IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

DONALD ROBERT TESCHER,

Respondent.
_____/

Supreme Court Case
No. SC16-2072

Florida Bar File
No. 2016-50,292 (17H)

RESPONDENT'S INITIAL BRIEF

On Petition for Review of Report of Referee

DAVID B. ROTHMAN
Florida Bar No.: 240273
dbr@rothmanlawyers.com
JEANNE T. MELENDEZ
Florida Bar No.: 0027571
jtm@rothmanlawyers.com
ROTHMAN & ASSOCIATES, P.A.
200 S. Biscayne Blvd., Ste 2770
Miami, FL 33131

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PREFACE

The following record designations will be used:

(R___) – Record of Proceedings;

(TR__) – Transcript of Final Hearing;

(R. Exh. __) – Respondent's Exhibits from Final Hearing;

ROR __) – Report of Referee.

JURISDICTIONAL STATEMENT

Respondent is petitioning for review of the Report of Referee. This Court has jurisdiction pursuant to Article V, §15, Florida Constitution and Rule 3-7.7(a)(1), Rules Regulating The Florida Bar (RRTFB).

REQUEST FOR ORAL ARGUMENT

Respondent, pursuant to Rule 3-7.7(c)(4), RRTFB, respectfully requests the opportunity to present oral argument before the Court.

STATEMENT OF THE CASE AND FACTS

Proceedings Before Referee

This Bar disciplinary action was brought by The Florida Bar against Respondent Donald Tescher based on Respondent entering into a Consent Judgment in a civil proceeding filed against him by the United States Securities and Exchange Commission (SEC), alleging insider trading. On December 19, 2016, Respondent filed an Answer to the Bar's Complaint, admitting his conduct

and that he was in violation of the Rules Regulating The Florida Bar. (R 4)

On March 10, 2017, The Florida Bar filed a Motion for Partial Summary Judgment. (R 17) On April 26, 2017, based upon the uncontested material facts, as stipulated by both parties, this Referee entered an order granting the Bar's Motion and finding Respondent violated the following Rules Regulating The Florida Bar: 3-4.3; 4-1.8(a); 4-8.4(a); 4-8.4(b); and 4-8.4(c). (R 26)

On May 4, 2017, a final hearing was held in this matter to determine the appropriate discipline. A total of four (4) exhibits were admitted and considered by the Referee. (R. Exh. 1 through 4) The Report of Referee was signed by the Referee and docketed with this Court on August 7, 2017. The Referee recommended Respondent be suspended for one (1) year. Respondent filed his Petition for Review on October 5, 2017.

Don Tescher: Personal Background

Donald Tescher grew up in Miami, Florida. From the age of three, when his father died, Mr. Tescher was raised by a single-mother who worked as a sales person at a local department store and struggled to make ends meet and support him and his siblings. (TR 38) Due to his mother's limited financial means, Mr. Tescher had to work throughout high school, college and law school. (TR 39-41)

In 1966, Mr. Tescher earned his Bachelor's degree in accounting; in 1969, he graduated from law school; and, in 1973, he earned his Master of Laws in

Taxation from New York University. (TR 42) (R. Exh. 3)

Thereafter, Mr. Tescher returned to South Florida where he has been practicing for more than forty years. He earned the respect of his peers and clients, as evidenced by his AV rating in the Martindale-Hubbell Law Directory. He built a tax practice, focusing on wealth transfer planning for high net-worth individuals and families, including gift and estate tax planning, business succession planning, charitable planning, corporate, limited partnership and asset protection planning, life insurance planning, post-mortem planning, probate administration and other tax related matters. Over the years, his legal skills and commitment to clients and the profession have been recognized by numerous legal publications, as well as the Tax Section of The Florida Bar. (R. Exh. 3)

Factual Summary of Underlying Conduct

On November 8, 2011, Mr. Tescher attended an end-of-year tax and estate planning meeting with a long-time client, who at that time was on the Board of Directors of Pharmasset, a publicly-traded pharmaceutical company. The meeting was also attended by Robert Spallina, Mr. Tescher's then law partner, as well as two accountants and the client's financial advisor. For the purpose of obtaining legal, tax and financial advice, the client informed them Pharmasset was in negotiations to be acquired by another company and that, if the acquisition went through, the client would realize a significant profit. Mr. Tescher knew the

information was non-public and should not be used in trading in the stock of the company. (ROR 2-3)

Less than one hour after the end of the November 8, 2011, meeting, Mr. Tescher telephoned his financial manager, and, without mentioning anything about the information he learned from his client, asked him to purchase $10,000 worth of Pharmasset stock. 150 shares of Pharmasset stock were purchased in an IRA account held by Mr. Tescher in his own name at a price of approximately $67.78 per share. (ROR 3) Mr. Tescher used the client's information for his own benefit, but never disclosed the information to anyone. He did not tell his family. He did not tell his friends. He did not tell anyone. (TR 63)

On November 21, 2011, following the public announcement that Pharmasset was being acquired by a company named Gilead, the price of Pharmasset stock rose to $134.14, an increase of $61.47, or 84.6%, from its closing price on Friday, November 18, 2011, the previous trading day. After the announcement on November 21, 2011, Mr. Tescher sold the 150 shares of Pharmasset stock in his IRA account at an average price of $134.29 per share, resulting in a profit of $9,937. (ROR 4)

In April 2013, when Mr. Tescher was informed of a federal investigation, he immediately cooperated with federal authorities. He was interviewed by FBI agents and acknowledged from the very beginning that he had purchased

Pharmasset stock based upon information he learned at the year-end meeting with his client. (TR 61-62) Mr. Tescher produced all non-privileged documents requested by the Government. (ROR 4)

On June 5, 2014, he entered into a Consent Judgment with the SEC. Over a year later, on September 28, 2015, the SEC filed its Complaint along with the Consent Judgment. Final Judgment was entered by the Court on October 1, 2015. (R. Exh. 2) As agreed in the Consent Judgment, Mr. Tescher disgorged his profits and paid interest and a civil penalty. All totaled, he paid the SEC $20,564.00. (ROR 4-5)

Mitigation Evidence

At the final hearing, the Referee heard testimony from the following witnesses:

1. Jennifer Tescher:

Mr. Tescher's daughter, Jennifer, a mother of three who runs a non-profit organization in Chicago, testified about how her father loves the law, working with clients and helping others. (TR 19-21) She testified regarding the amount of care and devotion he has exhibited towards his clients. (TR 21) When she learned about her father's insider trading, she was taken aback and surprised because, based on his past conduct, it was entirely out of character. (TR 21-22) When her father told her about it, he was embarrassed, remorseful, made no excuses and

owned up to it. (TR 21-22) She admitted she was disappointed by what he had done, but proud of how he has handled himself after his conduct was disclosed. (TR 23-24)

Ms. Tescher recounted that the SEC investigation and settlement was a long process and her father thought he could move on once it was concluded. (TR 22) However, after the SEC issued a press release, which was picked up by the Wall Street Journal and other publications, as a result, banks informed him they could no longer do business with him and he lost a number of clients. (TR 22-23) Not only has her father's conduct taken a toll on his business, it has taken a personal toll on him and his health. (TR 23) But she is proud that her father continues to contribute to the community and to the profession, even to the point of attending professional meetings at which every lawyer in the room knows about her father's insider trading and the SEC case. (TR 24)

2. Melvin Black:

Mr. Black is a semi-retired lawyer, who practices in the areas of civil rights and criminal defense. (TR 28) He and Mr. Tescher have been close personal friends for nearly 60 years, since they attended the same high school. They were roommates when they attended the University of Florida. (TR 29) They both came from limited means families and struggled financially through college. (TR 29) In college, Mr. Black lost his sister to cancer and, then, was in a car accident

in which he almost died. Mr. Tescher helped him through that difficult time in his life with his compassion and organizational abilities. (TR 29-30)

Mr. Black testified about Mr. Tescher's community service throughout the years, particularly when their synagogue was splitting up and Mr. Tescher counseled the members through it. (TR 30) He also testified regarding Mr. Tescher's service on Florida Bar Committees and his mentoring of other lawyers. (TR 32) Mr. Black described Mr. Tescher as compassionate and a hard worker with superior intelligence and a broad knowledge of estate matters. (TR 32)

Mr. Tescher called Mr. Black when he was contacted by the FBI agents. Mr. Black acted as a sounding board and helped Mr. Tescher find counsel to represent him. According to Mr. Black, Mr. Tescher was crushed and upset at himself for what he had done. Mr. Tescher never blamed anyone else and exhibited genuine remorse. (TR 32-33)

Despite Mr. Tescher's conduct, Mr. Black has the highest regard for Mr. Tescher's integrity and testified, "I trust Don." (TR 34) He believes Mr. Tescher's conduct was isolated and aberrational. (TR 34) He also testified that a long suspension would be a "game ender" for Mr. Tescher's practice. (TR 36)

3. Elliot Hahn, Ph.D:

Dr. Hahn, who has advanced degrees in Chemistry and, over the course of many years, has served in an executive capacity and as a board member for several

pharmaceutical companies, is the client whose confidential information was used by Mr. Tescher when he decided to purchase the stock in Pharmasset. Mr. Tescher has been doing estate planning for Dr. Hahn and his wife, children and grandchildren for the past 25 years. (TR 83-86)

Dr. Hahn learned Mr. Tescher had used his information to purchase Pharmasset stock when he was asked to provide testimony relating to insider trading activities by several individuals. (TR 86-87) Dr. Hahn testified that he engaged counsel to attend his interviews with the FBI and SEC. (TR 92)

Mr. Tescher called Dr. Hahn to apologize for what he had done. (TR 87) According to Dr. Hahn, Mr. Tescher was "sincerely remorseful" and never tried to shirk his responsibility. (TR 87-88) Dr. Hahn said he was upset and disappointed, but he did not view it as a betrayal. (TR 88) According to Dr. Hahn, he truly believes Mr. Tescher never acted on any other information. (TR 88-89)

Dr. Hahn did not terminate Mr. Tescher's representation. He continues to have confidence in Mr. Tescher's capabilities and advice. (TR 88-89) He views what Mr. Tescher did as his one failing. (TR 89) According to Dr. Hahn, if Mr. Tescher is suspended for a lengthy period of time, he will need to look for a new attorney which would negatively impact him and his family, who Mr. Tescher has advised for 25 years. It will be both time consuming and costly for him to hire

another attorney, who will need to learn all the details of his and his family's estate. (TR 90-91)

4. Marvin Hollub:

Mr. Hollub is a retired owner of a construction company in Miami, which is now run by his children and grandchildren. (TR 94-95) Mr. Tescher has represented Mr. Hollub and his family for 30 years. (TR 95) According to Mr. Hollub, Mr. Tescher is more than his attorney–he has become part of the family. (TR 96)

According to Mr. Hollub, he does not read the news and found out about Mr. Tescher's insider trading when Mr. Tescher called him and admitted he did something wrong. (TR 96-97) When Mr. Tescher told him he would understand if he wanted to hire another attorney, he immediately responded "absolutely not." (TR 97)

According to Mr. Hollub, he dreads thinking about the possibility of Mr. Tescher not being able to continue as his attorney. (TR 96) Mr. Hollub became noticeably upset and emotional when testifying. He claimed it will be an "impossible situation" for him and other clients, who rely on Mr. Tescher's representation, as the work Mr. Tescher does is significantly different than other attorneys. (TR 96-97) Mr. Hollub felt it was important to take into consideration that Mr. Tescher has lived an exemplary life and done good works for his clients,

their families and the community. (TR 99-100) He also expressed concern for the clients who stayed with Mr. Tescher, who may need to hire new counsel in the event Mr. Tescher cannot represent them. (TR 100)

5. Lauren Detzel:

Ms. Detzel is a member of The Florida Bar and met Mr. Tescher in 1980 when she joined The Florida Bar Tax Section and attended her first meeting. (TR 102) According to Ms. Detzel, Mr. Tescher took her under his wing and has been but one of the many attorneys Mr. Tescher has mentored over the years. (TR 109) In addition, they serve together on The Florida Bar Real Property, Probate & Trust Law (RPPTL) Section. (TR 103) They are both founding members of the Florida Tax Institute. (TR 103-104) According to Ms. Detzel, Mr. Tescher is one of the most caring and giving individuals she has ever met, who gives freely of his professional time, speeding hundreds of hours every single year giving back to the community and The Florida Bar. (TR 108, 111)

Ms. Detzel testified she worked with Mr. Tescher on drafting many pieces of legislation. (TR 105) For instance, they were successful in getting the corporate limited liability company (LLC) income tax repealed. (TR 107-108) Of particular note was their work in drafting legislation to protect the spousal elective share. (TR 105) They worked on it for three years and other states have replicated it in passing their own legislation. (TR 106) Fifteen years after passage of the elective

share legislation, the provisions needed to be tweaked. For the past three years, Ms. Detzel and Mr. Tescher worked on revisions, which were recently passed by the Florida legislature and sent to the Governor for his signature. (TR 106-107) She described their work on legislation as "very time consuming," but "a labor of love" done for the good of Florida's citizens and lawyers. (TR 105)

Ms. Detzel was surprised when she learned of Mr. Tescher's insider trading. (TR 109) According to her, such conduct is an "aberration" from the conduct she has seen from Mr. Tescher before and since the conduct in question. (TR 110) She has always known him to be a person of integrity who puts the client first, even when it is not in his own best interest. (TR 110) According to Ms. Detzel, the SEC case was "very public" and the bad publicity has been hard on Mr. Tescher. (TR 111-112)

Ms. Detzel has the same type of practice as Mr. Tescher. According to Ms. Detzel, a lengthy suspension will be the equivalent of termination of Mr. Tescher's practice as it would be difficult for the clients to transition back after hiring another attorney. Given Mr. Tescher's age (72 years old), he could not start all over again. (TR 112-113) A suspension would be a hardship on his clients. The clients, who have been with him for years, count on Mr. Tescher being there to help them when a need arises. (TR 113)

6. Donald Tescher:

Mr. Tescher testified and freely admitted his conduct. He knew it was wrong. (TR 59) He knew he would earn a profit on the trade. (TR 58) He testified that he did not need the money. (TR 58) He could not easily answer why he had done something so stupid. (TR 59) From the time he was contacted by the FBI and the SEC, he has never denied what he had done. (TR 61-62) According to Mr. Tescher, he has never engaged in insider trading before and will never do so again. (TR 72) Mr. Tescher did not blame anyone but himself for what he had done. (TR 72)

Mr. Tescher signed the SEC Consent Judgment in June 2014 and put approximately $20,000 in trust with his attorney for payment to the SEC. (TR 46, 70) One and a half years later, on October 1, 2015, the SEC filed the Civil Complaint along with the Consent Judgment. (TR 46, 70) (R. Exh. 2)

Following entry of the SEC Consent Judgment, articles appeared in newspapers and online. (TR 66-69) (R. Exh. 1) Thereafter, Mr. Tescher began losing clients. (TR 69) Many of his clients with positions in publically held companies had to terminate his representation due to policies of the companies. (TR 69) Mr. Tescher has been open in his discussions with his clients about what he did. (TR 77) Approximately one half of his clients are now gone and he has virtually no new referrals due to the bad publicity. (TR 74, 76) He is grateful for

the understanding and support he has received from his family and the clients who stayed with him. (TR 77-78)

Mr. Tescher admitted he let a lot of people down and that his conduct clearly has a negative impact on the profession. (TR 77-78) He expressed remorse and stated he would like an opportunity to re-establish his practice. (TR 78)

Character Affidavits (R. Exh. 4) from the following individuals were admitted into evidence:[1]

1. Michael Dribin:

Mr. Dribin is a member of The Florida Bar and has known Mr. Tescher for more than 40 years. In his Affidavit, Mr. Dribin provided details regarding Mr. Tescher's extensive service to The Florida Bar and the legal profession. Mr. Dribin is aware Mr. Tescher has admitted to insider trading and entered into a Consent Judgment with the SEC. According to Mr. Dribin, Mr. Tescher's conduct was an "anomaly" and "so out of character." (R. Exh. 4, p. 3) Mr. Dribin wrote as follows in his Affidavit:

> During the forty years plus I have known Mr. Tescher, the SEC action is the only such action of that nature which has been brought to my attention and, indeed,

[1] In addition, Support Letters from the following individuals were admitted into evidence: Norman Moscowitz, Elliot Hahn, Ph.D, Mel Black, Elaine Bucher; Richard B. Comiter; Lauren Detzel; Marvin Hollub; Monte Kane, CPA; Richard Milstein; Richard Newman, CPA; Louis Nostro; Dore Pollock Kaiser; David Pratt; Lewis Ress; Robert Solomon; Steven Sonberg. (R. Exh. 4)

> there have not been any "rumors" or suggestions of any kind of lack of professionalism ... Every conversation I have had with Mr. Tescher has reflected his genuine regret for what has happened. Nothing in those conversations gives me any reason to be concerned that his continued work within [the RPPTL Section and American College of Trust and Estate Counsel (ACTEC)] would be anything other than what it has been to date: working for good legislation in the trust and estate field that will be beneficial to the citizens of Florida and improving tax legislation, both at the State and Federal levels.

(R. Exh. 4, p. 4, 5)

2. Lewis Ress:

Mr. Ress is a member of The Florida Bar since 1956. He was the senior partner of Ress, Mintz and Truppman, P.A. and, thereafter, became a Certified Circuit Court Mediator. He has lectured in the areas of legal and mediator ethics for many years and has received certificates of appreciation from The Florida Bar. In addition, he served as a member of the Cornell Law School Advisory Committee (Trustee) and was named the Foremost Benefactor of Cornell University for the year 1998. He is the founder of the Ress Family Foundation which endows seven scholarships which help send mostly minority students to college and in addition endows a Music in the Hospitals Program and a Parkinson's therapy program.

Mr. Tescher has represented Mr. Ress and his family for more than twenty years. Mr. Tescher planned his estate and his sons' estates. He has named Mr.

Tescher as co-trustee to administer his estate. Mr. Tescher also helped him form the Ress Family Foundation.

Mr. Tescher voluntarily told Mr. Ress he had violated the insider trading rules and, according to Mr. Ress, appeared to be "genuinely contrite." (R. Exh. 4, p. 7) Mr. Ress wrote as follows in his Affidavit:

> My wife and I, based on our own personal and ethical beliefs forgive Don Tescher for this one lapse of judgment and continue to trust him with our most intimate family matters. Hopefully we will remain clients of his until we die, after which, as a co-trustee, we know that he will fairly and honestly look after our grandchildren.

Id.

3. Michael Simon:

Mr. Simon is a member of The Florida Bar and has known Mr. Tescher, personally and professionally, for approximately twenty years. Mr. Tescher informed him about the SEC Consent Judgment and admitted he had engaged in insider trading. According to Mr. Simon, Mr. Tescher was "extremely remorseful." (R. Exh. 4, p. 8) Mr. Simon wrote in his Affidavit as follows:

> Having known Don for many years, I find his actions, which are the subject of the pending Bar Proceeding, to be very much out of character for him. The Don Tescher that I know is a man of integrity and good character. By nature, he is honest, diligent, and has great concern for his clients ... in my opinion, his conduct, which is the subject of the current Bar Proceedings, is a serious, but isolated, incident. This was certainly a lapse in judgment

> on Don's part for which he is extremely and sincerely sorry ... Though undeniably serious, when considered in light of two decades of knowing Don and knowing of his many good deeds, Don's conduct that is the basis for the Bar matter does not change my opinion of him or the respect I have for him as a person and a lawyer.

(R. Exh. 4, p. 8-9)

4. Steven Sonberg:

Mr. Sonberg is a member of The Florida Bar and has known Mr. Tescher for approximately 35 years, both professionally and personally. He has worked as co-counsel and as opposing counsel to Mr. Tescher in various matters and stated he is "impressed with Don's substantive abilities as a tax lawyer, as well as his commitment to his clients and their interests." (R. Exh. 4, p. 10) In the course of his dealings with Mr. Tescher, he has "never known him to engage in questionable conduct." *Id.* Mr. Sonberg also noted Mr. Tescher's "significant contributions to the Florida Bar, including his work as Chairman of the Tax Section," and that he has "also been a tireless supporter of the University of Florida, and a strong supporter of numerous charitable and religious organizations." *Id.* He is aware of the SEC insider trading matter and negative effects it has had on Mr. Tescher, his family and his law practice. Mr. Sonberg stated as follows in his Affidavit:

> I know that Don recognizes the seriousness of his actions, and is genuinely remorseful over his actions ... While Don's actions in the insider trading matter were serious violations of the securities laws and the rules regarding the Florida Bar, I do not believe they outweigh

> the many contributions he has made over his career to his clients, the legal profession, the community, and his family.

Id.

STATEMENT OF THE STANDARD OF REVIEW

The Court is "precluded from reweighing the evidence and substituting its judgment for that of the referee" and should presume that the factual findings are correct and uphold the findings "unless clearly erroneous or lacking in evidentiary support." *The Florida Bar v. Wohl*, 842 So. 2d 811,814 (Fla. 2003) (citations omitted).

The Court's scope of review in considering discipline is broader and should only uphold the referee's recommended sanction if it has a "reasonable basis in existing case law." *Id.* at 815.

SUMMARY OF ARGUMENT

The Referee's recommendation for a one year suspension is excessive given the substantial mitigating factors, existing case law and dispositions in similar matters and the totality of the circumstances.

The substantial mitigating factors include: exceptional acceptance of responsibility and remorse; extraordinary service to The Florida Bar, the legal profession and the community; imposition of other penalties, sanctions and collateral consequences; due to Mr. Tescher's age and nature of his practice, a one

year suspension will effectively and prematurely end his practice and cause substantial hardship to his long-term clients and their families.

Applying the Standards for Imposing Lawyer Sanctions, existing case law and prior Bar dispositions in similar cases, a non-rehabilitative suspension of 90 days is appropriate under the specific and unique circumstances of this case, including the nature and extent of the underlying conduct, the person before the Court and the multiple, substantial and compelling mitigating factors.

ARGUMENT

The Referee's Recommendation for a One-Year Suspension is Excessive Given the Substantial Mitigating Factors, Existing Case Law and Prior Bar Dispositions and the Totality of the Circumstances

Donald Tescher agrees he deserves to, and must be sanctioned for his misconduct. However, the analysis of the appropriate punishment cannot end upon consideration of his underlying conduct. In addition to fitting the conduct, the punishment needs to fit the person, and therefore, in determining the appropriate punishment, it is essential to consider who Mr. Tescher is, what he has accomplished, how and for how long he has devoted himself to his clients and the lay and legal communities, the impact the punishment imposed will have on his clients and the communities he serves and, finally, the late stage and nature of Mr. Tescher's legal career and his age.

1. *Substantial Mitigating Factors:*

Acceptance of Responsibility

Mr. Tescher has never denied his conduct. He always and often admitted it was wrongful. From the very beginning, when interviewed by federal agents, Mr. Tescher confessed he bought stock based upon nonpublic information he learned at a meeting with a client. When The Florida Bar requested that he explain his conduct relating to the SEC Consent Judgment, he fully admitted his conduct and admitted he had committed misconduct in violation of the Rules Regulating The Florida Bar.

Mr. Tescher voluntarily entered into a civil Consent Judgment with the SEC, disgorged his profits and paid a fine. If there was any evidence Mr. Tescher had previously engaged in similar conduct, it is unlikely the United States Attorney's Office would have declined to prosecute him criminally. These results are consistent with the unrefuted and unrefutable fact the conduct leading to the SEC civil case was an aberration and does not reflect the person Mr. Tescher worked so hard his entire life to become.

Most importantly, Mr. Tescher confessed his transgression and apologized to his long-time client, who magnanimously forgave him. It is a testament to both the client and to Mr. Tescher's otherwise impeccable character and profound remorse that to this day, the client and his family remain Mr. Tescher's clients.

Remorse

Mr. Tescher's remorse is profound and sincere as is evidenced by his acceptance of responsibility for his conduct. He is genuinely grateful his client was understanding and forgiving and has decided to remain a client despite Mr. Tescher's conduct. When Mr. Tescher testified, "he openly expressed shame that he let down his family, his clients, the legal profession and himself by his misconduct." (ROR 30)

Service to The Florida Bar, the Legal Profession and the Community

Our profession talks of rehabilitation following bad deeds, and Florida Supreme Court decisions, as well as the Rules relating to lawyer discipline and admission to The Florida Bar, set forth what constitutes proof of rehabilitation. But doing good deeds one's whole life should count for something, for isn't the true test of character the value of what one does when no one is paying attention? Isn't the real worth of an individual not what one does for oneself, but what one does for the benefit of others?

As set out in detail in Mr. Tescher's Curriculum Vitae (R. Exh. 3), and attested to by the many individuals who submitted affidavits, letters of support and/or testified on Mr. Tescher's behalf at the hearing in the matter, there is overwhelming evidence of his service to The Florida Bar, the legal profession and the community.

Mr. Tescher always has been devoted to giving back to the legal profession. In the past, he taught as an Adjunct Professor for the University of Miami School of Law, Graduate Tax Program, and as an instructor in Estate, Gift and Generation Skipping Taxes for The Florida Bar Tax Section Tax Certification Review Course. He served several years on the Board of Directors of the Dade County Bar Association. He formerly was the Chair of The Florida Bar Tax Section and, over the years, has been active as a committee chair, co-chair or member of numerous committees of the Real Property, Probate and Trust Law Section. He is also a Fellow of the American College of Trust and Estate Counsel, a Fellow of the American College of Tax Counsel and on the Board of Trustees for the University of Florida Law Center Association.

Mr. Tescher also has been very devoted to community service. He served as President of Beth David Congregation in Miami when it was the largest Conservative Synagogue in Miami. He has been a member of, and served on, the board or advisory committees for numerous charitable organizations/foundations, including Foundation of Jewish Philanthropies of The Greater Miami Jewish Federation, The Jewish Community Foundation of the Jewish Federation of South Palm Beach County, Dade Community Foundation, Broward County Community Foundation, Switchboard of Miami, Florida Friends of Bar Ilan University, Friends

of the March of the Living, Community Foundation for Palm Beach and Martin Counties and South Palm Beach County Foundation.

Extraordinary Legal Skill and Commitment to Clients

By witness testimony at his final hearing, as well as the affidavits and letters of support submitted to the court, it is clear Mr. Tescher not only is highly effective in representing his clients, but truly cares about and goes the extra mile for his clients and their families. (TR 21, 32, 34, 88-89, 94-100, 110) (R. Exh. 4)

Imposition of Other Penalties, Sanctions and Collateral Consequences

Mr. Tescher has paid more than $20,000.00 to the SEC as part of his Consent Judgment. The SEC civil enforcement action and the Consent Judgment have been the subject of numerous news articles, in print and on the internet. As a result of the publicity from entry of the Consent Judgment, Mr. Tescher has been experiencing collateral consequences to his practice. Without even providing an opportunity to convince them otherwise, financial institutions have asked him to close accounts or be removed from accounts on which he serves as a trustee, co-trustee or independent trustee on behalf of his clients. Based on the negative publicity, Mr. Tescher has lost approximately one half of his clients and is having difficulty getting new clients and referrals.

Mr. Tescher's Age and Nature of Practice

Mr. Tescher is 72 years old and in the sunset of his legal career. Due to his

age and the nature of his practice, a one year suspension will effectively and prematurely end Mr. Tescher's legal career, resulting in a de facto disbarment. The nature of the practice is primarily long-term tax planning and estate management, not litigation. He is involved in a very personal practice. Unlike many attorneys who are in a "one-and-done" type practice, Mr. Tescher has numerous long-term client relationships. In many cases, he is representing second and third generations of client families. The business, tax and estate planning he provides is, in many instances, based upon the accumulation of years of institutional knowledge of the family and its affairs.

Mr. Tescher is a solo practitioner with no one else to keep the balls in the air during a suspension. If he is suspended for one year (which in practical terms is longer due to the additional time of several months for the processing of a petition for reinstatement), his current clients would need to be transitioned to alternate counsel. His clients know he is approaching retirement and it is highly unlikely they would want to go through the transition process a second time in only a few years time when Mr. Tescher retires. Once they are settled somewhere else, it is likely they will remain there.

As for being able to obtain new clients, at Mr. Tescher's age, one of his main referral sources, other lawyers, for the most part, have retired. The only primary source of new business is referrals from clients. Therefore, if his current

clients do not return, his potential to obtain new clients will be slim to none.

Consequently, a suspension from the practice for more than 90 days will amount to a death-knell of his practice.

Adverse Impact on Mr. Tescher's Clients

The record is replete with evidence of potential hardship to Mr. Tescher's clients if a long suspension is imposed. As testified by Dr. Hahn, if the suspension imposed is "too long," he will have no choice but to find a new lawyer, which will be both time consuming and costly. (TR 90-91) But the most significant hardship, due to the nature of the practice, as testified to by Mr. Hollub, is the emotional aspect due to the decades of representation during which the clients and their families developed particularly personal and trusting relationships with Mr. Tescher. (TR 94-100)

2. *Application of the Standards for Imposing Lawyer Sanctions, Existing Case Law and Prior Bar Dispositions in Similar Cases*

Standards for Lawyer Sanctions

The Standards for Lawyer Sanctions "constitute a model, setting forth a comprehensive system for determining sanctions, **permitting flexibility and creativity in assigning sanctions in particular cases of lawyer misconduct."** Standard 1.3, Florida Standards for Lawyer Sanctions (Purpose of These Standards) (Emphasis added). The Standards are designed to promote:

> (1) consideration of all factors relevant to imposing the appropriate level of sanctions in an individual case; (2) consideration of the appropriate weight of such factors in light of the stated goals of lawyer discipline; (3) consistency in the imposition of disciplinary sanctions for the same or similar offenses within and among jurisdictions.

Id.

In imposing a sanction after a finding of lawyer misconduct, a court should consider the following factors:

> (a) the duty violated;
> (b) the lawyer's mental state;
> (c) the potential or actual injury caused by the lawyer's misconduct; and
> (d) the existence of aggravating or mitigating factors.

Standard 3.0, Florida Standards for Lawyer Sanctions. In addition, in determining whether a sanction is appropriate, this Court has stated that it takes into account the following three purposes of lawyer discipline:

> First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty. Second, the judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations.

The Florida Bar v. Behm, 41 So.3d 136, 150 (Fla. 2010) (quoting *The Florida Bar v. Barrett*, 897 So.2d 1269, 1275-76 (Fla. 2005)).

Insider trading is a serious violation and can be prosecuted as a felony under federal law. Ordinarily, the presumptive sanction under Standard 5.1 (Failure to Maintain Personal Integrity), *without consideration of any mitigating circumstances*, for serious criminal conduct would be disbarment. In practice, however, suspension is generally considered to be the appropriate sanction when there has been no criminal conviction, for instance, where an attorney is charged criminally, enters a no contest plea and adjudication is withheld. See *The Florida Bar v. Pavlick*, 504 So.2d 1231 (1987) (this Court noted that the "Court has approved periods of suspension **shorter than three years** in cases involving nolo contendere pleas.") (emphasis added).

Where, as here, the investigating authorities decline to pursue criminal charges and the attorney enters into a CIVIL Consent Judgment, it is respectfully suggested that the starting point for determining an appropriate sanction, *before consideration of any mitigating circumstances*, should be a one year suspension.

Case Law and Prior Bar Dispositions in Similar Cases

In determining the sanction to recommend, the Referee did not have the benefit of having any published disciplinary opinions from this Court involving insider trading. The only Florida Bar case involving insider trading is *The Florida Bar v. Grocock*, Case No. SC11-1430 (Fla., Dec. 22, 2011). In that case, the respondent attorney was suspended for 90 days pursuant to a Consent Judgment

agreed to by The Florida Bar and approved by the Referee and, ultimately, the Florida Supreme Court. Although, based on the Court's recent holding in *The Florida Bar v. Wynn*, 210 So.3d 1271, 1274 (Fla. 2017), such a disposition does not constitute controlling case law, given the lack of any other Florida case on point, *Grocock* is instructive. Grocock's conduct was far more egregious than Mr. Tescher's conduct, with substantially less mitigation. Grocock engaged in a total of 11 insider trading transactions (many of which occurred after he became aware of the SEC investigation), spanning more than one year and totaling more than 20 times as much money as the $10,000 involved in Mr. Tescher's single trade. An extremely significant difference in the two cases is that in contrast to Mr. Tescher's complete and truthful admissions, cooperation and acceptance of responsibility, Grocock provided false and altered documents to the SEC in response to a subpoena and engaged in other obstructionist conduct.

Even the Bar had difficulty committing to the particular sanction it thought was appropriate based upon the case law it provided to the Referee for consideration. At the final hearing, the Bar argued "what would be appropriate would be anywhere from a 91-day suspension, to disbarment." (TR 141)

Bar Counsel provided and the Referee considered several attorney discipline cases from other jurisdictions involving insider trading, in which the discipline imposed ranged from a one year suspension to disbarment. However, unlike Mr.

Tescher, all of those attorneys had felony criminal convictions for insider trading. And their conduct was substantially more egregious than the conduct of Mr. Tescher, and the mitigation, if any, unlike in this case, was not significant. See *Chadwick v. State Bar of California*, 776 P.2d 240, 49 Cal.3d 103 (1989) (one year suspension imposed on a lawyer who engaged in multiple trades, disclosed the confidential information to another individual who engaged in additional trades on behalf of the lawyer and, when the SEC investigated, the lawyer conspired with the other individual to lie to and hide information from the SEC); *Cincinnati Bar Ass'n v. Wiest*, __ N.E.3d __, 2016 WL 7386245 (Ohio Dec. 19, 2016) (2 year suspension, with second year stayed, for lawyer who engaged in multiple trades based upon confidential client information and who also contested his conduct violated rules of professional conduct); *In the Matter of Matthew H. Kluger*, 102 A.D.3d, 959 N.Y.S.2d 2 (N.Y. 1st Dept. 2013) (disbarment imposed on lawyer who participated in a 17 year insider trading scheme and was convicted of multiple federal felony offenses, including conspiracy to commit securities fraud and money laundering, and sentenced to 60 months imprisonment).

Florida discipline cases relating to dishonest conduct which is criminal in nature were also considered by the Referee. Due to the unique quality and quantity of mitigating circumstances present in this case, as well as the significantly less egregious nature of Mr. Tescher's conduct, the following cases are distinguishable,

but provide some insight into the sanctions imposed by this Court in recent years in such discipline cases.

In *The Florida Bar v. Erlenbach*, 138 So.3d 369 (Fla. 2014), the Respondent failed to file personal income tax returns for 9 years. In addition, she withheld federal income tax, social security tax, and Medicare tax from employees of her professional association and knowingly failed to pay the sums withheld over to the Department of the Treasury for 3 years and instead used the funds to pay her own expenses. Although she was not charged with or convicted of any crimes, as this Court noted, "Erlenbach's intentional failure to pay the Department of the Treasury the funds that were withheld from her employees constitutes violations of 26 U.S.C. § 7202, 'Willful failure to collect or pay over tax,' and 26 U.S.C. § 7203, 'Willful failure to file return, supply information, or pay tax,'" which are felony tax offenses. She was given a one year suspension followed by two years probation. Not only was Ms. Erlenbach's conduct more egregious than Mr. Tescher's, she had several prior discipline cases, all resulting in formal sanctions: one, minor misconduct; another, a public reprimand; and the third, a suspension. Mitigation included personal and emotional problems and prior good works, including providing legal services and pro bono representation for the less fortunate in her community for many years.

In *The Florida Bar v. Russell-Love*, 135 So.3d 1034 (Fla. 2014), the respondent attorney was found to have knowingly and deliberately made false statements on immigration visa forms submitted to the United States government on behalf of a client. The attorney signed the forms declaring under penalty of perjury the information being provided was true and correct. In imposing a 91 day suspension, the Florida Supreme Court considered mitigating factors, far less, in number and substance, than in Mr. Tescher's case (absence of prior discipline, inexperience in the practice of law, good character and remorse), but in aggravation stressed that the attorney's actions caused significant harm to her client, a Bahamian citizen, who was charged with immigration violations and is now subject to "permanent inadmissibility" to the United States.

In *The Florida Bar v. Cibula*, 725 So.2d 360 (Fla. 1999), a 91 day suspension was imposed on an attorney who was found to have intentionally lied under oath regarding his monthly income at two court hearings held in connection with his alimony obligation, conduct more egregious than that of Mr. Tescher. And, as opposed to Mr. Tescher's nearly five decades of exemplary conduct, the attorney had prior discipline. Finally, and perhaps most compelling, this Court did not note any mitigating factors other than recognizing that dissolution of marriage proceedings present an emotional time for both parties.

In *The Florida Bar v. Calvo*, 630 So.2d 548 (Fla. 1994), the respondent attorney assisted his clients in perpetrating a large-scale securities fraud scheme. In imposing disbarment this Court noted as follows:

> We can conceive of few situations posing more serious harm to a large segment of the public than a fraudulent offering of securities. Such misconduct certainly is comparable to abuse of client funds, except that here the number of persons exposed to the risk of harm potentially was in the hundreds or thousands. Securities fraud of the type at issue here risks robbing many everyday citizens of their investments, their retirement savings, and their financial security. Calvo and his colleagues fraudulently sold securities that may have been worthless from the moment they were purchased. This is conduct of the most serious order.

Similarly, in *The Florida Bar v. Greene*, 926 So.2d 1195 (Fla. 2006), the Court disbarred an attorney with a federal felony conviction as a result of his participation in a criminal conspiracy to commit securities fraud and mail fraud involving an illegal kickback scheme. The attorney had an additional trust account violation and prior discipline. The Court found that the lone mitigating circumstance (evidence of good character and reputation) failed to outweigh the aggravating circumstances and was insufficient to overcome the presumptive sanction of disbarment.

In *The Florida Bar v. Diamond*, 548 So.2d 1107 (Fla. 1989), the respondent attorney was found guilty by a jury of six felony mail and wire fraud counts and served time in prison. In requesting disbarment, The Florida Bar argued that

Diamond's conduct was particularly egregious because he "utilized his talents as an attorney to participate in consumer fraud on a mass scale." The Florida Supreme Court found that Diamond's felony criminal conduct was extensively mitigated by a number of factors, particularly the abundant character testimony, justifying a reduction of his sanction to a three year suspension.

Certainly, Mr. Tescher's misconduct, though serious, pales in comparison to the misconduct in *Calvo*, *Greene* and *Diamond*.

The remainder of the cases considered by the Referee are clearly distinguishable or not on point. The conflict of interest situations present in the following cases are substantially more egregious and not analogous to Mr. Tescher's insider trading conduct: *The Florida Bar v. Scott*, 39 So.3d 309 (Fla. 2010) (3 year suspension imposed on attorney who represented multiple parties with directly adverse interests because all had claims to the same limited pool of money, creating unwaivable conflicts of interests; in addition, the attorney engaged in dishonest conduct by failing to inform third party of non-confidential information under circumstances that allowed his client to perpetrate a fraud on the third party); *The Florida Bar v. Swann*, 116 So.3d 1225 (Fla. 2013) (disbarment imposed on attorney who engaged in conflicts of interests in multiple matters and aided his girlfriend in exploiting an elderly client); *The Florida Bar v. Doherty*, 94 So.3d 443 (Fla. 2012) (disbarment warranted due to attorney's failure to disclose in

writing to elderly client, to whom he provided both legal and financial services, his financial interest in the annuities being sold to the client); *The Florida Bar v. Rodriguez*, 959 So.2d 160 (Fla. 2007) (often referred to as the Benlate case) (2 year suspension imposed on attorney who became an agent for an opposing party while still representing his clients against that party, when he entered into a secret agreement wherein his law firm agreed, for a substantial fee, not to bring future cases against that party; attorney failed to disclose the conflict of interest, exposing clients to potential harm, while also potentially harming the public and the legal system; respondent denied he violated any Rule and did not accept responsibility for his misconduct); *The Florida Bar v. Ticktin*, 14 So.3d 928 (Fla. 2009) (91 day suspension ordered for attorney who represented multiple clients with adverse interests, was aware of the conflicts, but did not adequately disclose them to the clients, and actively worked against one client's property interest while that client was in jail, causing the client to lose valuable property ownership rights).

In analyzing all the case law discussed above, the following two points should be given primary consideration in determining an appropriate sanction for Mr. Tescher. First, Mr. Tescher's conduct did not rise to the level of cumulative conduct or egregiousness as was present in those cases. Though it is admitted that by his conduct, Mr. Tescher violated several Rules, his conduct was a single, stupid, wrongful act.

Second, this case is by no means the average case, and Mr. Tescher is not close to the average respondent. This Court is presented with undisputed proof the task before it is to balance one bad act, for which Mr. Tescher has both demonstrated full responsibility and has been, and will be punished in many, significant ways, against seven decades of innumerable, significant good deeds and sterling conduct, including a half century of outstanding lawyering. With the exception of this one transgression, Mr. Tescher stands out in many respects, all good. The substantial quality and quantity of mitigating evidence presented makes this an extraordinary case.

In that regard, we urge this Court to consider the following two additional unpublished Florida Bar cases with substantial mitigation in which the lawyers engaged in criminal conduct. In these two cases, like Mr. Tescher, the respondent lawyers stipulated to the facts and admitted they violated the Rules Regulating The Florida Bar, and the cases proceeded to full evidentiary sanction hearings before a Referee, after which, the Referees recommended a sanction lower than requested by The Florida Bar. The Bar did not seek review in either case, and the Court approved the sanctions recommended by the Referees.

In *The Florida Bar v. Roberts*, 157 So.3d. 1050, Case No. SC13-1753 (Fla. 2014), the respondent attorney, who had previously been employed by a Florida State agency and was now in private practice, listened in on a monthly conference

call conducted by her prior employer and disclosed information obtained from the call to one of her new clients. The attorney was charged with two third degree felonies for illegally intercepting and disclosing electronic communications. After admitting her conduct and successfully completing a Pretrial Intervention program, the charges were dismissed. Noting substantial character evidence and the imposition of other sanctions in the criminal case, including agreeing to refrain from the practice of law for 90 days, the Referee recommended imposition of a public reprimand which was approved by this Court.

Likewise, in *The Florida Bar v. Larry Handfield*, Case No. SC14-1568 (Fla. July 2, 2015), the respondent attorney pled guilty to two federal misdemeanor tax offenses related to his submission of two false income tax returns in which he understated his income, of course under oath, two years in a row, resulting in the under payment of taxes in the amount of $78,842, which we submit, is conduct more serious than that of Mr. Tescher. In the criminal case, Mr. Handfield was sentenced to probation with early termination upon payment of the restitution, which was made forthwith. Noting there was overwhelming evidence of Mr. Handfield's good character, outstanding personal and professional reputation and pro bono work in the community, as well as citing the harm that would be caused to his clients and community if a long suspension were imposed, the Referee recommended a 60 day suspension, which was approved by the Court.

3. *A Non-Rehabilitative Suspension is Appropriate Under the Specific and Unique Circumstances of this Case*

Based upon Mr. Tescher's extraordinary personal and professional accomplishments, the positive impact both have had on the lives of so many, and the devastating effect a lengthy suspension will have on his practice and the individuals who would be denied Mr. Tescher's services during the suspension, it is respectfully submitted that a 90 day suspension is warranted. A non-rehabilitative suspension would satisfy all of the objectives of lawyer discipline.

The primary purpose of a lawyer's discipline is to protect the public and administer justice. A lengthy suspension in this case would defeat that purpose. A rehabilitative suspension would be unduly harsh and effectively end Mr. Tescher's career. It would be unfair to his clients, as it would deprive them of an excellent attorney of their choice, unfair to the profession, which he has served well for nearly five decades, and unfair to him.

The genuine emotion, affection and appreciation expressed by so many witnesses for Mr. Tescher was compelling. The negative impact on his clients, should Mr. Tescher be suspended for longer than proposed herein, would far outweigh the benefit, if any, to the profession or to the community at large that a lengthy suspension could possibly achieve. We ask the Court to consider the immeasurable good Mr. Tescher has done for many people for so many years and could continue to do and weigh this against the certainty his clients and the

community would be forced to endure: a lengthy loss of his extraordinary legal acumen and total commitment to our legal profession should a lengthy suspension be imposed.

CONCLUSION

Based upon the underlying conduct, the person before the Court and the substantial and compelling mitigating factors presented at his final hearing, it is respectfully submitted that the appropriate sanction is a 90 day suspension, to be followed by two years of probation with the condition Mr. Tescher perform 100 hours of community service, providing *pro bono* legal services to those who otherwise cannot afford the services of a lawyer in Mr. Tescher's area of expertise.

WHEREFORE, Respondent Donald Tescher submits the Referee's recommended sanction of a one-year suspension is, under this exceptional set of circumstances, excessive. Respondent requests that this Court enter an Order imposing a suspension of no more than 90 days.

Respectfully Submitted,

ROTHMAN & ASSOCIATES, P.A.
200 S. Biscayne Blvd,, Ste 2770
Miami, Fl 3313
(305) 358-9000

By: /S/ David B. Rothman
DAVID B. ROTHMAN
Florida Bar No. 240273
dbr@rothmanlawyers.com

By: /S/ Jeanne T. Melendez
JEANNE T. MELENDEZ
Florida Bar No. 0027571
jtm@rothmanlawyers.com

CERTIFICATE OF SERVICE

I certify that the foregoing document has been E-filed with The Honorable John A. Tomasino, Clerk of the Supreme Court of Florida, using the E-filing Portal; with copies provided via e-mail to Staff Counsel, The Florida Bar (aquintel@flabar.org) and Bar Counsel, Frances R. Brown-Lewis (fbrownle@flabar.org; smiles@flabar.org), on this 5th day of January, 2018.

/S/ Jeanne T. Melendez
JEANNE T. MELENDEZ
Florida Bar No. 0027571

CERTIFICATE OF TYPE SIZE AND STYLE

Undersigned counsel hereby certifies that the type size and style of this Brief is Times New Roman 14pt.

/S/ Jeanne T. Melendez
JEANNE T. MELENDEZ
Florida Bar No. 0027571