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

FILED
SID J. WHITE
MAY 11 1993
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

THE FLORIDA BAR
Complainant

- against -

WILLIAM A. CALVO, III
Respondent

Florida Bar Number 0315494

RESPONDENT'S REPLY BRIEF APPEALING DECISION OF REFEREE AT FINAL HEARING

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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 5.

PRELIMINARY STATEMENT

For purposes of clarity, the following abbreviations have been used in this Reply Brief: the Securities and Exchange Commission is referred to as the "SEC;" the National Association of Securities Dealers, Inc., is referred to as the "NASD;" the Rules Regulating the Florida Bar are referred to as the "FBR;" and, the Respondent's Answer, Affirmative Defenses & Mitigating Factors is referred to as the Respondent's Answer.

Reply to Complainant's Counterstatement of the Case & Facts

The Complainant's criticism of the Respondent's statement of the case is without merit. The Respondent was legally limited in the length of his brief and could not re-recite the record verbatim. In light of the Complainant's successful opposition to the Respondent's motion for permission to file oversize brief, its comments are unfair and lacking in candor.

The Complainant alleges without record support that it proved its case by clear and convincing evidence. A review of the Respondent's numerous citations to the record make that claim's falsehood obvious.[1] At best the testimony of the Complainant's witnesses was confusing, internally contradictory, largely multiple stage hearsay, contradicted by the Complainant's other witness, at odds with prior testimony and, in the case of Bremer, contradicted by his own taped telephone conversations. The testimony of the Complainant's expert concerning applicable law was totally at odds with the clear contrary language of Securities and Exchange Commission ("SEC") regulations and when compared therewith, demonstrates that he was either not an expert as to the subject matter of his testimony, or that he committed perjury with respect thereto.

The testimony of the Complainant's own witnesses established every fact alleged by the Respondent in his Answer, on which the Complaint purports to rely heavily. The Court is respectfully requested to ignore the Complainant's translation thereof and instead, rely on the Answer itself, as a whole, rather than as dissected by the Complainant.[2]

Because of the 15 page limitation, the Respondent is unable to use the space required to refute each of the Complainant's blatantly false characterization of the evidence presented. However, the Court's attention is called to the detailed citation to the record in the Respondent's brief.[3]

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1. See the introductory index to the Respondent's appendix filed concurrently herewith.

2. The Respondent would, however, urge the Court to note that testimony by Richmond, a witness for the Complainant, clarified the fact that the "disbursement letter" was of no consequence since it was provided at his request and delivered after the closing had started. Those facts were either unknown to the Respondent or had been forgotten in light of the Complainant's unjustified delay in filing its complaint. Furthermore, the testimony of Mr. Beasely, the Complainant's expert, supported such contention since he deemed the delivery of disbursement instructions to have been of no import.

3. For illustrative purposes, the Court's attention is directed to the following "fabrications:"

The Complainant, at page 2, alleges without support that "throughout the offering period Respondent consulted and advised both Warehouse and Gallagher with regard to the public offering."

The Complainant purports to cite to examples of misleading assertions of facts by the Respondent. However, it in fact misquotes the Respondent's statements and then attempts to distort the testimony of the witnesses. The Respondent hopes that his preparation and filing of an appurtenant Appendix will make the real facts clear.[4] At best the "factual" examples cited by the Complainant indicate that the evidence it presented at the Final Hearing was contradictory and unreliable, clearly inconsistent with a duty of proof by "clear and convincing" evidence.[5] The Complainant seeks to prove its case by fabricating allegations, repeating them over and over again, and trusting that because of its status, the Court will refuse to believe that it could be acting in so egregious a manner. It then requests a penalty so drastic that the Court is expected to react with the negative psychological impact that accompanies the mere allegation of hideous conduct. This Court cannot permit such tactics to succeed.

The Complainant concludes by bemoaning the Respondent's failure to adequately develop issues in his brief. The Respondent was not satisfied with his ability to present his case within the limits

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The testimony from Mrs. Gallagher and the Respondent was that such "consultation and advise" occurred on about three occasions over a 150+ day period. The Complainant at page 3, without supporting record citation, asserts that the Respondent became aware that the offering would not be sold to bona fide investors during the offering period. The testimony was to the contrary. At the closing itself (as confirmed by Richmond and others) a broker by the name of Kalinowski was awaiting a wire that would have led the Respondent to believe that the offering had been oversubscribed (a "hot issue"). The Complainant, again without citation to authority, on page 3, asserts that the Respondent contacted potential flash loan lenders. Only Bremer made such an allegation, but he changed the identity of the purported flash lenders from prior testimony, and the new "potential flash lenders" provided affidavits utterly refuting such testimony.

4. The Complainant throughout its brief misleads the Court concerning the Respondent's relationship with the Gallaghers and Granai by claiming that he represented the Gallaghers throughout their series of Warehouse proceedings (in fact, the Respondent's first representation of the Gallaghers in any Warehouse related proceeding commenced in the summer of 1991, 6 1/2 years after the Warehouse closing, and "coincidentally" mere days prior to the Complainant's decision to belatedly bring this action against the Respondent [see, *e.g.*, page 7 at Number 11, last sentence]); and, similarly, by characterizing Granai as (at the closing) being the Respondent's friend and partner. The testimony was that the Respondent first met Mr. Granai at the closing and thereafter befriended him and discussed the possibility of someday becoming partners, an event that never occurred.

5. The Complainant completely ignores the inarguable inconsistency between the testimony of its expert concerning the rules regulating underwriter's counsel, with the rules themselves (total opposites), and the obvious fact that such testimony was the cornerstone of the Complainant's case.

imposed by the rules and he requested permission for additional space in which to develop his arguments. However, based on the Complainant's own objection, such request was denied. Because of the heavy burden faced by the Respondent in demonstrating that the Referee's decision was not supported by the evidence, he was forced to sacrifice argument to a detailed and fully documented summary of every aspect of the testimony presented. The Complainant's criticism of the natural consequence of its actions violates its duty of candor towards this Court.

Reply to Counter Argument

I. Judicial Notice:

1. In Favor of the Complainant. The Complainant requested that the Referee take judicial notice of the Warehouse cases for purposes of establishing facts (the Complainant's counsel at the final hearing, both in his opening and closing statements, made clear that he relied heavily thereon for purposes of establishing his case). That was contrary to applicable law as cited by the Respondent in his brief.[6] The unavailability as precedent of cases supported by lower standards of proof is a pillar of our legal system and was violated in the instant case.[7]

2. The Respondent's Request. The Complainant ignored the Respondent's argument concerning the failure of the Referee, at the request of the Complainant, to take mandatory judicial notice of the matters requested by the Respondent. Consequently, this Court should deem such

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6. The issue is one of mathematical clarity. If, for purposes of this argument, percentages are assigned to burdens of proof (51% for a preponderance of the evidence; 66 2/3% for clear and convincing evidence; and, 75% for beyond a reasonable doubt); then the person with the burden of proof requiring clear and convincing evidence cannot rely on a preponderance of the evidence decision to establish his case because such evidence fails to meets such burden by 14 2/3%. However, his opponent can use such evidence because it establishes that the most that the person bearing the burden of proof can prove is the remaining 49%. As applied to the instant case, the subject decisions can only be used by the Respondent to establish those aspects of the Complainant's case which the Complainant cannot prove.

7. The Complainant disingeniously argues that because the District Court decision involved a motion for summary judgment (without taking any evidence at all) it met a higher standard of proof. That was clearly contrary to the SEC's argument on that exact issue during the subject appeal, where it was held that the SEC needed to establish, "by a preponderance" of the evidence that no material dispute existed with reference to facts. The District Court found that disputes concerning the facts would not have affected its decision, hardly the case in this proceeding. The District Court completely based its decision on the fact that the Respondent's continued ability to practice law would be unaffected. That is also clearly not what the Complainant is proposing.

arguments to have been irrefutably established.

II. **Exclusion of G. Richard Chamberlin**: No one knows the requirements of Rule 4-3.7(a) of the of the Rules Regulating the Florida Bar (the "FBR") better than this Court. They specifically permit a client to have his attorney testify as a witness if depriving him of such testimony would be unjustifiably prejudicial. That was clearly the case at the final hearing.

The Complainant claimed that if the Respondent did not call Mr. Chamberlin as a witness it would. That was the basis for the Referee's terminally prejudicial ruling. The Complainant's argument that the Referee, faced with the Complainant's claim of intent to call Mr. Chamberlin as a witness, would have decided otherwise if the Respondent exercised a right of election is in bad faith. That is exactly what the Respondent unsuccessfully attempted to do when he was "cut off."[8]

The Complainant totally failed to respond to the numerous cases involving due process guarantees of the United States Constitution applied to the State of Florida by the Fourteenth Amendment, thus, the deprivation of the Respondent's constitutional rights in this action should be deemed established.

III. **Participation by Mr. Beasely**: The Complainant's argument starts by ignoring the fact that the Respondent objected to Mr. Beasley's testimony, and was promptly overruled. The stipulation referred to involved only Mr. Beasley's artfully prepared resume.

This case did not involve scientific, technical or other specialized knowledge, it involved purported violations of Bar rules. The SEC has and exercises its own mechanisms to deal with violations of its rules, that being the 2(e) process. That rule has been recognized as in conflict with the obligations of attorneys under state bar ethical rules.[9] Mr. Beasley's testimony involved facts to which

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8. The fact that the Complainant obviously lacked candor when he claimed that he would call Mr. Chamberlin as a witness is evidence of such strong prosecutorial impropriety as to render the presentation of his entire case suspect, prosecutorial conduct consistent with that noted by Judge Regensteiner in the 2(e) proceeding.

9. See, *e.g.*, 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); 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); Downing & Miller, *The Distortion and Misuse of Rule 2(e)*, 54 Notre Dame Lawyer 774 (1979); Report of the Special Ad Hoc Committee of the ABA's Section of Corporation, Banking and Business Law, *SEC*

he was not privy, and law which he did not know. Unfortunately, his inaccurate testimony was "expertly and convincingly" presented in a manner which terminally tainted the subject proceeding.[10]

Not unsurprisingly, the Complainant fails to refute the Respondent's brief with reference to the numerous and material errors of law presented as facts by Mr. Beasely. That false testimony was the cornerstone for the Complainant case and as it crumbles, so should this action.

IV. Prior Disciplinary History: The Complainant's argument concerning prior disciplinary history ignores critical facts. First, while Mr. Chamberlin was prepared to address the prior hearing as evidence limited to establishing the fact that meaningful participation at closing was impossible, its only relevant aspect, Mr. Houston knew nothing about the issue. Furthermore, the Referee, based on the Complainant's objections, refused to permit the Respondent himself from objecting.

The subject matter of the prior complaint was not properly dealt with at the proceeding and was terminally prejudicial. On direct examination, the Respondent testified concerning the existence of the subject hearing, the Complainant's refusal to grant a continuance, and the resulting impossibility of participation in any meaningful matter in the Warehouse closing. Such matters were relevant to the subject matter of the Final Hearing. The subject matter of the prior hearing was totally irrelevant and was presented by the Complainant in a distorted and highly prejudicial manner.[11]

Standard of Conduct for Lawyers: Comments on the SEC Proposal (Release No. 33-6344), 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).

10. His aircraft analogy missed one vital point, that being that the Complainant, by refusing to postpone a hearing, made it impossible for the Respondent to board the flight.

11. As reflected in the Respondent's initial brief, after the hearing when he examined the exhibits to the record submitted by the Complainant, he was horrified to discover that the referee's decision in the prior matter had never been appealed to the Supreme Court. The Respondent had paid John V. Marinelli, his attorney, $2,500 to handle such matter, had been told by him that the matter had been appealed but that the appeal had been lost. It is likely that Supreme Court records show that a notice of appeal was filed but that Mr. Marinelli neglected the matter. Mr. Marinelli, who also assisted in representation of the Respondent in Warehouse matters, appears to have been improperly instrumental in initiating this action through correspondence with the Complainant; however, all correspondence for the subject period was missing from the Complainant's files when requested by the Respondent.

To the extent that the Complainant concludes its comments with criticism of the Respondent's trial strategy, the Court is reminded that the Complainant was responsible for the improper exclusion of the Respondent's chosen legal counsel, to the Respondent's great prejudice.

V. **Applicability of Old Rules 1-102(A)(1) & (6)**: The Complainant distorts the Respondent's argument, which involves the fundamental legal concept that when legislation or rules governing conduct are replaced, such portions of the old rules as are not reflected in the new rules can no longer be relied on, even as to pending matters.

There are two exceptions as to pending matters, the constitutionally created exception for criminal matters (see Article Ten, Section 9 of the Florida Constitution)[12] and the exception where the promulgating authority directs that the discontinued portion of the old rule shall continue to apply to cases pending at the time of replacement. A clear reading of the Court's language at 494 So. 2d 978 makes it clear that "*[a]ll disciplinary cases pending as of 12:01 a.m. January 1, 1987 shall thereafter be processed in accordance with the FBR*" (the new rules). Thus, neither exception applies.

The Complainant distorts the Respondent's argument making it appear that the Respondent claims that all the old rules became non-applicable and resulted in a grant of general amnesty. That is clearly not the Respondent's argument, which relates only to DR 102(A)(6) that unlike every other provision of DR 102(A) was not reflected in a substantially similar manner in the new rules.[13]

The cases cited by the Complainant do not deal with DR 102(A)(6) and are thus totally

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12. A provision that would certainly be superfluous if the Respondent's assertions were not accurate.

13. As indicated in the Respondent's initial brief, "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. 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). 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., 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."

irrelevant.

VI. Referee's Findings Are Not Supported by Credible Evidence: As the Complainant stated, the Referee's findings of fact are presumed correct *unless clearly erroneous or lacking in support*.

The Referee found that the Respondent was special counsel to Warehouse, then counsel to the underwriter, and then special counsel to Warehouse, a proposition with no support on the record from anyone except the expert witness, who had no personal knowledge. The bulk of the Referee's findings were clearly predicated on the expert witness' statements to the effect that, as a matter of law, counsel for the underwriter was one of the persons described in Item 601(24) of regulation S-K, had to provide a written consent to the use of his name in the prospectus, and could be replaced as legal counsel only pursuant to a formal amendment to the prospectus. Indeed, when it was called to his attention that the Respondent had not filed such a consent, he indicated the Respondent was guilty of further violations. However, as the Respondent demonstrated by referencing the actual rules of the SEC, the expert was totally wrong, as a matter of law! The issue is specifically dealt with by SEC Rule 436(e), which directly contradicted Mr. Beasley's statements.

The hearsay allegations by Bremer relied on by the Referee concerning the purported meetings with Messrs. Jenkins, Baldrica and Scherer, have all been contradicted in sworn affidavits. The hearsay allegation by Bremer that Ms. Daniels calculated the proper closing date in the Respondent's presence is directly contradicted in her affidavit.[14]

The evidence from persons other than Bremer, including Bremer's friend Ehrlich, totally dispelled the myth that the Respondent participated in any manner in formulation or implementation of the loan schemes. Indeed, even Bremer testified that the idea was either his or Granai's and that he did not communicate it to the Respondent. Mr. Granai's testimony read into the record demonstrated that what he told the Respondent did not involve any fraudulent or improper activities.

Because the Complainant distorts the purported facts it presents, they would be unreliable even

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14. It is obvious that Bremer's testimony was perjurious and the Complainant's continual presentation thereof to this Court is improper. Rule 4-3.3 of of the FBR requires that the Parties, upon becoming aware that a witness may have committed perjury, bring such fact to the Court's attention. Subsection (b) thereof makes it utterly clear that the subject duty applies in the instant case. See The Florida Bar v Agar, 394 So.2d 405 (1981); and, The Florida Bar v Simmons, 391 So.2d 684 (1980). Sections 837.02 and 777.011, Florida Statutes, and, Rules 4-3.3, 4-3.4(b), 4-8.4(d) of the FBR also require that Complainant make the Court aware of Mr. Bremer's perjury.

if they had come from unimpeachable sources. For example, it states that: the Respondent assured Richmond that he would be paid a $75,000 finders fee, no one testified as to that, at all; Respondent received a fee for representing the Gallaghers from closing proceeds, no one testified as to that, at all;[15] the Respondent continued to participate in the offering after Bremer's indictment, no one testified as to that, at all;[16] that the Respondent consulted with Granai concerning the April 22, 1985 closing on April 15, 1985, no one testified as to that, at all;[17] Responded represented Gallagher at the closing, neither the Respondent nor Gallagher, the only persons who would know, testified as to that. The Complainant then has the effrontery, having been made aware of its expert's lack of knowledge concerning the rules regulating underwriter's counsel through the Respondent's brief, to cite that expert's opinion as to the Respondent's responsibilities at closing, as a fact.

In his requests for production of documents, the Respondent made the Complainant aware of massive available documentary evidence which the Complainant but not the Respondent could obtain from the SEC. The Complainant, knowing that such evidence was terminal to its case, avoided its duties to review all reasonably available evidence before bringing this action. The Complainant cannot meet its burden of proof by avoiding the massive available evidence and the availability of credible eye witnesses who could provide non-hearsay testimony.

The fact is that the Complainant had a large burden of proof which it had to meet at the Final Hearing. That burden could have been met as to the alleged statements and actions of Messrs. Jenkins, Baldrica and Scherer, only through their readily available testimony. The Complainant did not call them because it knew they would destroy its case. That burden could have been met as to the Respondent's status as counsel to the underwriter only by testimony from the principals of the underwriter, also readily available. The Complainant did not call them because it knew they would destroy his case.[18]

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15. The testimony was that Respondent received no fees at all for representation of the Gallaghers.

16. The testimony from Granai was that as of April 15, 1985, merely days prior to the closing, the Respondent was not aware that the offering was proceeding.

17. Indeed, the determination to close on April 22, 1985, was according to Bremer, made during the afternoon of April 19, 1985, four days later.

18. Indeed the testimony from Mrs. Gallagher introduced by the Respondent effectively destroyed the Complainant's case.

Contrary to the Complainant's allegations, the following facts were established at the Final Hearing:[19] That the Respondent's only formal participation in the entire Warehouse matter involved preparation of a hand written draft of a portion of post effective amendment number one to the Warehouse registration statement; that the initial post effective amendment was followed by three others, in which the Respondent's participation, if any, was limited to review for the underwriter's benefit; that although the Respondent initially agreed to act as underwriter's counsel for the limited purpose of filing the registration statement with the National Association of Securities Dealers, Inc. ("NASD"), and state regulatory authorities, he was replaced in such role by the the Wilkes-Beers Firm on September 24, 1984; that although he discussed being retained by the underwriter to assist with closing, no such relationship was established, first, because no closing occurred during January of 1985, and second, because the Respondent was not advised of the April 1985 closing until the last minute, and the Complainant refused to continue a scheduled grievance committee hearing on that date; that the Respondent neither asked for nor received any fees for representation of the underwriter; that during April of 1985, the Respondent was representing Gallagher & Company in another public offering (Dennison, Inc.) in which Barnett Bank also served as the escrow agent, and thus, Barnett Bank was aware that the Respondent represented Gallagher in certain matters; that at the request of Messrs. Bremer and Richmond and with the consent of Gallagher, the Respondent prepared a letter to the escrow agent dated April 22, 1985 and first delivered after the subject closing had commenced, instructing the escrow agent to pay to Richmond funds that Bremer and Bremer's attorney had represented were due Bremer as repayment for advances to Warehouse; that the so called "disbursement letter" had nothing to do with directing the escrow agent to close, but merely how the parties had agreed to disburse the proceeds if a closing took place; that Bremer had plotted to deceive Gallagher as to certain matters which would have led Gallagher to abort the offering; that Gallagher had consulted the Respondent on a limited basis with questions as to the legal ramifications of facts posited as accurate by Bremer, and that the Respondent had, without charge and on an informal basis,[20] orally indicated that, if the posited facts were true, he did not believe they would constitute an

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19. Citations to the record are contained in the Respondent's initial brief.

20. The Respondent believed that he was legally permitted to limit his role in whatever manner he and Mr. Gallagher determined might be appropriate. That belief is currently affirmed by FBR 4-1.2(c).

impediment to closing, however, he recommended that the facts be verified through a cold comfort letter from Warehouse's accountant and a certification that Bremer's indictment had been dropped from his special criminal attorney, and that the proceeds directly receivable by Warehouse be held in trust by Warehouse's attorney until such verification was delivered to the underwriter.[21] After the closing, Bremer tried to force Gallagher to illegally sell 144 securities and, based on the legal advice of the Respondent, Gallagher refused, whereupon Bremer, with the assistance of the Wilkes-Beers Firm, concocted a story implicating Gallagher and the Respondent which they presented to the SEC and Justice Department.

When the SEC conducted its investigation, the escrow agent managed to convince the SEC[22] that it[23] should not be found to have been the causative agent for the failure of Warehouse investors to recover their subscription proceeds by distorting the Respondent's letter of April 22, 1985,[24] and by providing the funds required to reimburse the investors, subject to recovery thereof through a federal receivership action.[25] The SEC has gone along with the escrow agent's suggestion, despite the fact that it involved an unquestionable violation of the SEC's officially enacted position on the illegality of indemnification for securities law violations (see Item 510 of Regulation S-K), and has, in fact, actively and formally participated in both effecting such indemnification and keeping its actions secret.[26]

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21. The Respondent was unwilling to hold such proceeds in his trust account because the pending bar complaint had made him uncomfortable with acting as a "stakeholder" for any purposes.

22. In a secret Wells Committee Submission that the District Court has sealed and which has been improperly unavailable to the Respondent in the preparation of his defense.

23. Its attorneys have also escaped the Warehouse matter unscathed.

24. Inarguably provided long after the illegal failure to return the funds had occurred and recognized as such even by the Complainant's expert.

25. During the receivership action, the escrow agent offered to lend substantial funds to the Respondent and to the Gallaghers, on a non-recourse basis secured by the equity in their homes, if the proceeds were used to settle the receivership action. In the Respondent's case, the loan offered was in excess of $500,000, despite knowledge that the Respondent had less than $30,000 of equity in his home. Needless to say, both the Respondent and the Gallaghers rejected such overtures.

26. It has, in fact, acted for the escrow agent by bringing the receivership action, an action in which the escrow agent is the undisclosed principal.

The receiver in the receivership action has, despite an open and shut case, not required Bremer or Richmond to make restitution[27] because they have furthered the escrow agent's efforts to shift liability to the Respondent by testifying in whatever manner is required to effect such goal.

The Wilkes-Beers[28] firm has managed to convince the SEC and other regulators, including the Complainant, that the Respondent should be held liable for the improper closing, despite the inarguable facts that: (1) the Wilkes-Beers Firm filed the registration statement with both the NASD, and the state regulatory authorities of every state involved in the offering, including the State of Florida;[29] (2) the Bremer tapes disclose that the Wilkes-Beers Firm, not the Respondent, was involved in arranging meetings for purposes of finding closing financing; (3) correspondence from the Wilkes-Beers Firm filed as exhibits to the Respondent's Answer demonstrates inarguably that the Wilkes-Beers Firm knew that the offering was being closed on April 22, 1985; (4) the Bremer tapes disclose that the Wilkes-Beers Firm was made aware by Granai that the offering had been closed "short;" and, (5) the Wilkes-Beers Firm received significant compensation for its activities while the Respondent was paid nothing for purported representation of the underwriter.[30]

While the evidence of wrongdoing by the escrow agent and the Wilkes-Beers Firm is unequivocable, the blame has been transferred to the Respondent as a scapegoat.[31]

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27. The Respondent volunteered such restitution immediately and the underwriter has been vigorously prosecuted in such action.

28. Robert C. Beers, Esquire, served as chief enforcement counsel for the NASD, in Washington, D.C., and developed a strong personal relationship with the leadership of the SEC's enforcement division.

29. Activities which even the Complainant's expert attributed to the role of underwriter's counsel.

30. It is amazing that the State of Florida, which has an obvious interest in enforcing its own securities act, has done nothing to prosecute the Wilkes-Beers Firm, which undeniably prepared and filed the Warehouse offering materials with the State of Florida, but has instead focused on the Respondent, who inarguably had nothing to do therewith. It is an odd coincidence indeed that the complaint in this action was filed six years after the fact but almost immediately after the Respondent commenced representation of the Gallaghers in an appeal whose focus was the fact that primary responsibility for the Warehouse fiasco should have been borne by the escrow agent.

31. The Referee's specific finding of fact that the Respondent was born in the Republic of Colombia is indicative of potentially improper bias. The Respondent doubts that any current court would find the fact that a person was black or a woman a relevant issue; however, the unfortunate association of Colombians with the illicit drug trade has made them ideal scapegoats.

VII. The Respondent Was Highly Prejudiced by the Delay in Filing Complaint: It is incredible that the Complainant, on the one hand, claims that its delays in filing a complaint in this matter did not prejudice this case, and on the other, claims that the Respondent's evidence, especially concerning the Bremer tape "snippets," could not be relied on because Bremer could not be expected to recall the subject events after so long a time. Indeed, Bremer's memory was extremely selective at the Final Hearing[32] and that fact alone indicates that the Respondent was terminally prejudiced in the conduct of his defense by the Complainant's unjustified and inexcused delay in bringing these proceedings.

The Complainant's witnesses themselves established that the delay in bringing this proceeding terminally prejudiced the Respondent's ability to defend himself. All of them, except for the Complainant's purported expert, affirmatively expressed an inability to respond to questions posited by or on behalf of the Respondent, based on the length of time since the incidents in question. As importantly, numerous persons that could have provided non-hearsay testimony were obviously unavailable to either party (*e.g.*, Gary Granai).[33]

Not only were witnesses unavailable, but documents had been destroyed by the SEC and placed on microfiche unavailable to the Respondent[34] and the Respondent's financial ability to pay for defense assistance had been exhausted in prior related matters.[35] Matters were not at all helped by the decisions of the Referee, at the request of the Complainant, limiting the Respondent's ability to use the scant materials that he did have available (*e.g.*, excerpts from depositions taken by the SEC).

The Respondent and his family have also been unjustifiably penalized by the Complainant's unexplained and inexcusable delay in filing its complaint in that their lives and his career have already

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32. Bremer claimed that the Respondent could not provide anything that would refresh Bremer's recollection of conversations with Respondent during April of 1985, FHT, Page 154.

33. The delay in bringing this action massively prejudiced the Respondent's ability to defend this action because so many people had moved and become unavailable, including Granai; Edward Thomas Kalinowski; Raymond Crane; Donald Ehrlich; Dean Scholl; John J. Stewart; and, Michael F. Gilligan.

34. The SEC provided even the Complainant with only an incomplete number of the materials the Referee ordered him to attempt to obtain on behalf of the Respondent for the Final Hearing .

35. The delay required massive amounts of duplication in work that could have been undertaken concurrently with the related actions.

been destroyed once as a result of the Warehouse matter, and that any discipline by the Complainant should have been imposed concurrently, not three years after the Respondent and his family gave up their business in North Carolina, at massive cost,[36] to return to the practice of law in Florida, after having been advised by the Complainant that the Respondent was in "good standing."

The Complainant's attempt to distort the nature of the delay complained of from the delay in filing the complaint to the length of the proceedings after filing the complaint is totally lacking in required candor towards this tribunal and utterly without support in the record.[37]

The Complainant's criticism of the Respondent's handling of the Final Hearing is hypocritical when the Court considers that the Complainant succeeded in barring the architect of the Respondent's defense from participation. After the Referee's ruling excluding Mr. Chamberlin, he returned to his office in Belleview, Florida, and the Respondent and Mr. Houston (who was totally unfamiliar with the case) did the best they could, under the circumstances.[38] However, it was hardly what the Respondent was entitled to or required. All such deficiencies are the fault of the Complainant's egregious but successful ploy to deprive the Respondent of a meaningful ability to defend this action.[39]

VIII. The Respondent's Conduct Warrants No Further Discipline: In Aaron v SEC, 446 U.S. 680 (1980), the United States Supreme Court found that Section 17 of the 33 Act applied only to Sellers. In Pinter v Dahl, 108 S. Ct. 2063 (1988), interpreting Section 12 of the 33 Act, the Supreme Court of the United States ruled that the term Seller did not include attorneys acting within the normal scope of

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36. A loss of $400,000.

37. The Court is requested to examine the paltry responses to the Respondent requests for admissions and interrogatories to see just how uncooperative the Complainant was in the discovery process.

38. Mr. Houston, unlike Mr. Chamberlin, was totally unfamiliar with and had never spoken to the prospective witnesses and was unfamiliar with how they could be contacted.

39. The Complainant's assertion that the presentation to the Referee of a request by the federal public defender in Denver, Colorado, for a continuance so that the Respondent could meet his obligation to assist her in the defense of a federal criminal trial, was a tactic to delay these proceedings is ludicrous. The Complainant's failure to grant opponents professional courtesies started the Warehouse mess in the first place. The Respondent would be only slightly surprised to find that, if he prevails in this matter, the Complainant will bring an action against the Respondent alleging that the Respondent breached his professional responsibilities by not being at both the Final Hearing and the Colorado trial at the same time; an argument no more ludicrous than that faced in this proceeding.

rendering professional legal services. Nothing has been proven in the subject action to demonstrate that the Respondent acted other than as an attorney performing his normal functions.

In the Warehouse matter, the Respondent interpreted the applicable law in a manner different than the SEC's subsequent position. However, even Bremer admitted that the Respondent, at closing, believed that everything he said was legal. His role was limited, as specifically permitted by FBR 4-1.2(c), to providing observations based on assumed facts which, because of the timing involved, the Respondent was in no position to verify. The issues in question were complex and called for a balancing of interests.[40] The Respondent's errors, if any, were in good faith and do not constitute grounds for discipline.[41]

The injunction to which he is subject and the suspension which he served are more than enough to assure that the public is not threatened by the Respondent's practice of law, even had the Complainant met its burden of proof. The Complainant introduced utterly no evidence to the contrary while the Respondent introduced significant and persuasive evidence of his good character and legal competence.

As he has always done, the Respondent is an active member of his community, donating his time generously to public causes. He regularly provides *pro bono* assistance, serves actively on the Belleview Elementary School Advisory Council and has served actively on the County Wide Schools Council, in which he has been requested to serve as president. He is one of the few members of an under-represented minority in the legal profession, especially in the field of corporate and securities' law. If this matter is successfully resolved, the Respondent will be in a position to devote more time to the public good, while if he is further disciplined, his reputation will again be destroyed and he will again become isolated.

Conclusion

The Complainant's posture in this action, especially its initial posture concerning its motion to

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40. Especially the "dropped indictment" issue. The Complainant's recitation of a series of cases dealing with criminal activities by attorneys is not only not applicable, but highly prejudicial.

41. The Respondent's only real failure in conjunction with his participation in the Warehouse offering was the failing which led to the replacement of his firm by the Wilkes-Beers Firm. He had and has no political clout. That ought not to be a disbarable offense.

limit issues at trial, are difficult to understand, when compared with Mr. Harkness' recent comments published in the Florida Bar Journal, see Harkness, John F., Jr., Judicial Independence is at the The Heart of Today's Lawyer Regulation, 57-5 The Florida Bar Journal 12 (May 1993). There, he stated:

"While it may have a populist appeal to have lawyers governed by executive or legislative agencies and bodies, such a move would be a radical change in our constitutional democracy .... [T]he legal system is the means, and individual lawyers are the people who bring cases to be settled. They advocate the just causes of citizens. Sometimes that just cause means being the adversary of an impersonal government bureaucracy or the overreaching power of a government agency[42] *.... Therefore, it is inherent in our constitutions--U.S. and Florida--to protect the individual from the power of government. In order to provide that protection, an independent judiciary is essential, a judiciary equal to and free from intimidation or coercion by the other branches. And of course lawyers, as "officers of the court" are the key players on the ideally level playing field of the justice system ..... The judicial branch (including lawyers) must be protected from regulatory retaliation for challenging governmental abuses of power. The judicial branch (including lawyers) should be insulated from political attacks and the tyranny of the majority for deciding on behalf of or representing unpopular causes. Our legal system must remain one based on law and not one based on the popular cross currents of the moment."*

Judge Cameron, dissenting in Mitchell v Pidcock, 299 F.2d 281 (5th Cir. 1962), wrote:

"The majority repeats the argument so often made by spokesmen for the bureaucracies which occupy so large a percentage of the time of the courts in their efforts to substitute government by fiat for government by law: 'The injunction subjects the defendants to no penalty, to no hardship. It requires the defendants to do what the Act requires anyway -- to comply with the law. True, it subjects them to correction by contempt proceedings. If this is a hardship, they may avoid it by respecting the law.' Implicit in this statement is the thought that no good citizen should rebel at having an injunction stamped upon his back; at being placed in a position where federal functionaries will be constantly breathing down his neck; where his every action will be suspect. In this country, many lives have been given in the complete repudiation of such a concept as that."

The injunction in the Warehouse case was argued to require no more than everyone's duty, mere compliance with law. It was deemed necessary by Judge Dorsey because the Respondent's continued ability to practice law was not expected to be curtailed. The result, as evinced by this proceeding, is drastically different.

Respectfully submitted, this 11th day of May, 1993

William A. Calvo, III
Respondent

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42. Emphasis added.