ADMINISTRATIVE PROCEEDING
FILE NO. 3-1972

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of
MURRAY A. KIVITZ
Rule 2(e), Rules of Practice

INITIAL DECISION

(Private Proceeding)

Washington, D.C.
April 17, 1970

David J. Markun
Hearing Examiner

C O N T E N T S

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APPEARANCES: Jacob H. Stillman, Assistant General Counsel, Brian M. Eisenberg and Michael J. Roach, Attorneys, for the Office of General Counsel; with Robert M. LaPrade, Special Counsel, and Martin I. Robins, Attorney, of the Division of Trading and Markets, of counsel.

Jacob A. Stein and Carl W. Berueffy, both of Washington, D.C. for the respondent.

BEFORE: David J. Markun, Hearing Examiner

THE PROCEEDING

This private proceeding was instituted by an order of the Commission dated June 12, 1969, pursuant to Rule 2(e) of the Commission's Rules of Practice, 17 CFR 201.2(e), to determine whether the charges of unethical and improper professional conduct reflected in the order for proceeding against the respondent, Murray A. Kivitz, an attorney at law, are true, and if so, whether the respondent should be temporarily or permanently disqualified from and denied the privilege of appearing or practicing before the Commission.

The hearing in this proceeding took place in Washington, D.C., on October 13 through 16, 1969. Respondent has been represented by legal counsel at all stages of this proceeding. As part of the post-hearing procedures, proposed findings, conclusions, and supporting briefs were filed by the parties.

The findings and conclusions herein are based upon the record and upon observation of the various witnesses.

JURISDICTION

Respondent challenges the jurisdiction of the Commission to disbar an attorney practicing before it, urging that Congress by enacting the provisions of 5 U.S.C. §500 [1/] in 1965 withdrew the

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1/ The provisions in question were first enacted by Act November 8, 1965, 79 Stat. 1281. As reenacted in codified form by Section 1(1) of Act September 11, 1967, 81 Stat. 195, 5 U.S.C. §500 provides in pertinent part as follows:

"§500. Administrative practice; general provisions

* * * *

(Continued on following page)

power of administrative agencies to prescribe admission-qualification standards for attorneys practicing before them and that the power to disbar, being derived from and dependent upon the power to admit to practice, was repealed by implication.

This argument lacks validity for several reasons.

It is well established that federal administrative agencies, including the Commission, have implied authority, under their general statutory authority to prescribe rules of procedure and to make rules and regulations necessary for the exercise of their functions, to regulate the admission and conduct of attorneys appearing before them. 2/

Enactment of 5 U.S.C. §500 did nothing to divest the Commission of its long-recognized and long-exercised power to discipline

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1/ (continued)

(b) An individual who is a member in good standing of the bar of the highest court of a State may represent a person before an agency on filing with the agency a written declaration that he is currently qualified as provided by this subsection and is authorized to represent the particular person in whose behalf he acts.

* * * *

(d) This section does not --

(1) grant or deny to an individual who is not qualified as provided by subsection (b) or (c) of this section the right to appear for or represent a person before an agency or in an agency proceeding;

(2) authorize or limit the discipline, including disbarment, of individuals who appear in a representative capacity before an agency ";

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2/ Goldsmith v. Board of Tax Appeals, 270 U.S. 117 (1926); Herman v. Dulles, 205 F.2d 715 (C.A.D.C. 1953) (International Claims Commission); Schwebel v. Orrick, 153 F. Supp. 701 (D.C.D.C. 1957) (Securities and Exchange Commission). See also Cheatham, The Reach of Federal Action Over the Profession of Law, 18 Stanford Law Review 1288, 1289 (1966) for the proposition that federal administrative agencies, like the federal courts, may set their own standards of practice.

attorneys practicing before it under Rule 2 of its Rules of Practice, 35 CFR 201.2.[3] Section 500(d)(2) expressly negates any limitation or repeal by the section of any pre-existing authority an agency may have had to disbar or otherwise discipline attorneys appearing before it (see footnote 1 above). Where the language of a statute is thus plain and free of doubt, and where it does not lead to absurd or impractical consequences, no occasion for statutory construction arises.[4] Much less is there basis for finding an implied repeal of authority where the statute expressly preserves it.

3/ Rule 2, as herein pertinent, provides as follows:

"Rule 2. Appearance and Practice Before the Commission.

* * * *

(b) By lawyers. A person may be represented in any proceeding by an attorney at law admitted to practice before the Supreme Court of the United States, or the highest court of any State or Territory of the United States, or the Court of Appeals or the District Court of the United States for the District of Columbia.

* * * *

(e) Suspension and disbarment. The Commission may deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found by the Commission after notice of and opportunity for hearing in the matter (1) not to possess the requisite qualifications to represent others, or (2) to be lacking in character or integrity or to have engaged in unethical or improper professional conduct.

* * * *

(g) Practice defined. For the purposes of this rule, practicing before the Commission shall include, but shall not be limited to (1) transacting any business with the Commission; and (2) the preparation of any statement, opinion or other paper by an attorney, accountant, engineer or other expert, filed with the Commission in any registration statement, notification, application, report or other document with the consent of such attorney, accountant, engineer or other expert." * * * *

4/ Caminetti v. United States, 242 U.S. 470, 485, 490 (1917).

While the express statutory savings provision is a full answer to the respondent's challenge to the Commission's jurisdiction to disbar, it should be noted that in fact 5 U.S.C. §500 does not preempt the matter of admission to practice before federal agencies. It only makes automatically eligible a certain class of attorneys, i.e. those admitted to the highest court of a State. It does not preclude an agency's admission to practice before it of other individuals bearing other credentials or qualifications. Thus, the Commission's Rule 2(b) still operates to admit to practice before it attorneys admitted to various federal courts (see footnote 3 above). (Since eligibility to practice in the federal courts does not always follow eligibility to practice in a State court, 5/ this provision is not academic.) Thus respondent's argument that the Commission cannot oust from practice because it is totally lacking in power to admit to practice is not supportable.

STANDARD OF PROOF

The respondent urges that because of the serious consequences attending an order of disbarment the charges in this proceeding must be proved by "clear and convincing evidence" and not merely by a "preponderance of the evidence". The Office of General Counsel ("General Counsel"), on the other hand, urges that the applicable standard of proof in a Rule 2(e) proceeding, as in the Commission's

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5/ Theard v. United States, 354 U.S. 278, 281-282 (1957); In re Ruffalo, 390 U.S. 544, 547 (1968).

administrative proceedings generally, is the "preponderance of the evidence."

The state courts are divided on the issue, with some applying the "preponderance" or "fair preponderance" standard applicable to civil litigation generally [6/] while others have applied various formulations of the higher standard of proof.[7/]

At least some federal courts apply the "clear and convincing" standard.[8/]

The United States Supreme Court has evidently not had occasion to rule on the point expressly but the fact that the two varying

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6/ In re Mayberry, 295 Mass. 155, 3 N.E. 2d 248 (1936); In re Trask 46 Hawaii 404, 380 P. 2d 751, 755-56 (1963); Mahoning County Bar Ass'n v. Ruffalo, 176 Ohio St. 263, 199 N.E. 2d 396 (1964), certiorari denied, 379 U.S. 931, collaterally attacked on other grounds sub nom. In re Ruffalo, 390 U.S. 544 (1968); In re Mogel, 18 App. Div. 2d 203, 238 N.Y.S. 2d 683 (1963). See Annot. 105 ALR 985 (1936).

7/ Clear preponderance: Florida Bar. v. Rose, 187 S.2d 329 (Fla. 1966); In re Hertz, 139 Minn. 504, 166 N.W. 397 (1918). More than a preponderance; Copren v. State Bar, 64 Nev. 364, 183 P. 2d 833 (1947). Clear and satisfactory proof: People v. Baker, 311 Ill. 66, 142 N.E. 554 (1924). Convincing preponderance: Iowa St. Bar Ass'n. v. Kraschel, 148 N.W. 2d 621, 625 (Iowa, 1967). Convincing proof and to a reasonable certainly: Zitny v. State Bar of Calif., 64 Cal. 2d 787, 51 Cal. Rptr. 825, 415 P. 2d 521 529 (Sup. Ct., en banc 1966). Clear and convincing: In re Ratner, 194 Kan. 362, 399 P. 2d 865 (1965); In the Matter of Brown, 101 Ariz. 178, 416 P. 2d 975 (1966).

8/ In re Fisher, 179 F.2d 361, 370 (C.A. 7, 1950) cert. denied 340 U.S. 825; In re Ryder, 263 F. Supp. 360, 361 (E.D. Va., 1967). But Cf. Herman v. Dulles, 205 F.2d 715, 717 (1953).

standards of proof exist among the States indicates that due process considerations of the U.S. Constitution do not require the "clear and convincing" standard. However, the Court's characterization of disbarment proceeding in In re Ruffalo[9/] as "adversary proceedings of a quasi-criminal nature" may suggest the appropriateness of the higher standard and portend the Court's eventual enunciation of such a standard.

The "Administrative Procedure Code,"[9a/] under which "preponderance of the evidence" is the standard of proof normally applied to adjudications subject to that "code",[10/] does not itself in terms establish either standard of proof.

It does not appear that the Commission has had occasion to rule expressly on the question of the standard of proof in Rule 2(e) proceedings.

Application of the "clear and convincing" standard of proof to a Rule 2(e) proceeding would not appear to impose an impractical standard or one that would imperil the public interest by establishing too onerous a burden on the proponent of disciplinary action.[11/]

9/ 390 U.S. 544, 551 (1968).

9a/ The former Administrative Procedure Act of 1946, enacted into positive law as 5 U.S.C. §§551-559, 701-706, 1305, 3105, 3344, 5362, 7521.

10/ On the question whether a disbarment proceeding under the Commission's Rule 2(e) is subject to the Administrative Procedure Code, contrast Schwebel v. Orrick, (D.C.D.C., 1957), 153 F. Supp. 701, 704-706 and Herman v. Dulles (C.A.D.C., 1953) 205 F.2d 715, 717. See also Dorsey v. Kingsland, 173 F.2d 405, 410 (C.A.D.C. 1949), reversed (on different grounds) 338 U.S. 318, 320 (1949).

11/ Wigmore proposed redefining the "clear and convincing" standard in terms of requiring in the factfinder "a sense of being safely and surely convinced." Wigmore's Code of Evidence (1935) 2d Ed. §2861, p. 503.

Examination of the Commission's 2(e) decisions suggests that in fact the findings were based upon "clear and convincing" evidence though the standard of proof was not discussed as such.

The General Counsel's argument that a less stringent standard of proof than the "clear and convincing" standard adopted by some courts is warranted because the impact on the attorney is less in a 2(e) proceeding since only one aspect of legal practice is denied him has only limited validity since in given circumstances practice before the Commission may be the major, and conceivably even the sole, practice in which the attorney is engaged. Moreover, the argument overlooks the fact that the stigma attending a disbarment by the Commission can be every bit as devastating as that incident to a disbarment by a court. In addition, agency action could lead to initiation of proceedings by a state.[12/]

To avoid the anomaly that would result were the Commission in its 2(e) proceedings to apply a less stringent standard of proof where the attorney practicing before it is eligible to do so on the basis of his admission to practice in a jurisdiction recognizing the "clear and convincing" standard of proof in disbarment proceedings, and because the latter standard seems both workable and fair, it is concluded that the "clear and convincing" standard of proof should be applied in this proceeding.

12/ A special committee on evaluation of disciplinary enforcement of the American Bar Association is currently studying, among other aspects of its comprehensive study, the feasibility of a jurisdiction's taking reciprocal disciplinary action against an admitted attorney when it learns he has been disciplined in another jurisdiction.

FINDINGS OF FACT AND LAW

The Charges; Findings

Respondent Murray A. Kivitz ("respondent", or "Kivitz") is an attorney at law with offices in the District of Columbia. He is admitted to practice in the District of Columbia and in Maryland, and has been a member of the American Bar Association since 1958. Both before and after the events here involved respondent has prepared, and rendered legal services connected with, registration statements filed with the Commission.[13/]

The charges against respondent arose out of the efforts in October, 1964, of a Robert Ackles ("Ackles") to obtain necessary legal services in connection with Ackles' proposed registration with the Commission of the stock of his corporation, Houses of Plastic, for sale to the public. Section D of the Order for Proceeding charges that respondent, in the negotiations for the furnishing of such legal services, did as follows:

1. Respondent allowed his professional services and his privilege to practice before the Commission as a lawyer to be controlled and exploited by Harold G. Quase, a lay person acting as an intermediary between respondent and House of Plastic, his prospective client. In particular, respondent permitted the essential terms of the fee for his legal services with respect to the aforesaid registration statement to be negotiated and formulated by Quase, a non-lawyer.

2. Respondent participated in an arrangement whereby his fee for legal services with respect to the registration statement was to be divided with Quase, a non-lawyer. In particular, at least a portion of the money and other consideration to be paid by Houses of Plastic pursuant to the proposed letter agreement, purportedly as a fee for respondent's legal services, was to be paid to Quase and others for other than such legal services.

13/ Respondent, 42 years old when he testified, began the practice of law in 1951 and began SEC work in 1952 or 1953.

3. In the proposed letter agreement, respondent concealed the true nature of his fee arrangement by omitting to state therein that at least a portion of the money and other consideration to be paid by Houses of Plastic was to be paid to Quase and others for other than the legal services of respondent.

4. Respondent acquiesced in representations made in his presence to Houses of Plastic that the services of an accountant (who would cooperate and stretch a point) could be obtained to prepare for submission to the Commission the financial information regarding Houses of Plastic so that such information would appear to meet the Commission's accounting requirements. Respondent thereby created the impression that the employment of such an accountant would facilitate favorable consideration by the Commission with respect to the registration statement, irrespective of whether such information actually met the accounting requirements.

The order further alleges that the conduct alleged indicates that respondent lacks the requisite qualifications to represent others, is lacking in character and integrity, and has engaged in unethical and improper professional conduct, within the meaning of Rule 2(e) of the Commission's Rules of Practice.[14/]

Ackles wanted to produce low-cost housing utilizing a formula he had developed for making laminated plastic panels that could be erected readily at the site by relatively unskilled labor. In Florida, where he had erected an experimental model house, Ackles retained an attorney, E. Welken Marchand ("Marchand") to form a corporation, which was to serve as a vehicle for raising equity capital, and to file a registration statement for the public issuance

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14/ See footnote 3 above.

of stock by the intended corporation under the Securities Act of 1933. At Marchand's suggestion Houses of Plastic was incorporated (September 17, 1964) in Idaho, where filing fees and annual fees were relatively low. The Boise, Idaho, law firm of Givens, Doane, Givens and Manweiler ("Givens, Doane") was retained as local associate counsel to handle the incorporation. Thereafter Marchand drafted a registration statement for filing with the Commission covering 15 million shares of common stock of Houses of Plastic at $1 per share. When Marchand and Ackles brought the draft statement to Washington it was not accepted for filing, the Assistant Director in the Division of Corporation Finance, Abraham A. Zwerling, having concluded after review that the material submitted was inadequate in a number of respects.

Ackles then discharged Marchand and hired Givens, Doane to prepare a new registration statement. This was done by Howard I. Manweiler ("Manweiler"), a partner of the firm, who came to Washington, D.C. with Ackles on October 18, 1964, intending to file the new, printed statement with the Commission the following day. In the morning of the 19th Manweiler went to the Commission's offices where he met with Commissioner Budge, whose legal assistant thereafter introduced Manweiler to members of the staff of the Division of Corporation Finance for a pre-filing conference that lasted about 1½ to 2 hours. August R. Wolz, a staff engineer, and Maxwell Kaufman, a branch chief, commented generally on deficiencies or problems in the areas of pre-incorporation activities,

description of business, insiders, competition, uniqueness of product, engineering reports, use of photographs, financial statements, and use of proceeds. Although Manweiler was advised that he could file the registration statement notwithstanding the deficiencies pointed out if he so chose, he concluded, after conferring with his law partner David Doane("Doane")by telephone that morning, that he wouldn't file the registration statement until it had been "prepared in a proper manner." After leaving the pre-filing conference Manweiler went to the Commission's Public Reference Room to examine some registration statements in an allied industry that had been brought to his attention during the conference.

Meanwhile, Ackles, who had remained at their hotel that morning, the Mayflower, received a telephone call from Mary Jo Freehill ("Freehill"), a public stenographer at the Mayflower, who had previously been introduced to Ackles by a fellow board-of-directors member of Houses of Plastic and who had earlier done some stenographic work for Ackles and Marchand in connection with the abortive effort by Marchand to file a registration statement. Freehill told Ackles that he should see a man across the street named Harold G. Quase ("Quase") about the problem he was having in getting a registration statement filed. Acting on this suggestion, Ackles met with Freehill who, in Ackles' presence, telephoned Quase to make an appointment for Ackles, telling Quase that the

matter involved someone seeking to submit a registration statement. Freehill then took Ackles across the street to meet Quase, telling him along the way that Quase would "fix the thing" so that Ackles would be able to have his filing cleared by the SEC and that "you have to go around to various people who have influence."

Quase, 62 at the time of the hearing, was commonly known as "Dr." Quase, but the record does not establish the profession or specialty to which the designation referred. He is not an attorney at law. In 1964, at the time of the events here involved, Quase had, among other interests, a public relations firm which included besides himself a James Costello and "a couple of secretaries."

When Ackles and Freehill arrived at Quase's office, Costello was also present, but he did not remain very long. Freehill remained for half an hour to 45 minutes at the urging of Quase before leaving prior to the conclusion of the conference. Freehill was in a position to hear the discussion between Quase and Ackles while she was there, but she testified that she did not always pay close attention. In the course of their extended conversation, Quase told Ackles that he had a "hick lawyer" and that Ackles would not "get anything through" the Commission unless he learned "how things were done in Washington." Quase said that with the services of the proper people Ackles could achieve his objective of getting a filing cleared "with no problems whatsoever," but he said that money had to be paid so that it could be "put around

to the various people." The fee mentioned was $10,000.[15/]

During the course of the conference Quase showed Ackles pictures of Quase and the then President and stated that he had a direct line to the White House. After placing a call, he stated to Ackles that the President was unavailable. Quase represented that he "was doing a lot of things for the President."

Quase also made a number of other calls in the course of the conversations, after which he reported (accurately) to Ackles the names of the persons whom Marchand had earlier seen at the Commission in the course of his abortive filing effort, as well as the names of the persons whom Manweiler was meeting at the Commission that morning.

At the conclusion of the discussions Ackles told Quase that he would think about Quase's proposal and discuss it with his lawyers.

That afternoon Ackles and Manweiler met at the hotel and related to each other their respective experiences of the morning, after which Manweiler had a further appointment at the Commission's offices. Thereafter Ackles and Manweiler returned to Idaho, the latter intending to redraft the statement there upon his return.

15/ Ackles testified at the hearing that the fee mentioned was $50,000. Freehill testified it was $10,000 and Doan testified that Ackles reported to him in Idaho shortly after the meeting that $10,000 had been mentioned. (While this testimony by Doan was objected to as hearsay, Respondent in his brief now relies on such, so presumably his objection thereto has been withdrawn.) It is concluded that Ackles was mistaken in his testimony and that he confused a later-demanded fee of $50,000 with the earlier conference.

Once back in Boise, Ackles and Manweiler discussed their Washington experience with Doane, who expressed disbelief that Quase could have said some of the things he reportedly said, particularly that for a $10,000 payment he could guarantee the statement would be cleared in 30 days. Accordingly, Ackles called Freehill to arrange with her to have Quase call Doane the following (Saturday) morning, so that Doane could discuss the matter directly with Quase.

When Quase called Doane at about 11:30 A.M. E.S.T. on October 24, 1964, Ackles and Manweiler were also present and Doane tape recorded the call.[16/] During the conversation Quase assured Doane that he (Quase) had very qualified SEC attorneys who could get the thing through "right and proper." Quase stated that his[17/] fee would be $20,000 down in cash with the balance of the cash payment (to be fixed when Doane came to Washington) payable when the statement went effective plus stock rights to an undetermined amount of stock. Quase implied he was giving Ackles a break by stating that their ("our") fee is usually $50,000 "off the bat" and the balance (evidently referring to the stock rights) later. Quase stated that the check for "our" fee

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16/ Respondent stipulated that Ex. 11 is an accurate typewritten transcription of the tape.

17/ In this negotiation Quase kept referring to what "we" could do and what "our" fee would be but he never identified the organization or individuals for whom he was dealing.

was to be certified and made payable not to Quase, but "to the attorney", whose name Quase would furnish later. The unnamed attorney was represented as being an SEC attorney and "a top man in Washington." Quase further stated that the fee would be "distributed to the right areas" and that money and experience count in getting a registration statement cleared. The "key" to his success, Quase stated at one point, is that though he'd been "in this game for thirty-eight years" Doane had not heard Quase's name before.

After Ackles and Doane considered what to do in the light of Quase's call, Ackles decided to return on Monday to his home in Michigan where he would think it over further and perhaps talk to his board of directors.[18/]

On Monday morning, October 26, 1964, Freehill, at the behest of Quase, called Doane's office, asking to speak to Ackles, who by then was enroute to the airport. In Ackles' absence, she spoke to Doane. Manweiler was in the office during a part of this conversation. Doane tape recorded this call, too.[19/]

Freehill made a pretty strong pitch for moving promptly, emphasizing the importance of getting the arrangements completed before election day because one must "show the faith beforehand."

18/ The board, however, appears to have been pretty much a figure-head board.

19/ Respondent stipulated that Ex. 12 is an accurate typewritten transcription of the tape.

She also represented that Quase was on a trip with the President but that she couldn't give all the details.

After this call was completed Doane spoke by phone to Ackles at the airport, and Ackles authorized Doane to go to Washington for further negotiations with Quase.

Doane came to Washington, D.C. on Wednesday, October 28, 1964, and through Freehill arranged a meeting with Quase for the following day. On Thursday morning Doane walked to Quase's office with Freehill,[20] where he met Quase and Costello.[21] Respondent Kivitz arrived at Quase's office shortly after Doane and Freehill, in response to a call that day from Quase.[22]

20/ Freehill left sometime before the meeting finally concluded. She had attempted to leave earlier a couple of times but Quase suggested she stay.

21/ Costello apparently did not stay long.

22/ Sometime before the 29th, which Kivitz testified could have been as much as a week earlier, Quase had phoned Kivitz to ask him to ascertain whether Houses of Plastic had filed a registration statement with the Commission. Kivitz called the Public Reference Room and reported back that none had been filed. Kivitz made no charge for this slight service, having regarded it as a favor to a "friend". Kivitz testified he had first met Quase in the early 60's and that Quase, some 20 years his senior, had taken a "fatherly" interest in him. Kivitz also testified that prior to the events here involved Quase had had occasion to refer clients to him (not involving SEC work) and that he (Kivitz) had done legal work for Quase or a firm (Underwater Storage) of which Quase was President which earned Kivitz legal fees estimated at about $2,500. Kivitz had visited Quase's offices prior to October 29, 1964, on "numerous occasions" in connection with his work for Underwater Storage, including attendance at its Board of Directors' meetings. Relations between Quase and Kivitz continued to be friendly subsequent to the events here involved. Quase visited Kivitz's office about 4 times subsequent to October, 1964. As respects Mrs. Freehill, the evidence is uncontradicted that Freehill and Kivitz did not know one another prior to the October 29th meeting and that they had no contact with one another either before or after that date.

In introducing Kivitz to Doane, Quase made a very flowery introduction, referring to Kivitz as "a great SEC lawyer, the finest in the city." At the outset Quase pointed out to Doane pictures of himself with Presidents Johnson and Kennedy as well as some evidence of his association with President Truman. Quase represented that he had a "pretty good sized organization" which included former F.B.I. agents and investigative staff.

Quase dominated the course of the negotiation, with Kivitz from time to time, on Quase's cue, furnishing needed exposition, e.g. the necessary accounting procedures and the names of qualified CPA's.

At one point Quase inquired whether Doane had access to accountants who were willing to "stretch a point". Doane replied that they didn't have such accountants out where he came from. Respondent Kivitz failed to challenge the implications of Quase's question.[23/]

Quase disclosed now what the full monetary fee would be, i.e. $50,000: $20,000 down and $30,000 when the registration would be completed. When they were unable to agree readily upon an amount of stock as part of the fee, Kivitz suggested that the retainer agreement provide that the amount of stock involved be "mutually agreeable" and this device was adopted. Quase again indicated, as

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23/ Even later, when Kivitz was alone with Doane, and when he did make a point of remarking to Doane that he had not had success with all his registrations (contrary to what Quase had earlier implied) Kivitz failed to remedy his acquiescence in the import of Quase's question about accountants.

he had in his phone call to Doane, that payment of the down payment was to be by cashier's or certified check to the lawyer.

The importance of making the down payment before election day was stressed by Quase. He commented, among other things, that in politics a "Johnny-come-lately" does not help much and does not get anywhere.

Quase also discussed the possibilities of his finding a corporate entity with which Houses of Plastic might become associated.[24/]

After the basic terms had thus been arrived at and after Doane had indicated he needed something in writing to take to his Board of Directors, Quase suggested that the two lawyers, Kivitz and Doane, get together and formalize the proposal. Kivitz dictated the draft fee proposal to Quase's secretary, and after minor modifications were worked out by Doane and Kivitz, the latter had the agreement typed in final at his office on his letterhead during the luncheon break.[25/] The retainer proposal,[26/] signed by Kivitz, set forth the terms that had earlier been laid down, principally by Quase, and included a provision that "this office" would lend its best assistance toward obtaining a corporate entity actively engaged in business to associate with Houses of Plastic in the manufacture,

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24/ Though Kivitz testified that he too had in mind such possibilities based on contacts with other clients of his, it is significant that he testified in 1965 when the matter was investigated by the Commission's staff (Ex. 17) that he had no one particularly in mind. On the whole record it is clear that this element of the services to be furnished would be provided, if at all, by Quase and not by Kivitz.

25/ The meeting that morning lasted 2 to 2½ hours.

26/ Ex. 20.

sale, and distribution of its products. The final paragraph of the proposal called for Houses of Plastic to indicate their approval and acceptance on the original of the letter and its return to Kivitz, along with a cashier's check or certified check for the $20,000 down payment.

Doane utilized the luncheon break to report by phone to Ackles, in Michigan, on the course of the negotiations.[27] Doane read to Ackles the text of the draft agreement. Ackles had substantial reservations about retaining Quase, though Doane seemed to feel they could do the job.[28] Ackles instructed Doane to tell Quase and Kivitz that he (Doane) had been unable to reach Ackles and to return to the discussions in the afternoon, as scheduled, particularly to sound out further what they had in mind specifically about the possibilities for associating Houses of Plastic with another company.

When Doane, Quase, and Kivitz met again in the afternoon, again at Quase's offices, the signed retainer proposal was presented to Doane and some further discussion was had, involving principally the possibilities of finding someone for Houses of Plastic to merge or affiliate with. During the course of the discussion Quase introduced an individual reported to be actively engaged in building

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27/ This phone conversation was recorded by Ackles. The typed transcript of the conversation, Exhibit 15, was jointly moved into evidence by the parties and is stipulated to be an accurate report of the conversation.

28/ In discussing the $20,000 down payment referred to in the draft proposal, Doane said "that's to open up the doors for them from this present administration and many things that I don't want to know anything about."

low-cost housing, who joined the discussions for a time.

After concluding his afternoon meeting[29] with Quase and Kivitz, Doane visited the Commission's offices, where he talked to Commissioner Budge, his legal assistant, and various staff personnel. Later that evening Doane again reported to Ackles.[30] By this time both Ackles and Doane had serious misgivings about retaining Quase and Kivitz[31] and Ackles decided they should handle it themselves. Both felt that Quase's and Kivitz' conduct should perhaps be reported to appropriate authorities.

Although the proposed fee was greatly in excess of any he had previously received,[32] Kivitz made no direct inquiry of Houses of Plastic concerning the outcome of his offer to them of legal services. Ultimately he inquired of Quase in casual conversation and, upon learning that Quase had not heard affirmatively, he assumed the proposal had fallen through.

CONCLUSIONS

The record in this proceeding establishes by clear and convincing proof that respondent Kivitz permitted the essential terms of the fee for his legal services with respect to the proposed preparation

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29/ The afternoon session was brief, perhaps a half hour or so.

30/ This call, too, was tape recorded by Ackles. Exhibit 16, stipulated to be an accurate typed report of the phone conversation, was jointly moved into evidence by the parties.

31/ Indications are that Ackles was reluctant to part with $20,000, even if he could have readily raised it, which appeared to be a problem.

32/ Through 1967, Kivitz' largest fee for work on a registration statement was about $15,000. As shown by his tax returns, his highest gross legal fees during the years 1961-1964 were $42,412, in 1964; his lowest were $25,393, in 1963; and the mean amount of gross fees for the period was $21,342.

and filing of a registration statement with the Commission pursuant to the Securities Act of 1933 to be negotiated and formulated by Quase, a non-lawyer. It is equally clear from the record that the fee for the services covered in Kivitz' proposed fee agreement was to be split between Quase and Kivitz in some proportion not disclosed by the record. That this was so is clear from a number of established facts and circumstances, including the fact that Quase, not Kivitz, purposefully and vigorously and with considerable expenditure of time and some phone expense went out to get the client's signature on the line. This was clearly not a mere "referral" by a friend of a potential client to a lawyer, as respondent contends.

In addition, the fact that the final negotiations were conducted in Quase's office, not respondent's, although both offices were equally suitable and available and only a few blocks apart, both before and after Kivitz drafted the proposed retainer agreement, strongly supports the conclusion that Quase was to share in the fee. Respondent was able to suggest no persuasive reason why the negotiations were held in Quase's office. Respondent urges vaguely that Quase may have had other things to take up with Doane that were not embraced in the services to be rendered under the proposed retainer agreement, but the record is devoid of evidence to support this suggestion.

Moreover, the provision in the draft retainer agreement calling for "best assistance toward obtaining a corporate entity actively

engaged in business to associate with" Houses of Plastic called for the kind of services that Quase, not Kivitz, had professed he was in position to render. Perhaps of even greater significance is the fact that during the negotiations, both earlier and during the meeting that Kivitz attended, Quase represented that a part of the fee would be spread around to gain political influence. Whether Quase was in fact in a position, or intended, to so employ some of the funds is not disclosed by this record, and is not material; his representations do show, however, that some part of the fee was destined for Quase and was for other than the legal services to be rendered by Kivitz.

And, finally, the fact that Kivitz later went to Quase rather than to Doane to ascertain whether he had a retainer agreement indicates, in the absence of an adequate explanation, that Quase was the principal negotiator and that he was to share in the proposed fee.

Accordingly, it is concluded that charges 1 through 3 [33/] have been substantiated by clear and convincing proof.

As to charge No. 4, it is concluded that the proof clearly and convincingly establishes the first sentence of the charge, i.e. that respondent acquiesced in representations that accountants could be gotten who would stretch a point, but the record fails to establish the second sentence of the charge, alleging that respondent thereby "created" a certain impression.

33/ Set forth at pp. 9-10 above.

It is further concluded that proof of the charges as found above shows unethical and improper professional conduct[34/] and a lack of character and integrity within the meaning of those terms as employed in Rule 2(e) of the Commission's Rules of Practice.

RESPONDENT'S CONTENTIONS

Respondent makes a number of contentions in urging that it would be improper or inappropriate to impose any disciplinary action upon him predicated upon the charges herein.

Respondent contends that the conduct complained of does not constitute "practice" before the Commission under its Rule 2(g)[35/] and that, therefore, no disciplinary action may be founded thereon. The argument has dual flaws. First, Rule 2(g) does not restrict practice before the Commission to the activity there described as constituting such practice but to the contrary expressly provides that the definition "shall not be limited to" the activity mentioned. Since the preparation of registration statements is clearly a principal element of practice before the Commission under Rule 2(g) it would seem that agreements ancillary to such preparation, e.g. an attorney's retainer agreement (or proposal) for the preparation of such a statement is likewise embraced within the definition of "practice". Apart from that, it is well settled that disbarments by courts may be predicated upon conduct occuring outside the courtroom

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34/ The conduct relative to charges 1 and 2 contravenes the spirit if not the letter of Canons 34 and 35 of the American Bar Association, as then in force. Martindale-Hubbell Law Directory 1967, Vol. III, p. 184A.

35/ The text of Rule 2(g) is set forth in footnote 3 above.

and unrelated in any direct way to practice, i.e. the so-called "non-professional" conduct.[36/] Consistently with this principle, the Commission's Rule 2(e),[37/] setting forth the findings upon which an attorney may be suspended or disbarred, in no way restricts itself to conduct occuring before the Commission or in connection with practice before it.

Respondent also urges that the charges herein, being based upon conduct that occurred in 1964,are too "stale" to support or warrant disciplinary action at this time. Respondent does not contend, however, nor does anything in the record suggest, that the lapse of time here involved has in any way prejudiced respondent's ability to present a defense to the charges or that it otherwise affected adversely the requirements of due process. Absent any such showing, the mere lapse of time does not preclude disciplinary action.[38/] The fact of the lapse of such time, coupled with respondent's apparent good conduct in the intervening years since the 1964 conduct involved in the charges, actually favors the respondent since it is an element to be considered in mitigation.

Another contention made by respondent is that the General Counsel "actively prevented" Quase from testifying by warning him of his privilege against self-incrimination and by declining after Quase had invoked the privilege, to seek authority from the Commission to grant Quase immunity from criminal prosecution so that his

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36/ 43 Cornell Law Quarterly 489 (Note, 1958); 7 American Jurisprudence 2d §25.

37/ See footnote 3 above for the text.

38/ Hatch v. Ooms, 69 F. Supp. 788 (D.C.D.C., 1947) rev'd sub nom.; Dorsey v. Kingsland, 173 F.2d 405 (C.A.D.C., 1949); revd and District Court judgment affirmed per curiam, 338 U.S. 318 (1949) (disbarment of attorney from practice before United States Patent Office for conduct occuring 19 years earlier).

testimony in this proceeding could have been compelled. The record shows quite clearly that there is no support for this contention. The warning was given, in customary language, not to keep Quase from testifying, but to avoid unintended conferral of immunity to criminal prosecution upon him.[39/] Respondent's demand that Quase be given immunity was not made in connection with any desire of the respondent to call Quase as his witness, but occurred in connection with the General Counsel's effort to put into evidence, following Quase's invocation of his privilege after testifying very briefly, of a purported sworn statement of Quase to the FBI. After being advised how he could raise the issue of conferring immunity on Quase if he desired to call Quase as respondent's witness, counsel for respondent stated:[40/] "[I]f you excluded the document . . . I wouldn't need the witness [Quase]. There would be nothing to examine him on . . . . I would have no reason to call him." Thereafter the General Counsel withdrew its offer of the Quase statement.[41/] The record shows clearly that respondent made a deliberate choice not to call Quase as a witness.[42/] He cannot now be heard to complain that the General Counsel declined to seek authority to compel Quase to testify as a part of its case where the hearsay statement offered in lieu of Quase's direct testimony was withdrawn.

39/ United States v. Parrott, 248 F. Supp. 196 (D.C.D.C., 1965).

40/ R. 220.

41/ R. 222.

42/ R. 195, 205-206, 208, 214-220. In this connection, it should be noted that the record contains no showing that Quase would have been a witness "hostile" to respondent. Kivitz testified that he had friendly contacts with Quase both before and after the events of 1964. See footnote 22.

Respondent also urges that the testimony of Doane is "inherently incredible" and should be disregarded and that without such testimony the charges against respondent lack support. The findings made herein do reflect a failure to credit Doane's testimony that when he came to Washington to confer with Quase he never had any intention of working with him, and that his sole purpose was to expose apparent misconduct. But Doane's purpose in this regard is not a finding on which the charges herein are dependent, nor is Doane's effort to present his motivations in a better light than the facts warrant such a deviation as would require or justify disregarding his testimony generally. Particularly is this true here where Doane's basic testimony is strongly corroborated by other direct testimony and by a tight structure of very compelling circumstantial evidence.

During the course of the hearing the respondent moved (and later renewed his motion) that the examiner adopt for the hearing a rule which would exclude all objected-to hearsay testimony. This motion was denied, the examiner observing that he would not rule out all objected-to hearsay evidence as such and that he would consider hearsay objections in the course of preparing his initial decision in light of the purpose for which particular evidence was offered or being considered.[43/]

The law is well settled that in administrative proceedings under the Administrative Procedure Code[44/] hearsay evidence may be received

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43/ R. 436-37.

44/ See footnote 9a above.

and findings may be based upon hearsay if corroborated by competent evidence.[45/] Respondent urges that the requirement in 5 U.S.C. §556(d) that findings under the Administrative Procedure Code be supported by "reliable, probative, and substantial evidence" is controlling and that it precludes admission of hearsay. The Court of Appeals for the 9th Circuit has ruled to the contrary,[46/] saying at pp. 690-91:

> " . . . The requirement that the administrative findings accord with the substantial evidence does not forbid administrative utilization of probative hearsay in making such findings. Such construction would nullify the first portion of section 7(c), Administrative Procedure Act, providing for the receipt of such evidence."

As an alternative argument, respondent urges that hearsay, though perhaps admissible generally under the Administrative Procedure Code, should not be relied upon here, where the serious consequences of a disbarment are involved.[47/]

It is concluded that there are no due-process or other requirements forbidding appropriate use of hearsay evidence in the Commission's disbarment proceedings, particularly where the use of

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45/ N. Sims Organ & Co., Inc., 40 SEC 573, 576 affirmed 293 F.2d 78 (C.A. 2, 1961), cert. den. 268 U.S. 968; Consolidated Edison Co. v. N.L.R.B. 305 U.S. 197, 230 (1938); FTC v. Cement Institute, 333 U.S. 683, 705-6 (1948).

46/ Willapoint Oysters v.Ewing, 174 F.2d 676, 690-91 (C.A. 7th, 1949), cert. den. 338 U.S. 860.

47/ Respondent cites Davis, Vol. II, Administrative Law §14.10, pp. 298-299, to the effect that good sense requires that a professional license not be revoked "solely on the basis of tenuous hearsay" even though such evidence might be sufficient to support a social security award or the like.

hearsay would be subject to the overall requirement that the charges be established by "clear and convincing" evidence, as discussed earlier in this decision.

In any event, the findings made herein do not rely upon hearsay evidence for their support. Respondent in his brief has not cited any particular hearsay evidence that should be stricken or disregarded. Among items objected to in the course of the hearing on hearsay grounds were transcripts of four telephone calls that had been tape-recorded: Quase's call to Doane (Ex. 11); Freehill's call to Doane (Ex. 12); Doane's first call to Ackles (Ex. 15); and Doane's second call to Ackles (Ex. 16). Exhibits 15 and 16 were ultimately jointly moved into evidence by the parties, so there is no hearsay question as to them. Both parties to the call reflected in Ex. 12 testified at the hearing and were cross examined.[48/] As respects Ex. 11, one party to the call (Doane) testified at the hearing and was cross examined while the other party (Quase) did not testify as to the call. However, Quase's statements in the course of the call are not properly "testamentary" statements within the hearsay rule but "verbal acts" of Quase reflecting his efforts to negotiate a contract to represent Ackles in the preparation and filing of a registration statement. As such his statements and representations were not hearsay.[49/]

48/ Some courts hold that prior consistent statements are not hearsay where the declarant is present and subject to cross-examination and that such statements may be received for their full value, not merely to impair or to support the credit of the witness. Model Code of Evidence, American Law Institute, 1942 Ed., Rule 502, p. 233.

49/ McCormick on Evidence, 1954 Ed., §228, pp. 463-64.

Likewise, Ackles' testimony as to the negotiations between himself and Quase was not hearsay any more than was Doane's testimony as to his negotiations on October 29, 1964, with Quase and Kivitz.

While other objected-to evidence that was in fact hearsay was received in the course of the hearing, it has not been relied upon in making the findings herein, since there was ample credible and probative non-hearsay evidence on which to found them. (For example, it is unnecessary to rely on Doane's testimony as to what Manweiler or Freehill told him about something where Manweiler and Freehill's own testimony is available to establish the point).

Respondent also disputes the relevance, materiality, and probative value of testimony and evidence respecting the negotiations between Quase and Houses of Plastic prior to the October 29th meeting in which respondent participated. In doing so, respondent appears to attack the whole concept of circumstantial evidence. There is no basis for this objection. Circumstantial evidence is neither inferior nor superior, per se, to "direct", or "testimonial" evidence; it may have more or less probative value, depending upon the nature of it in a particular case and context.[50/]

DISCIPLINE REQUIRED IN PUBLIC INTEREST

General Counsel urges that respondent's conduct was so highly improper as to call for his being permanently disqualified from

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50/ Wigmore's Code of Evidence, 2d Ed. 1935, §§210, 211 pp. 44-45.

practicing before the Commission. Respondent contends that, even if the charges relating to conduct in 1964 are found to be established, no disciplinary action against respondent is indicated at this date in view of the "staleness" of the charges and the uncontradicted testimony as to respondent's present reputation for good character.

The charges made and established by clear and convincing proof in this proceeding are of an extremely serious nature. The operations of a Quase are highly destructive of public faith and confidence in the administrative process and the simple fact is that a Quase cannot operate in the mannner disclosed by this record without the collaboration of a Kivitz. The Commission has a right to expect that an attorney-at-law practicing before it will not lend his talents to the furthering of such improper motives and has a right as well as a duty in the public interest[51/] to take appropriate disciplinary measures against an attorney who has failed to live up to such expectations. The deterrent effect upon others who might be tempted to improper conduct is a necessary element to be taken into account in determining what discipline is appropriate.[52/]

51/ Disbarment is designed to protect the public. In re Ruffalo, 390 U.S. 544, 550 (1968).

52/ A judgment in a disciplinary proceeding must be just to the public and must be designed to correct any anti-social tendency on the part of the attorney, as well as to deter others who might tend to engage in like violations; it must be fair to the attorney but the duty of the court to society is paramount. State ex rel Florida Bar v. Murrell, 74 So. 2d 221, 227 (S.Ct. Fla. en banc, 1954).

While the misconduct of the respondent, considered alone, was sufficiently grave to warrant permanent or indefinite disqualification from practice before the Commission, it is considered that there are countervailing considerations that support imposition of less stringent disciplinary action. So far as the record shows, respondent has not heretofore been the subject of any disciplinary action. The charges involved a single incident, not a protracted or prolonged course of conduct. In the years since this violation in 1964 the respondent has, so far as this record shows, committed no further violations of Rule 2(e). The testimony of respondent's witnesses that his present reputation for character is excellent is uncontradicted in the record. On the other hand, the findings made in this proceeding necessarily involve the conclusion that respondent did not testify with complete truth or candor either to the Commission's investigators when the matter was scrutinized in 1965 or at the hearing in the instant proceeding.[53/]

Taking into account the foregoing as well as all factors urged by the parties and all of the evidence in the record, it is concluded that a 2 year suspension of respondent's eligibility to practice will adequately and appropriately serve the public interest. Accordingly,

IT IS ORDERED that Murray A. Kivitz be, and he hereby is, denied the privilege of appearing or practicing before the Commission

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53/ To the extent that Respondent's testimony conflicts with the findings herein, it is not credited.

for a period of two years from the effective date of this order, which shall become effective in accordance with and subject to the provisions of Rule 17(f) of the Commission's Rules of Practice.

Pursuant to Rule 17(f), this initial decision shall become the final decision of the Commission as to each party who has not, within fifteen (15) days after service of this initial decision upon him, filed a petition for review of this initial decision pursuant to Rule 17(b), unless the Commission, pursuant to Rule 17(c) determines on its own initiative to review this initial decision as to him. If a party timely files a petition for review, or the Commission takes action to review as to a party, the initial decision shall not become final with respect to that party. 54/

David J. Markun
Hearing Examiner

Washington, D.C.
April 17, 1970

54/ To the extent that the proposed findings and conclusions submitted by the parties are in accordance with the views herein they are accepted, and to the extent they are inconsistent therewith they are rejected. Certain proposed findings and conclusions have been omitted as not relevant or as not necessary to a proper determination of the issues presented.