

UNITED STATES OF AMERICA

Before the

SECURITIES AND EXCHANGE COMMISSION

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In the Matter of  
MARTIN A. FORMAN  
and  
FORMAN AND ROSENBERG  
Rule 2(e), Rules of Practice  
File No. 4-102

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RECOMMENDED DECISION  
(Private Proceeding)

SIDNEY L. FEILER  
Hearing Examiner

Washington, D. C.

March 2, 1964.

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(Private Proceedings)

APPEARANCES:

Messrs. Theodore H. Focht, George P. Michaely, Jr.,  
Walter P. North, Mitchell P. Rieger and Jacob H.  
Stillman for the General Counsel.

Arnold, Fortas & Porter  
by Edgar H. Brenner and Milton V. Freeman, Esqs.  
for Martin A. Forman and Forman and Rosenberg.

BEFORE: SIDNEY L. FEILER, HEARING EXAMINER

I. THE PROCEEDINGS

This is a private proceeding pursuant to Rule 2(e) of the Commission's Rules of Practice to determine whether Martin A. Forman and the law firm of Forman and Rosenberg ("the respondents")<sup>1/</sup> should, temporarily or permanently, be disqualified from and denied the privilege<sup>2/</sup> of appearing or practicing before the Commission.

The matters put in issue by the order for this proceeding are:

(a) Whether the respondents, while acting as counsel for General Investment Research Corporation ("General"), on March 11, 1957, filed with the Commission on behalf of General a Form ADV application under the Investment Advisers Act of 1940 for registration as an investment adviser, which application contained an untrue statement of a material fact, to wit, in reply to Item 6 it was stated that there were no persons not named in the Form who had the power to exercise a controlling influence over the management or policies of registrant when, in fact, respondents knew or with adequate inquiry, should have known that Albert Edward DePalma

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1/ The firm is now known as Forman, Rosenberg & Resnick. At all times here relevant it was known as Forman and Rosenberg, a law partnership consisting of Forman and Allen I. Rosenberg.

2/ Section 2(e) provides:

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

was responsible for the creation, operation, and maintenance of the registrant. Item 6 requires that the full name and address be given for every such person if the answer is in the affirmative.

(b) Whether, in General's application for registration as an investment adviser, respondents made an untrue statement of a material fact, to wit, in response to Item 7 of Form ADV, which seeks information concerning the nature and duration of the business and professional connections of any individuals named in prior items, respondents reported that Stuart Leslie Chapman (named as President, Treasurer and Director in Item 4 of Form ADV) was a recent college graduate with no prior business or professional connections when, in fact, respondents knew, or with adequate inquiry should have known, that this was false and untrue.

(c) Whether, during an interrogation under oath by officers of the Commission on May 5, 1958 in Philadelphia, Pennsylvania respondent Forman gave false and misleading testimony concerning his relationship with Albert Edward DePalma and concerning his knowledge of and relationship with the registration of General as an investment adviser.

Prior to the commencement of the proceeding, the Commission granted, in part, an application by the respondents for a more definite statement. The General Counsel was directed to specify in what respect each designated answer in Forman's 1958 testimony was alleged to be false and misleading. Subsequently, the General Counsel filed a Response specifying what portions of Forman's 1958 testimony were alleged to be false and misleading and in what respects they were false and misleading. Additional information also was supplied with respect to the allegations concerning

Items 6 and 7 in the Form ADV filed by the respondents on behalf of General.

Pursuant to notice, a hearing was held in Washington, D. C. before the undersigned Hearing Examiner commencing on June 26, 1961. All parties were represented by counsel. During the course of the hearing, an application was made for an order directing the taking of the deposition of a Leonard L. McCarthy, a Canadian resident, before the Consul or Vice-consul of the United States of America at Toronto, Ontario, Canada. This application was granted by the undersigned. However, the General Counsel advised the undersigned that McCarthy refused to appear voluntarily to testify. The General Counsel then made a motion for an order directing the taking of the deposition of McCarthy and for a request to an appropriate Canadian judicial authority for an order directing the witness to appear and testify. A similar application was made with respect to Eugene Memin. Both applications were granted by the Commission and the hearing stood in recess while efforts were made to obtain the co-operation of appropriate authorities in Canada. The efforts to secure the co-operation of the judicial authorities were not successful and the hearing was resumed on July 1, 1963 and concluded on August 21, 1963. The history of the Canadian proceedings is summarized in the transcript, pages 325-328.

At the conclusion of the presentation of evidence an opportunity was afforded the parties for filing of proposed findings of fact, conclusions of law or both, together with briefs in support thereof. Proposed findings and briefs were submitted on behalf of all the parties. Upon the entire record, and from his observation of the witnesses, the undersigned

makes the following:

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Background

1. Martin A. Forman is a graduate of Temple University and of its law school. He received his law degree in 1941. In 1942 he was employed by the Securities and Exchange Commission as an attorney. He was assigned to the Division of Trading and Exchanges doing interpretative work with reference to the Securities Exchange Act and the Investment Advisers Act. He also worked on cases involving injunctions and criminal references. He also had assignments in areas relating to his accounting background which he had developed at Temple University.

2. Forman was first employed by the Commission when it was located in Philadelphia. He moved with the Commission when it returned to Washington in 1948 but secured a transfer to its New York Regional Office later that year in order to be able to maintain his residence in Philadelphia. His work in the New York office consisted of investigating and, in appropriate cases, preparing injunctive, criminal, and administrative proceedings for alleged violations of the Securities Acts. He left the Commission's employ in 1954 or 1955 and engaged in private practice. After a short period in New Jersey, he returned to Philadelphia and resumed the private practice of law there. He specialized in matters under the jurisdiction of the Commission and other corporate problems.

3. Allen I. Rosenberg was graduated from the University of Pennsylvania in 1946 and received his law degree from that institution in 1950. He has been a member of the Pennsylvania Bar since 1950.

Rosenberg had an association with a lawyer who controlled a suite of offices in which Forman rented an office when he returned to private practice in Philadelphia. On occasion Rosenberg assisted Forman in some cases. In 1956 they decided to form a partnership and set up their own offices. At that time they moved to the firm's present address at 12 South Twelfth Street, Philadelphia.

4. Forman had the major interest in the firm and has always specialized in matters relating to the jurisdiction of the Commission. Forman estimated that in 1957, the time in which the filing which is in issue here took place, the firm had approximately 75 clients and its gross fees were approximately \$50,000. According to Rosenberg, a large part of the practice of the firm is referral work from other law firms who seek assistance with respect to problems under the Securities Acts. Forman testified that in 1957 and prior thereto, he had done work for Canadian clients who were referred by either New York or Philadelphia attorneys.

5. Stuart Leslie Chapman, a Canadian citizen and a resident of Canada, testified that he had completed approximately 3½ years of high school work, leaving school in January, 1951. Subsequently he worked for a year and a half for the Bank of Toronto, then worked as a car salesman from 1952 until December, 1954. Thereafter, he became employed by the Board of Trade in Toronto where he worked until February 8, 1957.

6. Leonard L. McCarthy has described himself as engaged in the business of free-lance writing, specializing in subjects relative to investments and stock market movements whose services are available on a fee basis. McCarthy met Chapman socially, since his daughter and Chapman's

fiancee were friends. He let it be known that he would be glad to help Chapman if the latter ever needed assistance in finding work. When Chapman left the Board of Trade he contacted McCarthy who agreed to employ him in his office.

B. Operational History of General Investment Research Corporation and the Connection of Forman and Rosenberg with it

7. After a few days in McCarthy's employ, McCarthy told Chapman that he had a deal for Chapman which would be good for him. The next day McCarthy introduced Chapman to Albert Edward DePalma. The record indicates that some time prior to this time DePalma had been indicted in the United States for an alleged securities violation and had jumped bail. At the meeting the three participants discussed a plan for the formation of an investment advisory service in the United States in which Chapman's part would be to organize a company and supervise its operations with all writing and preparation of material to be done by McCarthy. DePalma was to furnish the capital. According to Chapman, DePalma asked him a few questions about his background and said he felt that Chapman could carry out the proposed plan. There was a discussion of arrangements. DePalma wanted McCarthy and Chapman to go to Philadelphia to proceed with the organization of the investment advisory and, according to Chapman, DePalma instructed them to meet with the law firm of Forman and Rosenberg and leave the details of organization to that firm (Tr. 24, 26). DePalma gave McCarthy some money during the conference and the next day when they reported back that transportation arrangements had been made, he gave Chapman sufficient



money in cash to make up a total of \$5,000.<sup>3/</sup> Chapman and McCarthy went to Philadelphia on February 19, 1957.

8. Continuing his testimony, Chapman stated that the next morning McCarthy telephoned Forman in Chapman's presence, introduced himself and stated that he understood they were to come to see him. An appointment was made. Prior to going to Forman's office, McCarthy told Chapman that DePalma had gotten into trouble in the United States and had jumped bail and should always be referred to as Mr. Edwards and that his name should never be associated with the new company.

9. McCarthy and Chapman proceeded to Forman's office and after introductions were made, there was discussion of the plan to form an investment advisory firm and the details of carrying out the plan. They discussed whether the new organization would be an individual entity, a partnership or a corporation. McCarthy preferred the corporate firm but refused to take any official position in it. According to Chapman, Forman suggested that the firm locate in Wilmington, Delaware, which was not far from Philadelphia and where there would be a minimum of delay with respect to incorporation. The parties also settled on the name of the proposed firm, its publications, and the way that its material would be issued.

10. Forman took out a blank Form ADV application for registration as an investment adviser under the Investment Advisers Act and proceeded to ask Chapman a number of questions to obtain information to be used in filling it out. Chapman testified that Forman was told that funds to carry on the business would be provided as needed but that Chapman was not putting up any of

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<sup>3/</sup> Chapman was uncertain as to whether he received the money in United States or Canadian currency.

his own money. Chapman further testified that during the conference DePalma's name had come into the conversation and that he was referred to as "Eddie" or "Edward". Chapman also said that Forman asked whether Chapman was aware that DePalma should be referred to as "Edward". McCarthy stated that he was aware of that (Tr. 40). Chapman also swore that Forman asked him about his background and Chapman described his high school education and the jobs he had held and also had specifically stated that he had not had any college training (Tr. 21). The conference took place in the morning and it was agreed that there would be another meeting after lunch when the necessary form would be ready for signature.

11. In the afternoon meeting Chapman signed the application and paid Forman \$2,000 in cash for legal fees.<sup>4/</sup> Chapman testified he did not read the application but merely signed it.

12. After the meeting, McCarthy and Chapman went to Wilmington and proceeded to arrange office space and make preliminary arrangements with regard to their printing requirements. When premises were obtained, the address was furnished to counsel. Also when the incorporation of the proposed investment adviser was completed all blanks in the application were filled out and the application was filed with the Commission. The Commission's files show that an investment adviser application form was filed on March 11, 1957 by General Investment Research Corporation.

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4/ Chapman testified that prior to the establishment of corporate records for the business he kept a ledger record of all expenses relating to the organization and operation of the business. The ledger was offered in evidence (Staff Ex. 3) and decision was reserved on the offer. It is received in evidence. The ledger shows an entry on February 20 of \$2,000 paid as legal fees.

Chapman was listed as president, treasurer, director and owner of more than 25% of the voting securities of the applicant. Counsel supplied the remaining necessary directors. Item 6 of the application specifies that no person not previously named in prior items had power to exercise a controlling influence over the management or policies of the registrant. Item 7 of the application required the furnishing of all business and professional connections within the past ten years of all persons previously mentioned. The information supplied as to Chapman in an annexed sheet was "Recent college graduate - no prior business or professional connections." (File No. 801-1455-1). On April 12, 1957 official notice was sent to General that its registration as an investment adviser had become effective on April 10, 1957.

13. Chapman was notified by Forman and Rosenberg when the corporate application became effective. He then had another conference with DePalma which was attended by McCarthy. He received detailed instructions on the set-up of the office and also received additional funds. He proceeded to Wilmington and carried out his instructions. He hired a secretary and arranged for advertising and the solicitation of trial and yearly subscriptions for a weekly publication. He obtained copy from McCarthy and in accordance with instructions he had received from DePalma and at the suggestion of Forman and Rosenberg, he submitted copy for their approval from a legal standpoint. After obtaining approval or incorporating suggestions he arranged for the printing and mailing of the newsletters. Both McCarthy and DePalma were fully aware of all details of the operations, according to Chapman.

14. On July 2, 1957 Chapman returned to Toronto and never again resumed an official connection with the registrant. McCarthy accused him of mismanaging company funds and told him that he was being removed from any connection with the company (Tr. pp. 64-65). Later on McCarthy called him in to sign certain letters needed in connection with the company's business. The official files of the Commission included a letter from the registrant signed by Chapman informing the Commission that the registrant's campaign for permanent subscriptions had not been successful and that it was requesting withdrawal of its registration as an investment adviser. The letter is dated August 21, 1957. Chapman testified that the registrant did receive 2,000 to 2,500 trial subscriptions sold at a minimum rate but was never able to sell any yearly subscriptions. Chapman further testified that he never saw Forman and DePalma together, but he stated that on one occasion he was in DePalma's office in Toronto when DePalma made a telephone call to Forman during which Chapman spoke to Forman briefly and Chapman recognized Forman's voice (Tr. pp. 71-73).

15. After the initial legal fee was paid by the witness to Forman and Rosenberg, the company was billed on a monthly retainer basis. The first bill was for legal services in the amount of \$250. Chapman testified that he felt the amount was too high and spoke to DePalma about it, the latter in turn said he would speak to Forman and Forman later, according to Chapman, said the amount would be reduced to \$150. An invoice for the charge shows that a change was made in the amount. Chapman stated that he had made the ink change on the invoice (Staff Ex. 5).

16. Chapman had no further dealings with DePalma so far as the record indicates after the termination of the former's connection with

the registrant. DePalma died in December, 1957.

17. On cross-examination, Chapman testified that a bill from Forman and Rosenberg for legal services, dated May 1, 1957 was the first periodic bill received by General. He could not account for an entry in his ledger on April 18th evidencing a payment to counsel for legal fees in the sum of \$200.

18. The record contains statements by counsel for the General Counsel that he did not have in his possession any telephone records evidencing telephone calls between the firm of Forman and Rosenberg and DePalma in Toronto (Tr. 295-300). There is one telephone record of a call from Montreal which will be dealt with later.

19. Eva Tibbitt was hired by Chapman as a secretary for General at the end of April, 1957, and continued to work there until August of that year. She was the only full-time salaried employee. She took care of the preparation of lists of subscribers and the mailing of the weekly newsletter published by General. She confirmed that long distance calls were received from Forman and Rosenberg, from Edwards and from McCarthy. Edwards telephoned two or three times a week she estimated. The material written by McCarthy was sent to counsel for their approval. Miss Tibbitt became a director of General at Chapman's request, replacing one of the nominees previously used by Forman and Rosenberg in the original corporate filing.

20. As previously mentioned, efforts were made by the General Counsel to secure the oral testimony of McCarthy and Eugene Memin. These efforts were not successful. Thereafter, at the hearing, statements obtained from these men by an attorney, Frank C. Brophy, Jr., then on the staff of

the General Counsel were offered in evidence. Brophy went to Toronto in September, 1958. He obtained the assistance of Mr. Arthur Verity, an investigator with the Ontario Securities Commission. He first interviewed McCarthy at the latter's office and obtained from him a statement, dated September 16, 1958, which McCarthy typed out himself. The next day Brophy interviewed Memin at McCarthy's office and obtained a statement, dated September 17, 1958, witnessed by Verity. This statement was prepared by Brophy and McCarthy from the information given by Memin. McCarthy typed this statement and, according to the evidence, Memin read it over before signing it and made one correction in it (Staff Ex. 9). On September 18, 1958, Brophy obtained another statement from McCarthy and he, at that time, swore to the truth of the matter contained in both his statements (Staff Ex. 10). Verity further testified that in 1961 both McCarthy and Memin were again interviewed and at that time they re-read their statements and again asserted that the matter therein was true and correct.

21. Verity described Memin as a runner for DePalma and further stated that while his office had investigated DePalma's activities, no charges had been lodged against him in Canada. He described McCarthy as a free-lance writer for mining companies who would sell information to brokers. McCarthy had been investigated from time to time but no proceedings were brought against him. According to the record herein, McCarthy was indicted in the United States some time after he gave the statement referred to above. There was extensive discussion on the record as to the admissibility of these documents when they were offered in evidence by the General Counsel (Tr. 352-388; 433-441; 446-447; 450-458). The undersigned

ruled that the documents would be received in evidence subject to their evaluation in light of the circumstances under which they were given and with due consideration to the fact that neither Memin nor McCarthy was available for cross-examination (Tr. 381-388; 446-447).

22. McCarthy, in his written statements, corroborated Chapman's testimony in important respects. In his first statement, he stated that DePalma told him in late 1956 or early 1957 that he was negotiating with Forman and that if the negotiations were successful, indictments against him would be quashed and that he would be able to open a business in the United States. On one occasion DePalma had planned to have McCarthy meet with Forman in order to discuss the establishment of an investment adviser firm in the United States which DePalma intended to use to retaliate against a Canadian promoter with whom he had had a disagreement. This meeting did not take place.

23. DePalma, according to McCarthy, told the latter that he was desirous of setting up someone as an investment adviser in the United States and that he would provide the necessary funds. It was then McCarthy introduced Chapman to DePalma and an agreement was made to establish an investment adviser firm. DePalma gave Chapman \$5,000 in United States currency and instructed him, on February 19, 1957 to proceed to a hotel in Philadelphia where Forman had supposedly made reservations for them.

24. The next morning Chapman and McCarthy went to the offices of Forman and Rosenberg and had a conference with Forman. In his statement, McCarthy said that Forman declared that he wanted to assist DePalma in being reinstated in the United States, that Chapman should at no time

disclose the receipt of financial assistance from DePalma, and that any and all references to DePalma by them should be made as Mr. Edwards. Forman obtained information from Chapman necessary to complete the investment adviser application form. After this, the parties adjourned for lunch.

25. When they met after lunch, Forman produced the completed application form and said that he had cleared the name of the firm with the offices of the Commission and by the State of Delaware. Forman also indicated that he had been in telephone touch with DePalma because he asked McCarthy what DePalma had meant when he had asked Forman to give them a "list of cleaners" to take back to Toronto. McCarthy replied that DePalma would like to get a telephone list of all the employees of the Commission in order to check any lists he might use for "spotters" acting for the Commission. Forman gave such a list to him, McCarthy asserted. The parties then proceeded with the actual signing of the application by Chapman. Forman cautioned Chapman, according to McCarthy that he was making an affidavit, that all relevant information had been disclosed. The question of DePalma's private financing was then discussed and Forman stated that if Chapman had not signed an agreement with DePalma or anyone else, he would not be making a false affidavit. McCarthy also supported Chapman's testimony that Chapman gave Forman \$2,000 at this meeting. Forman asserted that \$1,000 was necessary for registration fees and disbursements, including corporation costs; \$500 was required for legal fees and \$500 for the parties who had agreed to act as officers for the new company.

26. McCarthy's statement also refers to a William S. Carroll, Q. C., as an attorney who paid him for his work for General at DePalma's direction.



It further states that DePalma referred McCarthy to Carroll to check with Forman as to the part General might play in recommending the purchase of a particular stock. McCarthy asserted that he was present when Carroll telephoned Forman and made arrangements for him to come to Toronto to see him and DePalma. McCarthy asserted that he was told by DePalma that Forman had been in town but McCarthy did not actually meet with him. McCarthy concluded his statement by asserting that when Chapman failed to accompany him on a business trip, DePalma did some checking and informed McCarthy that Chapman had not been attending to business and had been misusing business funds and shortly thereafter the business was closed.

27. In his supplemental statement of September 18, 1958, McCarthy amplified the information contained in his prior statement. He asserted that DePalma instructed Chapman that he must follow Forman's instructions at all times. DePalma, according to McCarthy, complained on several occasions of high fees charged by Forman. McCarthy also asserted that his recollection was that Chapman did not carefully check the application when he signed it. He further stated that he was instructed and did send to Forman duplicate copies of everything he wrote for General in advance of the material being sent out to a printer.

28. Memin's statement is much shorter than those submitted by McCarthy, being two pages long. In his statement, Memin asserted that he had had 15 years' association with DePalma in various capacities. He then stated that on a number of occasions in the latter part of 1956 and in the early part of 1957, he had seen, met and talked with Forman who was represented to him as a former employee of the Commission who had

participated in the early investigation of DePalma's activities in the United States. Memin asserted that on all those occasions he saw Forman always in the company of DePalma and that the meetings took place mostly in DePalma's office in Toronto or at the Royal York Hotel in that city. He further asserted that on two occasions he accompanied DePalma when Forman was driven to a local airport. DePalma, according to Memin, told him that Forman had contacted him with the proposal that Forman was in a position to effect the quashing of indictments pending against DePalma in the United States and to re-establish DePalma in the securities business there. Memin stated that he saw DePalma on one occasion pay Forman \$5,000 in United States currency and on several occasions, on DePalma's instructions, mailed American currency in amounts never less than \$1,000 to Forman at his business office. On one occasion, he maintained he mailed Forman \$10,000. He also recalled DePalma's expressing violent dissatisfaction with Forman's services and charges.

29. Martin A. Forman categorically denied ever having met with or having done any business for and with DePalma. He denied any knowledge that any person other than Chapman or McCarthy had any interest in General. According to his version, he received a telephone call from McCarthy who stated that he had been recommended by an attorney in Canada and that he wished to come to Philadelphia with a Mr. Chapman who desired to form an investment adviser business in the United States. The date was set for a meeting, McCarthy telephoned Forman in Philadelphia on the date set and came to Forman's office with Chapman.

30. McCarthy stated, according to Forman, that Chapman was engaged to McCarthy's daughter and that Chapman wished to open an investment

advisory service in the United States and McCarthy would assist Chapman in the editing and preparation of material. Forman then took out an investment adviser application and went over the items with Chapman. Forman affirmed that Chapman told him that he was a recent college graduate who had taken courses in economics and was familiar with the field of investment and had done some investing on his own and wished to get in the investment advisory business (Tr. 523). McCarthy described himself as a writer who had had extensive experience in the preparation of brochures relating to Canadian securities on behalf of clients. He said that he had come to Philadelphia to help Chapman set up the contemplated service and wanted to help Chapman because he was going to marry McCarthy's daughter and McCarthy also would receive compensation for his work. Forman then called in ~~his partner~~ <sup>his partner</sup> Allen Rosenberg, and they discussed the question of whether the business should be conducted as a sole proprietorship or a corporation. Other items discussed were the name and address of the new corporation, and the need to obtain two temporary directors to complete the slate needed for incorporation. Then a luncheon recess was taken.

31. Continuing his testimony, Forman stated that during the luncheon recess the application was prepared except for inclusion of some information which was unavailable. The question of fees was discussed. Forman denied that a fee of \$2,000 was demanded or paid. He stated that a \$500 fee and a retainer of \$250 a month was suggested by him. Of the \$500, \$200 was paid at that time in cash by Chapman. Chapman signed the investment adviser's application form at that time and it was filed as soon as the incorporation was completed and the address of General was supplied by

Chapman.

32. After the application for registration as an investment adviser had been approved, Chapman returned to Philadelphia and had a conference with Forman and Rosenberg. Relevant provisions of the Investment Advisers Act Act were reviewed with Chapman and Forman suggested that since he was unfamiliar with United States law, he should submit his copy to the law firm for checking before issuing it to the public. This was done.

33. Forman also stated that Chapman was always trying to reduce the retainer fee of \$250 a month and it was finally agreed to reduce this figure to \$150 (Tr. 530). The parties also discussed the fact that cease and desist orders had been sent to General from various states where it was not qualified to do business. Steps to qualify and register General in certain states <sup>were</sup> discussed. Chapman was quoted a figure of \$2,500 for this work. He did come in with a check in this amount and it was cashed by the firm but according to Forman, he retained only \$1,300 of the amount, applying \$300 to the amount due on the original retainer and \$1,000 as fee for the new work contemplated. The balance of \$1,200 he swore he returned to Chapman (Tr. 531-532). A series of deposit slips was offered in evidence which Forman testified correctly evidenced all dealings of his firm with General (Respondents' Exhs. 3-7). He maintained that his firm received a total of \$2,108.99 from General of which sum \$640.17 covered disbursements.

32. In August, Chapman telephoned Forman and, according to the latter, stated that the response to his advertisements was so poor he saw no reason to continue the business and wanted to terminate it. McCarthy

also telephoned Forman and stated that Chapman had been a disappointment in managing the business and had been taking money from the firm and that it would be closed up (Tr. 540-541). The necessary document advising the Commission of the termination of the business was prepared.

33. Forman asserted that at all times he dealt with Chapman concerning the affairs of General and that Chapman made all the decisions and that Forman had no ground for feeling that anyone else was a controlling person in the corporation. He maintained that Chapman read the application form carefully before signing it and that Forman had no reason to believe there were any inaccuracies in the information contained in the form. He further maintained that he never had any dealings with an Edward DePalma or a Mr. Edwards or a Mr. Memin. He denied receiving any large sums of cash in the mail and also denied that he had anything to do with the prosecution of DePalma. His only knowledge of DePalma's problems were from hearsay which he received from other staff members in the New York Regional Office of the Commission, he maintained (Tr. 544).

34. With reference to the transcript of his testimony concerning the affairs of General, which transcript was taken in 1958 (Staff Exh. 2A) he stated that his testimony was taken without prior information to him that the affairs of his firm would be explored and without his having the chance to read and correct any inaccuracies in the transcript. While he stated he felt that the transcript was inaccurate in certain respects, he did affirm that on the matters in issue here, it correctly reflected his testimony in that he took substantially the same position in the hearing herein as he did in 1958. He did admit that he was in error when he stated

in the transcript that he thought Rosenberg had spoken to Chapman and McCarthy before he had (Tr. 557-558), He also admitted that his statement in the prior transcript that Rosenberg had prepared the application was incorrect and that records now show that both worked on the application form (Tr. 563).

35. Forman also stated in the present proceeding and in the prior transcript that he had no recollection of ever receiving a phone call from a Mr. Edwards on May 23, 1957 at 4:20 P.M. (Staff Exh. 11). A photostat copy of a long distance toll slip regarding a call from a Mr. Edwards in Montreal to Mr. Forman at his office on May 23rd was received in evidence. Forman testified that this document did not refresh his recollection and he could not recall any circumstances surrounding this call (Tr. 578-582), He rejected as untrue the statements in the documents signed by McCarthy and Memin linking him with DePalma, but could advance no reason why their statements would be at such variance to his (Tr. 583-590).

36. Allen I. Rosenberg, a law partner of Forman, corroborated his testimony. He did not know of any dealings between Forman and Chapman and McCarthy until Forman called him into his office, introduced him, and disclosed the purpose of their visit. In Rosenberg's presence there was a discussion of whether the new firm would be a sole proprietorship or a corporation. Chapman, according to Rosenberg, wanted the corporate form.

37. After luncheon recess, Chapman returned to sign the application. According to Rosenberg, Chapman leafed through it rather perfunctorily and signed it because he and McCarthy were anxious to leave for Wilmington (Tr. 468). He recalled later discussions with Chapman about material Chapman was

going to have published for distribution to subscribers, discussions about the amount of the monthly retainer, and the problem of qualification in various states. Rosenberg swore that in all his dealings with Chapman, the latter seemed in command of the firm's activities and there was never any question of his referring matters to someone else. Rosenberg talked with Chapman in July when the latter said that business had not gone well and requested assistance in working out the details of closing it down. Rosenberg also assisted Mrs. McCarthy when she came to Wilmington to deal with various matters, including the liability of General on its lease.

38. Rosenberg corroborated Forman's testimony that there was never any discussion of a Mr. Edwards or a Mr. DePalma with anyone connected with General. He also denied that the firm was paid \$2,000 in cash, declaring that the books of the firm show that \$200 was paid. He maintained that it would have been impossible for Forman to keep from him the receipt of substantial sums received from clients because on occasion they opened each other's mail and Rosenberg never found substantial sums in cash in any mail. McCarthy, he stated, was introduced as a free-lance or independent analyst or writer with offices in Canada, who was gathering information and writing on behalf of General for a fee.

39. Rosenberg did not know who referred McCarthy and Chapman to the firm. He was not present at the start of their conference with Forman. He apparently had come into the conference when a good deal of the problems involved in setting up the investment advisory service had already been discussed with Forman. He worked on the question of the form the new entity

would take and the necessity of finding additional directors. He recalled in the original meeting of Chapman and McCarthy there was mention of the fact that Chapman had no prior experience in this field but he felt with assistance from McCarthy and taking trips, he would be able to do the necessary work.

C. Contentions of the parties; Conclusions

1. Knowledge of De Palma's Control over General

38. The evidence establishes that DePalma had the power to and did exercise a controlling influence over the management and policies of the registrant, General. He should have been so listed in the investment adviser application. The failure to do so was a serious breach of the duty of disclosure and affected the public interest adversely. A key issue is whether the respondents knew of this misstatement at the time it was made.

39. It is urged that Chapman's testimony, corroborated by the statements of McCarthy and Memin, all of whom had no personal interest in this proceeding, presents a consistent and credible account of the circumstances under which General was organized and operated.

40. Memin's statement is relied on as showing a close business relationship between Forman and DePalma in 1956 and 1957. However, certain portions of the statement raise some doubts as to the accuracy of the contents. Memin stated that Forman was introduced to him as a former employee of the Commission who had participated in the earlier investigation of DePalma's activities. Forman denied ever meeting DePalma and testified that he had nothing to do with the investigation of DePalma's



activities or his prosecution. No evidence was presented to contradict this assertion.

41. Memin mentioned large sums in cash being paid to Forman. Yet there is no proof that Forman did anything for DePalma. There is no evidence that he even made an inquiry on his behalf.

42. Memin mentions the filing of indictments of DePalma which had been quashed. There is no evidence corroborating this statement nor any proof that the respondents had any connection with any such proceedings.

43. In his statements (Staff Ex. 10) McCarthy stated that on February 20, 1957 Forman told him and Chapman " . . . how he desired to assist DePalma in being reinstated in the U.S., after having worked with the S.E.C. in prosecuting him some years ago . . ." (P. 2). There is no proof that Forman had anything to do with the prosecution of DePalma and his denial of any connection stands unchallenged.

44. McCarthy further stated that Forman produced a blank application form and went over the items with Chapman and obtained the requisite information from him. He further declared that at the time Chapman signed the application Forman cautioned Chapman that he was making an affidavit that all relevant information had been disclosed (P. 3). When the question of DePalma's supplying the finances was discussed, McCarthy quoted Forman as saying that provided Chapman had not signed a written agreement with DePalma, he would not be making a false affidavit (Pp. 3, 8). This would have been a most extraordinary statement to have been made by an experienced practitioner.

45. McCarthy, in his statements, declared that DePalma was very angry when he and Chapman reported that they had paid Forman \$2,000 declaring that he had already paid Forman and that he should not have been given anything (P. 3). In a later portion, McCarthy asserted that he and Chapman were given \$5,000 and instructed to pay the charges to be stipulated by Forman (P. 6).

46. The respondents attack Chapman's testimony on the claim that he was guilty of improper conduct and that his testimony was unreliable.

47. Chapman testified that he participated in a telephone call from DePalma's office to Forman. No record of this call was produced although presumably some record of the call would be in existence and it is apparent that the General Counsel made diligent efforts to locate telephone evidence on calls involving DePalma or a Mr. Edwards.

48. As previously pointed out, Chapman had no satisfactory explanation for an entry in his cash book reflecting a \$200 payment to counsel in April, 1957.

49. It is alleged that Chapman misappropriated funds from General. Whether this was true or not would depend on a computation of what Chapman drew and what was owed him - a point not fully developed. Nevertheless, it is true that both DePalma and McCarthy felt that Chapman had mis-handled funds. Also, of course, Chapman on his own testimony was a knowing participant in a plan to deceive the Commission.

50. The evidence presented by the General Counsel is contradicted in almost every material detail by the evidence presented by the respondents. There are aspects of that presentation that raise doubts. Forman did not

have any exact recollection of the course of his dealings with McCarthy and Chapman and either erred or was hazy on important items. He admitted that a call from a Mr. Edwards in Montreal was made to his office number, as the documentary proof establishes. It is maintained that this call was not traced to DePalma or a Mr. Edwards in Toronto. Yet it is a suspicious circumstance. However, the most telling point against the respondents is the basic agreement among Chapman, McCarthy, and Memin and the question arises why they would concoct a false story. It is suggested that McCarthy and Memin were attempting to ingratiate themselves with the United States and Canadian authorities. This contention is rejected; there is no proof that anything was sought from them other than the truth. Yet certain portions of their statements raise serious question. They, of course, were in the best position to resolve those doubts by coming forward and testifying fully including subjecting themselves to cross-examination. Instead, they strenuously resisted all efforts to secure their testimony even when arrangements were attempted for their appearance in their home city. Their successful opposition to those efforts leaves the record with many unanswered questions which they, perhaps, might have cleared up in their testimony,

51. In resolving the issue of credibility, it is relevant and important to consider the background of the witnesses. McCarthy and Memin were obviously afraid to set foot in the United States and did not even wish to testify in Canada. They have unsavory records.

52. Both Forman and Rosenberg are members of the Bar in good standing. The record does not evidence that any complaint has ever been

made of their professional conduct either to the Commission or to any legal professional organization. A proceeding, such as the instant one, is fraught with grave consequences to the parties respondent and adverse findings should not be made against them except on proof clearly established.

53. While Chapman's testimony raises the most serious doubts with respect to the respondents, it must be observed that his own record is not unblemished and that the effect of his testimony suffers from the defects in the statements of McCarthy and Memin which have been previously outlined. For these reasons and others set forth in this section of the recommended decision, it is concluded that the testimony of Forman, supported by Rosenberg, should be credited and it is found that although highly suspicious circumstances are present, the evidence does not establish the respondents knew that DePalma had a controlling influence over the operations of General.

54. One of the issues raised in the order for this proceeding is whether Forman, in an interrogation under oath by officers of the Commission on May 5, 1958 in Philadelphia, Pennsylvania gave false and misleading testimony concerning his relationship with DePalma and concerning his knowledge of and relationship with the registration of General as an investment adviser.

55. While there is some difference in detail, Forman's version of his dealing with Chapman, McCarthy, and General in the instant proceeding is substantially the same as he testified to in the earlier examination. For the reasons set forth in the consideration of the testimony in the present proceeding, it is concluded that it has not been established that

Forman testified falsely in 1958.<sup>5/</sup>

2. Knowledge by the Respondents of Chapman's Educational Background

56. The registrant was required by Item 7 of the application to show all business and professional connections within the past ten years of persons mentioned in the application. For Chapman, the information supplied was, "College graduate and part-time law student - no prior professional or business connections".

57. Chapman testified that he had a high school education followed by business experience and that he so informed Forman. Forman testified, in substance, that the application reflected what had been told him. It is alleged that the respondents knew that the material that was inserted by them in the ADV application was false.

58. The record is very meager on this point. There is no evidence that the question of fabricating Chapman's background was discussed or any reasons advanced for falsifying it. Nor is there any apparent reason. The application, as filed, called attention to Chapman's lack of business experience. While his business experience was not outstanding, there was nothing derogatory in it necessitating concealment. Chapman testified that he leafed through the application quickly before signing it, but he was not prevented from examining it carefully, especially when, according to

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<sup>5/</sup> Forman also asserted that the transcript of his 1958 testimony was inaccurate. Other than this general claim, he gave no specific examples of material which did not truly reflect his answers. On cross-examination he specifically affirmed answers read to him from the transcript. It is concluded that it has not been established that the transcript was inaccurate in any respect materially affecting the issues in this proceeding.

McCarthy, Forman stated that the application had the effect of an affidavit.

59. Under all the circumstances, the undersigned is not persuaded that the evidence establishes that the respondents knew that the information they inserted in the application as to Chapman's background was false.

Forman's denial is credited.

3. Extent of Inquiry by the Respondents

60. It is alleged in the order that the respondents, with adequate inquiry, should have known of DePalma's connection with the registrant and the falsity of the information given in the ADV application as to Chapman's educational background and business experience.

61. Forman testified that he was not acquainted with either McCarthy or Chapman before he received a telephone call from the former. He stated that McCarthy told him that he had been recommended to Forman by an attorney in Canada - Forman believed that a Mr. Carroll for whom he had done some legal work was mentioned.<sup>6/</sup>

62. Forman's version of what Chapman told him about his background was that Chapman told him that he was a recent college graduate, had taken courses in economics, was familiar with the field of investment, had done some investing on his own, and wished to get into the business of preparing advisory bulletins (Tr. 523). In his 1958 testimony, Forman quoted Chapman as saying he was pretty good on picking winners (Staff. Ex. 2-A, pp. 33-34).

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<sup>6/</sup> In his 1958 testimony (Staff Ex. 2-A), Forman stated that Chapman told him that he had heard of the law firm through some work it had done for Canadians. (P. 6).

63. Forman also testified that McCarthy identified himself as a financial writer of experience who wished to help Chapman both for personal and financial reasons.

64. The most extraordinary circumstance that emerges from the evidence is that the respondents, both experienced lawyers in the securities field, especially Forman, made no effort to check on the stories told them by Chapman and McCarthy. There was a combination of factors which should have alerted them to that need. Both Chapman and McCarthy were strangers to the firm. Yet no record was made of the identity of the person who they claimed referred them and certainly no effort was made to communicate with that person to verify that statement and their background.

65. In 1957, Chapman was 23 years old. In his 1958 testimony, Forman stated that he had the impression Chapman wasn't of age (Staff Ex. 2-A, p. 43). Yet the fact that this young man with no business or financial experience other than perhaps some personal investing proposed to engage in business holding himself out as one skilled in advising investors did not seem to strike Forman as extraordinary.<sup>7/</sup> His testimony indicates that he did not explore the special courses Chapman was supposed to have taken nor even the college from which he supposedly graduated. A little inquiry on these points would have cleared up any confusion the parties might have been laboring under.

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<sup>7/</sup> It is true, as Forman testified in 1958, that there is no experience requirement for registration as an investment adviser. This does not rule out from consideration the background of an applicant as a factor for evaluation with other information furnished by him.

66. McCarthy was supposed to be the expert who would advise and help Chapman and write material. Yet the respondents made no effort to check his background or even his place of business in Toronto. When McCarthy refused to take any official position in General, this should have caused the respondents some concern in view of his supposed deep interest in Chapman.

67. Chapman, according to Forman's version, a college graduate with no business or professional experience, sought to establish an investment service and undertake all the financial obligations involved in such an enterprise. At no time did the respondents make any inquiry as to the financial ability of Chapman to meet these obligations or the source of his funds.

68. An attorney has a general obligation to fully investigate a claim made by a client. This extends to carefully checking statements made by a client himself, both in the interest of the client and the public interest.<sup>8/</sup> This is especially true when the administration of statutes reflecting a deep public interest is involved.<sup>9/</sup> The Commission has stressed the need for care and accuracy in completing registration

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<sup>8/</sup> Opinions of the Committees on Professional Ethics of The Association of the Bar of the City of New York and the New York County Lawyers' Association (1956), P. 9, #17, P. 19, #42, P. 50, #105, and P. 300, #540.

<sup>9/</sup> See, e.g., Morris Mac Schwebel, 40 S.E.C. 347 (1960).



forms under this Act and other statutes under its jurisdiction, both in instructions and in decisions. Great harm can result when dishonest and unscrupulous persons can secretly control the operations of registrants and thus are free to deal with and attempt to influence the decisions of thousands of persons. An attorney obviously cannot be a guarantor of every item of information he files on behalf of a client. Neither can he shirk his professional responsibility and accept every statement made to him as complete and accurate without doing such checking with his client and elsewhere as the facts warrant.

69. The facts in the instant case were such that, accepting the respondents' version of what was told them, there were many factors which obviously required more details from Chapman and McCarthy. These avenues of inquiry were not pursued. The main item of discussion seemed to be whether or not the business should be conducted in the corporate form. Both Forman and Rosenberg were experienced attorneys with special knowledge in matters under the jurisdiction of the Commission. Forman, particularly, with his years of experience on the Commission's staff should have been alert to the possibility of fraud and deception being practiced by an applicant for registration especially under the circumstances here. The undersigned concludes that the respondents, with adequate inquiry, could have found out that the statements in the application for registration were untrue in material respects, that Chapman was not in sole control of the registrant, but that Albert Edward DePalma had a controlling influence, and that the statements as to Chapman's education and experience were false and untrue.

70. By their conduct the respondents have engaged in unethical and improper professional conduct within the meaning of Rule 2(e) of the Commission's Rules of Practice in that by their conduct and failure to observe minimum professional standards of due care they aided, abetted, and assisted in the perpetration of a fraud upon the Commission.

#### RECOMMENDATIONS

The effect of a false registration is incalculable. It opens the door for all sorts of maneuvers by unscrupulous behind-the-scenes operators. The injury to the public may be most extensive before the fraud is uncovered.


The registrant engaged in an advertising campaign assisted by the respondents and obtained approximately 2,500 trial subscriptions. The harm which resulted from the campaign is not to be gauged by the \$2,500 collected from unsuspecting investors, but by the fact that it opened communication between them and a principal in Canada who could manipulate material in the newsletter to serve his own ends.<sup>10/</sup>

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<sup>10/</sup> The respondents recommended that General submit its material to them for checking before publication. This was a worthwhile suggestion, but it did not meet the dangers created by the false registration since, at best, the respondents might have been able to tone down some language which they felt went too far, but they were in no position to check the claims made on securities recommended.

It is concluded that the conduct of the respondents as set forth above requires censure by the Commission. It is also recommended that the respondents Martin A. Forman and the law firm of Forman and Rosenberg, now known as Forman, Rosenberg & Resnick, be temporarily denied the privilege of appearing or practicing before the Commission for a period of thirty <sup>11/</sup> days.

Respectfully submitted,



Sidney L. Feiler  
Hearing Examiner

Washington, D. C.

March 2, 1964.

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11/ All contentions and proposed findings submitted by the parties have been carefully considered. This recommended decision incorporates those which have been accepted and found necessary for incorporation herein.