JUDGE HOLWELL

10 CIV 9141

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STEVEN ALTMAN,

Plaintiff,

-against-

UNITED STATES SECURITIES AND EXCHANGE COMMISSION, MARY L. SCHAPIRO, Chairman, and ELIZABETH M. MURPHY, Secretary,

Defendants.

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10 Civ. ( )

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO STAY AND VACATE

by:

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PRELIMINARY STATEMENT

On November 10, 2010, for the first time in history, the Securities and Exchange Commission ("SEC" or "Commission") disciplined an attorney unilaterally and solely for violation of New York's Canons of Ethics, raising its own recommended nine month suspension to a lifetime ban. As the SEC undoubtedly anticipated, its published decision hit the trade press like lightening and the front page of the New York Law Journal in under 24 hours.[1]

Instead of permitting the apparatus of the New York Courts and its disciplinary arm – the entity with the powers and expertise to regulate lawyers – to perform its function, the SEC's unprecedented usurpation of the disciplinary process represents both a complete departure from historical practice and an impermissible overstepping of jurisdictional boundaries - - from federal to state and from executive to judicial - - in violation of the exclusivity expressly granted this State's Judiciary.[2]

As if in anticipation of this suit, both the Second Circuit and the Ninth Circuit foreshadowed plenary jurisdiction before this Court:

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[1]"Despite insisting that it possessed the authority under Rule 102(e) to pursue unethical conduct by lawyers, the SEC has continued to exercise restraint in applying its terms absent evidence that an attorney has engaged in a substantive violation of the federal securities laws. In fact, we could find only one case [the one underlying this action] in which the SEC asserted solely the provisions of Rule 102(e)(1)(i) or (ii) as a basis for discipline." (Emphasis added.) Flannery, Anne C. and McCarthy, Alice L. , "Ethical Responsibilities of Legal and Compliance Professionals: Recent SEC and FINRA Cases Involving Lawyers and Compliance Professionals," 2009, Morgan, Lewis & Bockius LLP.

[2]Section 90(10) of the New York Judiciary Law clearly provides that:"Any statute or rule to the contrary notwithstanding, all papers, records and documents upon . . . any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of an attorney or attorneys, shall be sealed and be deemed private and confidential. However, upon good cause being shown, the justices of the appellate division having jurisdiction are empowered, in their discretion, by written order, to permit to be divulged all or any part of such papers, records and documents." (Emphasis added.) Judiciary Law, Article 4, §90(10).

> We do not consider whether cases can arise in which the SEC in Rule 2(e) matters exceeds its proper jurisdictional boundaries. The precise reach of the SEC in these situations has not been defined and we leave that task for a future case which implicates that question directly. . . . (Emphasis added.)

Davy v. S.E.C., 792 F.2d 1418, 1422 (9th Cir. 1986), interpreting Touche Ross, 609 F.2d 570, 574 (2d Cir. 1979) ("appellants need not exhaust their administrative remedies"); accord Free Enterprise Fund and Beckstead and Watts, LLP v. Public Co. Accounting Oversight Board, __ U.S. __, 130 S.Ct. 3138, 3150 (June 28, 2010) ("We first consider whether the District Court had jurisdiction. We agree with both courts below that the statutes providing for judicial review of Commission action did not prevent the District Court from considering petitioners' claims.")

Plaintiff, Steven Altman, Esq., by his attorneys, hereby petitions this Court for a temporary, preliminary and permanent injunction against defendants, the SEC, Mary L. Schapiro, and Elizabeth M. Murphy, its Chairman and Secretary, respectively, and all those acting in concert or participation with them, from conducting, completing and publishing any investigation or determination solely predicated upon a violation of New York State's Disciplinary Rules and in the absence of a prior state adjudication.[3] Respectfully, this is the "future case" predicted by the Ninth Circuit in Davy and it is now time for a decisive ruling that "the SEC should not be empowered to determine the standards by which ... attorneys ... are to be judged." Davey, 792 F.2d at 1422.

[3]In the alternative, in light of the absence of any prior, published rules establishing standards or implementation of rules of ethics for attorneys, injunctive relief should be limited to this case, and its facts at hand. Cf., Standards of Professional Conduct for Attorneys Appearing and Practicing Before the Commission in the Representation of an Issuer, 17 C.F.R. § 205 (Chapter II, Part 205), et seq.

FACTS RELEVANT TO THE RELIEF SOUGHT[4]

On November 10, 2010, the Commission issued an Opinion and "Order Imposing Remedial Sanctions" permanently denying plaintiff, an attorney of 24 years with an unblemished record, "the privilege of appearing or practicing [law] before the Commission." (Ex. A)[5] Both the Opinion and Order were published on the Commission's website and widely reported in the legal press, including front-page coverage in the New York Law Journal. The Opinion and Order declined to address plaintiff's challenge to the SEC's authority, and instead granted its own Office of General Counsel ("OGC")'s request to increase the sanction from a nine-month suspension to a permanent bar.

The SEC opined that 6 telephone calls between plaintiff and Irving Einhorn, counsel in a pending administrative proceeding[6], during the 13 days between January 28 and February 10, 2004, concerning an employee compensation claim, constituted a violation of New York's Rule of Professional Conduct, DR 1-102(A)(4), DR 1-102(A)(5) and DR 1-102(A)(7).[7] The SEC deemed the ethical violation "egregious, recurrent and reflect[ing] a high degree of

[4]Plaintiff/petitioner reserves his right to seek redress under the Administrative Procedures Act, 5 U.S.C. § 700, et seq., on grounds appropriate to, and distinct from those set forth herein, upon exhaustion of administrative remedies. Currently, plaintiff's motion for reconsideration with the Commission is due to be filed on December 8, 2010, and depending upon the outcome thereof, plaintiff will perfect his appeal to the Second Circuit.

[5]"Ex. __" refers to exhibits appended to the Verified Complaint, filed herewith.

[6]In the Matter of Harrison Securities Inc., AP File No. 3-11084.

[7]Part 1200, now § 8.4(c), (d), and (h): "A lawyer or law firm shall not:. . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; (d) engage in conduct that is prejudicial to the administration of justice; . . . (h) engage in any other conduct that adversely reflects on the lawyer's fitness as a lawyer."

scienter"[8] making "future violations likely"[9] likening its authority to, and seeking to preempt the "New York courts."[10] The evidence consisted of transcripts of Einhorn's clandestine recordings of five of those telephone calls (in lieu of the recordings themselves). The purported witness' testimony was not taken, and plaintiff's testimony was deemed completely incredible. Treating psychiatric testimony concerning plaintiff was ignored. Einhorn's testimony on what he believed plaintiff meant was determinative. In adopting the administrative law judge's Initial Decision (Ex. B), the SEC employed Black's Law Dictionary as the sole and distinctive source of the legal standards for determining New York's Rules of Conduct. Quoting the SEC:

- Intentional Wrong: "An intentional wrong is '[a] wrong in which the mens rea amounts to intention, purpose, or design. - Also termed a willful wrong. BLACK'S LAW DICTIONARY 1606 (7th ed. 1999).'" (Initial Decision, Ex. B, at 24)

- Scienter: "In addition to acting knowingly, Altman acted with scienter, '[a] mental state consisting in an intent to deceive, manipulate, or defraud.' BLACK'S LAW DICTIONARY 1347 (7th ed. 1999)." (Initial Decision, Ex. B, at 26)

- Egregious: "Altman's conduct was egregious. As a member of a profession responsible for upholding honest and ethical standards, he engaged in dishonesty, deceit, fraud, and misrepresentation. Deceit is defined as the 'act of intentionally giving a false impression.' BLACK'S LAW DICTIONARY 413 (7th ed. 1999)." (Initial Decision, Ex. B, at 32)

- Fraud: "Altman engaged in fraud, defined as a 'knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment,' because he did not disclose his contacts with the Division's adversary, a material fact, and the Division relied on him to its detriment in calling his client as a rebuttal witness where she was 'thoroughly impeached on cross-examination' and found not to be a reliable witness. BLACK'S LAW DICTIONARY 670 (7th ed. 1999); (OGC Ex. 19 at 11.)" (Initial Decision, Ex. B, at 32)

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[8]Ex. A, p. 31.

[9]Ex. A, p. 32.

[10]Ex. A, fn 46 at p. 24.

- Tampering: "Witness tampering is the 'act or an instance of obstructing justice by intimidating, influencing, or harassing a witness before or after the witness testifies. Several states and federal laws, including the Witness Protection Act of 1982, 18 U.S.C. § 1512, provide criminal penalties for tampering with witnesses or other persons in the context of a pending investigation or official proceeding.' BLACK'S LAW DICTIONARY 1598 (7th ed. 1999)." (Initial Decision, Ex. B, at 33)

The SEC has not and cannot point to any authority anywhere that demonstrates the adoption of these standards for a proceeding of this kind, in any forum, including its own. And, as shown below, the rule-making process required for it to adopt such standards (assuming it had the infrastructure and the right) was never commenced, let alone followed.

There is no evidence in the record that demonstrates whether the SEC's Ethics Counsel, who is delegated the authority to refer and defer to New York's Departmental Disciplinary Committee ("DDC"), ever did either, or whether the DDC ever took action (or even more importantly, declined, as from its silence one may reasonably infer). Indeed, in the nearly 6 ½ (six and one-half) years since this purported "egregious" event, the DDC has not said one word to anyone (or at least none that plaintiff is aware of), creating the inference (negative to the SEC) that the conduct was not deemed "egregious" or even violative of the Canons of Ethics by those charged with the duty of enforcement and presentment to the judiciary for determination.[11]

In admitting that this case is a matter of first impression, the SEC confesses: "[t]his appears to be one of the few proceedings brought against an attorney for an ethical violation pursuant to Commission Rule of Practice 102(e)(1)(ii) and its predecessor Rule 2(e). See Kivitz, 475 F.2d at 962 (reversing the Commission's imposition of a two-year bar because it could not find that the evidence supporting the Commission's position was substantial.)" (Initial

[11]The SEC admits that, despite its referral, the DOJ did not bring charges. (Ex. A, fn 35, p. 18.)

Decision, Ex. B, at 24, fn 32) This is not "one of the few;" this appears to be the first and only instance in which an attorney was denied the privilege to practice before the SEC based solely on the SEC's interpretation and enforcement of state disciplinary rules.

ISSUE BEFORE THIS COURT

Does the Commission's November 10, 2010 Opinion and Order and the administrative proceeding underlying it constitute a wrongful attempt to "federalize" the New York State disciplinary rules and unconstitutional usurpation of the exclusive rights of the Departmental Disciplinary Committee of the Appellate Division, First Department?

ARGUMENT

I

MANDAMUS IS RESPECTFULLY REQUIRED TO STAY AND VACATE THE SEC'S ACTIONS AT BAR

A. The Procedure Employed by the SEC is Unconstitutional

1. The SEC lacks Constitutional, Statutory and Regulatory Authority to determine an intentional violation of New York States' Disciplinary Rules without a prior determination by the DDC and First Department.

(a) History of Rule 2(e):

The history of the Rule 2(e), 17 C.F.R. § 102(e), 15 U.S.C. § 78d-3,[12] demonstrates the requirement that priority be afforded to the New York State Departmental Disciplinary Committee ("DDC") and First Department under the State system for disciplining

[12]Rule 102(e)(1)(ii), under which plaintiff was charged, provides:

> (1) *Generally.* The Commission may censure a person or 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 and opportunity for hearing in the matter:
>
> (ii) to be lacking in character or integrity or to have engaged in unethical or improper professional conduct.

its attorneys, and that if and when the DDC and First Department renders a determination (*sub silencio* or explicit), then, and only then, should the SEC proceed.

As observed by one of the SEC's former Commissioners:

> Although Rule 2(e) has been in effect in some form since 1935, [FN15] the Commission did not bring its first disciplinary proceeding against an attorney until 1950. [FN16] A total of only five cases were instituted before 1960. During the past decade, however, the Commission embarked upon a program for improving professional responsibility, which resulted in the institution of over 85 cases against attorneys since 1970. However laudable the objectives of this program may be, it is not based on any congressional directive or amendments to the federal securities laws. Neither can it be justified as necessary to protect the Commission's processes since the Commission functioned quite well from 1935 until 1950 and has greatly increased its power since then. Few, if any, of the cases against attorneys brought by the Commission since 1970 have involved conduct which actually threatened the integrity or processes of the agency. [FN17]
>
> FN15: The first promulgation was Rule II(1) in 1935 which provided, among other things, that the Commission, "in its discretion, [may] deny admission to, suspend, or disbar, any persons who do not possess the requisite qualifications to represent others, or who is lacking in character, integrity, or proper professional conduct." This provision remained essentially unchanged through revisions in 1938 at which time the Commission abandoned specific admission requirements for persons practicing before the agency. Securities Act Release No. 1761 (June 27, 1938). A revision in 1970 added the specification that the Commission could deny any person from practicing before it who it found to have willfully violated, or willfully aided and abetted violations of, the federal securities laws and that the Commission could automatically suspend a person from practice before it who had been convicted of certain crimes **or who had been barred or suspended from practice by a court or state authority.** Securities Act Release No. 5088 (Sept. 24, 1970). In 1971 the Commission again amended the Rule to provide for the temporary suspension of practitioners who have been enjoined from violation of the federal securities laws. Securities Act Release No. 5147 (May 19, 1971). The Commission in 1974 proposed an amendment to make Rule 2(e) proceedings public unless the Commission directed otherwise. Securities Act Release No. 5477

(April 5, 1974). It subsequently withdrew that proposal. Securities Act Release No. 5572 (March 4, 1975).

FN16: Albert J. Fleischman, 37 S.E.C. 832 (1950).

FN17: The use of Rule 2(e) as an investor-protection mechanism is discussed in the text accompanying notes 21-30, *infra*.

(Emphasis supplied.) Keating, Muething & Klekamp, Release No. 15982 (1979) (dissent by Commissioner Karmel).

(b) Congress' use of neutral language in Rule 102:

Congress' use of neutral language in Rule 102 does not authorize or mandate an SEC usurpation of, or unilateral authority over, the state judiciary's unfettered and primary right, interest and responsibility to supervise and discipline attorneys within its jurisdiction and under its disciplinary rules and procedures..

As former Commissioner Karmel further observed:

Since 1938, the Commission has not set qualifications for attorneys practicing before it, and by the Administrative Practice Act 1965, [FN18] Congress mandated that no federal agency (except the U.S. Patent Office) may set such qualifications for attorneys. The purpose of this Act was to protect the right of persons to be represented before federal agencies by any attorney in good standing with state authorities. The statute was intended to do away with agency-established admission requirements for attorneys and to eradicate agency barriers which would so operate. An examination of the legislative history of the 1965 Act indicates that federal agencies were being denied the authority to judge the moral fitness or competence of an attorney in order for him to practice before the agency. [FN19]

The conclusion by the Second Circuit in the Touche Ross case that the language of the 1965 Act is "neutral" as to the Commission's disciplinary authority, [FN20] does not dispose of the problems which the use of Rule 2(e) to set professional standards raises. I believe that this legislation requires the parameters of the Commission's disciplinary authority to be drawn in light of the legislative history which indicates that such authority over

attorneys should not extend generally to questions of ethics or competence. By utilizing Rule 2 (e) to implement a program of professional responsibility in order to enhance investor protection, the Commission is not limiting its disciplinary powers to assuring the proper administration of justice.

In my opinion, Rule 2(e) is an invalid exercise of the Commission's authority. **I recognize that I am not writing on a clean slate, but until the question of the Commission's authority to discipline attorneys is validated by the United States Supreme Court or the Congress, I believe the validity of Rule 2(e) will not be free from doubt.**

FN18: 5 U.S.C. §500(b). The statute provides, in pertinent part:

> An individual who is a member in good standing of the bar of the highest court of a State may represent a person before any agency … and is authorized to represent the particular person in whose behalf he acts.

FN19: See H.R. Rep. No. 1141, 2 U.S. Code Cong. & Admin. News, 89th Cong., 1st Sess. 4170, 4171, (1965); 111 Cong. Record 27192-93 (Oct. 18, 1965) (remarks of Congressmen Willis, Poff, Fascell, and Edwards); 111 Cong. Record 7725 (April 9, 1965) (remarks of Senator Long).

At the same time as doing away with qualification requirements for attorneys in practice before agencies, the 1965 Act specifically provided that it did not:

> [A]uthorize or limit the discipline, including disbarment, of individuals who appear in a representative capacity before an agency. 5 U.S.C. §500(d)(2).

The intent of this provision was for federal agencies to retain appropriate disciplinary authority, to the extent it existed, over attorneys. The objective of Congress in preserving some disciplinary authority in federal agencies was to assure the proper administration of justice by these bodies. The section was added in large part to obtain the support of the Justice Department which wished to retain an element of control "on the basis of misconduct observed by Department boards and agencies." 2 U.S. Code Cong.

> & Admin. News, 89th Cong., 1st Sess. 4178 (1965) (emphasis added).
>
> FN20: Touche Ross & Co., et. al. v. SEC, note 8 supra, at p. 95479-80, n. 13.

(Emphasis Added.) Id..

(c) There has been no SEC discipline for 20 years; federal preemption has been permitted in 2002 only to determine ethical violations by attorneys representing issuers.

The 2003 enactment of Rule 205 "Standards of Professional Conduct for Attorneys Appearing and Practicing Before the Commission in the Representation of an Issuer" makes clear that the SEC knew how to create and implement rules to regulate attorney conduct. The absence of a rule covering attorneys in plaintiff's position highlights the lawlessness of the SEC's position. The 2003 enactment also demonstrates the awkward and incorrect approach employed by the SEC in the matter at bar, and calls for identical relief that the Commission, itself, employed since 1981 when facing the issue of attorneys' ethical duties in connection with issuers: **vacatur**. The history of Rule 205 shows why, since 1981, the SEC has not perceived itself as having the expertise (or infra-structure) to enable proper determination of ethical violations in the absence of prior state adjudication, why the SEC has routinely declined to exercise authority in the absence of a prior state adjudication, why the SEC in 1988 made these proceedings public and promised that it would not bring an action without first having a state adjudication, and why the case at bar is such a radical departure, gross overreach, and unconstitutional action.

After Commissioner Karmel's striking position in the 1979 Keating case, the Commission entered a landmark ruling in 1981 which set the standard for its twenty years of deferral to the state judiciary in matters of state discipline of attorneys. In In re Carter and

Johnson, 47 S.E.C. 471 (1981), after soliciting, receiving and considering amicus curiae briefs, the Commission reversed its ALJ's determination based upon an unfair, retro-active application of ad hoc rule-making, and stated:

> Moreover, we conclude that certain concepts of proper ethical and professional conduct were not sufficiently developed, at the time of the conduct here at issue, to permit a finding that either respondent breached applicable ethical or professional standards. In addition, we are today giving notice of an interpretation by the Commission of the term "unethical or improper professional conduct," as that term is used in Rule 2(e)(1)(ii). This interpretation will be applicable prospectively in cases of this kind.

(Emphasis Added.) Id., 1981 WL 38414 at *1. As discussed below, it was not until Sarbanes Oxley in 2002, that the SEC was given authority to actually create Rules of Ethics and implement those rules. Rule 205 was finally implemented after lengthy debate in 2003, and remains relegated solely to attorneys representing issuers.

> Critically, the Commission in Carter admitted:
>
> We are sensitive to the abuses that may occur when an administrative agency with prosecutorial responsibilities has the power to discipline attorneys representing regulated entities. We are constrained to point out, however, that each administrative agency is charged with responsibilities and vested with powers that are fraught with potential for abuse.
>
> . .
>
> The Commission's Expertise. As discussed in the section on Ethical and Professional Responsibilities, infra, in this decision the Commission interprets Rule 2(e)(1)(ii) in cases limited to securities lawyers performing disclosure-related professional services, an area within our responsibility and our expertise. At the same time, we do not view our efforts in this regard as an attempt to preempt the recodification efforts of the American Bar Association or the ongoing standard-setting of the various state bar disciplinary and ethics bodies. We view private sector initiatives to clarify the difficult problems in these areas as a useful— indeed necessary—response to **the need for predictable and generally**

> **applicable standards governing lawyers in the discharge of their professional responsibilities**. Our attention today is directed only to the narrow range of lawyers engaged in a federal securities practice, to the specific factual context of an ongoing disclosure program of a corporate client, and to the limited question of when it is appropriate for a lawyer to make further efforts within the corporation to forestall continuing violative conduct.

(Emphasis Added.) Id., 1981 WL 38414 at *3, 4.

It took from 1981 to 2002, before any Congressional authority was given to the SEC to establish its own standards for ethics for lawyers. Section 307 of the Sarbanes-Oxley Act of 2002 (15 U.S.C. § 7201, et seq.) mandated that the Commission: "shall issue rules, in the public interest and for the protection of investors, setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers." (Emphasis added.)

In the public process of proper predicate rule-making under Sarbanes-Oxley (missing in the case at bar), the Commission revealed to the public its twenty year hiatus since Carter, explaining:

> The Commission's announcement in Carter and Johnson of the standard to be applied to similar cases in the future and its request for written comments engendered strong opposition from the private bar. The Commission, however, never amended the interpretation of "unethical or improper professional conduct" articulated in Carter and Johnson.

S.E.C. Release No. 8150, 46868, 33-8150, 34-46868, "Implementation of Standards of Professional Conduct for Attorneys" 2002 WL 31627090, *4 (November 21, 2002) (Ex. C). In this release, the SEC explained that its failure to prosecute reflected its lack of "time or expertise," and that:

> . . . **the Commission generally should not institute Rule 102(e) proceedings against attorneys absent a judicial determination that the lawyer has violated the federal securities laws**.

(Emphasis added.) Id. **Precisely**.

Critically, when the Commission determined, in 1988, to make its Rule 102(e) proceedings public, to ameliorate the concerns expressed by bench and bar alike, the Commission agreed to maintain the policy of deferring to the state judiciary:

> In 1988, the Commission issued a release announcing adoption of an amendment to Rule 102(e) to provide for public proceedings initiated under the rule. See Disciplinary Proceedings Involving Professionals Appearing or Practicing Before the Commission, 1988 SEC LEXIS 1365 (July 7, 1988). The majority of the release discussed the basis for the Commission's conclusion that the benefit of conducting such proceedings in public outweighed the competing privacy concerns. The Commission noted in the release that it "has generally utilized Rule [102(e)] proceedings against attorneys only where the attorney's conduct has already provided the basis for a judicial or administrative order finding a securities law violation in a non-rule [102(e)] proceeding" **and that it would continue to follow this policy**.

(Emphasis added.) Id.

The Commission has never deviated from its tradition, policy, and representations to the public - - except in the case at bar. There is yet more to the record of the proceedings in enacting Rule 205, but the critical endpoint is the legislative endorsement that a federal standard shall preempt any state rule only in the regulation of attorneys representing issuers. As Rule 205.6(c) states:

> An attorney who complies in good faith with the provisions of this part shall not be subject to discipline or otherwise liable under inconsistent standards imposed by any state or other United States jurisdiction where the attorney is admitted or practices.

(Emphasis added.) Rule 205.6, as enacted February 6, 2003, 17 C.F.R. § 205.6.

Respectfully, this history renders questionable the OGC's intent in regards to a specific lawyer not representing an issuer, but inquiry into the SEC's "scienter" is unnecessary at this juncture, as the record of the proceeding, and that of the SEC itself, is, we submit, sufficient to warrant a stay and vacatur, with immediacy. For the SEC cannot point to a single instance permitting its conduct, nor anything demonstrating its constitutional, legislative or regulatory right, nor any basis to violate the promise that it made when, in 1988, it rendered 102 proceedings public, to defer to the state judiciary. Simply put, there is no reason for the SEC to have changed its nearly 20 year stay of its own hand on attorney discipline, especially in the face of its own public pronouncements and involvement in the process of making Rule 205.

(d) Such SEC ad hoc rule-making has never been tolerated upon review.

In addition to Carter, the Commission's failure to articulate a clear standard for a finding of "improper professional conduct" in advance of bringing charges has three times previously produced a vacatur from the District of Columbia Circuit Court of Appeals.

> The court has engaged in an extended dialogue with the Commission about its standard for sanctioning professionals for "improper professional conduct." The court has twice concluded that the Commission had failed to articulate an intelligible standard for "improper professional conduct" under Rule 2(e)(1)(ii), the predecessor to Rule 102(e), and had failed to specify what mental state was required for a violation of the Rule.

Marrie v. Securities and Exchange Commission, 374 F.3d 1196, 1202 (D.C. Cir. 2004); see also Checkosky v. Securities and Exchange Commission, 23 F. 3d 452, 460-62 (D.C. Cir. 1994); Checkosky v. Securities and Exchange Commission, 139 F.3d 221, 226 (D.C.Cir. 1998).

> Turning to the Commission's application of amended Rule 102(e) in this case, we hold, in light of Checkosky I and II, that the Commission erred in applying its non-fraud Rule retroactively, for there was no "ascertainably certain" standard for finding "improper professional conduct" under Rule 102(e) in the summer of 1994

> when Marrie and Berry audited Cal Micro. See General Elec. Co. v. EPA, 53 F.3d 1324, 1330 (D.C.Cir.1995). **Fair notice of the standards against which one is to be judged is a fundamental norm of administrative law: "[t]here is no justification for the government depriving citizens of the opportunity to practice their profession without revealing the standard they have been found to violate."** Checkosky II, 139 F.3d at 225-26.

Marrie, 374 F.3d at 381.[13]

(e) SEC's Rule 180 already provides a remedy for the conduct complained of.

Under Rule 180, the SEC already had at its disposal all necessary controls over attorneys shown to engage in witness tampering by exclusion or suspension of the attorney for part or all of the proceeding (with new counsel for the witness) thus obviating any exigent threat to the SEC's administrative process or need for discipline before the state disciplinary process is commenced and completed.

There was also simply no need for the SEC to go to the lengths and depths of condemnation,[14] both public and private, for Rule 180 (17 C.F.R. § 201.180) (formerly 2(3)(f)) provides a straightforward system of exclusion or suspension for the very "contemptuous behavior" of which the SEC complains (*i.e.*, during the course of a proceeding) by having the attorney excluded or suspended for part or all of the duration, with an expedited review

[13]"[W]hen the regulation purports to authorize acts that may frustrate the purposes of the Rule (such as interviewing parties or engaging in settlement discussions), the Chrysler principles should be followed. The agency should establish a nexus between the statutory authorization and the proposed regulation and should subject the regulation to notice and comment procedures (or analogous procedures), when available. Only then can the regulation provide legal authorization for potentially dangerous communications. Otherwise, agencies could unilaterally promulgate guidelines completely exempting their attorneys from the Rule." 67 Indiana Law Journal 549, 585 (1992).

[14]Respondent anticipates moving for reconsideration before the Commission within the appropriate time period to address with specificity the numerous errors made and shown in the record below. This action, by comparison, is directed to the facial defects in the process.

procedure, and adjournment rights for new counsel. Simply put, this is the available administrative remedy enacted only after a proper rule-making process, without prejudice to whatever the state authority should determine on the issue of ethical violations.

§ 201.180 Sanctions.

(a) Contemptuous conduct -

(1) Subject to exclusion or suspension. Contemptuous conduct by any person before the Commission or a hearing officer during any proceeding, including any conference, shall be grounds for the Commission or the hearing officer to:

(i) Exclude that person from such hearing or conference, or any portion thereof; and/or

(ii) Summarily suspend that person from representing others in the proceeding in which such conduct occurred for the duration, or any portion, of the proceeding.

(2) Review procedure. A person excluded from a hearing or conference, or a counsel summarily suspended from practice for the duration or any portion of a proceeding, may seek review of the exclusion or suspension by filing with the Commission, within three days of the exclusion or suspension order, a motion to vacate the order. The Commission shall consider such motion on an expedited basis as provided in §201.500.

(3) Adjournment. Upon motion by a party represented by counsel subject to an order of exclusion or suspension, an adjournment shall be granted to allow the retention of new counsel. In determining the length of an adjournment, the Commission or hearing officer shall consider, in addition to the factors set forth in §201.161, the availability of co-counsel for the party or of other members of a suspended counsel's firm.

(Emphasis added.)

Commissioner Karmel also recognized the issue, and sought to confine Rule 2(e) proceedings to those that directly obstruct justice. She does not mention Rule 180 whether by oversight or by later date of enactment.[15]

> I also recognize that the Commission [through 1979] has brought numerous 2(e) proceedings against attorneys, and that unless the courts or Congress abrogate the rule, the Commission, unfortunately, is unlikely to rescind it. Accordingly, I advocate that the Commission at least confine proceedings against attorneys under Rule 2(e) to cases in which an attorney has improperly conducted himself while personally representing clients before the Commission. Further, the misconduct should thwart the Commission's ability to function or should obstruct administrative justice. **In no case, I believe, should the Commission invoke an equivocal administrative remedy like Rule 2(e) to discipline attorneys for conduct which does not directly threaten its administrative processes.** To do so, is tantamount to setting professional standards for the practice of law.

Keating, Muething & Klekamp, Release No. 15982 (1979) (dissent by Commissioner Karmel).

[15]Rule 180 was ignored by the ALJ and reviewing Commissioners. Both the prosecution and defense in the Harrison Proceeding were well aware of the issues before the hearing commenced and the witness presented. Indeed, Einhorn, who clandestinely recorded the dialogues, bargained with the OGC, indicating that he would use them for impeachment if, and only if the OGC actually produced the witness. These facts as established by the ALJ and followed by the Commissioners show that the party who clearly bargained for witness availability, was the lawyer who had taped plaintiff/petitioner herein without his knowledge, and sought exploitation of the witness and SEC at the hearing. More importantly for the issues at bar, however, avoidance of Rule 180 by design or happenstance, constitutes a serious error, as the rule provides the remedy necessary for the goal of administrative sanctity, without delving deeper into the guilt or innocence of all those involved or any disciplinary review involving an attorney's license. The prosecution, defense and ALJ knew of the issues surrounding the testimony before she was called, and should have suspended plaintiff/petitioner from further representation of her or anyone else in that proceeding, obliging her to get other counsel, and then adjourning and thereafter proceeding on that basis. Proceeding, as all but the plaintiff/petitioner did, is in excess of all proscribed rules.

2. Deferring the SEC's Rule 102 administrative hearings and determinations unless and until the state adjudicatory process is commenced and completed, is well-supported by the SEC's already extant regulations which oblige referral to the state system.

(a) SEC Handbook: Pursuant to the SEC Access Program, Section 24(c) of the Exchange Act, Rule 24c-1 and the SEC Handbook, the SEC is directed to disclose its investigation files to "professional licensing or oversight authorities that are government-sponsored (*e.g.*, bar associations that are part of a state's court system)." This is a clear agency recognition of the existence and priority of New York State's "court system," in distinction from the SEC, a federal agency that is not a member of any such "court system."

(b) The OGC's "Ethics Counsel": Rule 21a, 17 C.F.R. §200.21a, adopted by the SEC in 1995, establishes an Ethics Counsel subject to the oversight of the General Counsel.[16] "[M]atters involving alleged professional misconduct [are] ultimately referable to state professional boards or societies" by the Ethics Counsel, who is also charged with the duty" to "[o]versee investigations and refer findings of professional misconduct to state professional boards or societies." The language used - - "alleged" misconduct, "investigations" and "findings" - - are of critical import, for they speak directly to the duty to *defer to the State* prior to making *determinations, either Initial Determinations or Final Rulings,* as "determinations" and

[16]Evidence of record further proves SEC's partial acknowledgment of its duties under Rule 21a, by referral to the DOJ (but not deferral to state administrative process over disciplinary complaints against attorneys) under its duty to:

> (3) Refer complaints that appear to involve a violation of Federal criminal statutes, and do not appear to be frivolous, to the Inspector General for referral to the Department of Justice under 28 U.S.C. 535.

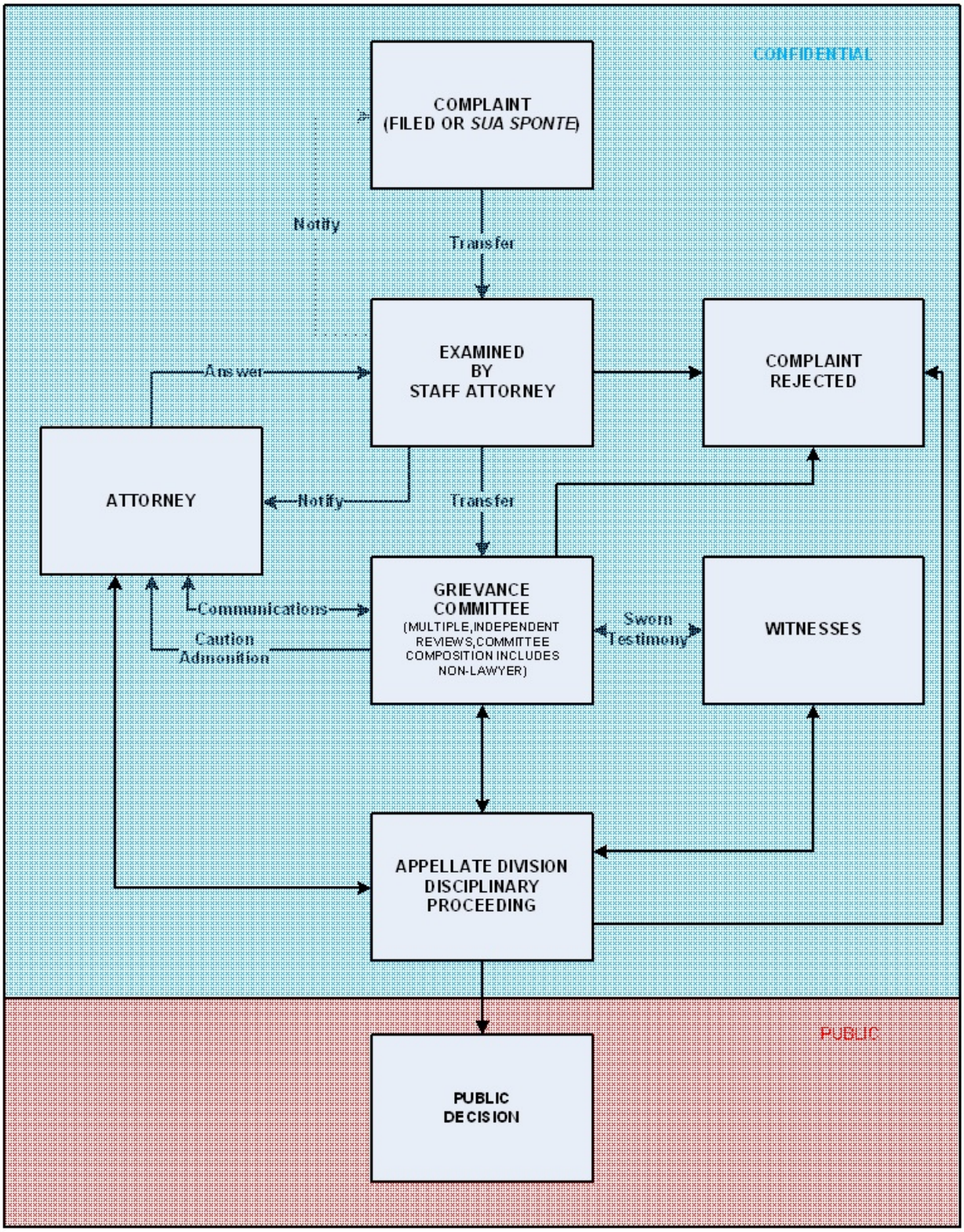
Compliance with the Ethics Counsel's duty to "act as liaison with the Office of the Inspector General on all [referred] matters" may have occurred, or not. In view of the absence of charges by the DOJ, such referral is only relevant to show what has not occurred.

"rulings" occur only after there are "allegations," an "investigation" and "findings" from the investigation, and thus subsequent to referral, liaising, and oversight by the OGC.

3. Deferring to the State Disciplinary Procedure (Committee, Hearing, Judicial Confirmation) before any hearing or determination on ethical violations by the SEC comports with the disparate federal and state procedures and priorities, and is the only mechanism currently available to safeguard competing interests.

(a) Safeguards of State Adjudication:

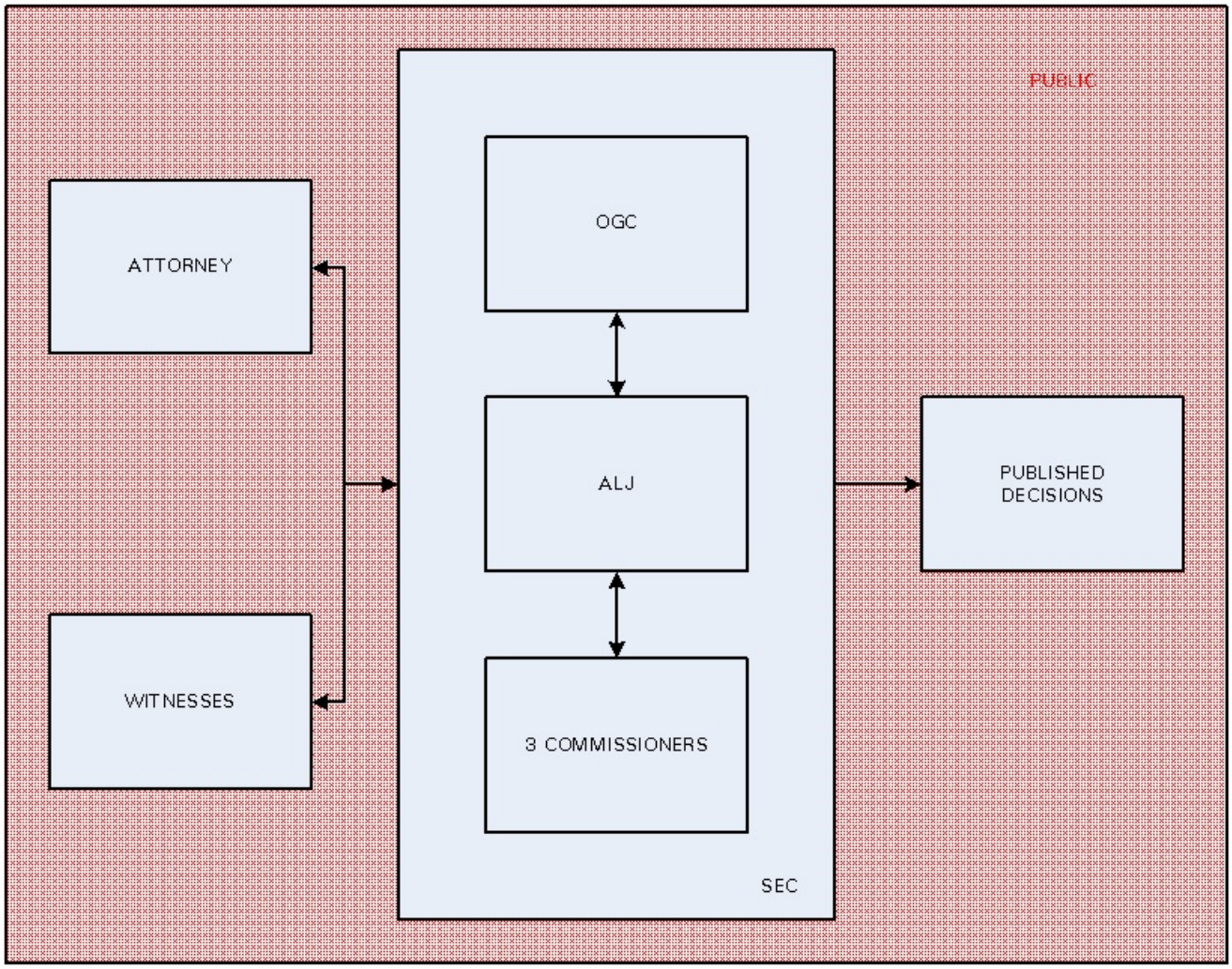
The age-old First Department Disciplinary Procedure is devoted to remedial balance between fundamental rights and public interest, and includes privacy, verification, and, ultimately, judicial determination prior to publication, as shown by the following flow diagram:



NEW YORK STATE ETHICS PROCESS

(b) SEC is ill-equipped:

SEC's ad hoc process possesses none of the safeguards inherent in the state's judicial process for full and fair evaluation of an attorney's alleged ethical misconduct, and inherently places public interest - - publicity - - above any private rights of the attorney, as shown by the flow diagram it employs:



SEC PROCESS

(c) SEC preemption without prior authorization.

By failing to defer to the state's right of priority, the SEC has effectively undermined and publicly humiliated the State and its credibility and authority, nearly forcing an expedited and ill-conceived joinder with the SEC in violation of the State rules and permanently and insurmountably prejudicing the attorney and his reputation. "Chasing the horse back into the barn" is hardly a simply task; however, the relief sought herein should at least go a distance towards leveling the field to permit due care in analysis. Among the relief that plaintiff/petitioner seeks is discovery: for if the DDC's silence is only a matter of lack of knowledge or is a result of its having already declined the matter, then this would speak volumes towards the inherent abuse of authority by the SEC, and be inferentially suggestive of a personal attack on plaintiff. Either way, the 6 ½ years of silence is provocative, and deserving of further investigation.[17]

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[17]It is not as if the U.S. Attorney's Office, with whom the OGC shares attorneys, does not know of the ability to refer, and thereupon to defer and accept a state's adjudicatory role.

> In Kelly, the court referred a United States Attorney's alleged misconduct to state disciplinary authorities. The court subsequently accepted the state board's recommendation that the United States Attorney not be disciplined. United States v. Kelly, 550 F.Supp. 901, 902 (D.Mass. 1982); see also Buffington v. Copeland, 687 F.Supp. 1089, 1104 n.12 (W.D. Tex. 1988) (citing Waters with approval for the proposition that the "[s]tate bar had authority to investigate alleged misconduct of federal prosecutor"); Cleckley, Clearly Erroneous: The Fourth Circuit's Decision to Uphold Removal of a State-Bar Disciplinary Proceeding Under the Federal-Officer Removal Statute, 92 W.VA.L.REV. 577, 607 (1990) (courts consistently say federal and state government attorneys are subject to state disciplinary proceedings); id. at n.138 (listing cases).

67 Indiana Law Journal 549 at fn 335 (1992).

There is no question, we submit, that the SEC exceeded the authority granted by Congress in unilaterally finding an intentional violation of New York State's Disciplinary Rules in the absence of a prior New York State Judicial ruling, frustrating the state's ability to ever fully or fairly consider the same (unless it has already), taunting the State to simply agree without more and rendering it powerless, and thus warranting an immediate, temporary, preliminary and permanent stay of the proceeding before the SEC and suspension of further negative publicity by the SEC.

B. The procedure employed by the SEC is a wrongful encroachment upon fundamental and Constitutionally-Protected Rights that belong solely to the state judiciary within the state's disciplinary system.

In her dissent in Keating, Muething & Klekamp, Release No. 15982 (1979), Commissioner Karmel eerily forewarns of the "evil" in the SEC's discipline of an attorney, quoting Justice Powell's observation that such a federal agency action oversteps statutory authority, and violates Constitutional separation of powers through the assumption of adjudicatory, judicial powers that are relegated to the federal and state courts.

> Rather than confronting the hard political chores involved, Congress is encouraged to shirk its constitutional obligation and leave the issue to the courts to decide. When this happens, the legislative process with its public scrutiny and participation has been bypassed, with attendant prejudice to everyone concerned. [FN11]
>
> FN11: Cannon v. University of Chicago, 47 U.S.L.W. 4549, 4566 (May 14, 1979) (dissent) (citation omitted). The separation of powers rationale on which Mr. Justice Powell rests his conclusion that the implication of private rights is improper, is also applicable to the disciplining of attorneys by a federal agency. General jurisdiction to regulate the conduct of attorneys resides in the courts and its delegated authorities. The Commission is neither a court nor a designated authority of a court. Although it may act as a tribunal in adjudicatory proceedings, it is primarily a prosecutorial and rule making body. The power of a federal administrative

> agency to control by disciplinary action attorneys who appear before it is not, as it is with a court of general jurisdiction, an inherent general power. To the extent the power exists, it is given by the legislature to such an agency. Absent a specific grant of statutory authority, the disciplining of attorneys traditionally has been the responsibility of the judiciary. To the extent the Commission disciplines attorneys, it impinges upon the authority of the federal and state courts to regulate the conduct of the bar.

(Emphasis supplied.)

It has long been acknowledged by the U.S. Supreme Court that states have ultimate authority regarding ethics and lawyers.

> The United States Supreme Court has recognized that the states have a strong interest in governing the conduct of attorneys who practice in the state. Thus in Leis v. Flynt, the Court stated that the licensing and regulation of lawyers had been left exclusively to the states "since the founding of the Republic." In Ohralik v. Ohio State Bar Association, the Court found that the states bore a "special responsibility for maintaining standards among members of the licensed professions" and the states' interest in the regulation of lawyers was "especially great" because lawyers were essential to the administration of justice. In Middlesex County Ethics Committee v. Garden State Bar Association, the Court applied the Younger abstention doctrine to a state disciplinary proceeding because of the important state interests involved." (Footnotes omitted.)

67 Indiana Law Journal 549, 624-625 (1992); Middlesex County Ethics Committee v. Garden State Bar Ass'n, 457 U.S. 423, 102 S.Ct. 2515, 1522 (1982) (recognizing that the state "has an extremely important interest in maintaining and assuring the professional conduct of the attorneys it licenses"); see also Mason v. Departmental Disciplinary Committee, 894 F.2d 512 (2d Cir. 1990) (federal court deferring to state regulatory scheme of attorney discipline).

While this record is not the way to go about it, there has been much debate about "federalizing" the rules of ethics. For example, in an article published in 2003 by the

Georgetown Journal of Legal Ethics, SEC Chairman Harvey Pitt explains the "risks inherent," foreboding the very case at bar:

> Harvey Pitt, as past SEC chairman, thus seemed to accept his new authority as a needed step. At the same time, he also acknowledged the inherent risks of federalization of ethics rules:
>
> > One need not oppose federalizing corporate governance standards to recognize there are risks inherent in giving an agency that sometimes faces corporate lawyers as adversaries the ability to regulate whether and how they satisfy our notions of appropriate professional behavior.

16 Geo. J. Legal Ethics 707, 715. Laffitee, Elizabeth, "The Potential Effects of SEC Regulation of Attorney Conduct under the Sarbanes-Oxley Act," Georgetown Journal of Legal Ethics (2003). Ms. Laffitee further observes, even with respect to Rule 205:

> While the SEC tools for sanctioning attorneys are extensive, the SEC has generally been reluctant to sanction attorney conduct, leaving the regulation of professional conduct to the state bars. However, with the introduction of Sarbanes-Oxley's requirement that the SEC regulate the professional conduct of attorneys appearing before it, the SEC may retreat from its laissez faire approach in In re Carter & Johnson and enforce section 307 regulations through Rule 2(e) proceedings. . . .
>
> The SEC regulation of attorney conduct under section 307 of the Sarbanes-Oxley Act raises concerns of preemption with state law and the potential effects of the regulation on the practice of securities and in-house law.

(Footnotes omitted.) Id., at 725.

C. In comparison to the SEC, the USPTO, like the Federal courts, has its own adjudicatory functions, with a bar admission process distinct and not reliant upon that of the states, as well as its own Code of Ethics and authority and process over purported violations.

Where Congress intended to endow a federal agency, as it did with the U.S. Patent and Trademark Office ("USPTO"), with some portion of the regulatory power accorded to the Departmental Disciplinary Committee, it knew how to do so.[18] Appearance before the USPTO is governed by 35 U.S.C. 31[19], et seq., deriving the specific exclusion provided this federal agency unlike any other, under 5 U.S.C. § 500(e).[20] Like federal courts and the state bar and much unlike the SEC, the USPTO has its own admissions standards (see Kroll v. Finerty, 242 F.3d 1359, 1364-65 (C.A.F.C. 2001)[21], its own bar and role of persons exclusively authorized to practice before it (see Sperry v. Florida[22], 373 U.S. 379, 389-90 (1963)), **its own disciplinary Cannons and Code of Professional Responsibility** (see Anderson v. Epstein, 59 U.S.P.Q.2d

[18]Mitchell A. Stein, Esq., co-counsel in this proceeding, has been a member of the U.S. Patent bar since 1982, Registration Number 30,978, and is hence keenly aware of the unique elements of qualification and exclusivity before that federal agency.

[19]In this regard, the Patent Commissioner prescribes regulations, but such are "subject to the approval of the Secretary of Commerce." 35 U.S.C. § 31.

[20]5 U.S.C. § 500(e) provides: "[s]ubsections (b)-(d) of this section do not apply to practice before the United States Patent and Trademark Office with respect to patent matters that continue to be covered by chapter 3 (sections 31-33) of title 35."

[21]Of moment, the Court of Appeals for the Federal Circuit found that even with the USPTO's entire set and system of governance, it did not preempt the state's self-autonomy on determining compliance with the state canons of ethics. Thus, even if the SEC were to somehow justify an inherent legislative basis to adopt state rules of ethics, this alone would not permit federal preemption enabling it to determine, on its own, compliance with those state rules.

[22]Sperry permits federal preemption over state bar requirements for members of the Patent Bar, but only insofar as they are practicing before the Patent Bar. Once again, the Supreme Court has maintained very clear delineation between executive and judicial powers, and state and federal authorities, blended with disregard by the SEC in the case at bar.

(BNA) 1280 (2001)) its own and specific rules regulating the practice of patent law before it and governing the suspension or expulsion of persons from practice before it (see 35 U.S. §§ 2(b)(2)(D) and 32 "Suspension or exclusion from practice - The Director may, after notice and opportunity for a hearing suspend or exclude, either generally or in any particular case, from further practice before the Patent and Trademark Office, any person, agent, or attorney shown to be incompetent or disreputable, or guilty of gross misconduct, or who does not comply with the regulations established under section 2(b)(2)(D) of this title [35 USCS § 2(b)(2)(D)], or who shall, by word, circular, letter, or advertising, with intent to defraud in any manner, deceive, mislead, or threaten any applicant or prospective applicant, or other person having immediate or prospective business before the Office").

But no such action or statutory framework is present here. Respectfully, should the SEC wish the same authority as the USPTO for those appearing before it, significant Congressional action is a predicate under the Administrative Procedures Act and otherwise, which is clearly and unequivocally missing. Moreover, whether there would be similar congressional action is far from doubt as the governance of the USPTO, unlike that of the SEC, derives directly from the Constitution.[23]

[23]"The Congress shall have Power *** To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Article I, Clause 8. Such language originates as far back as the Statute of Monopolies of 1624, enacted by Parliament.

D. Error in the analysis of scienter under the State Disciplinary Rules demonstrates the inability and continued lack of expertise of the SEC in this area.

The Commission followed the Administrative Law Judge in determining violations of DR 1-102(A)(4), DR 1-102(A)(5) and DR 1-102(A)(7), determining that the "conduct was egregious, recurrent, and reflected a high degree of scienter" (Ex. A at 31), and upon this basis increased the punishment from a nine (9) month suspension to permanent. Nowhere can one find the published standards upon which this determination was based in advance thereof, and no student of the law would position a legal brief, let alone a determination that permanently tarnishes a New York lawyer with unethical conduct, on the basis of a legal dictionary definition. Nowhere, however, but before the SEC.

That the SEC lacks any legal standard upon which to render plenary findings, and acted in excess of authority, is shown by, among other things, its distinct and consistent reliance upon Black's Law Dictionary as the source of the standard of law concerning "intent," "intentional wrong" (Initial Decision, Ex. B, at 24), "scienter" (Initial Decision at 26), "egregious" (Initial Decision, Ex. B, at 32), "fraud" (Initial Decision at 32), and "witness tampering" (Initial Decision, Ex. B at 33).

These terms are not found in New York's Canons of Ethics, nor can they be found in any rules published by the SEC upon which the ethics of lawyers may be adjudged. In short, these terms, and their definitions, have been adopted by the SEC ad hoc and in connection with the determination of plaintiff's compliance with New York's disciplinary rules. Adoption of such rules, ad hoc is grounds, under the SEC's own interpretation, for vacatur. In re Carter, supra, at 84,169-70. In rejecting the implied adoption of the ABA disciplinary rules, the Commission in Carter noted that it was not free to apply those admittedly accepted norms of

professional conduct without prior formal announcement; as the application of those rules had not been "firmly and unambiguously established." Id. at 84,170. In short, the SEC could not bypass well-established rule-making particularly where they encroach on the precise regulatory framework set up by the authority that licensed the plaintiff.

II

A STAY OF ALL SEC PROCEEDINGS AND PUBLIC RELEASES IN CONNECTION WITH THIS MATTER IS REQUIRED IN LIGHT OF THE THREAT OF CONTINUED, IRREPARABLE HARM, BALANCE OF THE EQUITIES, AND CONSENT (WITHOUT PREJUDICE) OF RESPONDENT

The required showing for granting a preliminary injunction or temporary restraining order are familiar:

> In order to justify a preliminary injunction, a movant must demonstrate 1) irreparable harm absent injunctive relief; 2) "either a likelihood of success on the merits, or a serious question going to the merits to make them a fair ground for trial, with a balance of hardships tipping decidedly in the plaintiff's favor," id.; and 3) that the public's interest weighs in favor of granting an injunction. Winter v. Natural Res. Def. Council, Inc., 129 S. Ct. 365, 374, 172 L. Ed. 2d 249 (2008). "When, as here, the moving party seeks a preliminary injunction that will affect government action taken in the public interest pursuant to a statutory or regulatory scheme, the injunction should be granted only if the moving party meets the more rigorous likelihood-of-success standard." County of Nassau, N.Y. v. Leavitt, 524 F.3d 408, 414 (2d Cir. 2008) (brackets and internal quotation marks omitted).

Metropolitan Taxicab Board of Trade v. City of New York, 615 F.3d 152, 156 (2d Cir. 2010).

Here, plaintiff has been irreparably harmed and can and has shown a likelihood of success on the merits of his claim that the Commission exceeded its powers and usurped the duties, roles, responsibilities and processes of the New York Departmental Disciplinary Committee, and the First Department, Appellate Division, as the sole authority for determination

and publication of decision effecting an attorney's compliance with the Canons of Ethics. Without doubt, the November 10, 2010 Commission and Order have already harmed plaintiff, and only an injunction can protect continued, irreparable harm. A lawyer's "most precious asset is [his] professional reputation." Cooter & Gell v. Hartmax Corp., 496 U.S. 384, 413 (1990) (Justice Stevens, concurring and dissenting in part) The plaintiff's professional reputation has now been tarnished perhaps beyond repair and harm will likely continue to accrue to him if the SEC publishes further releases and as further publications report on his case.[24] Nevertheless the entry of an injunction will put a plug in the dam and prevent further tarnishment while the matter of the Commission's authority to sanction the plaintiff as it has is fully considered and determined by the Court and while the Departmental Disciplinary Committee acts or continues not to take action. Clearly, there is no harm to the SEC in such an injunction, as it may have its ruling if, and only if, it may prove its authority, and such a situational delay cannot have much significance, where, as here, the SEC decision is already some 6 ½ year after the purported conduct has occurred.

To show likelihood of success plaintiff must demonstrate that it is more likely than not to succeed on its underlying claims or, put differently, show a greater than fifty percent probability of success on the merits. See Citigroup Global Markets, Inc. v. VCG Special Opportunities Master Fund Limited, 598 F.3d 30 (2d Cir. 2010), citing Munaf v. Geren, 553 U.S. 674 (2008); Nken v. Holder, __ U.S. __, 129 S. Ct. 1749 (2009); and Winter v. National Resources Defense Council, Inc., __ U.S. __, 129, S.Ct. 365 (2008). Respectfully, there is

[24]Irreparable harm should be presumed here, as it is in the context of trademark infringement cases, since there is no question of the identity of the lawyer who is the subject of the publication, beyond mere likelihood of similarity. See, e.g., Tough Traveler, Ltd. v. Outbound Prods., 60 F.3d 964, 967-68 (2d Cir.1995).

demonstrated more than a likelihood of success on this record. The SEC has boldly arrogated to themselves a power they do not have, without a hint of or any effort to seek and secure proper rule-making, in violation of their acknowledged prior practice, their own rules, and the pre-existing statutory framework of the New York State disciplinary rules.

Balancing of the equities also favors entry of a preliminary injunction against the SEC. There has been and can be no prejudice to the Commission by the entry of an temporary restraining order and/or preliminary injunction because the plaintiff has agreed not to appear or practice before the Commission (without prejudice) even if the requested provisional relief is granted.

III

THE SEC'S DETERMINATIONS MUST BE VACATED, AND ITS PROCEDURE JUDICIALLY NARROWED

In recently upholding the right of the District Court to entertain and grant equitable relief against the SEC, the Supreme Court restated basic principles of law, equally applicable to the case at bar. Admittedly, determination of an attorney's ethical duties under a state code of ethics lies outside the SEC's "expertise" as it has stated, time and again. In such circumstances, injunctive relief can be had at the District Court level, as the remedies under the APA do not limit this Court's jurisdictional right:

> But we presume that Congress does not intend to limit jurisdiction if "a finding of preclusion could foreclose all meaningful judicial review"; if the suit is "wholly collateral to a statute's review provisions"; and if the claims are "outside the agency's expertise." Thunder Basin, supra, at 212-213, 114 S.Ct. 771 (internal quotation marks omitted). These considerations point against any limitation on review here.

(Emphasis added.) Free Enterprise Fund v. Public Accounting Oversight Board, et al., 130 S.Ct. 3138, 3149 (2010).

Nor must plaintiff/petitioner await execution by the SEC in order to bring the claim.

> We normally do not require plaintiffs to "bet the farm ... by taking the violative action" before "testing the validity of the law," MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 129, 127 S.Ct. 764, 166 L.Ed.2d 604 (2007); accord, Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), and we do not consider this a "meaningful" avenue of relief. Thunder Basin, 510 U.S., at 212, 114 S.Ct. 771.
>
> Petitioners' constitutional claims are also outside the Commission's competence and expertise. In Thunder Basin, the petitioner's primary claims were statutory; "at root ... [they] ar[o]se under the Mine Act and f[e]ll squarely within the [agency's] expertise," given that the agency had "extensive experience" on the issue and had "recently addressed the precise ... claims presented." Id., at 214-215, 114 S.Ct. 771. Likewise, in United States v. Ruzicka, 329 U.S. 287, 67 S.Ct. 207, 91 L.Ed. 290 (1946), on which the Government relies, we reserved for the agency fact-bound inquiries that, even if "formulated in constitutional terms," rested ultimately on "factors that call for [an] understanding of the milk industry," to which the Court made no pretensions. Id., at 294, 67 S.Ct. 207. No similar expertise is required here, and the statutory questions involved do not require "technical considerations of [agency] policy." Johnson v. Robison, 415 U.S. 361, 373, 94 S.Ct. 1160, 39 L.Ed.2d 389 (1974). They are instead standard questions of administrative law, which the courts a

(Emphasis added.) Id.

Thus, regardless of which specific provisions of the Constitution are implicated here (whether separation of powers, or delegation, due process, or other), the SEC cannot dispute the right of plaintiff/petitioner to seek equitable relief as a general matter, based upon historical underpinnings and doctrinal law:

> The Government does not appear to dispute such a right to relief as a general matter, without regard to the particular constitutional

> provisions at issue here. See, e.g., Correctional Services Corp. v. Malesko, 534 U.S. 61, 74, 122 S.Ct. 515, 151 L.Ed.2d 456 (2001) (equitable relief "has long been recognized as the proper means for preventing entities from acting unconstitutionally"); Bell v. Hood, 327 U.S. 678, 684, 66 S.Ct. 773, 90 L.Ed. 939 (1946) ("[I]t is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution"); see also Ex parte Young, 209 U.S. 123, 149, 165, 167, 28 S.Ct. 441, 52 L.Ed. 714 (1908). If the Government's point is that an Appointments Clause or separation-of-powers claim should be treated differently than every other constitutional claim, it offers no reason and cites no authority why that might be so.

Id.

Accordingly, plaintiff is with this Memorandum of law and the Complaint filed herewith moving by Order to Show Cause for an Order of this Court, among other requested relief:

(1) temporarily and permanently staying and enjoining the Commission enforcement action against him, entitled In the Matter of Steven Altman, Esq., Admin. Proc. File No. 2-12944;

(2) declaring that the Commission administrative proceeding action against plaintiff is unconstitutional; and

(3) directing the Commission to (a) vacate the November 10, 2010 Opinion and Order and January 14, 2009 Initial Decision in Admin Proc. File No. 2-12944, and (b) publish a decision on its website announcing that those decision have been vacated, that they have no force or effect, and that their prior issuance should be deemed not to in any way negatively reflect on the plaintiff or his fitness to practice law.

CONCLUSION

This case is a first of its kind only insofar as the discipline is concerned, but not insofar as an overreach by a federal agency or the executive branch to which it belongs. The SEC has parted from its historical self-imposed injunction against entree into this area, where it admittedly lacks expertise, standards or an infra-structure that can compare to that provided by the state adjudicatory system. It has violated its promise in 1988 upon which it succeeded in rendering Rule 102 proceedings public. Simply put, consideration of whether the plaintiff/petitioner has violated the state Canons of Ethics, whether he should be disciplined under those very Canons and if so, to what extent, is not within the authority given to the SEC or federally preempted, and lies exclusively within the province of New York's Judiciary. Accordingly, the SEC must be stayed in this matter, and its determinations vacated, as they are beyond the color of the law.

Respectfully submitted,

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