BRIEF OF RESPONDENT

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STATEMENT OF FACTS AND THE CASE

Albert A. Rapoport, is a member in good standing of the District of Columbia Bar since 1954 and the U.S. Supreme Court Bar since 1959 (A1-3). He now lives in Florida. He does not maintain a law office or presently engage in the general practice of law. He is a Certified Family Mediator and Arbitrator by the Florida Supreme Court.[1] (A4-6) He has never been suspended, fined or disciplined for any breach of conduct.

He has acted for parties in Federal Securities Arbitration for some time in a fairly successful fashion benefitting his clients. No issues of incompetence or monetary misapplication, misdirection or client complaint have been raised. He has represented parties on securities arbitration cases before the National Association of Securities Dealers, Inc., American Arbitration Association and New York Stock Exchange since 1985 in Washington, D.C., New York City and Florida. He was licensed as a Service #7 stockbroker since 1982.

The Florida Bar charged him with unlicenced practice of law since he is not a member of the Florida Bar and represents parties to Federal Securities Arbitration Proceedings. His advertisement clearly shows he is not a member of the Florida

[1]Ironically, he successfully mediated family cases in Judge Carlisle's (the Referee) division before the Judge retired.

Bar, but is a member of the D.C. Bar and the United States Supreme Court Bar. In July he underwent bypass surgery and asked to continue proceedings (A-7), upon denial (A10). He moved for reconsideration (A11-12),which was denied (A13).

Judge Carlisle on September 24, 2001 (A-11) asked for an additional 60 days to file his response notwithstanding the request to continue and he nevertheless entered his Order on Summary Judgment on September 26, 2001 (A22). Rapoport's attorney served notice of appearance on September 25, 2001 (A15)

The Report of Referee incorporates "Order Granting Summary Judgment" (A20). At no time was there ever any hearing of any kind.

SUMMARY OF ARGUMENT

An attorney licensed and in good standing in another state or territory may appear in Federal Securities Arbitration for any party in a proceeding in Florida as an authorized practice. Such action, presently, is an authorized activity. Such does not permit a general practice of law in Florida and is limited to matters of interstate commerce under the Federal Arbitration Act by an attorney licensed in another jurisdiction.

The Supreme Court has declined to adopt a rule regulating non-Florida attorneys from representing parties in interstate securities matters under Federal Arbitration Act, and the Florida Bar attempts to circumvent the Supreme Court's rule making power, particularly, in light of questions of preemption, is unauthorized and unprofessional.

The denial of due process and professionalism is to be repudiated in any proceeding including an alleged unauthorized practice of law. The proceedings should be dismissed, the "Order" by the referee and report be vacated and the respondent granted his costs and attorney's fees.

POINT I

IT IS NOT THE UNLICENCED PRACTICE OF LAW FOR ANY ATTORNEY ADMITTED IN THE DISTRICT OF COLUMBIA TO ACT FOR PARTIES IN A FEDERAL SECURITIES ARBITRATION MATTER WITHIN THE STATE OF FLORIDA.

The Federal Arbitration Act 9 USCA 1 et.cet., under the supremacy clause has preempted state law in this area. For example:

> "69A AmJur 2d., Securities Regulation-State Sect. 223
> Thereafter, most of the blue sky jurisdictions have enforced arbitration, agreements, holding that the Federal Arbitration Act governs all claims, both state and federal, where interstate commerce is involved, including claims that the execution of the arbitration agreement was fraudulently induced."

Jones v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (Ala) 604 So.2d 332, reh den, without op (Ala) 1991 Ala LEXIS 721; Ex parte Merrill Lynch, Pierce, Fenner & Smith, Inc. (Ala) 494 So.2d 1; Sager v. District Court Second Judicial Dist. (Colo) 698 P2d 250; Nelson v. Roger J. Lange & Co. (3d Dist) 229 Ill App 3d 909, 171 Ill Dec 539, 594, 594 NE2d 391, CCH Blue Sky I. Rep ¶73623; Howells v. Hoffman (3d Dist) 209 Ill App 3d 1004, 154 Ill Dec. 713, 568 NE2d 934; Fouquette v. First American Nat.Secur.,Inc. (Minn App) 464 NW2d 760

The Florida Supreme Court has itself recognized the inherent problem of the Florida Bar invading the Federal Arbitration process. See Advisory Opinion on Nonlawyer Representation in Securities Arbitration, 696 So.2d 1178 (Fla. 1997). This case dealt with a nonlawyer doing representation for compensation. In that

case it was said:

> "*See Florida Bar v. Moses*, 380 So.2d 412, 417 (Fla.1980) (stating that the "single most important concern in th(is) Court's defining and regulating the practice of law is the protection of the public from incompetent, unethical, or irresponsible representation").
>
> "But the legislature has constitutional authorization to protect the public in administrative proceedings under article V, section 1 of the Florida Constitution, and when it does so any "practice of law" conduct becomes, in effect, authorized representation.
>
> 380 So.2d at 417. In that case, however, we found that PERC is unquestionably subject to the APA [the Administrative Procedure Act], and the APA has unquestionably authorized representation before PERC by non-lawyers. Sections 120.52(1)(b), 120.62(2), Florida Statutes (1975)," Id. t 417-18."[2]

There is no showing on incompetency, unethical conduct, or irresponsible representation in this matter.

In Amendments Regulating the Florida Bar, 795 So. 1 (Fla. 2000), this Court recognizes the difference.

> "After reviewing the proposals, we asked the Bar to file a supplemental petition addressing two matters of concern to the Court; that is, the adoption or amendment of rules 1-3.10 and 3-4.1. Specifically, we asked the Bar to address how the conduct of non-Florida lawyers engaged in mediation or arbitration within this state can be regulated if such lawyers are not required to be admitted to The

[2] The current hearing procedures of NASAD (A16-19) recognizes the limitation as to compensated nonlawyers, but as this court has declined to do, has not extended such prohibition to lawyers licenced in other jurisdictions.

> Florida Bar under rule 1-3.10.
>
> We reject the Bar's recommendation to amend rule 3-4.1 at this time. Under this proposed amendment, non-Florida lawyers would be placed on the same footing as a member of The Florida Bar by being subject to the Rules Regulating the Florida Bar, including the Rules of Professional Conduct, for any unethical conduct that might occur during the course of the representation. Because it is not clear who are appearing in mediation or arbitration in Florida without being admitted under the Rules Regulating the Florida Bar can be regulated by this Court, we are remanding this matter to the Bar for further consideration."

The Bar instead of proceeding to ask the Supreme Court to amend the rule has engaged in a frivolous action designed to not protect the public but to destroy an effective counsel in arbitration matters, knowing that the proposed rule was rejected.

Indeed, such a rule may in turn end up injuring members of the Florida Bar who represent parties in other states and forums in arbitration or mediation including international business arbitration. Further, we are talking about interstate commerce and service in response to that area.

The rationale is even more striking in this case where the "service" is in federal arbitration.

Note that Florida Supreme Court was overruled in Sperry v. State of Florida ex rel the Florida Bar, 373 US 579; 83 S.Ct.1322 (1963), when the court enjoined a

patent office practitioner from practice in Florida, and the Supreme Court of the U.S. held that patent practice was preempted by Federal Patent Office Rules.

POINT II

THE FEDERAL ARBITRATION ACT PREEMPTS STATE LAW AND PERMITS REPRESENTATIONS BY ATTORNEYS NOT LICENSED IN FLORIDA

The Federal Arbitration Act preempts state law and permits representation by attorneys not licensed in Florida in Federal security matters.

In the following cases the Doctrine of Preemption by Federal Law were an issue, and these include cases arising out of securities matters in interstate commerce: (see also 9 USCA Section 2).

> "Montana statute which conditioned enforceability of arbitration agreements on compliance with special notice requirement that was not applicable to contracts generally was preempted by Federal; Arbitration Act (FAA) with respect to arbitration agreements covered by FAA; state statute required that arbitration clause be printed on first page in underlined capital letters. Doctor's Associates, Inc. v. Casarott, U.S.Mont.1996, 116 S.Ct. 1652, 517 U.S. 681, 134 L.Ed.2d 902.

> This title preempts state law that withdraws power to enforce arbitration agreements that are enforceable under this section. Southland Corp. v. Keating, U.S.Cal.1984, 104 S.Ct. 852, 465 U.S.1 79 L.Ed.2d 1.

> New Jersey precedent holding that franchise agreement designating out-of-state judicial forum was presumptively invalid under state law

was preempted by Federal Arbitration Act, and thus did not govern franchisee's claim that franchise agreement's arbitral forum selection clause was unenforceable, as precedent did not establish generally applicable contract defense. Doctor's Associates Inc. v. Hamilton C.A. 2 (Conn.) 1998, 150 F.3d 157.

Assuming that Ohio law required that claims for fraudulent inducement of the entire contract be decided by a court, it conflicted with Federal Arbitration Act (FAA), and was preempted. Ferro Corp. v. Garrison Industries, Inc., C.A. 6 (Ohio) 1998, 142 F.3d 926.

Nonfrivolous claim that Federal Arbitration Act preempted state statutory rescission remedy otherwise available in dispute between broker and investors fell within exception to *Younger* abstention doctrine; although state administrative proceedings against broker were ongoing and were judicial in nature, and although such proceedings served important state interest of regulating securities transactions, state's insistence that contract between broker and investors be rescinded presented immediate potential for irreparable harm to broker's right under Act to arbitral forum. Olde Discount Corp. V. Turpman, C.A.3 (Del.) 1993, 1 F.3d 202, rehearing denied, certiorari denied 114 S.Ct. 741, 510 U.S. 1065, 126 L.Ed.2d 704.

To the extent that California polygraph protection statute's preference for judicial forum interfered with choice expressed by Congress in Federal Arbitration Act, it was preempted. Saari v. Smith Barney, Harris Upham & Co., Inc., C.A. 9 (Cal. 1992, 968 F.2d 877, certiorari denied 113 S.Ct. 494, 506 U.S. 986, 121 L.Ed.2d 432.

Vermont statute voiding certain arbitration agreements was preempted by federal arbitration law, in dispute between American investor and British metal futures trader, restrictive state law impermissibly impinged upon liberal federal arbitration policy. David L. Threlkeld & Co., Inc. v. Metallgesellschaft Ltd. (London), C.A.2 (Ft.) 1991, 923 F.2d 245 certiorari dismissed 112 S.Ct. 17, 501 U.S. 1267, 115 L.Ed.2d 1094.

The Virginia Motor Vehicle Dealer Licensing Act provision forbidding binding arbitration agreements in automobile franchise agreements, even if interpreted to apply only to nonnegotiable arbitration provisions, was preempted by Federal Arbitration Act, though the Virginia law did not expressly refer to arbitration and voided other contractual provisions denying dealers access to "procedures, forums or remedies" in Virginia; Virginia law treated arbitration agreements more harshly than other contracts by disallowing their formation as mandatory provisions. Saturn Distribution Corp. v. Williams, C.A.4 (Va.) 1990, 905 F.2d 719,108 A.L.R. Fed. 159, rehearing denied, certiorari denied 111 S.Ct. 516,498 U.S. 983, 112 L.Ed. 2d 527.

Massachusetts regulation of predispute arbitration agreements between broker dealers and their customers, by depriving broker dealers of opportunity to employ form contracts, was preempted by Federal Arbitration Act. Securities Industry Ass'n v. Connolly, C.A.1 (Mass.) 1989, 883 F.2d 1114, certiorari denied 110 S.Ct. 2559, 495 U.S. 956, 109 L.Ed.2d 742.

Federal Arbitration act creates body of federal substantive law of arbitrability and preempts contrary state law or policies. Cohen v. Wedbush, Noble, Cooke, Inc., C.A.9 (Cal.) 1988, 841 F.2d 282.

Since Federal Arbitration Act (FAA) was intended to foreclose state legislative attempts to limit enforceability of arbitration agreements, and provision in New Jersey Franchise Practices Act (NJFPA) creating presumption of invalidity of arbitration clauses in franchise agreements was just such an attempt, NJFPA provision violated the Supremacy Clause of the Federal Constitution and was preempted by the FAA. Central Jersey Freightliner, Inc. v. Freightliner Corp., D.N.J. 1997, 987 F.Supp. 289.

Provisions in Colorado Health Care Availability Act, setting forth specific language that any arbitration clause in a medical services agreement is required to contain, are inconsonant with, and therefore preempted by, Federal Arbitration Act (FAA), under which an arbitration clause in a contract evidencing a transaction involving

commerce is revocable only on those grounds applicable to contracts generally. Morrison v. Colorado Permanente Medical Group, P.C., D. Colo. 1997, 983 F.Supp. 937.

Federal Arbitration Act (FAA) preempted Minnesota Human Rights Act, (MHRA) to the extent the MHRA voided agreements that purported to waive right to judicial forum. Johnson v. Hubbard Broadcasting, Inc., D.Minn. 1996, 940 F.Supp. 1447.

Under the supremacy clause, Federal Arbitration Act preempted Georgia statute providing that, if employer pays employee lesser amount than the minimum wage law, employee may bring civil action for recovery of the difference between the amount paid and the minimum wage. Haluska v. RAF Financial Corp., N.D.Ga.1994, 875 F.Supp. 825.

Federal Arbitration Act preempted Puerto Rico Dealers' Act to extent that latter Act negated, as against public policy, arbitration clauses that provided for arbitration of controversies outside of Puerto Rico, or under foreign law or rule of law. Medika Inter., Inc. v. Scanlan Inter., Inc., D.Puerto Rico 1993,830 F.Supp. 81.

In dispute involving arbitration provision in account executive employment agreements, there was federal preemption of claim that agreements, there was federal preemption of claim that agreements were revocable under state law. Matter of Arbitration Between Management Recruiters Intern., Inc. and Nebel, N.D.Ohio 1991, 765 F.Supp. 419.

Provision of Minnesota Franchise Act prohibiting predispute agreements to arbitrate, and regulation requiring that franchise agreement specify the applicability of the Act, are inconsistent with the Federal Arbitration Act. Seymour v. Gloria Jean's Coffee Bean Franchising Corp., D.Minn. 1990, 732 F.Supp. 988.

Even if Kansas securities statute was interpreted to disallow arbitration of customer's Kansas securities laws claims against broker statute was

preempted by Federal Arbitration Act. Reed v. Bear, Stearns & Co., Inc., D.Kan., 1988, 698 F.Supp. 835.

State securities law statute voiding clauses which waive securities customers' rights under state law was preempted by Federal Arbitration Act, and thus arbitration clause in brokerage agreement was enforceable. Russolilio v. Thompson McKinnon Securities, Inc., D.Conn. 1988, 694 F.Supp. 1042.

Arbitration clause in Chapter 13 debtor's sales contract for purchase and financing of mobile home was enforceable, notwithstanding any Georgia Code provision to the contrary, where party to contract was Delaware, corporation with its principal place of business in Minnesota and, thus, Federal Arbitration Act preempted Georgia Arbitration Code. In re Pate, Bkrtcy.S.D.Ga 1996, 198 B.R. 841.

Securities broker was not required to exhaust administrative remedies to resolve investors' rescission claim, in that Federal Arbitration Act (FAA) preempted the Delaware statute insofar as it allowed Securities Commissioner to order rescission on behalf of individual investors who presigned dispute arbitration agreement. Olde Discount Corp. v. Tupman, D.Del. 1992, 805 F.Supp. 1130, affirmed and remanded on other grounds 1 F.3d 202, rehearing denied, certiorari denied 114 S.Ct. 741, 510 U.S. 1065, 126 L.Ed 2d 704.

Mayaja, Inc., S.A. v. Bodkin (CA5 Tex) 824 F2d 439, CCH Fed.Secur I. Rep ¶93584; Noble v. Drexel, Burnham, Lambert, Inc., (CA5 Tex) 823 F2d 849, CCH Fed. Secur. I. Rep. ¶93344.

It is clear that Federal law has preempted any state law as to Federal Securities Arbitration under the intestate commerce clause as well as other well established constitutional guidelines. It is within the scope of federal direction to determine the qualification of representation of parties in the arbitration process and

the Federal Arbitration Act, if they choose to do so.

This court In Re Advisory Opinion, supra, found that the preemption did not extend to a non-lawyer acting as compensated representative in a securities arbitration. [3]

In this case Rapoport is an attorney and no issue of public harm has been shown, so it is not necessary to revisit that opinion to exonerate Rapoport. Nevertheless, we do remind the court that the Alternate Dispute Resolution provisions related to interstate security industries are contractual in nature. Therefore, judicial direction on procedure and representation are an interference with the parties right to contract and right to be represented as they determine within the applicable rules.

There are countless examples of non-lawyer representation in the ADR context. For example, Collective Bargaining Agreements. The Miami-Dade County School Board agreement with UTD allows "union stewards" to attend preliminary disciplinary conferences with teachers by principals, but as a matter of practice prohibits independent attorneys.

School peer resolutions and community dispute centers are both without

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[3]The NASAD Memo (A16-19) reflects this court's opinion as to non-lawyers as opposed to lawyers admitted elsewhere.

attorneys and ad-valorem tax appeals have property owners represented by non-attorneys most of the time. Auto industry "lemon law" cases also find a paucity of attorneys.

When protecting the public interest, as opposed to Florida Bar members fees, the Court may well ask whether twenty (20) years experience in security matters will serve the public interest better in proper representation, than having a lawyer sworn in on Tuesday, appearing for them on Wednesday. It would seem it should be up to the client to decide the representation.

We do not suggest that the current rule as to compensated non-lawyers in Federal securities matters be changed. Certainly until the securities industry determines a means of approving the qualification of non-lawyers as is done by the U.S. Patent Office. The rule can stand since the rule serves to protect the public from unscrupulous unqualified persons. There is, however, no reason to extend the prohibition to lawyers from other states or territories, particularly where a substantial portion of the population are "snow birds" or part time residents.

POINT III

DUE PROCESS IS NOT SERVED BY EXPARTE DETERMINATION AS A "SUMMARY JUDGMENT" AND TO DENY CONTINUANCE WHEN MEDICAL REASONS SHOW REASONABLE BASIS AND THE DENIAL IS CONTRARY TO ACCEPTED PROFESSIONALISM.

Due process is not served by exparte determination of a 'Summary Judgment" and to deny continuance when medical reasons show reasonable basis for the same and the denial is contrary to accepted professionalism.

An exoneration by Rapoport under Points I or II would render consideration of Point III moot in this case although such may be applicable to other matters.

Despite significant space, time and rhetoric to the question of professionalism, this case shows the ignorance or contemptuous disregard for such maxims. On July 17, 2001, the respondent underwent a triple by-pass heart operation. While the Referee sought a sixty (60) day delay to file his report, he entered an "Order on Summary Judgment" without a hearing within hours of his request. While normally, such an Order is not final, the acts in not having one single hearing shows the Referee was prepared to rubber stamp a Florida Bar proposal even though the proposed Order was contrary to the Supreme Court's rejection of such determination by Rule. See in re: Amendments, supra.

The Bar declined to answer discovery and in light of in Re: Amendments, this prosecution constitutes a frivolous action. The Bar and its attorney should not be above the law. They should be leaders for fair play and professionalism.

Nevertheless, that and other procedural denials show a basic rejection of due process and a fundamentally flawed system. There was no hearing. This was an exparte presentation of judgment adopted without hearing. There were denials of continuance when justified. All of which question both the procedure and due process required.

At 16A AmJur. 21, Constitutional Law, Sect. 569, it says:

> "The word "'liberty," as used in the due process clauses, includes among other things the liberty of the citizen to pursue any livelihood or lawful vocation. Indeed, the right to earn a livelihood pursuant a lawful occupation is a fundamental right protected by the Constitution, and many authorities consider the preservation of such right to be one of the inherent or inalienable rights protected by the Constitution. Likewise, the courts have recognized that the right to follow a chosen profession free from unreasonable governmental interference comes within the "liberty" (and "property") concept of the Fifth Amendment."

The question, then is not regulation, but unreasonable regulation and the lack of safeguards to protect both public and the professional.

CONCLUSION

The Order Granting Summary Judgment should be vacated as should the Report of the Referee and the proceedings dismissed and the Respondent exonerated and allowed his costs and reasonable attorney's fees in these proceedings.

Respectfully submitted:

AINSLEE R. FERDIE

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of Respondent's Initial Brief was mailed this 20th day of March, 2002 to: Janet Elizabeth Bradford, Esq., Branch UPL Counsel, The Florida Bar, 5900 N. Andrews Avenue, Suite 835, Ft. Lauderdale, Fl. 33309; Hon. James T. Carlisle, Referee, South County Courthouse, 200 W. Atlantic Avenue, Delray Beach, Fl. 33444.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that I have complied with the font requirements of Rule 9.210.

By:_____
AINSLEE R. FERDIE
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