Bremer or Granai, FHT, Page 108. (12) Beers did the blue sky work for Warehouse, FHT, Page 116.[25] (13) He never indicated to anyone that his indictment was being or had been dropped, FHT, Page 120.[26] (14) His visit to Respondent's office on the day set for closing was unusual in that he was moved from room to room and different people kept coming in and out. See FHT, Pages 79-80.[27] (15) He had entered into a plea agreement for securities fraud in 1986, pertaining to Warehouse, but that no action had been taken under such plea agreement in the intervening seven years, and that he had no explanation for such inaction and did not know if it had anything to do with his willingness to testify, FHT, Page 136, 137, 286, 287.[28] (16) He had been sued in an ancillary action by the SEC seven years ago through a trustee to recover proceeds of the Warehouse offering but that he had settled that action without being required to make any restitution, and that he had no explanation for such deal, FHT, Page 137. (17) Respondent did not arrange any loans used to close the offering.[29] (18) Bremer would have and did make a deal with the devil to close the Warehouse

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23. The Court is asked to note that, had that wire arrived, then the Bremer Advertising purchase would have been above the minimum offering, making all allegations as to its impropriety irrelevant.

24. Both Respondent and Mr. Richmond testified that Respondent first arrived after the closing started, see their testimony infra.

25. A function that Mr. Beasely, Complainant's expert witness, claimed was the responsibility of counsel for the underwriter, see Mr. Beasely's testimony infra.

26. But see the testimony of Mr. Caruncho, as a witness for Complainant, infra, to the effect that Bremer promised that his Baltimore legal counsel would provide a certificate attesting that the indictment had been dropped. See also the testimony of Mr. Granai and Respondent infra.

27. Testimony confirming Respondent's testimony that he had no notice of the Bremer visit or the closing until Bremer, Granai and Gallagher showed up at his office.

28. The Court is asked to note that Mr. Bremer would be classified as a habitual criminal had the government elected to follow up on the securities fraud plea bargain, however, his credibility would have then been seriously impaired in proceedings such as this one.

29. However, he claimed that Respondent introduced him to three prospective lenders on November 19, 1985, who he identified as Paul Jenkins, Bobby Baldrica and Jim Scherer. Annexed hereto and made a part hereof as composite exhibit A are affidavits from Messrs. Jenkins, Baldrica and Scherer whom Respondent located after the hearing contradicting Mr. Bremer's testimony and attesting to the fact that they were people of moderate means with neither the ability nor inclination to make the loans alleged by Mr. Bremer.

offering, FHT, Page 138. (19) Bremer had been indicted and convicted prior to the indictment during the Warehouse offering, but had not disclosed such fact to anyone, FHT, Page 139, 140. (20) He had lied about having raised over $21,000,000 for the Nixon presidential campaigns and the "pet rock" projects." FHT, Page 140, 141. (21) He did not know whether or not provision of the so called "disbursement letter" to the escrow agent was a condition to closing and that none had been provided for the originally scheduled April 19, 1985 closing, FHT, Page 140, 141.[30] (22) He supposed the "so called disbursement letter" made no difference in his ability to pay off Richmond, FHT, Page 144.[31]

(23) *When Respondent indicated that he saw no illegality with the "plan" presented by Granai concerning the Bremer Advertising-Richmond stock transaction, Respondent believed that to be the truth, and that Bremer has never had reason to doubt that Respondent believed the closing to have been legal*, FHT, Page 148 (line 22) to 149 (line 2).

(24) He did not know whether Respondent ever advised that the registration statement should be amended to disclose Bremer's indictment, did not know whether Respondent had ever advised that Bremer resign and did not know whether or not he would have accepted advise to amend the registration statement, FHT, Page 149.[32] (25) He had never had any discussions with anyone at the SEC during late march concerning the closing date of the Warehouse offering, FHT, Page 150.[33]

(26) *As of the dates of the registration statements filed with the SEC in the Warehouse offering, they were materially correct*, FHT, Page 150, 151.

(27) He did not know if there was a way that Respondent, during the fall of 1984, could have divined the Bremer indictment of March 1985, or the Bremer fraudulent closing scheme of April 1985, FHT, Page 151, 152.[34] (28) he could not remember the answers to most questions that would have

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30. FHT, Page 142, 143. The Court is asked to note the letter included as exhibit E(G)(2) to Respondent's written presentation to the grievance committee [which was filed as Respondent's exhibit 8 to the Final Hearing Transcript]. That letter is of the genre that the purported disbursement letter belongs to, not any precondition to closing. The Court is also directed to testimony of Complainant's expert witness concerning disbursals directly from escrow, infra.

31. However, Mr. Bremer appeared inclined to be very evasive on that issue, see pages 143, 144 and 145.

32. Answers which impact very detrimentally on Bremer's credibility as a witness in light of Granai's testimony and the evidence in the Bremer tapes.

33. But see page 247 et. seq. dealing with Bremer's tape of a conversation with Manuel Crespo of the SEC.

34. It was obvious that Mr. Bremer was pandering to Complainant in refusing to provide meaningful answers to obvious questions, and that he was a thoroughly incredible witness.

benefited Respondent in the hearing, FHT, Pages 135 et. seq. (29) Respondent could not provide anything that would refresh Bremer's recollection of conversations with Respondent during April of 1985, FHT, Page 154.[35]

B. On cross examination, the Bremer Tapes revealed that:[36] (1) On April 9, 1985, Bremer and Granai plotted to deceive the Gallaghers and Respondent concerning the nature of their loan gimmicks by claiming that they involved "Gary ... bringing in straight money. That's all." and that they did not want Gallagher to know about certain other transactions, FHT, Page 156, 159, 160, 161. (2) On or about April 10, 1985, Bremer and Granai discussed a scheme to fraudulently close the offering in a manner making it seem that the use of proceeds section of the prospectus was being complied with, FHT, Page 162, 163. (3) Contrary to Bremer's assertions that he relied on Respondent concerning legality of the Bremer Advertising stock purchase, he had been told by Don Ehrlic that he was doing something illegal, information he never shared with Respondent, FHT, Page 163. (4) Granai told Wilkes, blue sky counsel for the Warehouse offering,[37] that the Warehouse closing had been improper during early May of 1985, FHT, Page 164, 165.[38] (5) Bremer was not against taking advantage of people, FHT, Page 167, 168. (6) Bremer was attempting to pressure Gallagher to illegally sell 144 stock, FHT, Page 169.[39] (7) During the Warehouse offering, the underwriter had an attorney in Denver, Colorado that he relied on for advice, FHT, Page 171, 172, 178. (8) The underwriter's Denver attorney felt there was a way to reduce the minimum for closing without a post effective amendment, FHT, Page 172. (9) Bremer contacted Respondent concerning the Denver attorney's minimum closing reduction proposal, but that Respondent said that "it takes a couple of

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35. A candid admission by Bremer that his testimony was designed solely to further Complainant's case.

36. See generally FHT, Pages 154 et. seq.

37. The only law firm that filed documents in the State of Florida subject to Florida law.

38. The Court is requested to note that the Beers-Wilkes firm was the firm that both filed materials in Florida and then sometime more than a month after the subject taped conversation, was horrified to re-discover the facts Granai told Wilkes a month earlier, and went to the SEC and Justice Department.

39. The Court is asked to consider the probability that such refusal, based on Respondent's legal advice (see excluded Gallagher materials, infra.), led to the unraveling of the Warehouse scheme, and retaliation by Bremer against Gallagher and Respondent in the form of the story concocted and told to the SEC and Justice Department.

months. You have to file post effective amendments and in most cases, the SEC probably requires that the money go back to the people and then they re-submit it." FHT, Page 173. (10) The underwriter disagreed with Respondent's opinion, saying "Oh shit, lawyers always disagree and its not true." FHT, Page 174. (11) Granai and Bremer deceived the underwriter by claiming that Granai had "talked to the SEC" when he had not, FHT, Page 175. (12) With reference to the discussions concerning avoiding post effective amendments, Respondent claimed to Granai that the underwriter was "out of -- excuse the language -- fucking tree." FHT, Page 176. (13) The Beers-Wilkes firm was aware of the closing of Warehouse, and they indicated that they might have somebody on line", FHT, Page 179, 180.[40] (14) Granai felt the indictment might not have been material, and stated that "Gallagher closed the fucking thing without his attorney." FHT, Page 184 (lines 5 and 6).[41] (14) Granai and Bremer discussed a decision by the underwriter not to request opinion letters at closing, as a means of avoiding the indictment issue, FHT, Page 184, staring at line 21 through page 185 to line 4.[42] (16) Contrary to his testimony at the final hearing, Bremer actively plotted with Granai to cover up or avoid the indictment issue, FHT, Page 186, 187. (17) Contrary to Bremer's testimony, amendment of the registration statement and Bremer's resignation had in fact, been actively discussed, FHT, Page 194. (18) Contrary to statements made by Granai to the SEC during his deposition, Bremer unequivocably agreed that Granai and not Respondent served as legal and SEC counsel to Warehouse, FHT, Page 197.[43] (19) Bremer and Granai were aware that the offering should have ended on April 7, 1985, FHT, Page 200.[44] (20) Bremer and Granai felt that Gallagher would close

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40. Bremer claimed that the discussion had to do with another matter, however, there was a taped conversation immediately following that made it clear that Bremer was working directly with Beers and Wilkes to help find money to close, see page 180, lines 15 to 20. See also page 181 (lines 9 to 11).

41. A critical admission fatal to Complainant's case, since obviously the parties were aware of Respondent's extremely limited role, for which he neither sought nor received compensation.

42. The Court is asked to note that Respondent did not provide a closing opinion, because he had not been provided with enough warning of the closing to prepare therefore, and consequently refrained from accepting the assignment to act as counsel to the underwriter at closing.

The evidence concerning the 11th Circuit's decision in the Gallagher case excluded by the Referee would have made it clear that that Court found, based on representations by the SEC that Respondent had provided the underwriter with neither a written nor oral opinion that it would be proper to close the offering.

43. The Referee, without evidence from anyone, other than comments from Beasely, the "purported" expert, concluded that Respondent had acted as special counsel for Warehouse, after he terminated his representation of the underwriter.

44. At this point in the cross examination, Bremer starts to desperately reconcile his story with claims concerning calculation of the correct escrow date by Fran Daniels, a fact she denies.

the offering by either "firing Respondent" or taking things to the wire before notifying Respondent of the closing, FHT, Page 205. (21) The Warehouse house stock purchased by Bremer advertising represented the majority of the securities available above the minimum offering (*i.e.*, the difference between the $1,200,000 minimum and the $1,500,000 maximum offering), FHT, Page 212. (22) Bremer was prepared to deny actions he had in fact taken, FHT, Page 229. (23) Bremer was prepared to lie about the basis for the loans if their legality came into question, FHT, Page 231. (24) Bremer and Granai plotted to agree to anything required to close the Warehouse offering and then, not perform, FHT, Page 232. (25) Respondent's name in materials filed with the SEC in the Warehouse offering was not accurate, FHT, Page 240. (26) During the Warehouse offering, brokers were not referred to Respondent, FHT, Page 242.[45] (27) His testimony concerning the closing date error was contradicted by taped telephone conversations with Manual Crespo of the SEC, thus, Bremer was aware of the Escrow Agent's error but kept the knowledge to himself, FHT, Page 246, 247, 248, 249, 250, 251, 252. (28) Bremer and Granai attempted to keep Respondent from communication with the Beers-Wilkes firm, FHT, Page 254, 255, 256.[46] (29) Bremer had deceived Respondent concerning the purported Radio Shack contract, FHT, Page 257. (30) Bremer had deceived Granai about his purported loans to Warehouse, FHT, Page 258, 259, 260, 262.

(31) *Respondent's first reaction when he suspected that something may have been wrong with the Warehouse closing was to protect the investing public*, FHT, Page 263. (32) *Months after the closing, Bremer and the underwriter, in a taped conversation, stated that Respondent would never have done anything wrong or illegal, and that Bremer believed that Respondent would not do anything improper and that at closing, all parties felt they were acting legally*, FHT, Page 263, 264, 266, 267.

C. Mr. Richmond's testimony indicated that: (1) Prior to the Warehouse closing, he had never met Respondent,[47] and that Respondent arrived after the closing had started, and there, for the first time, gave him and the bank the purported "disbursement letter." FHT, Page 440, 441, 442. (2) The escrow agent confirmed on the Friday prior to closing that it had been instructed by Messrs.

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45. An extreme oddity if Respondent was serving as underwriter's counsel.

46. The law firm which Respondent alleges replaced his firm as underwriter's counsel.

47. And that Bremer lied when he indicated that Mr. Richmond and Respondent met at a restaurant prior to the closing discussing mutual friends from Chicago.

Bremer and Gallagher to make a disbursement of approximately $325,000 to him directly and that the escrow agent agreed to do so three days prior to receipt of the "purported disbursement letter." FHT, Page 434. (3) He had met with the escrow agent's manager and staff prior to closing and completely disclosed to them the nature of his transaction [and therefore, by necessary inference, that there was no reliance on the "purported disbursement letter" as a condition to closing], FHT, Page 439-440. (4) He had spoken to Respondent during the afternoon of Friday, April 19, 1985, at the suggestion of Mr. Bremer, to verify that Mr. Richmond would receive his money upon breaking of escrow directly from the escrow agent, and that Respondent had agreed to provide the escrow agent with written instructions to that effect on behalf of Bremer and Gallagher, FHT, Page 435, 447. (5) The "purported disbursement letter" was, in fact, the letter Richmond had been promised, FHT, Page 447, 448. (6) Respondent played no role in finding him or in negotiation of the terms of his transaction, FHT, Page 431, 432, 433. (7) He had been sued in an ancillary action by the SEC seven years ago, through a trustee, to recover proceeds of the Warehouse offering but that he has not yet been required to make any restitution, and that he had no explanation for such lapse, FHT, Page 456, 457. (8) Respondent referred to the Richmond transaction as the purchase of an account receivable in a telephone call after the closing, during 1985, FHT, Page 445. (9) A broker by the name of Kolinosky was waiting at the closing for a large wire that would have been added to the balance in the escrow account at closing, FHT, Page 453, 454.[48] (10) His whole transaction was with the banker and no one else, FHT, Page 458.[49]

D. Mr. Beasely's testimony indicated that:[50] (1) Only the registrant can amend the registration statement, FHT, Page 317.[51] (2) After he was replaced as underwriter's counsel,

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48. The Court is asked to note that, had that wire arrived, then the Bremer Advertising purchase would have been above the minimum offering, making all allegations as to its impropriety irrelevant.

49. See also page 448 where Mr. Richmond indicated that the decision to proceed to closing was made prior to Respondent's arrival.

50. The Court is asked to note that Complainant succeeded in convincing the Referee not to take judicial notice of the materials in recognized scholarly materials [Matthew Bender's SEC Series] which contradicted most of Mr. Beasely's testimony. See FHT Pages 363 to 366.

Mr.Beasely's testimony as to what the law was was not properly admitted since expert testimony is limited to factual and not legal issues, see Devin v City of Hollywood, 351 So.2d 1022 (1976).

51. The Court is asked to note that Mr. Beasely was technically incorrect as a matter of law since SEC Regulation C at Rule 478 specifies that any person signing a registration statement may amend or withdraw it. The Court is also asked to note that under no one's interpretation of the facts did Respondent meet the foregoing qualifications.

Respondent became special counsel to Warehouse, FHT, Page 317.[52] (3) The identity of underwriter's counsel was material information that had to be disclosed to investors, FHT, Page 319.[53] (4) It was not unusual to have disbursements directly from escrow not disclosed in the registration statement and that the escrow agent would be advised as to such disbursements by a letter such as the "so called disbursement letter." FHT, Page 356.[54] (5) He attached no particular significance to the manner in which disbursement instructions were provided to the escrow agent, FHT, Page 357. (6) The escrow agent failed to properly discharge its duties, FHT, Page 358. (7) Contrary to his initial testimony, neither the SEC nor, at the time of the Warehouse offering, the State of Florida, had authority to review registration statements as to the merits of the offering, FHT, Page 367, 368, 369, 370, 371. (8) Despite having agreed to testify at the hearing as an expert, he was not familiar with the SEC release dealing with the ethical obligations of attorneys when clients fail to make full disclosure, FHT, Page 371, 407, 408 (where the Referee, at the request of Complainant, refused to permit Respondent to question Complainant's expert as to the ABA and Association of the Bar of the City of New York's extensive studies and materials concerning the obligations of securities lawyers), 409, 410. (9) An an investor was free to borrow funds to purchase securities in a public offering as long as he does not borrow from the underwriter or the company, FHT, Page 376. (10) He could not, off the top of his head, cite to any rules or regulations supporting his opinions, FHT, Page 377. (11) He

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52. The Court is asked to note that the Referee reached the same finding of fact despite a total absence of evidence from Respondent, Bremer or anybody else to such effect, and in light of Bremer's earlier specific repudiation of such possibility, on cross examination, see FHT, Page 197.

53. But, contrary to Mr. Beasely's statements, please see SEC Regulation C at Rule 436, in general, and subsection (e), specifically (which directly contradicts Mr. Beasely's testimony as to applicable law). See also SEC Release 33-6950 as it relates to consents [(10) *Consents -- (a) Experts:*], and, the definition of "counsel" in Item 228.509 of Regulation SB (the current successor to Regulation SK for small offerings). See SEC Rule 430A which permits a registration to be declared effective prior to determination of the identity of the membership of the underwriting syndicate.

In fact, the disclosure concerning the underwriting is contained in Item 508 of Regulation SK. That regulation provides no requirements at all concerning the identity of or changes in the identity of counsel to the underwriter. The situation of underwriter's counsel after declaration of effectiveness is most closely analogous to the situation of trial counsel after a trial decision, where the client, through another attorney, elects to appeal. There is absolutely no requirement for such counsel to file a motion for withdrawal as legal counsel with the court.

54. For an additional example of another such letter in the Warehouse offering, the Court is requested to review exhibit E(G)-1 to Respondent's written submission to the grievance committee, included in toto as Respondent's exhibit 8 at the final hearing.

Mr. Beasely's testimony on this point fatally flawed Complainant's argument concerning the nature and importance of the subject letter!

knew of no regulations that prohibited an affiliate of the company from purchasing stock in a public offering, FHT, Page 377 and 378. (12) Off the top of his head, he could not define an affiliate, FHT, Page 379.[55] (13) The concept of dilution was an important concept in securities law, FHT, Page 379, 380. (14) The purchase of securities in a public offering, at the public offering price, would have no affect on dilution, FHT, Page 380.[56] (15) After further cross examination, he was not sure whether or not the dilution table would have to be amended prior to closing to disclose purchases of securities by affiliates at the closing, FHT, Page 381. (16) All indictments, whether dropped, minor or dealing with matters having nothing to do with the offering, must be disclosed in a registration statement, or post effective amendments thereto, FHT, Page 382, 383, 384, 385.[57] (17) The qualifying language of Item 401 of Regulation SK had no meaning, FHT, Page 385.

(18) On further cross examination, that if an indictment had been dropped, disclosure would have involved a judgment call, FHT, Page 385.[58]

(19) The escrow agent has total control over the escrow proceeds and neither the company nor the underwriter can have any input on its decisions, FHT, Page 387. (20) It is legally permissible for the duties of an underwriter's counsel to be divided between a number of law firms, FHT, Page 387. (21) Item 601(24) of Regulation SK required underwriter's counsel to file a consent to the use of its name in the registration statement, FHT, Pages 388, 389.[59] (22) If Respondent's firm had not filed a

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55. The Court is asked to compare the definition suggested by Respondent with the definition thereof by the SEC in Rule 144. The court is asked to note that Mr. Beasely's differentiation of persons who might not be deemed affiliates does not conform to the SEC standards reflected in SEC Rule 144, the rule regulating sale of securities by affiliates.

56. But the Court is asked to note Item 506 of Regulation SK, which makes it clear that, if purchases by affiliates must be disclosed, then so must their affects on dilution. The Court is also asked to note the absurdity of Mr. Beasely's position as a practical matter. How can you disclose prior to closing something that you will not discover until the moment of closing!

57. The Court is asked to note that Item 401 of Regulation SK contained the following qualifying language "Describe any of the following events that occurred during the past five years and that are material to the evaluation and the ability and integrity of any director or executive officer of the registrant. And that with reference to such qualification, Mr. Beasely's expert opinion was that it had no meaning.

58. A crucial admission on the indictment issue.

59. However, his testimony is directly and unequivocably contradicted by SEC Regulation C, at Rule 436(e), which states that: "Where counsel is named as having acted for the underwriter or selling security holders, no consent will be required by reason of his having being named as having acted in such capacity. The Court is asked to note that the disclosure of underwriter's counsel "as having acted in such capacity" obviously contemplates action in the past tense, with no reference to any future activities.

consent to the use of its name in the registration statement, that would be "another indicator that the prospectus ... is clearly false and misleading, FHT, Page 390, 391.[60] (23) A prospectus drafter's responsibility is limited to his knowledge after reasonable inquiry, at the time of drafting the prospectus, FHT, Page 392. (24) Securities laws do not require that a registration statement be prepared by an attorney, FHT, Page 393. (25) When an attorney is listed as "counsel"[61] that attorney is the guarantor of all the information in the subject registration statement as an expert, FHT, Page 393, 394.[62] (26) In his entire, multi-decade professional career, he had been involved in less than 5 best efforts offerings, FHT, Page 394. (27) In his entire, multi-decade professional career, he has represented an underwriter in one or two best efforts offerings, FHT, Page 394.[63] (28) 28. In his entire, multi-decade professional career, he has never been involved in a public offering involving less than $1,500,000, FHT, Page 394.[64] (29) The typical cost of a post effective amendment was about $1,000 per sentence, FHT, Page 395. (30) When an insider is involved in a transaction with the company involving even a few thousand dollars, a post effective amendment pertaining thereto must be filed, FHT, Page 397. (31) Contrary to the preceding answer, that if 43 separate transactions

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60. However, see SEC Regulation C, at Rule 436(e) quoted above.

61. Which Mr. Beasely previously defined as including underwriter's counsel.

62. Mr. Beasely's position is clearly contrary to all law on such point. The Court is asked to note the following rules, regulations, and "real" authoritative sources: SEC Rule 436(e), Item 228.509 of new regulation SB; *Loss, Fundamentals of Securities Regulation; Little, Brown and Company, 1983*, pages 1034, 1035, 1234 through 1242, and 1256; *Sommner, 11 Part 1A BUSINESS ORGANIZATIONS - The Federal Securities Act; Matthew Bender, 1992*, pages 7A-11 through 7A-14, 9-20 through 9-20.2, 9-21 through 9-23, 7A-116 through 7A-119; *Hazen, THE LAW OF SECURITIES REGULATION; West Publishing Co., 1985*, pages 214 through 217; and, *Sommner, 11 Part 2A BUSINESS ORGANIZATIONS - The Federal Securities Act; Matthew Bender, 1992*, pages 4-343, 4-344, 4-231 through 4-234.11.

Mr. Beasely's "opinion" is clearly at variance with the SEC's pronouncement on point in In re Carter, CCH F. Sec, L. Rep., Paragraph 82,847 (1981 Transfer Binder 84,145-84,178) , which involved the following guideline. "*When a lawyer with significant responsibilities in the effectuation of a company's compliance with the disclosure requirements of federal securities laws becomes aware that his client is engaged in a substantial and continuing failure to satisfy those disclosure requirements, his continued participation violates professional standards unless he takes prompt steps to end his client's noncompliance.*"

63. It appears improbable that Florida Bar rules permit a person to characterize himself as an expert in matters that he has been involved in once or twice.

64. The Court is asked to note that Form S-1 is the form required by the SEC for larger offerings and that it appears that Mr. Beasely had no experience with Form S-18 or its requirements, the Form involved in the Warehouse offering and which had significantly lower disclosure obligations.

involving insiders occurred, it would be absurd to assume that you would have to file 43 different post effective amendments, FHT, Page 396, 397. (32) There are materially standards for all amendments to registration statements, FHT, Page 397. (33) Attorneys who file nothing and provide no opinions can still have federal securities laws liabilities, FHT, Page 398. (34) He had never heard of an instance when the SEC or anyone else brought a law suit against someone alleging that a prospectus was not material because a change in the underwriter's legal counsel was not disclosed, FHT, Page 400. (35) There is no federal securities law requirement that underwriters be represented by legal counsel, FHT, Page 403. (36) In small offerings, the blue sky function is performed by counsel to the underwriter, FHT, Page 403, 404.[65] (37) The National Association of Securities Dealers, Inc. (the "NASD") would not normally deal with anyone other than underwriter's counsel, FHT, Page 404.[66] (38) First, that he had never heard of NASD rules regulating oversubscribed offerings, and almost immediately thereafter, that "sure he had heard of them" but had no idea what they dealt with, FHT, Page 404, 405. (39) He could not answer questions posed by Respondent of the top of his head, although he had had no such problem with questions posed by Complainant, FHT, Page 405. (40) If an affiliate bought one share or $10 worth of securities in a public offering, the closing could not take place until registration statement were amended to disclose the purchase (which had not taken place yet) because no materiality standards applied to affiliate purchases, they all had to be disclosed, FHT, Page 406.[67] (41) No firm he has ever been involved with would have ever been involved in an offering as small as the Warehouse offering, FHT, Page 407. (42) He was testifying as an expert as to why lawyers should never represent small companies or small underwriters, FHT, Page 407. (43) A wrong interpretation of a law ought not, in and of itself, to constitute a basis for securities and Bar sanctions, FHT, Page 408. (44) He evaded responding to questions dealing with the SEC's proposed guidelines

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65. The Court is asked to note that the Wilkes-Beers firm prepared and filed all the Blue Sky Applications; please see the materials included as exhibits E(a), E(f) and E(l) to Respondent's written presentation to the grievance committee [which was filed as Respondent's exhibit 8 to the Final Hearing Transcript].

66. The Court is asked to note that the Wilkes-Beers firm prepared and filed all the NASD documents; please see the materials included as exhibits E(a), E(f) and E(l) to Respondent's written presentation to the grievance committee [which was filed as Respondent's exhibit 8 to the Final Hearing Transcript].

67. The Court is asked to note that although Form S-18 and Regulation SK require disclosure as to sale of securities by an affiliate, no item deals with purchases by affiliates in the offering. The Court is also asked to note that Mr. Beasely's answer contradicted his answer at FHT pages 377 and 378.

for securities lawyers faced with non-complying clients, FHT, Page 409. (45)[68] Nothing the underwriter or company could have said would have justified release of the Warehouse offering proceeds by the escrow agent after April 7, 1985, FHT, Page 412. (46) There was nothing wrong with underwriter's counsel drafting amendments to registration statements but that they could not file them, that being reserved to the issuer, FHT, Page 418. (47) It is not improper for an attorney who represents a client on certain matters to respond to inquiries from such client concerning other matters, in which the client is represented by other legal counsel, FHT, Page 424. (48) Cold comfort letters are a method by which legal counsel verifies the accuracy of statements made concerning the company's financial [statements], FHT, Page 425.

E. Mr. Caruncho's testimony indicated that: (1) Although no one told him, he assumed that Respondent's law firm was acting as underwriter's counsel at a closing for Warehouse because there was another attorney present representing Warehouse (Granai) and because he assumed the closing was taking place at Respondent's offices on April 19, 1985, FHT, Page 1003, 1004.[69] (2) His role was extremely limited and involved no review of documents substantively, FHT, Page 995, 996.[70] (3) Prior to April 19, 1985, he had never heard of Warehouse, FHT, Page 997. (4) During his services on April 19, 1985, he recalled two things, one involved discussions about "checking out the indictment" and that there was litigation counsel for Bremer that was supposed to provide a letter or would provide something, FHT, Page 1004, 1005.

(5) *In his entire relationship with Respondent, he was never told to do anything improper and that Respondent always insisted on complete and full disclosure of matters involving Respondent's clients and the SEC. FHT, Page 1005, 1006.*

F. Mr. Caruncho's testimony at the 2(e) Hearing indicated that:[71] (1) On Friday, April 19, 1985, in Caruncho's presence, Respondent was informed that the indictment issue was moot because the indictment had been dropped, and that Bremer's special litigation counsel in Baltimore was

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68. After significant attempts at hedging and avoiding the question.

69. It is undisputed that the Warehouse closing took place on April 22, 1985 at the offices of Barnett Bank, the escrow agent.

70. The Court is asked to note that Rule 4-1.2(c) of the Rules Regulating the Florida Bar specifically permits a lawyer to limit the objectives of his representation.

71. Introduced as part of Respondent's exhibit 5 to the Final Hearing Transcripts.

confirming that fact. Final Hearing Transcript, Exhibit 5 (record of 2e proceedings),[72] Page 805, 806, 809. (2) During the week prior to April 19, 1985, Caruncho had heard nothing about a closing for Warehouse, FHT, E5, Page 812.

G. **Judge Regensteiner's 2e Decision Indicated that:**[73] (1) The attorneys who prepared and prosecuted the District Court Case and the 2e proceeding made significant misstatements in their presentation which appalled Judge Regensteiner, and rendered the SEC's entire presentation subject to doubt. See Complainant's exhibit B at page 15, Note 9. (2) Respondent's involvement in Warehouse was unusually limited.[74] See Complainant's exhibit B at page 18, 19. (3) Respondent was not aware that the offering had been improperly extended. See Complainant's exhibit B at page 21. (4) A permanent bar to practice was not called for, even assuming the accuracy of the SEC's contentions. See Complainant's exhibit B at page 26. (5) Respondent had, with reference to the Warehouse matters, been "deceived not only by Bremer, but by Granai, a fellow attorney. See Complainant's exhibit B at page 26.[75]

H. **Judge Dorsey's Injunction Decision that:**[76] (1) There was no evidence that Respondent had notice or should have had notice of improper transactions, other than that involving Richmond. See Complainant's exhibit A at Pages 62, column two, last paragraph staring on page, 63. (2) Bremer was not a credible witness on whose testimony a decision should be made. See Complainant's exhibit A at Page 62, Note 12, column two. (3) Bremer claimed that Respondent introduced Bremer to Jordan, Burckhardt and Daniels for purposes of arranging loans,[77] but that Jordan, Burckhardt and Daniels denied such fact in their affidavits. See Complainant's exhibit A at Pages 62. (4) The SEC did not claim that Respondent personally contacted any lenders or arranged any loans. See

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72. Hereinafter referred to as "FHT, E5."

73. Complainant's exhibit B. The Court is asked to note that in SEC administrative proceedings, the standard of proof is a mere preponderance of the evidence.

74. The Court is asked to note that Rule 4-1.2(c) of the Rules Regulating the Florida Bar specifically permits a lawyer to limit the objectives of his representation.

75. Clearly indicating Bremer's lack of credibility.

76. Complainant's exhibit A.

77. Bremer, at the final hearing, admitted that was not the case, and substituted Paul Jenkins, Bobby Baldrica and Jim Scherer as the purported lenders (see their contrary affidavits annexed as exhibit A to this Brief).

Complainant's exhibit A at Pages 62.

I. **Complainant's Exhibit E demonstrates that:** (1) The SEC was aware that Respondent was not acting as counsel to the underwriter since, in its notification of effectiveness, it copied the firm of Oshins, Singer, Segal, Murphy & Morris as underwriter's counsel.

J. **Complainant's Closing Argument demonstrates that**[78] (1) Complainant distorted Respondent's role in drafting materials in the Warehouse offering by claiming that the draft materials prepared by Respondent in conjunction with the first post effective amendment included the form of prospectus declared effective by the SEC, three amendments later, see FHT, Page 1019. (2) Complainant distorted all the evidence by claiming that Respondent directed the escrow agent to disburse the offering proceeds, see FHT, Page 1020.[79] (3) Having totally been unable to demonstrate the existence of any scheme through his witnesses,[80] Complainant, despite this Court's ruling on the Referee's motion to limit issues at trial, used the factual findings of the injunction action as alleged proof of facts in the instant case, see FHT, Page 1021, 1022.[81] (4) Respondent arranged meetings with prospective lenders (Messrs. Jenkins, Baldrica and Scherer), see FHT, Page 1022, 1023.[82] (5) The expert witnesses conclusions were consistent with the District Court decision, see FHT, Page 1025.[83] (6) Complainant, in closing argument, attempted through his unsworn testimony, for the first time, to introduce evidence of aggravating factors not included in the pleadings and as to which Respondent was provided with no ability to defend, see FHT, Page 1037, *et. seq.* (7) Complainant introduced no evidence to refute the testimonials concerning Respondent's character provided by Father Nicholas C. Nick, SEC Attorney Jack Stein, Accountant Saul B. lipson, Laura Gallagher (a

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78. The Court is asked to note that Complainant's closing argument was clearly violative of Rule 4-3.4(e) of the Rules Regulating the Florida Bar.

79. Contrary to the characterization of the subject letter by his own expert witness, Mr. Beasely.

80. Even Bremer having testified that no one intended to violate the law at closing and that Respondent felt everything was legal.

81. Clearly improper in light of the different standards of proof involved, see generally Lawton v State, 13 So.2d 211 (1943).

82. Bremer's testimony was at best multiple hearsay, was refuted by both Ms. Gordon, Respondent and Mr. Ehrlic, and is refuted by the purported lenders in their affidavits annexed as an exhibit to his Brief, thus it hardly meets the "clear and convincing standard."

83. However, as demonstrated throughout this brief, they were inconsistent with the language of the actual rules and regulations involved.

principal of the underwriter), Joe Caruncho and Bremer (its own witnesses). (8) Respondent introduced no evidence that since it initiated its investigation of the Warehouse matter in 1987, or that except for the Warehouse matter,[84] Respondent has been anything but a model lawyer. (9) There was any justification for the multi-year delay between the grievance committee decision and the initiation of this action, the failure to have the Complaint signed, or, the addition of a number of unauthorized charges to the Complaint.[85] (10) Complainant could not provide copies of materials pertaining to the initial years of its investigations to Respondent because they had "disappeared from the files." (11) Complainant did not call either of the Gallaghers, Gordon, Granai, Baldrica, Scherer or Jenkins as witnesses, despite the fact that all of them except Granai were within easy driving distance from the hearing, and despite Complainant's heavy burden of proof.

II. Testimony of Respondent's Witnesses

A. The Granai Deposition demonstrates that[86] (1) Robert Beers, Esquire, and his firm served as legal counsel to the underwriter in the Warehouse offering, prepared the underwriting documents used and billed $19,000 for their services, FHT, Page 479, 541 (lines 22 and 23), FHT, GDE, Page 39 (lines 12 to 17), 79 (lines 4 to 6 and 10 to 15). (2) (a) Nina Gordon was the attorney in Respondent's law firm principally involved with the Warehouse offering and she was "the SEC" in Respondent's law firm and actually did the prospectus work, FHT, GDE, Page 91, 104 (lines 20 1nd 21), 183 (lines 2 to 5); and (b), that Nina Gordon attended a lunch with Respondent and Messrs. Bremer, Granai and Gallagher, at Rolands' in Fort Lauderdale on Friday, April 19, 1995, FHT, GDE, Page 188.[87] (3) Respondent was not notified when the Warehouse offering became effective, FHT, GDE, Page 110. (4) There was little communication with Respondent during the Warehouse offering, FHT, GDE, Page 135. (5) Bremer claimed to have advanced funds to Warehouse, FHT, GDE, Page 138, FHT, Page 493, 494. (6) Bremer claimed to be entitled to

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84. Even assuming the accuracy of all Complainant's allegations and innuendo.

85. That failure did not stop the Referee from finding Respondent at fault for such delays.

86. Filed as a Respondent's exhibit to the final hearing transcript, hereinafter referred to as the "FHT, GDE".

87. Ms. Gordon contradicted Mr. Granai's recollection of the events at Rolands (as does Mr. Jenkins in his affidavit), see Transcript of 2(e) Proceedings filed as an exhibit to the record of the final hearing, at pages 698, 699.

reimbursement for funds advanced to Warehouse from proceeds of the Warehouse offering, FHT, GDE, Page 148, line 22 et. seq., 149. (7) The funds that Bremer claimed entitlement to reimbursement for were, according to Bremer, spent for items disclosed in the use of proceeds section of the Warehouse registration statement and Respondent "put Bremer through the hoops" with questions designed to verify such fact, FHT, GDE, Page 149, 159, 151, 155. (8) Granai verified from personal observations that Bremer had advanced to Warehouse for expenditures disclosed in the use of proceeds section of the Warehouse registration statement, FHT, GDE, Page 155, 156, 157. (9) Respondent advised Granai that certain kinds of transactions would not be proper in conjunction with the Warehouse closing, as a result of which they were not effected, FHT, GDE, Page 144, 145 (lines 12 to 14). (10) Respondent's views concerning the legality of the purchase of stock by Bremer affiliates were predicated on facts presented by Granai and Bremer, FHT, GDE, Page 171. (11) Respondent's views concerning the legality of the purchase of stock by Bremer affiliates were held in good faith, FHT, GDE, Page 148, 149, 150, 151, 154, 155, 156, 157, 171 (lines 9 to 12), 239. (12) The difference between raising public funds to purchase goods or services, as opposed to paying debts associated with the purchase of identical goods or services is not a material difference requiring supplemental disclosure, FHT, GDE, Page 158, 159, 160, 161. (13) Respondent was led to believe that the Warehouse offering was being closed at the maximum, rather than minimum offering amount, FHT, GDE, Page 116 (lines 20 and 21), 117 (lines 10 to 13), 133 (lines 5 to 9), 134 (lines 18 to 22). (14) There was no scheme to extend the closing beyond the offering period, FHT, GDE, Page 125, 127. (15) Respondent was told that Crane (one of Bremer's lenders) was purchasing stock, and that such information was not true, FHT, GDE, Page 193, 202. (16) Respondent insisted that the proceeds of the Warehouse offering be expended in accordance with the use of proceeds disclosure in the Prospectus, FHT, GDE, Page 238 (lines 14 to 18). (18) Legal counsel for Mr. Richmond had reviewed the transaction with Bremer and opined it was legal, FHT, Page 539. (19) Respondent, upon being informed of the Bremer indictment, advised that the Warehouse registration statement would have to be amended and that Bremer should resign from Warehouse, FHT, Page 549, 550, 551. (20) Respondent did not know that the Warehouse offering was being continued after the Bremer indictment, FHT, Page 492. (21) Respondent was told immediately prior to the closing that the Bremer indictment had either been dropped or was in the process of being dropped, FHT, Page 552,

554 (line 21 et. seq.), 556, 557, 558 (line 18 et. seq.). (22) Granai had been unable to communicate with the United States attorney responsible for the Bremer indictment, despite efforts to do so because Mr. McDonald was not allowed to discuss the case, FHT, Page 558 (line 18 et. seq.), 559, 561. (23) The reason Granai did not specify that the Bremer indictment had been dropped in his closing opinion and merely opined that a government victory in the case was unlikely was because he had been replaced as criminal counsel to Bremer by a politically influential attorney, stating "I can not have all the information. Bremer has other counsel." FHT, Page 558 (line 18 et. seq.), 559, 561. (24) During a telephone conversation on April 15, 1985, with Respondent, Respondent expressed surprise that the Warehouse offering was still pending since he was under the impression that it had been terminated because of the Bremer indictment, FHT, GDE, Page 137. (25) Granai considered Respondent to be extremely knowledgeable and experienced in the area of securities law and referred to him as a "securities lawyer's securities lawyer, pick up the phone and ask advice." FHT, GDE, Page 108. (26) Bremer dealt with SEC personnel directly, FHT, GDE, Page 113 (lines 10 to 13). (27) Granai and Bremer traveled to Florida for a closing on April 19, 1985, and arrived either the day before or on the 19th of April, FHT, GDE, Page 121. (28) The decision not to close on April 19, was made during the afternoon on April 19, FHT, GDE, Page 121, 122.

B. Testimony from 2(e) Proceeding[88]

1. Father Nicholas Nick's testimony demonstrated that: (a) Father Nicholas Nick had been employed at St. Demitrios Greek Orthodox Church in Fort Lauderdale, Florida for the past 25 years and has been in the priesthood for 45 years, FHT, E5, Page 543. (b) He has known Respondent since approximately 1980 and sees him frequently, even walking into his home without knocking on the door, FHT, E5, Page 544. (c) Throughout the years, Father Nick has sent parishioners and others to Respondent for legal assistance outside the securities field and Respondent has regularly provided such assistance, without charge, FHT, E5, Page 545.[89] (d) In Father Nick's opinion, Respondent is the most honest man he has ever met in his community and he trusts him very highly, FHT, E5, Page 546. (e) Respondent contributed $15,000 to the new church, FHT, E5, Page 546.[90] (f) In Father

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88. Citations are to the transcript of the 2(e) proceedings included as an exhibit to the record of the final hearing.

89. Hardly the greedy individual portrayed in the Referee's report.

Nick's opinion, based on his experience, Respondent is not greedy and would never engage in wrongful conduct in order to earn money or otherwise, FHT, E5, Page 547. (g) No matter what the SEC or Connecticut judge might have said or might say about Respondent, based on his experience, he would not believe that Respondent would ever do anything improper, FHT, E5, Page 547.[91]

2. *Jack Stein, Esquire's testimony demonstrated that*: (a) Jack Stein was employed as an assistant attorney general for 5 years and as a special counsel with the SEC in Washington, D.C., and Miami, Florida for eight years (FHT, E5, Page 529, 530). (b) Mr. Stein believes, both based on personal knowledge and on Respondent's reputation in the community that Respondent is a competent and good lawyer and is very bright (FHT, E5, Page 529, 530).

(c) *On several occasions during the period from 1983 to 1988, Mr. Stein had occasion to call Respondent to ask questions on certain areas as they related to Mr. Stein's litigation practice (FHT, E5, Page 531, 532)*.

(d) Mr. Stein initially represented Respondent in the Warehouse matter and that Respondent's position was always that "he intended and intends to do the right thing and the correct and honest thing" (FHT, E5, Page 532).[92] (e) Testifying on behalf of Respondent against the SEC's position in the Warehouse matter was a very difficult thing to do because he had never taken a position adverse to the SEC before and never thought that he would (FHT, E5, Page 533). (f) The fact that an injunction has been entered against Respondent has not changed Mr. Stein's belief in Respondent's innocence, honesty or integrity (FHT, E5, Page 534).

(g) *On cross examination by the SEC, that Mr. Stein, who served as special counsel to the SEC, was highly impressed by Respondent's knowledge of the law, directions, issues and trends in securities law, and*

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90. The Court is asked to note that that contribution was made during the year of the Warehouse matter, and is in an amount equivalent to the fee paid to Respondent's law firm for the Warehouse post effective amendment. Such action and such testimony is not compatible with the Referee's finding that Respondent was greedy and ill motivated.

91. Father Nick's testimony has never even been rebutted nor did Complainant introduce contrary evidence, thus no evidence at the hearing supports the Referee's finding that Respondent was a greedy and ill motivated individual. The Court is asked to note that even Bremer and Caruncho, witnesses for Complainant, testified to Respondent's belief that he acted legally, always instructed full disclosure and would not engage in improper conduct [knowingly].

92. Hardly consistent with the Referee's unsupported conclusion that Respondent was not honest but rather, greedy and ill intentioned.

that his opinion was based on Respondent's having directed Mr. Stein "to research in certain areas, to research certain cases, certain laws [Mr. Stein] was unaware of." FHT, E5, Page 536 to 537.[93] *(h) Mr. Stein handled litigation matters and that when he ran into a problem, he would call Respondent and Respondent would tell him what to do, FHT, E5, Page 536 to 537.*

(i) Mr. Stein's opinion of Respondent was shared by brokers in South Florida, FHT, E5, Page 538.

3. Regis C. Vogel, Jr.'s testimony demonstrated that: (a) Mr. Vogel has known Respondent in a professional capacity since 1984 (FHT, E5, Page 506). In Mr. Vogel's opinion, Respondent is probably among the best in terms of structuring and grasping the essentials of a transaction (FHT, E5, Page 506). (b) Mr. Vogel's first public offering with Respondent's firm was Frenchmen's landing North, Inc., in 1984 (FHT, E5, Page 507). (c) He worked heavily with the Calvo firm during the Warehouse offering period, *i.e.*, 1984 and 1985 (FHT, E5, Page 507). (d) Mr. Vogel testified that Respondent went to great lengths to make certain that all material facts were disclosed to investors (FHT, E5, Page 512, 513). (e) In 1988, Respondent informed Mr. Vogel that because of the 2e proceeding, he could no longer serve as Mr. Vogel's securities attorney (FHT, E5, Page 515). (f) During the Frenchmen's offering, Respondent required Mr. Vogel to amend a registration statement to extend the offering period (FHT, E5, Page 526). (g) Mr. Vogel has never known Respondent to be dishonest (FHT, E5, Page 514). (h) He believed Respondent to be "a competent and a valuable person to the community. And his legal services [Mr. Vogel] found to be extremely good. And [Mr. Vogel] believe[d] the [Respondent] is extremely competent" (FHT, E5, Page 514, 515). (i) Mr. Vogel found Respondent's judgment to be extremely good in most all matters and could not fault Respondent's judgment (FHT, E5, Page 517). (j) The injunction entered against Respondent did not change his opinion of Respondent (FHT, E5, Page 518, 519). (k) On the basis of conversations with persons other than Respondent, he had reason to disbelieve the Court's conclusions in Warehouse (FHT, E5, Page 522). (l) Faced with the facts alleged in the Warehouse decisions and a denial of culpability by Respondent, Mr. Vogel's experience with Respondent would lead him to believe Respondent (FHT, E5, Page 525).

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93. Almost exactly what Respondent claimed he believed that he was doing with Messrs. Granai and Gallagher. The practice of law is hardly served when the threat of disbarrment prevents an attorney from sharing his knowledge and experience with other attorneys.

4. Saul B. Lipson's testimony demonstrated that: (a) Mr. Lipson has been an accountant in practice since 1982 (FHT, E5, Page 455). (b) Respondent was a "very ethical, very smart attorney." FHT, E5, Page 458. (c) In his many securities related dealings with Respondent, he always "wanted to make sure things were done in an honest and ethical manner so that [his client's] were abiding ... by the law ...." FHT, E5, Page 458. (d) Respondent prevented clients from pursuing projects or plans that he believed were not totally proper, FHT, E5, Page 459. (e) Mr. Lipson was Respondent's accountant and had known him 1983 (FHT, E5, Page 455). Mr. Lipson has, since 1983, frequently represented clients also represented by Respondent's firm, and, in conjunction therewith, has had frequent occasion to interact with the attorneys employed at Respondent's firm (FHT, E5, Page 457). (f) Mr. Lipson has worked on closings of public offerings with Respondent's firm and that in conjunction therewith, he was worked closely with Nina Gordon and Richard P. Greene (FHT, E5, Page 466).

(g) *Mr. Lipson testified that Respondent was always adamant about full disclosure (FHT, E5, Page 469) and if he saw something wrong, he would do his best to halt the offering, as he did in the case of Environmental Recovery Systems (FHT, E5, Page 740) where Respondent, according to Mr. Lipson, lost at least $15,000 in earned legal fees as a result of his actions (FHT, E5, Page 471)*.[94]

(h) Respondent always demanded full disclosure and if that meant changing deadlines, he would insist that deadlines be changed, FHT, E5, Page 469. (i) Mr. Lipson testified that cold comfort letters are generally a standard closing requirement in the Calvo Firms and that, in his opinion, if money is not distributed pending receipt of a cold comfort letter, but rather held by an attorney, as trustee, that is a secure procedure (FHT, E5, Page 495). (j) Mr. Lipson has testified that Respondent is very ethical, smart and honest and conducts his business affairs in conformity to such standards (FHT, E5, Page 457, 458).[95]

5. Laura Gallagher's testimony demonstrated that[96]: (a) Mrs. Gallagher was a licensed general

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94. A closing scheduled within 30 days of Warehouse. Mr. Lipson's testimony was absolutely contrary to the Referee's conclusion that Respondent was greedy and was motivated in the Warehouse matter to assist with closing solely in order to derive an economic benefit.

95. Not consistent with the Referee's findings, despite their having been no contradictory evidence introduced at the final hearing.

96. Her testimony is significantly buttressed by the statements of facts in the Gallagher cases excluded by the Referee, which includes her husband's participation.

securities principal with Gallagher & Company, the Warehouse underwriter, and was (and is) married to Russell K. Gallagher, the owner of Gallagher & Company (FHT, E5, Page 398).[97] (b) Mrs. Gallagher testified that the Warehouse matter has had a terrible impact on her life, her husband's life, their health and their business, and has subjected them to a $160,000+ law suit (FHT, E5, Page 420, 421, 422). (c) Mrs. Gallagher's opinion of Respondent is that he's very honest and tries to do the best job that he can, FHT, E5, Page 399. (d) Respondent, to her knowledge, shortly after the time of the Warehouse closing, refused to proceed in a closing with Mr. Gallagher because of the lack of appropriate documentation, FHT, E5, Page 424.[98] (e) Mrs. Gallagher testified that in her experience, underwriter's counsel generally was responsible for Blue Sky matters, but, that in order to save expenses, it became the practice of Gallagher & Company to require that Company's counsel assume such work, FHT, E5, Page 437.

(f) *She admitted that she could understand how the issue of who was representing Gallagher & Company became confused when the Blue Sky and NASD filing responsibilities were withdrawn from the Calvo Firm*.[99]

(g) While Respondent's Firm was not paid anything by Gallagher & Company, Mrs. Gallagher has testified that the Firm of Beers and Wilkes received approximately $15,000 for their Blue Sky related services, [the same amount that was to have been paid to Respondent by Gallagher & Company for service as underwriter's counsel, including NASD and Blue Sky filing services] and that she was in general communication with them as early as December of 1984 (FHT, E5, Page 449, 450. (h) She further testified that Messrs. Bremer and Granai attempted to cause a great deal of confusion during the offering and that based on her review of taped conversations provided to her by the Commission, Messrs. Bremer and Granai were clearly attempting to mislead Respondent (FHT, E5, Page 437, 438, 441). (i) Mrs. Gallagher testified that she had been told that the Bremer indictment

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97. Gallagher & Company no longer acts as an underwriter or brokerage firm as a result of the Warehouse matter.

98. The Court is asked to note that in the Dennison offering, Respondent's firm was engaged in exactly the same manner as the Wilkes-Beer firm had been engaged for the Warehouse offering, *i.e.*, they were retained after the effective date to perform Blue Sky work, replacing the underwriter's counsel named in the prospectus. Unlike the Beers-Wilkes firm, Respondent did, in fact, attend and actively participate in the closing.

99. FHT, E5, Page 437.

had been dropped (FHT, E5, Page 442). She also testified that Mr. Gallagher and Respondent spoke a total of approximately 12 times during the entire offering period, but that most of the time, such conversations dealt with non-Warehouse matters (FHT, E5, Page 413, 414).

(j) *Most importantly, despite all her loss and suffering as a result of this matter, Mrs. Gallagher testified that she continues to believe that Respondent is a man of high integrity and honesty (FHT, E5, Page 399)*.

C. Evidence to Grievance Committee Filed as Exhibits at Final Hearing[100]: Exhibit E to Respondent's Written Submission to the Grievance Committee, demonstrated that: (a) The Beers firm was retained in the Warehouse offering on or about October 24, 1984, as confirmed in a written engagement letter dated November 12, 1984; and, that their retention at such time confirms Respondent's testimony as to when his firm was replaced to perform the identical functions as counsel to the underwriter.[101] (b) Robert C. Beers was the attorney dealing with the NASD in the Warehouse offering.[102] (c) Immediately prior to Respondent's involvement with Warehouse, the firm of Oshins, Singer, Segal, Murphy & Morris acted as counsel to the underwriter, and that the anticipated fee for their services was $15,000.[103] (d) The SEC was aware that Respondent's law firm was not serving as counsel to the underwriter as of November 8, 1985, since the old underwriter's counsel was retained as counsel of record in the SEC's document control memorandum.[104]

D. SEC Deposition of Donald E. Ehrlic demonstrated that[105]: (1) He was involved in secret financing agreements with Bremer that no one else knew about, FHT, E3, Page 51. (2) Mr. Ehrlic came to Florida for the closing and stayed at Bremer's hotel, the "Sea Garden. When he arrived, Bremer told him that the minimum had been met, FHT, E3, Page 79. (3) He was at Shooters on April 19, 1985, with Bremer, FHT, E3, Page 80. (4) The "reunion" at Shooters was a light hearted celebration, FHT, E3, Page 81. (5) There were no discussions concerning loans or illegal stock

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100. Respondent's Exhibit 8.

101. See specifically the letter included as exhibit E(a)-6 (page 6 of exhibit E[a]).

102. See specifically the letter included as exhibit E(a)-8 (page 8 of exhibit E[a]).

103. See specifically the letter included as exhibit E(f)-3 (page 3 of exhibit E[f]).

104. See specifically the letters included as exhibits E(L)-6, 7 (page 6 and 7 of exhibit E[L]).

105. Respondent's exhibit 3, submitted at final hearing, hereinafter referred to as "FHT, E3".

arrangements at Shooters, FHT, E3, Pages 88 - 89. (6) Respondent did not talk about loans at Shooters, FHT, E3, Page 90. (7) At the Shooters gathering, people were talking about over-subscribing the offering, FHT, E3, Page 91. (8) After the Shooters gathering, he was pretty intoxicated, FHT, E3, Page 92. (9) He had no conversations with Respondent the weekend of April 19, 1985, FHT, E3, Page 103. (10) Respondent did not attend the closing party, FHT, E3, Page 106.

E. Evidence Excluded by the Referee

1. Gallagher Statements of Facts demonstrated that[106] (1) At the request of Gallagher & Co., the Original Registration Statement was amended to reflect the change in underwriters, a restructuring of the offering, updated financial statements and the potential for litigation with a financial consultant involved with the prior underwriter (the "Amended Registration Statement").[107] (2) The Amended Registration Statement was declared effective by the SEC on November 8, 1984;[108] however, the escrow agreement required by Rule 15c2-4 promulgated under authority of the Securities Exchange Act of 1934, as amended (the "Escrow Agreement," "Rule 15c2-4" and the "Exchange Act", respectively"), was not executed until November 21, 1984,[109] and Barnett Bank of South Florida, NA, the escrow agent (the "Escrow Agent"), calculated the 150 day escrow period called for in the Amended Registration Statement from the date of the Escrow Agreement, rather than from the date of the Amended Registration Statement.[110] (3) The offering closed with a number of serious defects. First, the Escrow Agent miscalculated the escrow period so that the offering closed approximately 15

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106. The following listing of facts is taken from brief's of the Gallaghers filed in the several Warehouse proceedings, and fully support the Respondent's contentions. Citations are to materials in the Gallagher's administrative proceedings before the SEC.

107. See Petitioners' Findings of Fact (Transcript of SEC Proceedings at page 1675); also see Bremer's Testimony (Transcript of SEC Proceedings at page 118).

108. See Transcript of SEC Proceedings at page 1108 and Initial Decision (see Transcript of SEC Proceedings at page 1814).

109. See Initial Decision (Transcript of SEC Proceedings at page 1812), escrow agreement (see Transcript of SEC Proceedings at pages 1109-1112) and Petitioners' finding of Fact (see Transcript of SEC Proceedings at page 1675).

110. See Initial Decision (Transcript of SEC Proceedings at page 1815), Barnett Bank Letter (see Transcript of SEC Proceedings at page 1114) and Findings of Fact (see Transcript of SEC Proceedings at pages 1676-1677).

Pursuant to the requirements of Rule 15c2-4, the offering could not commence until the Escrow Agreement was in effect since brokers are required to deposit any funds received in escrow by the close of the banking business day following their receipt.

days late (see Barnett Bank Letter (Transcript of SEC Proceedings at page 1114; also see Initial Decision, Transcript of SEC Proceedings at page 1815). Second, Edward Bremer, Warehouse's president, director and principal shareholder ("Bremer"), claimed entitlement to approximately 25% of the proceeds of the offering based on having advanced funds to Warehouse for purposes disclosed in the prospectus as involving proceeds of the offering. Based on such claim, counsel consulted by Petitioner Russell K. Gallagher, at the request of Bremer, notified the Escrow Agent that Bremer was to be reimbursed through payments directly by the Escrow Agent to a third party from whom Bremer claimed to have borrowed funds to invest in the offering (see Initial Decision, Transcript of SEC Proceedings at page 1818). Third, in addition to the purported reimbursement transaction[111] (of which Petitioner Russell K. Gallagher had been informed), unbeknown to the Petitioners, Bremer borrowed most of the funds required to close the offering and repaid such loans (together with exorbitant premiums) to the lenders from proceeds of the offering leaving Warehouse with practically no funds (see Initial Decision, Transcript of SEC Proceedings at page 1818). Finally, Bremer was indicted during March of 1991, for mail fraud[112] and the Amended Registration Statement was not amended to disclose such fact (see Findings of Fact, Transcript of SEC Proceedings at pages 1683-1686). (4) Gallagher consented to the closing[113] (being unaware of the erroneous closing date) based on the representations of Bremer and Gary C. Granai, Warehouse's legal counsel, that: [1] The reimbursement to Bremer from proceeds of the offering was not a material matter requiring disclosure since all the advances involved expenditures anticipated from proceeds of the offering disclosed in the use of proceeds section of the Amended Registration Statement; and [2] The indictment against Bremer had either been dropped or was in the process of being dropped, merely requiring ministerial action by the office of the prosecutor. See Transcript of SEC Proceedings at page 1684. (5) In order to verify the accuracy of the information provided by Bremer and Warehouse's legal counsel, William A. Calvo, III, an attorney consulted by Gallagher & Co.,[114] recommended that the closing proceeds

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111. The "Richmond" loan.

112. See Initial Decision (Transcript of SEC Proceedings at page 1816) and Commission Opinion (Transcript of SEC Proceedings at page 2361).

113. After consultation with attorneys (see Transcript of SEC Proceedings at pages 1680-1681).

114. Who had met with the Petitioner Russell K. Gallagher, Bremer and his legal counsel on the Friday prior to the closing date.

payable to Warehouse be held in escrow by Warehouse's legal counsel pending receipt of written verification that the indictment had been dropped and receipt of the "cold comfort" letter from Warehouse's accountant (which would have verified that advances had been made by Bremer). Warehouse and its legal counsel agreed; however, immediately after closing, Warehouse obtained all of its proceeds from its counsel and no verification was ever provided. See Initial Decision (Transcript of SEC Proceedings at pages 1819-1820). (6) After the closing Bremer tried to force Gallagher & Co. to make illegal stock sales, evidently to cover up the diversion of funds, but Gallagher & Co. refused.[115] Seeing that his scheme would be discovered, Bremer approached the SEC and Justice Department with a concocted story about how Gallagher & Co. and its attorney had planned the whole scheme (see Transcript of SEC Proceedings at pages 1683).[116] The SEC conducted an investigation and, despite the fact that all of the testimony from witnesses other than Bremer[117] supported Gallagher & Co.'s recollection of the events, decided to bring a civil action naming, among the many defendants, Petitioners Russell K. Gallagher, Laura K. Gallagher and Gallagher & Co.[118] The SEC also, at such time, arranged an ancillary civil proceeding seeking recovery of the proceeds of the offering."

2. *Materials From Other Bar Organizations Dealing with Attorneys Obligations demonstrated that*[119]: The testimony of Complainant's expert witness was at odds with the opinions of most securities

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115. See Transcript of SEC Proceedings at pages 1683.
Gallagher & Co. was not aware of the diversion of funds. Its refusal to make the stock sales was based on the fact that William A. Calvo, III, counsel consulted by Mr. Gallagher, advised that the securities were control securities (as that term is used in conjunction with Rule 144 promulgated under authority of the Securities Act of 1933, as amended [the "Securities Act"]), and consequently, only a limited quantity of the securities could be sold every three months.

116. Bremer pled guilty to a securities fraud felony and has testified that his testimony in the various Warehouse proceedings is uninfluenced by any deals with the government; however, it has been almost six years since his guilty plea and he has yet to be sentenced thereon.

117. With the exception of irrelevant, purely distractive evidence provided by Marvin Richmond, also a convicted felon (see Transcript of SEC Proceedings at pages 355).

118. Such action was predicated on the jurisdictional grant of authority provided by Section 20(b) of the Securities Act of 1933, as amended (the "33 Act"; 15 U.S.C. Sections 77t[b]) and Sections 21(d) and (e) of the Securities Exchange Act of 1934, as amended (the "34 Act"; 15 U.S.C. Sections 78u(d) and (e). It alleged violations of Section 17(a) of the 33 Act (15 U.S.C. Section 78g[a]), Sections 10(b) and 15(c) of the 34 Act (15 U.S.C. Sections 78j[b] and 78o[c]) and Rules 10b-5, 10b-9 and 15c2-4 promulgated thereunder (17 C.F.R. Sections 240.10b-5, 10b-9 and 15c2-4).

119. These were materials, principally during the cross examination of Mr. Beasely, that the Referee prohibited discussion of.

laws scholars at the time of the Warehouse matter and acting as suggested by such expert would probably violate obligations under Bar rules.[120]

F. **Testimony of Respondent demonstrated that**: (1) Respondent was a member of the Florida Bar, the New York Bar, the American Bar Association, the International Union of Lawyers, The Florida Bar Securities Law Committee, and, the Association of the Bar of the City of New York, FHT, Pages 584 and 585.[121] (2) Respondent has served frequently as an NASD arbitrator in securities matters, FHT, Page 586, 587. (3) At the time of the final hearing, Respondent was serving as a special counsel to a federal public defender in Denver, Colorado, in a securities law case, FHT, Page 588.[122] (4) Respondent first met Bremer on September 26, 1984, at which time there was already an effective Warehouse registration statement, FHT, Page 589, 590. (5) Respondent made handwritten changes which were incorporated in post effective amendment number one to the Warehouse registration statement,[123], and that such changes were limited to matters concerning change in the

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120. American Bar Association, *Statement of Policy Adopted by the American Bar Association Regarding Responsibilities and Liabilities of Lawyers in Advising with Respect to the Compliance by Clients with Laws Administered by the SEC*, 35-2 *The Business Lawyer* 605 (1980). Association of the Bar of the City of New York, *Report by Special Committee on Lawyer's Role in securities transactions*, 32 The Business Lawyer 1879 (1977). Kenneth J. Bialkin, SEC Standard of Conduct for Lawyers, 37-3 *The Business Lawyer* 915 (1982). Block & Ferris, *SEC Rule 2(e) - A New Standard of Ethical Conduct or an Unauthorized Web of Ambiguity*? 11 Capital University Law Review 501 (1982). Maureen H. Burke, The Duty of Confidentiality and Disclosing Corporate Misconduct, 36-2 *The Business Lawyer* 239 (1981). Cooney, *The Registration Process: The Role of the Lawyer in Disclosure*, 33 The Business Lawyer 1329 (1978). Downing & Miller, *The Distortion and Misuse of Rule 2(e)*, 54 Notre Dame Lawyer 774 (1979). Ferrara, *Administrative Disciplinary Proceedings Under Rule 2(e)*, 36 The Business Lawyer 1807 (1981). Report of the Special Ad Hoc Committee of the ABA's Section of Corporation, Banking and Business Law, *SEC Standard of Conduct for Lawyers: Comments on the SEC Proposal (Release No. 37 The Business Lawyer* 915 (1982). *Statement of the Section of Corporation, Banking and Business Law in Response to Securities Exchange Act Release No. 16045 (July 31, 1979)*, 35 The Business Lawyer 605 (1980).

121. The Court is asked to take into account that Respondent, in dealing with non-Florida law matters, such as the Warehouse offering, is responsible for compliance with ethical standards imposed under New York, as well as Florida law, in conjunction with client confidences, *etc.*

122. The Court is asked to note that, as in the case with the Warehouse matter, Respondent requested a continuance of the final hearing in this matter so that he could adequately perform a legal function, and that such request was denied at the insistence of Complainant. As a result, Respondent was unable to assist the federal public defender during the actual trial and the defendant was convicted. It would be ironic (as it is ironic in this case) if Complainant were to initiate proceedings in the future accusing Respondent of improperly meeting his obligations to the defendant in the recent Denver case.

In the Warehouse matter, Complainant refused a requested continuance of a hearing on the date of the Warehouse closing, making it impossible for Respondent to concentrate on Warehouse related matters that day, and making it physically impossible to undertake the many 20/20 hindsight suggestions of Complainant and its expert witness with reference to the Warehouse matter.

123. Hereinafter defined as "PEA-1."

identity of the lead underwriter and the terms of the offering,[124] FHT, Page 592. (6) Bremer and Gallagher wanted Respondent's firm to take over representation of Warehouse, but that after speaking to Granai, Respondent declined the offer, but agreed to assist with the initial post effective amendment, in a quasi-of counsel to Granai's firm, basis, FHT, Pages 595-599, 608. (7) Respondent did not prepare the amendment package, rather, he marked up the affected portions of the then effective prospectus, and added insert pages on legal pad paper, which he gave to Bremer, and which Bremer had retyped and incorporated with other materials and filed as a portion of PEA1 with the SEC, FHT, Pages 600, 606, 607. (8) The fee arrangement for Respondent's services in assisting with PEA1 to the Warehouse registration statement was that Respondent's firm would be paid $15,000 within 45 days after PEA1 was filed, FHT, Page 611. (9) When Respondent declined to replace Granai as counsel to Warehouse, he was requested (probably at the beginning of October, 1984) to act as counsel to the underwriter in conjunction with the Blue Sky and NASD filings and that he indicated he would be willing to undertake that project for an additional fee of $15,000, but would require a $5,000 retainer, FHT, Pages 612, 613, 614. (10) Representation of the underwriter was to be on a limited basis,[125] solely for purposes of reviewing the changes made in the post effective amendments and for Blue Sky and NASD filings, since all other matters, including due diligence and preparation of the underwriting documents had already been completed by predecessor counsel, FHT, Page 614, 615.[126] (11) Respondent did not add his firm's name to the Warehouse registration statement, FHT, Page 614.[127] (12) Because of Respondent's lack of political clout with the NASD, Bremer and Gallagher caused Respondent to be replaced for purposes of NASD and Blue Sky filings by the firm of

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124. All of which are encompassed by one item to Regulation SK, that being Item 508, Plan of Distribution. Respondent had no role whatsoever in conjunction with any other disclosure items (*e.g.*, Item 504, Use of Proceeds; Item 103, Description of Legal Proceedings; Item 301, Selected Financial Data; Item 302, Supplementary Financial Information; Item 401, Directors & Executive Officers; Item 404, Certain Relationships & Related Transactions, *etc.* The Court is asked to note that Rule 4-1.2(c) of the Rules Regulating the Florida Bar specifically permits a lawyer to limit the objectives of his representation.

125. The Court is asked to note that Rule 4-1.2(c) of the Rules Regulating the Florida Bar specifically permits a lawyer to limit the objectives of his representation.

126. See the decision of Judge Regensteiner at the 2e proceeding (filed as an exhibit by Complainant) acknowledging Respondent's limited role.

127. Indeed, as pointed out during cross examination of Bremer, the registration statement referred to William A. Calvo, rather than William A. Calvo, III, a name that Respondent never uses, and which he would have changed had he seen it.

Beers-Wilkes during the latter part of October, 1984 (prior to the time the post effective amendments to the Warehouse registration statements were declared effective by the SEC), FHT, Pages 616, 617, 618, 619.[128] (13) As a result of the political clout of the Beers-Wilkes Firm, the NASD cleared the Warehouse offering within days, and did not even require filing of an escrow agreement, FHT, Page 619, 620.[129] (14) Respondent and his wife left on vacation after Respondent's firm was replaced by the Beers-Wilkes firm, FHT, Page 620. (15) When Respondent's firm was replaced by the Beers-Wilkes firm for purposes of the NASD and Blue Sky filings, Respondent assumed that his firm no longer served as underwriter's counsel, FHT, Page 617.[130]

(16) **Respondent's firm neither billed for, claimed or received a fee for any services as counsel to the underwriter in the Warehouse offering**; however, Respondent was then representing Gallagher & Company on other matters and continued to do so for several years, FHT, Page 618.

(17) Respondent next saw the Gallaghers[131] during the spring[132] of 1985, when they and Bremer requested an introduction to Ms. Francesca Daniels, an investment banking consultant from California and close personal friend of Respondent and his wife, FHT, Pages 621, 625, 626, 627, 628, 630. (18) Ms. Daniels wanted the offering extended for a fresh 90 day period and the registration statement amended to disclose additional co-underwriters, FHT, Pages 627-630.[133] (19) During January of 1985, Respondent's firm received proposed closing documents from Granai and contacted the Gallaghers to find out why they had been provided. The Gallaghers indicated that they might have

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128. See also the October 24, 1984, retainer letter between Bremer and the Beers- Wilkes firm, and other materials pertaining to such relationship described in the previously cited portions of the exhibits to Respondent's exhibit 8.

129. Resulting in the eventual conclusion regarding the closing date, which was measured from signing of the escrow agreement, rather than the prospectus date.

130. That does not mean that Respondent had not served in that capacity in conjunction with review of post-effective amendments 1, 2 and 3. However, in light of the October 24, 1984, retainer letter between Bremer and the Beers-Wilkes firm, it did mean that Respondent's firm did not serve in such capacity after October 24, 1984. The Court is asked to note that the last post-effective amendment was filed November 6, 1984, and declared effective November 8, 1984, all after October 24, 1984.

131. Actually, Respondent probably spoke to the Gallaghers during January of 1985.

132. Actually late February.

133. Neither Ms. Daniels, the Gallaghers nor Respondent have a recollection of a specific date countdown, as described by Bremer. It is highly unlikely since the two week error would not have impacted Ms. Daniel's request that the offering be extended until late May of 1985.

wanted Respondent's firm to represent them at a contemplated Warehouse closing, and Respondent agreed that his firm would undertake such assignment for a $5,000 fee; however, no closing took place, no retainer agreement was entered into and no fee was requested or paid, FHT, Pages 621, 622, 623. (20) During January or February, 1985, Bremer visited Respondent, and Respondent requested his $15,000 fee earned for his work on PEA1; Bremer instead offered an additional $2,500 in fees, if Respondent would invest it in Warehouse stock, an offer Respondent declined, FHT, Page 632. (21) Respondent did not hear from any of the persons involved with the Warehouse offering until late March or early April of 1985, when Granai called, told Respondent that Bremer had been indicted on trumped up charges, and requested advice on how to proceed, FHT, Page 632, 633.[134] (22) Respondent unequivocably answered that either the offering had to be terminated or a new post effective amendment filed. Respondent recommended that Bremer resign so that the post effective amendment could avoid mention of the indictment and disclose that Bremer had resigned for personal reasons, FHT, Pages 633, 634.[135] (23) If Bremer had resigned, it is Respondent's opinion that a formal amendment of the registration statement might not have been required[136] but rather, that a "sticker amendment" might have sufficed, FHT, Page 633. (24) Following the Bremer indictment, Respondent had no standing to force amendment of the Warehouse registration statement,[137] FHT, Page 634, 635. (25) Respondent immediately informed Russell K. Gallagher of his conversation with Granai, and of the recommendations made, FHT, Page 635, 636.[138] (26) After Respondent's

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134. The Court is requested to note Mr. Stein's previously cited testimony concerning his calls to Respondent for advice on securities law matters, as well as the reference by Granai in his deposition to the SEC cited above to the effect that Respondent was a "securities lawyer's securities lawyer" whom another attorney would consult for advice. Respondent, at that time, never hesitated to respond to informal inquiries for assistance from other securities professionals, a practice that the Warehouse proceedings has significantly curtailed, to the detriment of the public.

135. Since the indictment had nothing to do with Warehouse, Respondent felt such disclosure would have been effective. From the taped conversations between Granai and Bremer, it is clear that Granai passed such advice on to Bremer, although at the final hearing Bremer "had no recollection."

136. Requiring new financial statements.

137. See SEC Rule 478. The Court is asked to note that Judge Dorsey appeared to be of the opinion that Respondent could, in fact, have made such an amendment unilaterally. The Court is also asked to note that even had Respondent somehow, on Friday April 19, 1985, have prepared and filed an amendment, it could not possibly have been docketed with the SEC prior to the Monday closing.

138. Although Gallagher & Company was not, in Respondent's understanding, his client for Warehouse related matters, he still represented Gallagher & Company in a number of other matters, including another public offering (also using Barnett bank as escrow agent). That is why, in his so called "disbursement letter" to the escrow agent, he prefaced with it with a comment that the escrow

replacement by the Beers-Wilkes Firm, he did nothing to re-establish a legal relationship with the underwriter, FHT, Page 637. (27) Any communications with Granai or Gallagher after Respondent's replacement by the Beers-Wilkes Firm were courtesies extended to them (of the type described by Mr. Stein in his testimony previously cited), FHT, Pages 638, 639. (28) Respondent next heard from persons involved in the Warehouse offering on April 15 or 16, 1985, when he received a call from Granai who informed Respondent that Bremer's indictment had been dropped and that it looked as though the Warehouse offering was going to succeed, FHT, Page 642, 649.[139] (29) Respondent had assumed that, based on his earlier discussions with Granai and Gallagher, the Warehouse offering had been terminated,[140] and suggested to Granai that in light of the limited time left, his client ought to consider filing a post effective amendment extending the offering, FHT, Pages 642, 643, 650, 651. (30) The purpose of Granai's call was to request Respondent's opinion concerning the legality of guaranteeing a profit to an investor in a public offering, as to which Respondent advised that, in his opinion, it was not legal, FHT, Page 645, 649. (31) Respondent assumed that April 22, 1985 was the offering termination date because the escrow agent had provided such date months before, FHT, Page 646. (32) Respondent had never, to his knowledge, been provided with a copy of the final prospectus prior to April 19, 1985, FHT, Page 648. (33) Respondent had a grievance committee hearing on the date for closing on the Warehouse matter and thus could not devote either meaningful attention or time to anything other than preparation for that hearing, FHT, Page 652.[141] (34) During cross examination of Respondent, he was shown documents concerning the private reprimand that he had never seen before. While preparing this brief, Respondent was shocked to read in one of Complainant's exhibits that the private reprimand which resulted from the subject complaint had never been appealed to the Supreme Court. Respondent paid John V. Marinelli, Esquire, of Broward County, Florida, to handle the appeal and was told by Mr. Marinelli that the appeal was filed but that

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agent was aware that Respondent's firm represented Gallagher & Company (albeit on a different offering and other matters).

139. The Court is asked to note Granai's previously cited testimony to the SEC confirming such fact.

140. As confirmed by Granai in his SEC deposition cited earlier.

141. A situation similar to the one faced by Respondent as he drafts this brief, having been denied his request for an extension of time to file, or for permission to file the oversized brief necessary to adequately deal with the evidence in this matter.

the Supreme Court had confirmed the Referee's decision, and that Respondent had no further recourse, FHT, Page 653.[142] (35) On Friday, April 19, 1985, while Respondent was desperately preparing his defense for a grievance committee hearing prosecuted by Complainant, Messrs. Bremer, Granai and Gallagher appeared at his office, without notice or appointment, and informed him that the Warehouse offering was closing that day! FHT, Pages 653, 654. (36) Messrs. Bremer, Granai and Gallagher, requested that Respondent permit them the use of his conference room, as a professional courtesy, and for clerical assistance in preparation for the contemplated April 19 closing, FHT, Page 654, 655. (37) They did not request Respondent to prepare any documents but did request that a legal assistant look at the underwriting agreement and prepare a list of the documents they would need for closing and Respondent acquiesced, FHT, Page 655. (38) When Respondent's firm became involved in a securities closing as counsel to an underwriter, it took about a week of preparation and generated numerous documents, including a detailed opinion letter, FHT, Page 656. (39) No such activities were or could have been undertaken with reference to the Warehouse closing because of the lack of notice (and the pending grievance committee hearing), FHT, Page 656, 657. (40) Had Respondent felt that his firm were acting as "underwriter's counsel for purposes of the closing," he would have issued a lengthy legal opinion dealing with all aspects of the closing, and would have required voluminous prior documentation, FHT, Page 661, 662, 663. (41) During the morning of April 19, 1985, Messrs. Bremer, Granai and Gallagher, were moved around Respondent's offices because Respondent had to deal with regularly scheduled appointments, FHT, Page 663.[143] (42) During the morning of April 19, 1985, Respondent determined that he could not formally participate in a closing for Warehouse because he could not risk being unprepared for the scheduled grievance committee hearing, and because Complainant refused to grant the Petitioner a continuance therefor, FHT, Page 664.[144] (43) During the morning of April 19, 1985, Russell K. Gallagher, fully aware of the

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142. It appears that the same Mr. Marinelli played a role in initiating this action by requesting Complainant to initiate the investigation on conclusion of the injunction action, a case in which he participated on Respondent's behalf.

The facts surrounding the private reprimand were not introduced. Had they been, they would have demonstrated that the subject proceeding should have been considered only to demonstrate why Respondent was physically and emotionally unable to undertake a role as "counsel to the underwriter for purposes of performing traditional closing functions, and, why he did not volunteer his firm as the escrow agent for the funds entrusted to Granai. Indeed, since the private reprimand, Respondent has uniformly refused to hold trust funds as a "stakeholder."

143. See also Bremer's testimony at the final hearing previously cited.

Petitioner's inability to play a meaningful role with reference to the proposed closing, requested that the Petitioner consider certain matters that had been sprung on Gallagher by Bremer at the last moment, and as he did with reference to Mr. Stein and many other South Florida securities professionals, the Petitioner took time out of his frenetic schedule that day to provide "some" assistance, FHT, Page 666.[145] (44) Contrary to Mr. Caruncho's observations, no closing was ever held at Respondent's office involving Warehouse (or any other securities offering, closings always being required at the escrow agent's offices), FHT, Page 666. (45) During the late afternoon on April 19, 1985, Respondent's wife suggested that because of his apparent stress, Respondent would be better served by taking a break from preparation for the grievance committee hearing, and they went to Shooter's, a popular indoor-outdoor restaurant on the intercostal. FHT, Page 666, 667. (46) While at Shooters and without any pre-planning,[146] Respondent and his wife met Bobby Baldrica, an acquaintance and Jim Scherer, a friend of Mr. Baldrica, who were celebrating a new advertising account for Mr. Baldrica's small advertising firm, FHT, Page 667, 673. (47) About 45 minutes after they had met Messrs. Baldrica and Scherer, Messrs. Bremer, Granai and Gallagher and others, all of whom had supposedly come from a "strip bar," arrived at Shooters, spotted Respondent and his wife, and joined them and Messrs. Scherer and Baldrica at their table, FHT, Page 673, 674. (48) There was no discussion at Shooters in Respondent's presence or known to Respondent concerning any loans for Warehouse, nor had Respondent set up a meeting at Shooters for purposes of introducing Messrs. Baldrica and Scherer[147] as possible lenders,[148] FHT, Page 674, 686. (49) The Petitioner and Nina Gordon, an associate in Respondent's firm, were invited to lunch with Messrs. Bremer, Granai and Gallagher, at Rolands, a popular Fort Lauderdale restaurant, on April 19, 1985; however, contrary to

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144. Even had a continuance been granted, Respondent could not have properly prepared for a closing; however, he would have had not only more time, but a significantly greater ability to focus on the issues involved.

145. Altruism is not generally considered plausible by prosecutors, but that was Respondent's primary motive with reference to the evaluation that he performed for Mr. Gallagher on the day of closing.

146. See the affidavits of Messrs. Baldrica and Scherer annexed as exhibits to this Brief.

147. Who still work together in Palm Beach at their advertising agency, and are and have always been available to Complainant as witnesses.

148. Messrs. Baldrica and Scherer did not, and to the best of Respondent's knowledge, have never had the means or inclination to play the role suggested by Bremer.

the testimony of Bremer, no loans were discussed nor were any lenders introduced by Respondent,[149] FHT, Page 668, 669, 670, 671, 672.[150] (50) Because of his work in preparation for the grievance committee hearing, Respondent left Rolands' early, FHT, Page 672.[151] (51) Prior to arriving at Respondent's offices on the morning of April 19, 1985, Bremer and Granai had volunteered to Gallagher that Bremer had advanced in excess of $350,000 to Warehouse during the offering period to pay for items listed in the use of proceeds section of the Warehouse prospectus, because Warehouse had a contract with Radio Shack which could not wait until the closing, and that Bremer was to be finally reimbursed at closing.[152] (52) Bremer had previously indicated to Gallagher that he personally or through one of his companies intended to buy as much of the Warehouse offering as might be available, up to $250,000,[153] and that he was paying for such stock through a loan he had obtained, secured by the portion of the offering proceeds that he was to be reimbursed at closing, FHT, Page 677, 678, 683, 684. (53) One of the questions Gallagher had asked Respondent during the morning of April 19, 1985, was whether or not Bremer could buy stock in the offering, and if so, could he borrow money to pay for it, secured by the reimbursement he was due from the offering proceeds for the advances he had made to Warehouse, FHT, Page 679. (54) Respondent, without research and off the cuff[154] had informed Gallagher that he knew of nothing improper with such an arrangement, provided that Gallagher did not arrange the loan, although it was unusual[155] and the advances should be

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149. Although Bremer and Granai did make a number of phone calls, not unusual with a securities closing pending.

150. The Court is asked to examine the affidavit of Paul Jenkins, then an employee of Star of David Funeral home, annexed as an exhibit to this Brief. Mr. Bremer's allegations concerning Mr. Jenkins' role as a potential lender are "debunked" therein. The Court is also asked to note that Mr. Jenkins is a resident of Fort Lauderdale and has always been available as a witness to Complainant.

151. See also Bremer's confirming testimony cited earlier.

152. See Granai's testimony to the SEC previously cited.

153. Subject to applicable hot issue rules, in light of a purported $250,000 in subscriptions that were purportedly being brought in at the closing by a broker named Kolinosky, see FHT, Page 704, 705. The Court is asked to also refer to the Kolinosky related testimony of Messrs. Richmond and Granai previously cited.

154. He had absolutely no time to verify the underlying facts, a process which would have required days, FHT, Page 897, nor, in light of the pending grievance committee hearing, was he willing to undertake the major project involved. All he did was provide minimal, free advice, just as he frequently did with other attorneys and securities professionals, see testimony of Mr. Stein previously cited.

155. It was unusual that Bremer had bothered to volunteer such information, since after the closing, he had no need of anyone outside of Warehouse's consent to spend the offering proceeds.

specifically reflected in the accountant's cold comfort letter to be provided for the closing, FHT, Page 684, 685, 699, 700, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714.[156] (55) During the afternoon of April 19, 1985, while Respondent was deep in preparations for the grievance committee hearing, he received a telephone call from Bremer who advised that he owed money to someone who would be calling to confirm that he was to be paid directly by the escrow agent from the portion of the offering proceeds that were to be used to reimburse Bremer for his advances, and Bremer requested that Respondent confirm to such person that Mr. Bremer was delivering to the escrow agent written directions to that effect, FHT, Page 675, 678, 679, 680, 681, 682, 683, 691.[157] (56) Respondent knew that Bremer would be in control of all the offering proceeds immediately following the closing and would have the power (although not the right) to disburse them as he pleased, thus, he did not think[158] of putting Bremer through a verification and authentication process with reference thereto, nor did he have time to, in light of the pending grievance committee hearing, FHT, Page 718, 719. (57) On April 22, 1985, Respondent was furiously completing preparations for that evening's grievance committee hearing; however, he spent approximately 30 minutes to go to the offices of the escrow agent when he was advised that the closing had started, for the sole purpose of collecting his firm's long overdue fee and delivering the letter[159] he had promised Mr. Richmond,[160] FHT, Page 687, 689, 690, 691, 702, 703.[161] (58) When Bremer, Granai and Gallagher arrived at Respondent's offices on

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156. Respondent did not feel there was any material difference between paying a set amount for an item, as opposed to paying the exact same amount to the person who financed the item. One still wound up paying the set amount for the item, see FHT, Page 715, 716, 717.

157. At that time, Respondent had been led to believe that the Warehouse offering had been oversubscribed, see FHT, Page 681.

158. Nor was his attention focused on closing issues, rather he was totally concentrated on preparing for the pending grievance committee hearing.

159. Respondent had added to the letter a request that the Warehouse balance of proceeds be paid to Granai, as trustee, pending his tender of the materials Warehouse was supposed to provide at closing. Although Gallagher could legally have waived such requirements, waiver would not have been responsible and Respondent suggested a temporary escrow in order to motivate prompt compliance, see FHT, Page 692, 700, 701. As indicated previously, because of the matters that were being investigated by the grievance committee that day, Respondent would not permit his firm to hold the subject escrow funds.

160. As testified to by Mr. Richmond, the letter was an irrelevancy at that time since he, Bremer and Gallagher had previously confirmed such disbursement directly with the escrow agent. Nothing in that letter involved any directives instructing the escrow agent to close. Indeed, the escrow agent was prepared to close the prior Friday without such letter, and started the Monday closing without it, see FHT, Page 717, 718, 719, 720, 721.

the morning of Friday, April 19, 1985, Respondent inquired as to the Bremer indictment and, after noticing that Granai's proposed opinion excluded it specifically, suggested to Gallagher that he needed verification that it had been dropped,[162] FHT, Page 692. (59) Granai modified his opinion but stated that he had been replaced as counsel and would thus not state that the indictment had been dropped, whereupon Bremer got on the phone, purportedly to a Maryland attorney, to arrange for verification, FHT, Page 693.[163] (60) Respondent regrets that he was not able to prevent the Warehouse fraud perpetrated by Bremer, on the other hand, he believes that if he had refused to provide any assistance or advice, the result would not have changed (it would just have been easier to cover up), FHT, Page 698. (61) In Respondent's opinion, Item 401 of SEC Regulation SK required disclosure of indictments of a registrant's directors or executive officers "material to the evaluation and the ability and integrity" of such persons, and that the qualifying language led Respondent to conclude that a "dropped" indictment would not be "material to the evaluation and the ability and integrity" of the "formerly indicted person, FHT, Page 724, 725, 726, 727.[164] (62) Mr. Beasely's testimony to the effect that the stockholder ownership tables of a registration statement would have to be amended, prior to closing, to disclose purchases of stock by affiliates at the closing made no sense, especially in light of the NASD's hot issue rules since you would only have the required information after closing, see FHT, Page 727, 728, 729. (63) Mr.Beasely's testimony that the registration statement had to be amended (either once or 43 times) to reflect the insider bridge financing because all insider transactions, regardless of size, were material, was not consistent with the provisions of Item 404 of Regulation SK, which specifically provided that "[t]here may be situations where, although these

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161. See the testimony of Mr. Richmond concerning Respondent's late arrival and early departure from the closing. Respondent could do no more at the closing, as a non-participant, and his actions should not, therefore, be perceived as greedy or ill intentioned, as characterized by Complainant and the Referee.

162. Because of the timing and the pending grievance committee hearing, the only verification that the Petitioner could think of was to deprive Warehouse of the balance of its proceeds until it provided proper written confirmation from an authoritative source.

163. As with all other events during that weekend, Respondent's focus was on the grievance committee hearing and he did not have the time or ability to dedicate to finding better methods of verification.

164. The Court is asked to note that Respondent now understands that the qualifying language is, in the opinion of the SEC's staff, meaningless, and always discloses indictments to the staff, regardless of how old or the circumstances involved, see FHT, Page 726.

instructions do not expressly authorize non-disclosure, the interests of a person specified in Paragraph (a)(1) through (4) in a particular transaction or series of transactions is not a direct or indirect material interest. In that case, information regarding such a transaction is not required to be disclosed in response to this paragraph." See FHT, Page 730, 752.[165] (64) While Form S-18 requires disclosure concerning securities being sold by affiliates in an offering, there is no corresponding section requiring disclosure of purchases by affiliates in a public offering, see FHT, Page 730, 731, 732.[166] (65) Notwithstanding his opinions and the language in Regulation SK, since the Warehouse matter he has always disclosed in registration statements that short term bridge loans may be arranged to pre-acquire items disclosed in the use of proceeds section of prospecti, and that affiliates of the registrant may purchase securities in the offering, to meet minimum offering requirements or otherwise, see FHT, Page 732, 733. (66) It was apparent that Complainant's expert, never having been involved in smaller offerings, was totally unfamiliar with the subject matter of the law applicable to small offerings utilizing SEC Form S-18, see FHT, Page 733, 734, 735, 736, 737, 738. (67) Complainant's expert was wrong when he claimed that underwriter's counsel was an expert for purposes of guaranteeing to the public the accuracy of the information in a prospectus, and that the underwriter's counsel was not one of the types of attorneys contemplated by Item 601(24) of SEC Regulation SK,[167] see FHT, Page 741, 742, 743, 744, 745, 746, 747, 748, 749. (68) Testimony by Complainant's expert that Respondent was required to withdraw the consent to the use of his name in the Warehouse prospectus if he had been replaced was not correct, since there was no such consent requirement in the first place, see FHT, Page 753, 754. (69) Complainant's expert was incorrect in his description of the amendment procedures for registration statements in that he appeared to be unaware that there are two separate rules governing two different kinds of amendments, and that most amendments do not require re-review by the SEC, see FHT, Page 755. (70) Complainant's expert's suggestion that counsel is obligated to report to the SEC any instances where a client disagrees with

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165. The provision of short term, interest free bridge loans pending reimbursement at closing appear to fit directly into the quoted language. If the purported loans had been structured as requiring payment of bonuses or interest, Respondent's view would have been different, see FHT, Page 730.

166. See also SEC Form S-18 and Regulation S-X.

167. Complainant's counsel and its expert were obviously wrong on this critical issue, and Respondent was obviously correct, since SEC Rule 436(e) specifically and unequivocally contradicts Mr.Beasely's perjured testimony.

the attorneys advice was not correct in that it failed to recognize an attorney's fiduciary obligation to clients and issues involving attorney client privilege, see FHT, Page 757, 758.[168] (71) Respondent has in the past resigned when a client has refused to heed his advice and, with the client's consent, advised the SEC of the fact of his resignation, although not the privileged matters underlying the decision to resign, see FHT, Page 758.[169] (72) The Referee, at Complainant's request, improperly restricted Respondent's testimony concerning conduct under then applicable Bar rules, and thus his ability to defend the subject proceeding, see FHT, Page 758. (73) SEC Rule 15c-2(4) required the escrow agent to return investor funds at the conclusion of the escrow period and that nothing that occurred two weeks later could have any impact on that obligation, see FHT, Page 758, 759, 760, 761. (74) After the closing, Bremer and Granai tried to pressure Gallagher to make illegal sales of Bremer Advertising securities, see FHT, Page 764, 770, 771. (75) Respondent has suffered greatly as a result of his well intentioned advice in the Warehouse matter, and that such suffering has included being subjected to a permanent injunction, a two year suspension from practice that totally destroyed his law firm, and cost him and his family everything they owned, see FHT, Page 766, 767, 785, 786. (76) The Referee, at Complainant's request, improperly prohibited Respondent from testifying fully as to his

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168. The Court is asked to note the following SEC statement of policy with reference to the foregoing: *"When a lawyer with significant responsibilities in the effectuation of a company's compliance with the disclosure requirements of federal securities laws becomes aware that his client is engaged in a substantial and continuing failure to satisfy those disclosure requirements, his continued participation violates professional standards unless he takes prompt steps to end his client's noncompliance."* See Sec, Ex. Act. Rel. 17,597, 33 SEC Dock. 292 (1981). The Court is also asked to note from that same release, the following observations by the SEC: *"Some have argued that resignation is the only permissible course when a client chooses not to comply with disclosure advice. We do not agree. Premature resignation serves neither the end of an effective lawyer-client relationship nor, in most cases, the effective administration of the securities laws. The lawyer's continued interaction with his client will ordinarily hold the greatest promise of corrective action. So long as the lawyer is acting in good faith and exerting reasonable efforts to prevent violation of the law by his client, his professional obligations have been met. In general, the best result is that which promotes the continued, strong-minded and independent participation by the lawyer."*

The Referee, based on Complainant's objection, refused to permit Respondent to introduce or comment on the following critically relevant ABA report, directly on point: American Bar Association, *Statement of Policy Adopted by the American Bar Association Regarding Responsibilities and Liabilities of Lawyers in Advising with Respect to the Compliance by Clients with Laws Administered by the SEC*, 35-2 *The Business Lawyer* 605 (1980). However, the Court is asked to note that the actions suggested by Mr. Beasely would have, according to such report, violated Respondent's obligations as a member of the New York and Florida Bars.

169. The Court is asked to note that with reference to the Warehouse closing, Respondent had nothing to resign from, and that even had he been underwriter's counsel, such engagement would terminate at closing and thus resignation would not be relevant.

conclusions concerning the effect of Warehouse on his life, see FHT, Page 766. (77) Respondent not only immediately agreed to return to Warehouse the fee he was paid at closing, but an additional $10,000, see FHT, Page 767, 768.[170] (78) Respondent's first thought on learning of the SEC investigation was for the investing public, see FHT, Page 768, 769. (79) The Warehouse registration statement, in part two, revealed that Respondent had never consented to the use of his Firm's name in the Warehouse prospectus, see FHT, Page 780, 781, 782, 783. (80) Underwriter's counsel does not "expertise" any part of a registration statement, see FHT, Page 783.[171] (81) Since his return to practice of law in 1991, Respondent is paranoidly careful, see FHT, Page 786, 787. (82) At the grievance committee hearing in this case Respondent had neither the opportunity to testify nor to be represented by counsel, see FHT, Page 788, 789. (83) The Referee improperly admitted evidence concerning a prior private reprimand, over Respondent's objection, see FHT, cross examination of Respondent.[172] (84) Respondent's attorney informed him that 45 pages were missing from his deposition to the SEC in the Warehouse case, and that the SEC improperly "corrected" the deposition by merely renumbering the pages, see FHT, cross examination of Respondent.[173]

SUMMARY OF THE ARGUMENT

The Referee's decision is based on improperly introduced evidence and lacks factual and legal support sufficient to sustain his conclusions. It cannot be disputed that almost every procedural deficiency that can exist was present in Complainant's case. The Rule on which it based its case was

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170. The only person to have so done, as opposed to Complainant's witnesses, Bremer and Richmond, who have not been required to pay the enormous sums they obtained, for some unknown but easily guessed reason.

171. The Court is also asked to consider the in depth legal discussion of the expertising issue contained in the following scholarly publications: Association of the Bar of the City of New York, *Report by Special Committee on Lawyer's Role in securities transactions*, 32 The Business Lawyer 1879 (1977); especially guidelines four, five and six; *Sommner, 11 Part 1A BUSINESS ORGANIZATIONS - The Federal Securities Act; Matthew Bender, 1992*, pages 7A-11 through 7A-14; *Loss, Fundamentals of Securities Regulation; Little, Brown and Company, 1983*, pages 1034, 1035.

172. The page number appears to be 955 but was not legible in Respondent's copy of the record. The facts surrounding the private reprimand were not introduced. Had they been, they would have demonstrated that the subject proceeding should have been considered only to demonstrate why Respondent was physically and emotionally unable to undertake a role as "counsel to the underwriter for purposes of performing traditional closing functions, and, why he did not volunteer his firm as the escrow agent for the funds entrusted to Granai. Indeed, since the private reprimand, Respondent has uniformly refused to hold trust funds as a "stakeholder."

173. The page number was not legible in Respondent's copy of the record.

repealed without re-enactment prior to commencement of its case.[174] The case was started more than two years after it should have been and the Complaint was not signed, as required, by the presiding officer of the grievance committee. Complainant was deprived of effective discovery by the Referee's improper protective order.[175] Respondent was deprived of ability to properly present his case by the Referee's refusal to take mandatory judicial notice or permit introduction of the corroborating materials from the Gallagher series of cases, while permitting introduction for purposes of establishing facts of cases with lower standards of proof and which had, for purposes of this proceeding, been barred by this Court. Respondent was deprived of his ability to properly conduct his defense by the Referee's improper barring of his attorney, based on Complainant's false statement that Mr. Chamberlin would be called as a rebuttal witness. The Referee improperly permitted the testimony of Mr. Beasely, but thereafter improperly excluded Respondent's evidence of standards of conduct established concerning the issues in question by numerous other Bar organizations. Finally, following the final hearing, the Referee improperly communicated on an ex parte basis with Complainant, and Complainant, who somehow had many original portions of the record in its possession, failed to file them as part of the record.

ARGUMENT

SUBSTANTIVE MATTERS: This case presents a number of the major considerations facing securities lawyers during the first half of the 1980s, that being the conflict between their Bar related obligations and emerging positions by the SEC. The issues have been clearly discussed by the American Bar Association and by the Association of the Bar of the City of New York, both organizations in which Respondent was a member. The most that ought to be argued, assuming that this Court is willing to emasculate the concepts of attorney client privilege, confidentiality and loyalty owed by attorneys to their clients is that Respondent honestly espoused one of two competing legal theories during 1985, and that his proved to be the weaker.

The attorneys in both In re Carter, CCH F. Sec, L. Rep., Paragraph 82,847 (1981 Transfer

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174. Complainant convinced the Referee that this Court's determination that the old rules would continue to apply to matters pending on the date of their repeal remedied that defect. However, Complainant's case was not pending on that date or for a long time thereafter.

175. Limiting discovery to 5 interrogatories, especially distressing in a case where all of the major witnesses are outside the jurisdiction or governmental agencies that refused to co-operate with Respondent.

Binder, Pages 84,145-84,178),[176] and SEC v National Student Marketing Corp., 457 F. Supp. 682 (D.C. 1978), the two leading cases imposing obligations on attorneys in securities' law matters, were clearly found to have knowingly violated securities laws, they both clearly represented a party to such violations, and had represented such party extensively for a long period of time. In neither case were the subject attorneys subjected to sanctions of any kind. In the case of In re Keating Muething & Klekamp, CCH F. Sec. L. Rep. Paragraph 82,124 (1979 Transfer Binder at page 81,981, 81,995), where members of a law firm were found by the Commission to have participated in a continuing, multi-year series of materially inaccurate filings with the Commission, including filings reflecting forgiveness of over $1,000,000 in debt owed by a member of the Firm to the registrant, the Commission punished the errant group of attorneys by requiring them to improve their office procedures. All of the subject lawyers were found culpable in a manner significantly greater that Respondent was by Judge Dorsey. In none of such cases were the attorneys subjected to any disbarrment or suspension sanctions whatsoever.[177]

The Referee's decision is based principally on the decision of Judge Dorsey, improperly before the Referee and contradicted by the weight of the evidence presented; and, by the testimony of Complainant's expert, also improperly introduced but more importantly, specifically contradicted in all material respects by the rules promulgated by the SEC in Regulations C and SK. The great weight of the evidence, and all of the credible evidence disproves the allegations of Complainant.[178] Perhaps most damaging to Complainant's case were the admission by Bremer that at the time of closing all parties including Respondent believed that they were acting legally. Upon conclusion of Complainant's case, Respondent moved for dismissal, and that motion should have been granted.

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176. Respondent's conduct in Warehouse was similar to that of White & Case in In re Carter, *i.e.*, he informed counsel for Warehouse that he thought certain types of disclosure was required. It must be noted that no one at the Commission has ever considered the conduct of White & Case in In re Carter to have been improper.

177. Respondent has been unable to find any reported litigated 2(e) proceedings where former counsel for an underwriter have been found responsible for filing registration statements, contrary to the wishes of the registrant. Respondent doubts that there are, or should be, any. This would be especially true in a situation such as this one, where Respondent has testified that he was only one of a series of law firms that represented the underwriter, and that his Firm's representation terminated before the offering began.

178. Indeed, having introduced the Bremer testimony and then the contradictory testimony of Messrs. Richmond and Caruncho, Complainant clearly violated Rule 4-3.3(a) of the Rules Regulating the Florida Bar.

The summary of testimony which constitutes the bulk of this brief, makes it clear that Complainant failed to prove its complaint in accordance with the applicable clear and convincing standard, if at all.[179] Except for its expert witness and his own improper testimony, Complainant's witnesses testified that Respondent not only thought that he was acting legally, but that he would not act improperly. Bremer's testimony in conflict with Respondent's was contradicted by Complainant's own witnesses,[180] by his own taped conversations, and by the sworn testimony of his own attorney to the SEC . Bremer's lack of credibility was cited in both the decisions improperly introduced by Complainant.[181]

Complainant's purported expert was not shown to have been designated or certified by the Florida Bar, could cite to only one section of one regulation in support of his conclusions, and as to that single section, specific SEC Rules proved him utterly wrong.[182] Indeed, the plain language of numerous SEC rules cited by Respondent but ignored by the Referee made it clear that Mr. Beasely was wrong in almost every part of his testimony. With little wonder. His expertise was limited to one or two representations of underwriters in offerings requiring different forms and applying different regulations. Unfortunately his extremely and demonstrably wrong testimony was both persuasive and very prejudicial.

The Referee ignored all of the mitigating factors, including Complainant's role in making Respondent's meaningful participation in the closing impossible by refusing to continue a scheduled grievance hearing, the severe penalty already imposed and paid by Respondent for any errors committed on his part, the fact that even Bremer asserted that Respondent did not believe that he was participating in any illegal or improper activities, and the unrefuted testimonials concerning Respondent's character and ability, and gave undue weight to the purported aggravating factors which were neither pled nor proved by Complainant; and in fact, were contrary to everyone's evidence, except the purported expert.[183]

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179. Indeed, the evidence, both qualitatively and quantitatively, overwhelmingly supported all of Respondent's assertions.

180. Caruncho as to the indictment and Richmond as to Respondent's participation at the closing.

181. Judge Regensteiner having specified that Bremer had deceived Respondent.

182. The Court is requested to note that Mr.Beasely's claimed status as an expert violated Rule 4-7.6 of the Rules Regulating the Florida Bar, and thus, his testimony should have been excluded.

PROCEDURAL MATTERS

1. **ABSENCE OF LEGAL PREDICATE FOR ACTION**: The Bar's complaint alleged violations of two disciplinary rules, one of which, DR 1-102(A)(1), by referencing violations of other disciplinary rules, cannot stand on its own, and the second, the only substantive rule, DR 1-102(A)(6), having been repealed and not been re-enacted in any manner. The current rules of professional conduct greatly expand their six sentence predecessors and have clarified a number of troublesome issues for practitioners; including, the troublesome conflict between the duty of confidentiality and the federal government's imposition of "rat on your client" obligations. While DR 1-102(A)(1) has not been re-adopted, it can be argued that it is somewhat reflected in current Rule 4-8.4(a). However, since it requires a violation of an additional disciplinary rule, it must be coupled with a corresponding allegation that another specific disciplinary rule has been violated.

There is no corresponding analogy to DR 1-102(A)(6) a discarded, constitutionally questionable catch all provision that provided no acceptable guidance as to proper conduct. Thus, both rules fail in the present action. Where a statute (or rule) is repealed without a re-enactment of the repealed law in substantially identical terms, the repealed provision is, as to its operative effect (except in the Constitutionally specified exception involving criminal statutes), considered as if it had never been enacted. Neither courts nor other adjudicatory officials have power to perpetuate a repealed rule or law. Repeal of laws regulating conduct nullify all proceedings had under them. Repeal of a statute or rule is presumed when the statute is the subject of a total legislative overhaul, and repealing statutes should (except in the case of criminal laws) be given retrospective operation.[184]

Two cases are directly on point and require the dismissal of the Bar's current complaint. They are State ex rel. Arnold v Revels, 109 So.2d 1 (Fla., 1959), a case specifically involving disciplinary proceedings against an attorney; and, Gevant v Florida Real Estate Comm., 166 So.2d 230 (Fla.,

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183. The facts surrounding the private reprimand were not introduced. Had they been, they would have demonstrated that the subject proceeding should have been considered only to demonstrate why Respondent was physically and emotionally unable to undertake a role as "counsel to the underwriter for purposes of performing traditional closing functions, and, why he did not volunteer his firm as the escrow agent for the funds entrusted to Granai. Indeed, since the private reprimand, Respondent has uniformly refused to hold trust funds as a "stakeholder."

184. See Yaffee v International Co., 80 So.2d 910 (Fla., 1955) and see Flord v State, 129 So. 861 (Fla. 1930); Fort v Fort, 104 So.2d 69 (DCA 1, 1958).

1964), a case involving attempted discipline of a real estate broker, after modification of the operative rules. Both cases clearly stand for the proposition that, when the jurisdiction of a court depends on the jurisdiction of a statute that has been repealed, the jurisdiction falls even over cases pending at the time of such amendments.

Clearly, the repeal without re-promulgation of DR 1-102(A)(6), required that Complainant's complaint be dismissed. In passing, it is instructive to note that even had this proceeding been properly brought under the old rules, it would have failed, based on examination of the single securities related claim brought thereunder. The only reported case of attorney discipline under the former disciplinary rules involving alleged violations of federal securities laws was the case of Florida Bar v Abney, 279 So.2d 834 (1973). In that case, the Referee found the attorney guilty of a series of violations involving inadequate knowledge of securities laws and recommended a one year suspension followed by a multi-year prohibition on securities related practice. The Supreme Court rejected the referee's findings and dismissed the complaint, recognizing that securities attorneys file information provided by their clients, and that the client is responsible for its accuracy and timing.

2. VIOLATIONS OF RULE 3-7.4:[185] The constitutions of the United States[186] and the State of Florida provides specific constitutional guarantees that even the Florida Bar must respect. Among the most important is the right to due process. Complainant does not deny that it has failed to comply with the procedural requirements promulgated by the Supreme Court in conjunction with initiation of proceedings such as this one. Rather, it argues that such requirements are without substance.

Rule 3-7.4 specifically regulates grievance committee proceedings and must be complied with. It provides both timing requirements and other procedural requirements, none of which appear to have been complied with by Complainant, despite a preparation period of more than three years and, involvement by Mr. Whalen in the matter for more than three months prior to initiation. The deficiencies involved not only lack of timeliness, but total failure to comply with the requirement that the complaint be signed by the presiding member of the grievance committee [see Rule 3-7.4(j)].

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185. Florida Bar Rule 3-7.4(j): "If a grievance committee finds that there was probable cause, the bar counsel assigned to the committee shall promptly prepare a record of its investigation and a formal complaint .... The formal complaint shall be signed by the member of the committee who presided in the proceeding.

186. See fifth, sixth and fourteenth amendments.

With reference to timing deficiencies, Complainant cited to rule 3-7.11(a) and claimed that proper enforcement of such Rule requires separate contempt proceedings against the bar or against the Supreme Court. That argument appears ludicrous when one asks who would hold such proceedings, or seek to enforce them. Complainant ignored the observations of the Court in Florida Bar v Randolph, 238 So.2d 635 (1970), where addressing the issue of unwarranted delays, the Court held that "while the time provisions of the predecessor to current rule 3-7.11(a) are directory rather than jurisdictional, still, responsibility for proceeding with diligence rests with the Bar. When it fails in the regard, the penalizing incidents which the attorney suffers from the unjust delay might well supplant more formal judgments as a form of discipline, even when the record shows that the attorney's conduct merits discipline. The current action could not more strongly reflect the Court's concerns and thus, Complainant's complaint should have been dismissed.

3. **VIOLATIONS OF DUE PROCESS**: The Referee's evidentiary rulings, both prior to and at the hearing, his restrictions on Respondent's ability to undertake meaningful discovery, and his exclusion of Respondent's attorney from the hearing all violated Respondent's constitutional rights to due process, both on the state and federal levels.[187]

The government and every one of its branches, departments, agencies, and subdivisions are bound by the prohibition of due process guarantees which extend to legislative, judicial, executive and administrative proceedings. See State v Kelly, 112 S.E.2d 641, 644 (1960); West Virginia State Board of Education v Barnette, W.Va., 63 S.Ct. 1178, 319 U.S. 624, 87 L.Ed. 1628, (1943); Lovell v City of Griffin Ga., 58 S.Ct. 666, 303 U.S. 444, 82 L.Ed.2d 949 (1938). The general meaning of due process has been applied to administrative agencies. See Mooney v Holohan, 55 S.Ct. 340, 294 U.S. 103, 79 L.Ed 791, (1935). Once a requirement of due process of law is deemed to apply, the question becomes what process is due, see Smith v Organization of Foster Families for Equality and Reform, 97 S.Ct. 2094, 431 U.S. 816, 53 L.Ed 2d 14 (1977). Due process is a flexible concept. See Matthews v Eldridge, 96 S.Ct. 893, 424 U.S. 319, 47 L.Ed. 18 (1976) and it calls for such protection as a particular situation demands. The determination of what process is due in a particular situation requires a balancing or weighing of the individual or private and governmental interest in each particular situation, see Tler v Vickey, 517 F.2d 1089, *rehearing denied*; Banks v Vickery, 521 F.2d 814, 815 (1975); and, Perry v Sell,

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187. See fifth, sixth and fourteenth amendments.

521 F.2d 815, *cert. denied* 96 S.Ct. 2660, 426 U.S. 940, 49 L.Ed.2d 393 (1976). A court should first identify and isolate competing interest and then weigh relative importance before reaching assessment, see Davis v United States 415 F.Supp 1086 (1976). The extent to which procedural due process must be afforded a person is implied by the extent to which a person may be condemned to suffer a grievous loss, see Johnson v Breliz D.C. 482 F.Supp. 125 (1979). Due process of law requires essential fairness and justice in proceedings. It is in procedural aspect, cost and guarantee of due process that assures to every person his or her day in court, see Truck v Carrington, 42 S.Ct. 124, 257 U.S. 312, 66 L.Ed 254 (1921).

The opportunity to be heard has been required to be adequate, fair, reasonable, meaningful in time and manner, see Parrot v Taylor, 101 S.Ct. 1908, 451 U.S. 527, 68 L.Ed.2d 420 (1981); Matthew v Eldridge, 96 S.Ct. 893, 424 U.S. 319, 47 L.Ed. 18 (1976); Fuentos v Shevin, 92 S.Ct. 1983, 407 U.S. 67, 32 L.Ed 2d 556 (1972). The hearing before a trier of fact is to be fair and impartial, see Schwaker v McClure, 102 S.Ct. 1665, 456 U.S. 188, 72 L.Ed.2d 1 (1982). Failure of a tribunal to protect constitutional rights to confront or advise witnesses is a denial of due process, see Barber v Page, 88 S.Ct. 1318, 390 U.S. 719, 20 2d 255 (1968). Constitutional rights of confrontation and cross examination cannot be side-stepped because it happened to be convenient for one of the parties, see Holman v Washington, 364 F.2d 618 (1967). The exercise of a trial court's discretion must conform with due process, see United States v Grande 620 F.2d 1026 (1980).

The conduct of the Referee in depriving Respondent of meaningful discovery, in refusing to take mandatory judicial notice, in excluding Mr. Chamberlin and in depriving Respondent of an opportunity to present clearly relevant evidence impermissibly violated Respondent's right to effective legal counsel and to effective cross examination of the witnesses against him.[188] Indeed, it clearly demonstrated an impermissibly favorable predisposition towards Complainant. Those grounds in and of themselves justify reversal of the Referee's decision.[189]

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188. Administrative convenience is not adequate support for infringement upon a Constitutional right, see Howell v Tobinen, 279 F.Supp 22; Shapiro v Thompson, 89 S.Ct. 1322, 394 U.S. 618 (19__).

189. The hearing before a trier of fact is to be fair and impartial, see Schwaker v. McClure, 102 S.Ct. 1665, 456 U.S. 188, 72 L.Ed.2d 1 (1982). Due Process is the compendius expression for all those rights which the courts must enforce because they are basic to our free society, see Wolf v. People of State of Colorado, 69 S.Ct. 1359, 338 U.S. 25, 93 L.Ed 1782 (1949). It is an elementary precept in our form of law and government that a human being has an inherent right to due process of law, see Bund v. Wilson, 73 S.Ct. 1045, 346 U.S. 137, 97 L.Ed 1508. (1953). Due Process is interwoven throughout the common law, long prior to adoption of the Magna Carta, see Stoer v. Oklawaha River Farms Cp., 138

CONCLUSION

This action involves at most, a 30 minute error in judgment[190] on behalf of Respondent, for which he has already severely paid. In fact, a proper analysis of the conflicting Bar and SEC requirements imposed on Respondent should lead to a finding that, under the circumstances, Respondent's actions did not violate the Rules Regulating the Florida Bar, but that had he, based on refusing to believe his "purported" client, gone to the SEC, he would have violated Rule 4-1.6 of the Rules Regulating the Florida Bar, especially since the underwriter has never been charged with any criminal violations as a result of his conduct in Warehouse.

There was no credible evidence from any witness indicating that Respondent's motives were selfish or improper, or that Respondent knowingly participated in a fraud. All of the evidence suggests that Bremer and Granai concocted the scheme to fool Gallagher, and when Gallagher sought out Respondent, used it to deceive him. The allegations that Respondent's letter permitted Bremer to perpetrate the fraud were debunked by Complainant's own witnesses, Mr. Beasely, and Mr. Richmond. Respondent was not a conspirator in the scheme, he was a victim of the scheme.

No one, other than Gallagher or Respondent was subjected to the scheme, and the only reason it succeeded was because of the unusual luck enjoyed by Bremer and Granai in hitting Respondent with the scheme at a time when he was neither emotionally nor physically in a position to unravel it. No one was sorrier for the consequences of Warehouse to the public than Respondent. Of all the participants, only he made restitution, and the Bremer tapes and SEC correspondence make clear that when he discovered something was amiss, he immediately sought to protect the public by suggesting that Gallagher immediately cease trading activities. Respondent fully and completely cooperated with the SEC and Complainant in every investigation. He provided all of his files immediately, did not invoke any of the many privileges available nor did he counsel others to do so.

So. 270, (1931). Due Process is secured by the Magna Carta and successive constitutions of civilized states and nations, see Herman Doll V. Unemployment Compensation Comm., 82 A.2d 177, 182 7 NJ 547 (1951). In the United States, the concept of due process is embodied in the Fifth Amendment to the Constitution of the United States of America: "No person shall ... be deprived of life, liberty or property without due process of law."

190. The United States Court of Appeals for the 11th Circuit found, in the Gallagher case, based on representations by counsel to the SEC, that Respondent had provided neither a written nor an oral opinion authorizing the Warehouse closing. However, the Referee excluded that evidence.

Although Respondent's suggestions were not effective in preventing the Bremer scam, they created the trail that led to its unraveling. A trail that no one as skillful or intelligent as Respondent was portrayed as being by the independent witnesses, would have left were his motives impure. The prosecution of this case has, from start to finish, been replete with prosecutorial blunders and improprieties, each terminally prejudicial to Respondent's case. The multi year delay in bringing this action led Respondent to leave a family business,[191] return to Florida and restart his life. A new disruption is neither called for nor proper.

Judge Regensteiner, considering Respondent from a regulatory perspective has found that Respondent has paid enough. Complainant has introduced no evidence to the contrary. The Court is respectfully requested to dismiss this complaint and give Respondent back his life.

REQUEST FOR ORAL ARGUMENT

In light of the severity of the Referee's recommendation, the many procedural and constitutional issues involved and the Court's refusal to permit filing of an oversize brief or an extension of time to file, Respondent respectfully requests for this Honorable Court to grant oral argument unless it is inclined to dismiss Complainant's complaint on the briefs.

Respectfully submitted, this 7th day of April, 1993

William A. Calvo, III
Respondent
11355 Southeast 54th Avenue; Belleview, Florida 32620; Florida Bar Number 0315494

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191. Respondent, prior to making such move and after completion of the SEC suspension, verified his good status with Complainant, see the certificate of good standing dated August 10, 1990, annexed as exhibit B to this Brief.