INITIAL DECISION RELEASE NO. 367
ADMINISTRATIVE PROCEEDING
FILE NO. 3-12944

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

In the Matter of	:	
	:	INITIAL DECISION
STEVEN ALTMAN, ESQ.	:	January 14, 2009
	:	

APPEARANCES: Donna S. McCaffrey, Christopher M. Bruckmann, and Melinda Hardy for the Office of General Counsel, Securities and Exchange Commission

Jeffrey C. Hoffman for Steven Altman, Esq.

BEFORE: Brenda P. Murray, Chief Administrative Law Judge

BACKGROUND

The Securities and Exchange Commission (Commission or SEC) issued an Order Instituting Administrative Proceedings (OIP) on January 30, 2008, pursuant to Section 4C of the Securities Exchange Act of 1934 (Exchange Act) and Rule 102(e)(1)(ii) of the Commission's Rules of Practice. I held hearings on May 5-7 and May 29, 2008. The Office of General Counsel (OGC) presented four witnesses and introduced twenty-six exhibits. Steven Altman, Esq. (Altman or Respondent), presented his testimony and two experts, and introduced three exhibits. The last brief was filed on August 12, 2008.[1]

ISSUE

Whether Altman's knowing conduct, representing a witness in a Commission administrative proceeding, violated the New York State Bar Association Lawyer's Code of Professional Responsibility (NYCPR) Disciplinary Rules (DR) 1-102(A)(4), (5), and (7), and

[1] I will cite to the transcript of the hearing as "(Tr. __.)." I will cite to OGC's and Respondent's exhibits as "(OGC Ex. __.)" and "(Altman Ex. __.)," respectively. I will cite to OGC's and Respondent's Post-Hearing Briefs, and the OGC Reply Brief, as "(OGC Post-Hearing Br. __.)," "(Altman Post-Hearing Br. __.)," and "(OGC Reply Br. __.)," respectively.

constituted improper professional conduct subject to discipline pursuant to Section 4C of the Exchange Act and Commission Rule of Practice 102(e)(1)(ii).[2]

My findings are based on the record and my observation of the witnesses' demeanor. I applied preponderance of the evidence as the applicable standard of proof. See Steadman v. SEC, 450 U.S. 91, 102 (1981); William R. Carter, 47 S.E.C. 471, 472 n.3 (1981). I have considered and rejected all proposed findings, conclusions, and arguments raised by the parties that are inconsistent with this Initial Decision.

FINDINGS OF FACT

Steven Altman, Esq.

Altman is a forty-six year old graduate of Boston University and New York Law School, and a member of the New York State Bar. (Tr. 323, 325.) Altman has been practicing law since 1987 and maintains an office in Manhattan where he employs one salaried attorney, who handles the paperwork, while Altman spends his time litigating commercial disputes in courts and before the National Association of Securities Dealers, Inc. (NASD), now known as the Financial Industry Regulatory Authority.[3] (Tr. 325-26, 454.) Altman does not have an extensive practice before the Commission. (OGC Ex. 20 at 32.)

Altman has known Bonnie Rosen (Rosen) since he was in high school and she worked at a local insurance agency. (Tr. 327-28.) From November 1999 through October 2003, Rosen held an office position with a salary of $60,000 at NextGen Inc. (NextGen), a company owned by Jay Adoni (Adoni) located at the same address in Port Washington, New York, as Harrison Securities, Inc. (Harrison Securities).[4] (OGC Ex. 18 at 1633-34.) NextGen paid her salary, but Rosen spent half her time working for Harrison Securities. (OGC Ex. 18 at 1634-35.) Sometime in 2003, Rosen asked Altman for assistance in getting severance from NextGen and removing her name from automobile leases that she co-signed for Fred Blumer (Blumer), the CEO of Harrison Securities, who had the cars and paid the leases. (Tr. 13-14, 329-30, 446; OGC Exs. 24, 25.)

In response to Rosen's request, Altman called Adoni, who was a close business associate of Blumer's, twice and requested severance for Rosen and that he remove Rosen's name from the car leases. (Tr. 329-30, 339; OGC Ex. 18 at 1663-64, OGC Ex. 20 at 35-36, OGC Ex. 26 at 3 n.1.) Adoni refused. (Tr. 330-31; OGC Ex. 20 at 36.)

[2] Rule 2(e) of the Commission's Rules of Practice was the predecessor to Rule 102(e).

[3] Altman was with a large firm from 1987 until 1993 when he left to form a partnership with another attorney. The breakup of that partnership resulted in some financial liability and he began a solo practice in 2002. (Altman Ex. D.)

[4] Rosen testified that her salary was $45,000 and expenses. (OGC Ex. 13 at 1668.)

Altman testified that Rosen was not an active, paying client, and that he was trying to do her a favor by making a few phone calls on her behalf. (Tr. 331-32, 337, 341.) He claims he did not open a file as he would have in a normal representation, and, during the entire period, he paid little attention to the matter. (Tr. 335, 482-83.) He had no formal retainer with her, he did not bill her, and she did not pay him. (Tr. 329-31.) Altman never told Rosen that he would not bill her for his services, but he insists that he never intended to do so. (Tr. 340-41, 354, 476-77.)

On January 26, 2004, the Commission's Division of Enforcement (Division), in Harrison Sec. Inc., Admin. Proc. No. 3-11084, learned from the NASD that Rosen had called the NASD and said she had had information adverse to Blumer and Harrison Securities.[5] (Tr. 197.) The Division called Rosen on January 28, 2004, and she identified Altman as her attorney, and Altman later reaffirmed this fact. (Tr. 8-9, 199-201, 218-19, 248-49, 333; OGC Exs. 3, 4.) The Division and Altman talked initially either on January 28, 2004, or a few days after the Division contacted Rosen; the Division asked to interview Rosen. (Tr. 338; OGC Ex. 20 at 42.) Altman learned from the Division that Irving Mark Einhorn (Einhorn) was counsel for Blumer and Harrison Securities. (Tr. 411.)

Altman initiated the first in a series of at least six telephone conversations with Einhorn that occurred between January 28, 2004, and February 10, 2004.[6] (Tr. 8-9, 44-45, 339-40, 414-15.) In the first call, Altman identified himself as representing Rosen, and he told Einhorn that the Division was interested in talking with her. (Tr. 8-9, 339, 430-32; OGC Ex. 3.) Altman informed Einhorn that Rosen had done some work for Harrison Securities and Blumer, that she was hostile towards both parties, and that Rosen wanted her name removed from two car leases and some severance. (Tr. 9, 11, 13.) According to Altman, in their initial conversation, he gave Einhorn an abbreviated version of his conversations with Adoni and said he thought this would be an opportune time to reinvigorate Rosen's requests and that getting her some severance money would be good too. (Tr. 339, 430-32.) According to Altman, the Division's interest in Rosen did not give him leverage, but it gave him an opportunity to negotiate with Blumer. (Tr. 433.) Einhorn, on the other hand, considered Altman's first phone call:

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[5] Altman was unaware until the hearing in this proceeding that Rosen called the Commission's New York office inquiring about the hearing in Harrison Sec. (Tr. 286, 366-67.) Rosen also called the NASD and said she had information about Harrison Securities, and the NASD relayed that information to the Division on the last day of hearings in January 2004. (Tr. 197.) Harrison Sec. involved alleged violations of the net capital, books-and-records, and financial reporting provisions of the Exchange Act and regulations thereunder. (OGC Ex. 19.) Nebrissa Song was the third Respondent. (Tr. 285.) Hearings in Harrison Sec. occurred on January 20-23, 26, 2004, and March 8-10, 2004.

[6] Einhorn has practiced law for thirty-six years and was an attorney with the Commission for seventeen years. (Tr. 82.) Altman testified that his initial call to Einhorn was within two business days of when Rosen contacted him. (Tr. 430.) He testified earlier, however, that she contacted him sometime in 2003, so he must mean within two days of when Rosen contacted him about the Division's call on January 28, 2004. (Tr. 329-30, 430.)

> as an extortion attempt, seeking money from my client in exchange for favorable behavior and testimony from a witness, who, if paid the money, would be favorably inclined to testify or not testify at all against my client, and if not paid the money, would do damage to my client at a hearing.

(Tr. 16.)

Einhorn took Altman to mean that Blumer's problems with Rosen's testimony that would be harmful to his defense would disappear if Blumer had his friend Adoni give Rosen a severance package and Blumer took her name off the car leases. (Tr. 48-50.)

Without telling Altman, Einhorn taped five subsequent conversations.[7] (Tr. 17-18, 340, 379-80.) Their second conversation appears to have occurred on February 2, 2004, when Einhorn returned Altman's call. (Tr. 413-14, 429; OGC Ex. 5.):

> MR. ALTMAN: I am not going to pull any punches with you. They are aware if asked, she will testify that there was no virus in the computer, and I suspect once they start peeling it away, some other very, very unhelpful stuff with respect to the books and records of the firm . . . .[8]

(OGC Ex. 18 at 1646.)

The Division wanted to interview Rosen the week of February 3, 2004, but Altman did not make her available. (Tr. 292, 417, 425; OGC Ex. 5.) On March 3, 2004, after it had served Rosen with a subpoena, the Division notified Altman.[9] (Tr. 211-12; OGC Ex. 9.) On March 8, 2004, in a phone interview with Rosen from Altman's office, she told the Division that Harrison Securities' manager of information technology, who signed a letter stating that a computer virus affected the general ledger that Blumer maintained on his laptop, told her that the letter he signed was false. (Tr. 220, 242-43, 269-70, 291-92.)

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[7] The transcript in Harrison Sec. on March 10, 2004, the day the tapes were admitted as Div. Exs. 48-50, is OGC Ex. 13. In this proceeding, OGC Ex. 18 is the portion of the Harrison Sec. transcript for March 10, 2004, which contains certain corrections as to the transcription of the tapes. (Tr. 29.) OGC and Altman disagree on some of the corrections. OGC Ex. 18A is Altman's version of two pages of OGC Div. 18. (Tr. 27-31.) Einhorn withdrew as counsel after the hearings in Harrison Sec. concluded. (Tr. 57; OGC Ex. 19 at 4.)

[8] Respondents' primary defense in Harrison Sec. was that a computer virus compromised the firm's books and records. (Tr. 285.) Rosen's position was that Blumer's computer was not damaged, thus contradicting Blumer's defense that certain Harrison Securities files were corrupted on the computer. (Tr. 41, 46-47, 95-97.)

[9] Division counsel "just didn't want there to be any issue about Mr. Altman contacting Ms. Rosen about the service before service" was accomplished. (Tr. 212.)

When the Division called Rosen as a rebuttal witness in Harrison Sec. on March 10, 2004, Einhorn asked for an in-chambers conference. In this off-the-record conference, Einhorn played three tapes of Altman's calls, which he described as extortion or blackmail in that Altman demanded a severance payment for Rosen, otherwise Rosen's testimony might be damaging to Blumer. (Tr. 221-22.) Einhorn told the Division that he would report the matter to the FBI if the Division called Rosen as a rebuttal witness, but if it did not call her, that would be the end of the matter. (Tr. 222, 262, 264; OGC Ex. 26 at 2.) When the Division called Rosen as a rebuttal witness, Einhorn played the three tapes on the record. (Tr. 56, 75-76, 169; OGC Ex. 13 at 1632-33.) Altman was in the hearing room and tried to raise an objection on behalf of Rosen but was not permitted to do so. (Tr. 294-95, 343-44.) Following the hearing, Einhorn reported the matter to the U. S. Attorney for the Southern District of New York and the FBI. (Tr. 166-67.)

On March 18, 2008, the Division's memorandum to Giovanni P. Prezioso, General Counsel and Alternate Designated Agency Ethics Official, on possible lawyer misconduct stated:

> The tapes indicate that Altman suggested to Einhorn that if appropriate severance arrangements were made – removing Ms. Rosen as a co-signer with Blumer on two car leases and paying her severance of a year's salary – Ms. Rosen's recollection of the relevant events might "fade." Altman also said that his client would not evade service and that if she testified, she would not give untruthful testimony.

(OGC Ex. 26 at 2.)

Altman was married in 1987 and divorced in 1999. He testified that he provides financial support for three children, and his fiancée and her child with whom he lives. (Tr. 324-25; Altman Ex. D.) Altman maintains that, in January and February 2004, when these conversations occurred, he was working ten to fourteen hours a day, seven days a week, drinking very heavily, and in a contentious relationship with his ex-wife who has custody of his seven year old twins with whom he has a close relationship.[10] (Tr. 324-25, 344-47.) He recalls that several of his conversations with Einhorn occurred on his cell phone while he was walking along the street after dinner where he had been drinking. (Tr. 369-70, 437, 483-84, 515.)

On March 30, 2008, Altman admitted himself to a hospital where he was diagnosed with alcohol and cocaine abuse.[11] (Tr. 387, 469.) He left a twenty-eight day program on April 7, 2008, after eight days and began participating in an out-patient program at a different facility.

[10] A third child lives with his mother in Ohio. (Tr. 324.) From approximately December 2003 until March 2004, Altman reportedly was not seeing the woman who is now his fiancée, which was a source of great emotional stress. (Altman Ex. D.)

[11] The hospital admission report, dated March 30, 2008, states that Altman was seeking admission for his drug use because of recent conflict with his fiancée, and that his alcohol consumption was a half pint daily and his cocaine use was three grams a month. (Tr. 573-75.)

(Tr. 351, 397-98, 575-76.) On May 6, 2008, Altman testified that, since April 8, 2008, he has participated in the out-patient program four days a week and has attended meetings of Alcoholics Anonymous daily. (Tr. 351-52.)

EXPERT TESTIMONY

Amy S. Hoffman, M.D. (Dr. Hoffman)[12]

Dr. Hoffman, a psychiatrist, met with Altman for two hours on November 17, 2005, and talked with him on the phone for half an hour in December 2005 for the purpose of offering an opinion on Altman's current and past mental state. (Tr. 493-94, 497, 512; Altman Ex. D.) Dr. Hoffman rendered a Psychiatric Evaluation on December 19, 2005 (Evaluation), with the diagnosis of adjustment disorder, with mixed disturbance of emotions and conduct (adjustment disorder). (Tr. 401; Altman Ex. D.) Dr. Hoffman's report is not a report of a treating psychiatrist. (Tr. 493-94.) There are several types of adjustment disorder. (Tr. 504.)

> The adjustment disorders are a diagnostic category characterized by an emotional response to a stressful event. . . . There is little specificity to qualify these symptoms other than an excess of what would be expected from the particular stressor or a significant social or occupational impairment. By definition, the symptoms must begin within 3 months of the stressor and must remit within 6 months of removal of the stressor. . . . A variety of subtypes of adjustment disorder are identified in the [*Diagnostic and Statistical Manual of Mental Disorders*] IV-TR, varying on the particular predominant affective presentation. These include adjustment disorder with depressed mood, anxious mood, mixed anxiety and depressed mood, disturbance of conduct, mixed disturbance of emotions and conduct, and unspecified type.[13]

[12] Dr. Hoffman graduated from Yale University with a Bachelor of Science in 1976 and from the Medical College of Pennsylvania with a Doctor of Medicine in 1980. She holds certifications from the American Board of Psychiatry and Neurology, Inc., in General Psychiatry, with the added qualifications of Addiction Psychiatry and Forensic Psychiatry. She was an Assistant Professor of Clinical Psychiatry at Mount Sinai School of Medicine from 1987 to 2008. From 1991 until January 2008, Dr. Hoffman was employed by the Department of Psychiatry, Mount Sinai Services-Queens Health Network. Since January 2008, Dr. Hoffman has been Chief of Service, Department of Psychiatry, Lincoln Medical and Mental Health Center. Since 1989, Dr. Hoffman has been a Member of the Panel of Highly Qualified Psychiatrists designated by the New York State Supreme Court, Appellate Division, First Judicial Department, which makes her eligible for Court appointment as an expert. (Altman Ex. C.) Dr. Hoffman has done hundreds of psychiatric examinations. (Tr. 538-39.)

[13] THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM) (American Psychiatric Association 4th ed.) is the standard reference work for diagnosing mental disorders. The DSM has five axes of diagnosis. (Tr. 609; OGC Ex. 29 at 10.)

2 KAPLAN & SADOCK'S COMPREHENSIVE TEXTBOOK OF PSYCHIATRY, 2055 (8th ed.).

Dr. Hoffman does not agree that the diagnosis has a low degree of reliability. (Tr. 530.) She considers the statement, "[t]he literature contains mixed information about the reliability of the adjustment disorder construct," as a reference to the ability to establish a diagnosis by a scientific method, something that psychiatry has struggled with for over a hundred and fifty years. (Tr. 530-31.)

Dr. Hoffman concluded that Altman suffered from at least two episodes of adjustment disorder in the period 2002 to mid-2004. (Tr. 504, 506-08.) The effect of the disorder or the single "disturbance of conduct" that Dr. Hoffman was able to identify was Altman's excessive use of alcohol at times of stress. (Tr. 504, 510; Altman Ex. D.) Dr. Hoffman found that Altman used alcohol excessively in 2002 and during the fall and winter of 2003 and 2004. (Tr. 508; Altman Ex. D.) Dr. Hoffman cannot state with reasonable medical certainty that, between January 28 and February 10, 2004, Altman suffered adjustment disorder and excessive alcohol use or that he was intoxicated. (Tr. 508-09.) Dr. Hoffman believes, however, that Altman's pattern of alcohol use with adjustment disorder could have made him have less than perfect judgment. (Tr. 520.)

In December 2005, Dr. Hoffman considered that Altman's symptoms associated with the diagnosis of adjustment disorder were in remission. Dr. Hoffman strongly recommended that Altman enter an extensive psychotherapy relationship and abstain from alcohol for a period. (Altman Ex. D.) Dr. Hoffman did not diagnose Altman as having alcohol abuse.[14] (Tr. 505-06.) In 2005, Altman denied using drugs to Dr. Hoffman. (Tr. 502.)

[14] Diagnoses in psychiatry are made as much as possible by standard criteria. Dr. Hoffman did not consider that she had sufficient information to make any additional diagnosis. (Tr. 505-06.) Adjustment disorder is common in the general population. (Tr. 520.) "The diagnosis of adjustment disorder has been criticized as problematic on multiple levels and, at times, has been termed a *wastebasket diagnosis.*" 2 KAPLAN & SADOCK'S COMPREHENSIVE TEXTBOOK OF PSYCHIATRY, 2056 (8th ed.); (Tr. 527.) Dr. Hoffman defines "wastebasket diagnosis" to mean something that is very broad, not something that you throw away. (Tr. 530.)

Lisa Saraydarian, Ph.D. (Dr. Saraydarian)[15]

Since September 2006, Altman has had at least fifty psychotherapy sessions with Dr. Saraydarian, who he was referred to by Dr. Hoffman in November 2005. (Tr. 350, 399, 593-94; OGC Ex. E.) Dr. Saraydarian treated Altman for depression and stress management. (Tr. 588.) The emphasis of Dr. Saraydarian's treatment was on improving Altman's relationships so he could be the kind of person he wanted to be as a father and in the relationship with his fiancée. (Tr. 593-94.) She concluded that Altman has been abusing alcohol since at least college; by abuse, Dr. Saraydarian means that Altman's alcohol use has negative consequences on his life.[16] (Tr. 576.) These negative consequences are exacerbations of feelings of depression, irritability, and anger. (Tr. 576-77.) Alcohol abuse can, among other things, affect a person's judgment. (Tr. 577.) Dr. Saraydarian does not know that Altman became drunk every time he drank. (Tr. 580.) Altman told Dr. Saraydarian that he had a few drinks in 2004 during the phone conversations that are at issue here and that he had been sloppy and careless in those conversations. (Tr. 582-83.) Dr. Saraydarian's notes on September 26, 2006, show that Altman said he was drunk during one conversation when he was talking on his cell phone with another person, and he says he normally would have been screaming and yelling when someone mentioned extortion. (Tr. 585-86.)

Dr. Saraydarian endorsed Altman's admission to the hospital for the excessive use of alcohol. (Tr. 563.) She has not asked to see the March 30, 2008, hospital report that states he was admitted for alcohol and cocaine abuse. (Tr. 564, 573.) Altman told Dr. Saraydarian that he used cocaine in college, but that he did not have a problem with cocaine. (Tr. 555-56.) Dr. Saraydarian did not ask Altman about cocaine because it did not come up as a significant concern for him that was directly impacting his life.[17] (Tr. 561, 568, 590.) Dr. Saraydarian does not consider Altman's failure to tell her that he used cocaine a lack of candor. (Tr. 560-61.) Very frequently people with alcohol problems also sporadically use other substances. (Tr. 567.) She thinks Altman minimized, even to himself, his use of alcohol and its impact, which is

[15] Dr. Saraydarian earned a Bachelor of Arts in Psychology with honors from New York University in 1983 and a Doctorate in Clinical Psychology with distinction from Fairleigh Dickinson University in 1990. Dr. Saraydarian is a Licensed Psychologist in the States of New Jersey and New York. She maintains a psychotherapy private practice and has been Director of Psychology at Mount Sinai School of Medicine at Elmhurst Hospital Center in Elmhurst, New York, since August 1996. Since 1996, Dr. Saraydarian has been an Assistant Professor of Psychiatry at Mount Sinai School of Medicine in New York City, where she was a Clinical Instructor of Psychiatry from 1993 to 1996. (Altman Ex. E.)

[16] Altman told Dr. Saraydarian that he used cocaine in college. (Tr. 555-56.) Dr. Saraydarian considers alcohol abuse and the use of cocaine as maladaptive coping mechanisms. (Tr. 589-90.)

[17] Dr. Saraydarian states that patients who are under the influence of alcohol may experiment with other substances at times, but secondary behaviors are usually not the focus of treatment unless they become addictive behaviors. (Tr. 563-64, 567.)

common for people with substance abuse issues. (Tr. 569.) Dr. Saraydarian acknowledges that Altman's reported use of three grams of cocaine a month is not experimentation. (Tr. 575.)

Dr. Saraydarian's professional opinion is that the symptoms for which Altman sought treatment would not endanger anyone or compromise his behavior. (Tr. 591-92.) Dr. Saraydarian finds Altman's present mental state to be stable and that he has a strong desire and plan for his continued sobriety. (Altman Ex. E.) Dr. Saraydarian is not familiar with the NYCPR, but she does not believe that his current mental state will in any way impair his ability to conduct his professional affairs in an ethical manner. (Tr. 552, 554; Altman Ex. E.)

Mark J. Mills, J.D., M.D. (Dr. Mills)[18]

OGC asked Dr. Mills to form an opinion of Altman's psychological and psychiatric condition and to comment on the testimony of Altman's experts. (Tr. 623.) Dr. Mills interviewed Altman for two hours and spent another two hours administering the Minnesota Multiphasic Personality Inventory 2, Revised Fourth Edition, 2005 (MMPI-2) and the Personality Assessment Inventory (PAI). (OGC Ex. 29 at 6.) The MMPI-2 test, consisting of 567 true/false questions, has been used for decades and is considered to report reliably on the evaluee's long-term traits and how he relates to other people.[19] (OGC Ex. 29 at 6.) The MMPI-2's diagnosis of Antisocial Personality Disorder occurs if there is a pervasive pattern of disregard

[18] Dr. Mills earned a Bachelor of Arts from the University of California, Berkeley, in 1967, a Juris Doctor from Harvard Law School in 1970, and an Doctor of Medicine from Stanford University School of Medicine in 1975. Dr. Mills is licensed to practice medicine in the State of California and the District of Columbia. At present, he is a Professor of Clinical Psychiatry at Columbia University's College of Physicians and Surgeons and an Adjunct Professor in the Department of Psychiatry & Behavioral Sciences, New York Medical College, St. Vincent's Hospital. Dr. Mills has served as the Commissioner of the Department of Mental Health for the State of Massachusetts, as the Director of the Program in Psychiatry and Law at UCLA, and as Chief of the Psychiatric Evaluation Unit at the Palo Alto Veterans Administration Medical Center. He has performed over 5,000 clinical examinations in the twelve years he spent as a clinical psychiatrist. Since 1985, he has focused on forensic examinations and has conducted over 1,000 forensic psychiatric evaluations. Dr. Mills has been qualified as a psychiatric expert in over one hundred federal proceedings. His curriculum vitae lists, among other things, numerous academic and hospital appointments, Board Certifications, professional society memberships, ninety-six publications, and two hundred fourteen presentations. (OGC Ex. 29, Attachment A.)

[19] Dr. Mills has administered the MMPI-2 to over one hundred evaluees. There are ten clinical and six supplemental clinical scales. Scoring is done by a software package produced by the test's developer. Ninety-nine percent of the population would score between thirty-five and sixty-five, so a score above sixty-five is significant and considered a potential abnormality as it is more than three standard deviations outside the mean, which is considered to be a score of fifty. (OGC Ex. 29 at 8-9.)

for and violation of the rights of others by an individual after age fifteen, as indicated by the occurrence of three behaviors. (OGC Ex. 29 at 13-14.) The PAI test is newer and designed to show the same long-term traits as the MMPI-2 test. (OGC Ex. 29 at 9.)

I granted Altman's motion and granted Confidential status to OGC Ex. 29, Direct Testimony of Mark J. Mills, J.D., M.D., with Attachments A, B, and C; Altman's Memorandum of Law in Support of Motion to Exclude Expert Testimony of Mark Mills; and the hearing transcript of May 29, 2008, when Dr. Mills testified.[20] (Notice of Rulings at Continued Hearing, June 9, 2008.) I have detailed Dr. Mills's testimony in a separate CONFIDENTIAL portion of this Initial Decision.

ARGUMENTS[21]

OGC

OGC claims that Altman's strategy was to scare Einhorn's clients into giving Rosen what she wanted by describing her as hostile to them and capable of giving damaging testimony. (OGC Post-Hearing Br. 16-20.) As quid pro quo for Rosen receiving severance and having her name removed from the leases, OGC argues that Altman offered that Rosen would not cooperate or not remember when called to testify in Harrison Sec. (OGC Post-Hearing Br. 16-19, 21.) OGC characterizes Altman's position, that he was only urging Einhorn to arrange payment for Rosen so that Blumer would not look bad, as specious. (OGC Post-Hearing Br. 21.) OGC points out that information that Blumer paid Rosen $60,000 shortly before she testified would have been more damaging to Blumer than information that Rosen co-signed two car leases. (OGC Post-Hearing Br. 22.)

OGC maintains that Altman should be denied the privilege of appearing and practicing before the Commission under Rule 102(e) of the Commission's Rules of Practice and Section 4C of the Exchange Act because he knowingly engaged in improper professional conduct by suggesting that his client, a potential witness in a Commission administrative proceeding, would, in exchange for a financial package, avoid service of a subpoena, or, if subpoenaed, would feign no memory of relevant events. This conduct "undermines the Commission's investigatory and adjudicatory functions and threatens the integrity of its processes." (OGC Post-Hearing Br. 40.)

OGC refutes what it summarizes as Altman's arguments that: (1) his taped statements do not mean what is alleged; (2) he was not handling Rosen's matter carefully; (3) it was Einhorn's idea to link payments to a change of Rosen's testimony; (4) he made no false or deceitful statements; (5) Einhorn had no reason to believe that Altman was proposing an exchange of favorable testimony for payment; (6) Altman did not consummate the corrupt bargain; (7) Rosen

[20] OGC Ex. 29 was allowed in evidence except for ¶¶ 21(b)(i), 36(b), 36(f), and 37(a). (Tr. 616-18.)

[21] Altman's Post-Hearing Brief was ninety-seven pages. OGC's Post-Hearing and Reply Briefs were forty-one and twenty-five pages, respectively.

testified truthfully; and (8) Altman's conduct caused no harm to the Harrison Sec. proceeding. (OGC Post-Hearing Br. 6-14, 16-27; OGC Reply Br. 6-10.)

OGC argues that Altman violated DR 1-102(A)(4) because he sought to have his client engage in deceit or misrepresentation, i.e., pretend to forget facts that would assist the Division and hurt respondents in the Harrison Sec. proceeding. OGC cites the following cases where courts in the State of New York have sustained disciplinary action for violations of DR 1-102(A)(4): In re Geoghan, 253 A.D.2d 205 (N.Y. App. Div. 1999); In re Friedman, 609 N.Y.S.2d 578 (N.Y. App. Div. 1994); In re Lenahan, 34 A.D.3d 13 (N.Y. App. Div. 2006); In re Davidson, 11 A.D.3d 11 (N.Y. App. Div. 2004); In re Wisehart, 281 A.D.2d 23 (N.Y. App. Div. 2001). OGC cites In re Russakoff, 79 N.Y.2d 520 (N.Y. 1992), for the proposition that a violation of DR 1-102(A)(4) requires an intent to defraud, deceive, or misrepresent. Id. at 524. It argues that Altman acted knowingly and contemplated that Rosen would make either an intentional misrepresentation or omission if she were paid. (OGC Post-Hearing Br. 28-30.)

OGC believes that Altman violated DR 1-102(A)(5) because he suggested to Einhorn that Rosen would not remember relevant facts if she received a package of benefits from Einhorn's clients, which was an offer to testify falsely for money. (OGC Post-Hearing Br. 30.) OGC cites the following cases as instances where New York courts have found such conduct prejudicial to the administration of justice: In re Gen, 29 A.D.3d 230 (N.Y. App. Div. 2006); Geoghan, and Friedman. (OGC Post-Hearing Br. 31.) OGC maintains that Altman's conduct led to the impeachment of Rosen and the Administrative Law Judge's rejection of her testimony. Furthermore, Altman wasted the Division's time, and it was serendipitous that the Division did not need her testimony to prevail. (OGC Post-Hearing Br. 32.)

OGC claims that Altman violated DR 1-102(A)(7), citing In re Shapiro, 128 N.Y.S. 852 (N.Y. App. Div. 1911), for a holding that an attorney is "an officer of the court upon whom rests the responsibility of preventing false or perjured testimony." Id. at 858. OGC believes that Altman's suggestion that Rosen would either not cooperate or would testify falsely reflects adversely on Altman's fitness to practice law. (OGC Post-Hearing Br. 32.)

Altman

I. The charges should be dismissed because the alleged violations did not constitute securities law violations and were not committed while appearing or practicing before the Commission.

Altman contends that the charges should be dismissed because Rule 102(e)(1) only applies where persons committed wrongdoing while "appearing" or "practicing" before the Commission or have willfully violated the securities laws.[22] (Altman Post-Hearing Br. 27-32.) Altman defines appearing or practicing before the Commission as transacting business or

[22] Citing the language of Rule 102(e) of the Commission's Rules of Practice and the adopting releases for amendments in 1995 and 1998. (Altman Post-Hearing Br. 27-28.)

communicating with the Commission and denies that he has done either. (Altman Post-Hearing Br. 32.)

Altman cites Robert W. Armstrong, III, 85 SEC Docket 3011, 3031-34 (June 24, 2005), in which the Commission concluded "that the Commission may discipline individuals pursuant to Rule 102(e) even if those individuals did not appear or practice before the Commission while committing willful violations of the securities laws."[23] Altman contends, however, that the Commission has not indicated that a professional can be disciplined where he did not commit any wrongdoing while practicing before the Commission and has not been charged with a violation of the securities laws. (Altman Post-Hearing Br. 27-28.)

Altman contends that he was not appearing or practicing before the Commission by conversing with Einhorn during the period January 28 through February 10, 2004, and that he is not charged with a violation of the securities laws. (Altman Post-Hearing Br. 29.) In addition, Altman contends that, during this time period, he was not representing a witness in a Commission proceeding because Rosen had not been served with a subpoena, had not testified, and had not been scheduled to testify. (Altman Post-Hearing Br. 30.) Altman believes that his conversations with Division attorneys in February 2004, a "superficial contact on behalf of someone not yet under subpoena," cannot reasonably be deemed to be an appearance or practice before the Commission. (Altman Post-Hearing Br. 30.) Altman argues that OGC does not allege that he committed any violations after March 3, 2004, shortly after Rosen was served with a subpoena in the Harrison Sec. proceeding. (Tr. 212; OGC Ex. 9; Altman Post-Hearing Br. 31.)

Altman cites proposed rules in 2002 pursuant to the Sarbanes-Oxley Act to support his contention that the concept of appearing or practicing before the Commission apparently does not include an attorney's defense of an issuer in a Commission civil injunctive action because the issuer is not transacting business with the Commission, even though the attorney communicates with the Commission's staff.[24] (Altman Post-Hearing Br. 29.)

II. This proceeding is outside the scope of Rule 102(e).

Altman contends that, after twenty years of indicating that it would not generally institute Rule 102(e) proceedings against attorneys absent a judicial determination of a securities law violation, the Commission is acting in an arbitrary and capricious manner in singling him out for "very special treatment without a rational basis to do so." (Altman Post-Hearing Br. 36.) Altman relies on a 1982 General Counsel speech and a 1988 Commission release, representing that "Rule 2(e) proceedings rarely entail the adjudication of questions concerning professional

[23] Armstrong was a corporate controller who willfully violated Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5 and caused antifraud, reporting, and record keeping violations by the corporation. He was not a corporate officer and did not sign documents filed with the Commission.

[24] Implementation of Standards of Professional Conduct for Attorneys, 78 SEC Docket 3239 (Dec. 2, 2002).

standards that govern the conduct of attorneys," to argue that the securities bar had no notice that Altman's conduct could result in a disciplinary proceeding pursuant to Rule 102(e).[25] (Altman Post-Hearing Br. 32-34.)

Altman buttresses his no notice argument with citations to the adoption of the above cited proposed rules in 2002 which, "like the statute that authorized them, related only to attorneys, 'appearing and practicing before the Commission in any way in the representation of issuers.'" (Altman Post-Hearing Br. 34-35.)

Altman faults the Commission for failing to give notice of the standards that it applies to someone in Altman's situation and likens his situation to the Respondents in Checkosky and Marrie. (Altman Post-Hearing Br. 37 (citing Checkosky v. SEC, 23 F.3d 452 (D.C. Cir. 1994); Checkosky v. SEC, 139 F.3d 221 (D.C. Cir. 1998); and Marrie v. SEC, 374 F.3d 1196 (D.C. Cir. 2004)).) Altman maintains that he could not have anticipated that the Commission would enforce NYCPR for conduct in connection with representation of a prospective witness. (Altman Post-Hearing Br. 36-37.)

III. Altman did not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

A. Altman did not deceive anybody.

Altman argues that DR 1-102(A)(4), 22 NYCRR 1200.3(a)(4), applies only to acts involving deceit or deception. He cites to the definition in the NYCPR, 22 NYCRR 1200.1(i), which excludes from the meaning of the word "fraud" "any conduct . . . which lacks an element of scienter, deceit, intent to mislead, or knowing failure to correct misrepresentations which can be reasonably expected to induce detrimental reliance . . . ." (Altman Post-Hearing Br. 37-38.)

Altman maintains that he did nothing to facilitate false or misleading testimony by Rosen. He contends that there is not a shred of evidence that suggests her testimony was untruthful and notes that the Division believed, after listening to the taped conversations, that her testimony on what they intended to ask her about would be truthful. (Tr. 267; OGC Ex. 26 at 2; Altman Post-Hearing Br. 38.) Altman contends that nothing in the Initial Decision in Harrison Sec. "implicates her substantive testimony (as opposed to her reliability)." (Altman Post-Hearing Br. 38.) Altman concludes that Rosen's lack of credibility appears not to have resulted from any perceived falsehoods in her substantive testimony.[26]

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[25] Disciplinary Proceedings Involving Professionals Appearing or Practicing Before the Commission, 41 SEC Docket 448, 459 (July 19, 1988).

[26] The Administrative Law Judge stated: "I have not relied upon the testimony of Rosen, the Division's rebuttal witness. Rosen was thoroughly impeached on cross-examination. I do not consider her to be a reliable witness." (OGC Ex. 19 at 11.) The Initial Decision in Harrison Sec. became the final decision of the Commission. Harrison Sec., 84 SEC Docket 117 (Oct. 29, 2004).

Altman insists that he did not cause Rosen to testify falsely. He cites undisputed testimony that Rosen was unaware of the substance of his conversations with Einhorn, those conversations did not result in any bargain, those conversations ceased a month before she testified, and changing Rosen's testimony would have been "difficult and risky" because the Division already knew the information Rosen had. (Altman Post-Hearing Br. 38-40.) Altman concludes that whatever the propriety of his conduct, it did not involve the provision or attempted provision of false testimony. (Altman Post-Hearing Br. 40-41.)

B. Altman did not promise to have Rosen testify falsely or evade service.

(i) Overview

(i)(a) Altman was attempting to persuade Einhorn that goodwill and amelioration of car leases were reasons to settle with Rosen.

According to Altman, he was "several steps removed from 'conduct involving fraud' because he did not intentionally offer or agree to have Bonnie Rosen testify falsely or evade service in exchange for a severance payment or release from car leases." (Altman Post-Hearing Br. 41.) Altman asserts that the general hostility or goodwill of a material witness is a legitimate and substantial consideration for a litigator. He contends that he attempted to convince Einhorn to get his clients to release Rosen from the car leases and give her a severance package by, among other things, suggesting that doing so would be materially better for Blumer and Harrison Securities because: (1) Rosen would be less hostile and more favorably inclined towards them, and (2) it would eliminate highly embarrassing testimony that Rosen co-signed leases for Blumer. (Altman Post-Hearing Br. 41.) These arguments were far from perfect, but they were "the best ammunition" Altman had. (Altman Post-Hearing Br. 41.)

Altman dismisses OGC's position that the car leases were not relevant to the Division attorneys presenting evidence against Einhorn's clients in Harrison Sec. as "misguided" and "baffling." (Altman Post-Hearing Br. 42-43.) Noting that trials are unpredictable, Altman maintains that it was objectively credible for him to argue to Einhorn that testimony about the car leases would be potentially dangerous for Blumer in the Harrison Sec. hearing. (Altman Post-Hearing Br. 43.) Altman concludes that whatever the strengths or weaknesses of his argument about the car leases, he would not have needed to make such arguments to Einhorn if his intent was to negotiate Rosen's substantive testimony about the computer virus. (Altman Post-Hearing Br. 44-45.)

(i)(b) Potential for confusion between car lease and virus arguments.

Altman maintains that it was legitimate for him to argue with Einhorn that if Einhorn's clients provided releases and severance pay to Rosen, then Rosen would be less hostile toward

them, the tone of her testimony and willingness to speak with Einhorn might improve,[27] and the facts relating to the car leases would change. (Altman Post-Hearing Br. 45.) "[L]inking her testimony and her demand was also not necessarily wrongful." (Altman Post-Hearing Br. 54.)

Altman considered it would have been illegitimate for him to argue with Einhorn that Einhorn's clients should give Rosen what she wanted and that Rosen would change her substantive testimony about the computer virus. (Altman Post-Hearing Br. 45.) According to Altman, both outcomes link Rosen's testimony to settlement of her claims, however, the legitimate arguments result in outcomes that flow naturally from a settlement, but the illegitimate outcomes could result only from an agreement to exchange testimony for benefits and releases. (Altman Post-Hearing Br. 45.) "Perhaps [Einhorn] did not appreciate the fine line between properly and improperly linking Ms. Rosen's testimony to her receipt of benefits and releases." (Altman Post-Hearing Br. 60.) Altman repeats his legitimate versus illegitimate distinction several times.

Altman argues that the common feature and similarity of the legitimate and illegitimate arguments could lead to confusion between the participants in the taped conversations. Altman claims that his argument "was particularly susceptible to confusion because he was not paying close attention to the matter, was living with a high level of stress, and was abusing alcohol." His condition made him vulnerable to Einhorn's attempts to cause him to make incriminating statements. (Altman Post-Hearing Br. 45-46.)

(i)(c) Altman's handling of the Rosen matter was not deliberate and careful.

This portion of the Brief is a recitation of the evidence. (Altman Post-Hearing Br. 47-52.)

(ii) First conversation between Altman and Einhorn; subsequent taped conversations.

(ii)(a) Basic substance of first conversation.

This portion of the Brief is a recitation of the evidence. (Altman Post-Hearing Br. 52.)

(ii)(b) Einhorn's equivocation and lies undermine his story and justification for taping the calls.

Altman argues that Einhorn illegally taped the phone conversations with Altman, that he was not a credible witness, and that he violated 18 U.S.C. § 4, Misprision of felony, by not reporting what he considered to be an extortion attempt by Altman, and that he is unscrupulous.[28] (Altman Post-Hearing Br. 53-56.)

[27] Nothing in the record suggests that Einhorn ever wanted to speak with Rosen.

[28] OGC notes that 18 U.S.C. § 4 is applicable to a person who has knowledge of the commission of a felony, conceals and does not as soon as possible make known the same. According to

(ii)(c) Evidence casts further doubt on Einhorn's account of his first conversation with Altman and his justification for taping later conversations.

Altman argues that Einhorn's conversation with third persons that was captured on tape along with the Altman conversations, shows "that Mr. Einhorn is not shy about lying to this tribunal and that his criminal misconduct is found wherever a rock is overturned." (Altman Post-Hearing Br. 59.) Altman contends that Einhorn's testimony that he began to tape his conversations with Altman only after he believed Altman was attempting extortion in their first conversation is not credible. (Altman Post-Hearing Br. 60.)

(ii)(d) OGC's contention that Altman first raised the subject of payment in exchange for Rosen's substantive testimony is baseless.

Altman finds Einhorn's testimony about his first unrecorded conversation with Altman and the inferences he drew from it unclear. Altman characterizes OGC arguments and citations for the argument that Altman first suggested a trade of money and releases for Rosen's agreement not to testify about the computer virus as specious and misleading. (Altman Post-Hearing Br. 60.) Altman argues that OGC is wrong that Altman proposed an exchange of substantive testimony for benefits in Altman's first unrecorded conversation with Einhorn. (Altman Post-Hearing Br. 62.)

(iii) The taped conversations

(iii)(a) First known taped conversation.

Altman claims that "he obviously stated from the beginning of [the first taped] conversation that the Commission staff knew the basic substances of Ms. Rosen's information regarding the purported computer virus." (Altman Post-Hearing Br. 64.) The fact that the Commission's staff knew and had discussed the computer virus with Altman undermines any notion that Altman was trying to get Einhorn's clients to pay Rosen to change her testimony.

Altman claims that inasmuch as he had already told Einhorn that the Commission's staff was aware of Rosen's information and potential testimony, Einhorn tried to force a conversation about avoiding or altering Rosen's testimony. Altman claims that his statements in the first taped conversation after business hours and probably after consuming alcohol were a "semi-coherent babble." (Altman Post-Hearing Br. 65-66.)

(iii)(b) Second known taped conversation.

Altman disagrees with OGC interpretation of Altman's statement to Einhorn that he told the Division that he was not focusing on the matter. (Altman Post-Hearing Br. 68.)

OGC, the mere failure to report a crime is insufficient to support the charge. (OGC Reply Br. 11.) Einhorn did talk with the United States Attorney's Office at some time after the hearing. (Tr. 86.)

(iii)(c) Third known taped conversation.

Altman argues that, at the time of this conversation, he "was inattentive, sloppy, and probably intoxicated," and that OGC's sinister interpretation of the conversation is unlikely and inconsistent with his words. (Altman Post-Hearing Br. 69.) He maintains that his statements clearly implied that Rosen would not give untruthful testimony and that the failure to placate her might result in bad consequences for Blumer is consistent because, as noted previously, Rosen's hostility could affect the tone of her testimony, her willingness to consult with Einhorn, if asked to do so, and the issue of leases might embarrass Blumer at trial. (Altman Post-Hearing Br. 68-69.)

Altman characterizes his response of what Rosen would do if Einhorn's clients settled with her: "you know, I don't even know – you know she was not a registered person . . . I don't even know what her address is. The SEC can find her or not find her," as a stupid rejoinder by an annoyed and distracted man that could imply Rosen would not volunteer her testimony and the Commission might not be able to find her. (Altman Post-Hearing Br. 71.)

Altman repeats previous arguments that: (1) he was not offering anything to Einhorn, but was predicting the natural results of releases and receipt of severance pay, and (2) he could not have been suggesting that Rosen change her substantive testimony because Rosen had told the NASD and Division what she knew. (Altman Post-Hearing Br. 72-73.)

Altman cites the portion of the conversation where he refers to arguments he made to Adoni previously before Rosen's testimony was an issue, as evidence that he was seeking "no more" here, and that this discredits OGC's claim that he was seeking benefits in exchange for Rosen's false testimony or evasion of service. (Altman Post-Hearing Br. 73-74.)

Altman maintains that his statement beginning with "you pays your money, you take your chances" does not imply that he was seeking a trade of changed substantive testimony about the alleged computer virus for benefits for Rosen. Altman admits that his statements were not models of clarity but that "[d]istracted, obviously annoyed, probably tired after a long day and drunk, he was hardly in a position to compose his speech." (Altman Post-Hearing Br. 74-75.)

(iii)(d) Fourth and Fifth taped conversations.

Altman considers his response, "Uh, Probably both," as to Einhorn's inquiry, "What will we get if they [get Rosen out of leases and give her a year's salary], she won't cooperate or she won't remember," to be a "stupendous lapse of judgment." (Altman Post-Hearing Br. 77; OGC Ex. 18 at 1660.) Altman admits that his remark was "a colossally stupid statement that is in large part responsible for these proceedings." He maintains that he was "unprepared, careless, and almost certainly intoxicated." (Altman Post-Hearing Br. 76-77.)

Altman argues that his failure to communicate with Einhorn after this call and his argument that he never spoke to Rosen about his conversations with Einhorn, show he never intended to orchestrate any agreement. (Altman Post-Hearing Br. 78.) Altman contends his

conversations with Einhorn "consisted of legitimate requests and predictions, empty bombast, and one-sided fencing. They did not include any real attempt to alter testimony." (Altman Post-Hearing Br. 78.)

IV. Dr. Mills's testimony that Altman did not appear to be intoxicated is preposterous.

Altman challenges Dr. Mills's credentials for concluding that Altman was not intoxicated or impaired during the taped phone conversations with Einhorn. (Altman Post-Hearing Br. 78-79.) He characterizes Dr. Mills's opinion as preposterous and lacking sufficient bases. (Altman Post-Hearing Br. 80.) According to Altman, common sense indicates, and courts have recognized, that a person "can be impaired by alcohol and yet show no outward sign of that impairment." (Altman Post-Hearing Br. 80 (citing Olson v. Ford Motor Co., 481 F.3d 619, 629 (8th Cir. 2007)).)

V. Altman did not engage in conduct prejudicial to the administration of justice or conduct adversely reflecting on his fitness to practice law.

Altman argues that he did not violate DR 1-102(A)(5) and (7) for the same reasons he did not violate DR 1-102(A)(4): "not a scintilla of evidence suggests that he sold Ms. Rosen's testimony, that Ms. Rosen perjured herself, or that Mr. Altman ever talked to her about doing so." (Altman Post-Hearing Br. 82.) Altman distinguishes the cases cited by OGC. (Altman Post-Hearing Br. 81 n.46.) According to Altman:

> [t]he worst that can accurately be said about him is that through carelessness and false bravado he made bombastic statements that could be interpreted to indicate that his client was willing to enter into a corrupt bargain but for which he had no basis and no intent to follow it or them up and in fact did not do so.

(Altman Post-Hearing Br. 82.)

A. Altman should not be suspended from practicing before the Commission.

Altman argues that suspension under Rule 102(e) may be imposed for remedial purposes only, and that, in the absence of a strong showing of necessity to prevent future violations, the sanction may be considered punitive. (Altman Post-Hearing Br. 83-87.) See, e.g. McCarthy v. SEC, 406 F.3d 179, 188 (2d Cir. 2005); Kenneth L. Rubin, 86 SEC Docket 508, 532 (Sept. 8, 2005). Altman contends that, to impose a sanction, the Commission must show that the respondent is likely to repeat a violation if the relief is not imposed and that a lesser sanction will not be equally effective. (Altman Post-Hearing Br. 84.) Further, a showing of a past violation by itself is not sufficient to show the required "some risk" or "serious risk." (Altman Post-Hearing Br. 84-85 (citing KPMG Peat Marwick LLP, 74 SEC Docket 384, 430 (Jan. 19, 2001), as interpreted in KPMG, LLP vs. SEC, 289 F.3d 109, 125-26 (D.C. Cir. 2002); and KPMG Peat Marwick LLP, 74 SEC Docket 1351, 1361 (March 8, 2001)).)

Altman argues that the Commission must show a heightened risk of future violations and need for the sanction in order to justify suspensions or disbarments from otherwise lawful

occupations, especially where the respondent has not been cited previously, and it cannot rely on "wooden incantations of its traditional factors or a bald conclusion of risk to the public resulting from a prior violation in order to justify a suspension." (Altman Post-Hearing Br. 85 (citing McCarthy, 406 F.3d at 188; Monetta Fin. Servs., Inc. v. SEC, 390 F.3d 952, 957 (7th Cir. 2004); and SEC v. Patel, 61 F.3d 137, 141-42 (2d Cir. 1995)).)

Altman claims that a "convincing showing of risk of future violations is required to suspend or enjoin professional privileges in large part because the consequences including stigma and the loss of livelihood." (Altman Post-Hearing Br. 86-87 (citing McCarthy, 406 F.3d at 190; and Patel, 61 F.3d at 141-42).)

Altman concludes that, to suspend him from practicing before the Commission pursuant to Rule 102(e)(1), the Commission must have a particularly strong showing of the likelihood of future violations and need for this sanction. (Altman Post-Hearing Br. 86.) He notes that, if the Commission sanctions him, New York State disciplinary authorities will likely impose the same, or stricter, sanction, he will be publicly humiliated, deprived of his livelihood, and his reputation will be tarnished. See, e.g., Kivitz v. SEC, 475 F.2d 956, 962 (D.C. Cir. 1973) ("As courts have stated many times, the consequences of those forms of relief are damming and implicate an attorney's livelihood, reputation, and self-esteem.")

B. A suspension is not necessary to protect the Commission from future misconduct by Altman.

Altman argues that OGC has not shown that he will likely commit future violations or that suspending him from practice before the Commission is necessary. (Altman Post-Hearing Br. 87.) He contends that, even if the allegations are found to be true, the evidence shows, at most, an isolated violation of ethical duties that occurred in several short telephone conversations, over twelve days some four years ago. (Altman Post-Hearing Br. 87-88.) Altman notes that this is the only evidence that OGC presented in his twenty-two years of legal practice and it occurred when he was operating under stress and in the throes of substance abuse problems. Altman maintains he has taken decisive steps to address his personal issues. (Altman Post-Hearing Br. 88.) Altman maintains that his conduct for seventeen years before and four years following the events at issue, negates any implication that he is a continuing risk to the public or the Commission. (Altman Post-Hearing Br. 89 (citing McCarthy 406 F.3d at 189; Monetta Fin. Servs., Inc., 390 F.3d at 957; and SEC v. Jones, 476 F.Supp.2d 374 (S.D.N.Y. 2007)).)

Altman contends that the factors the Commission uses to decide whether to impose sanctions, including the low risk of repetition, weigh in his favor. As mitigating circumstances, Altman cites his personal circumstances at the time, Einhorn's pursuit of him, his lack of intent to follow through with any corrupt bargain, his substance abuse and intoxication, and his low degree of scienter in that "he did not carefully plan to commit any violations but, at the very worst, committed them during an isolated period of days." (Altman Post-Hearing Br. 89-90.)

Altman claims another reason his conduct cannot be considered egregious is that it did not harm the Division's prosecution in Harrison Sec. He repeats previous arguments that the

evidence does not suggest that he actually sought to alter Rosen's testimony, that he could have done so, or that he talked to Rosen about the possibility of doing so. (Altman Post-Hearing Br. 90.) Finally, he notes that his motivation was to assist an acquaintance and not personal gain. (Altman Post-Hearing Br. 90.)

VI. Altman's alcoholism should be considered a mitigating factor in determining whether to and how to sanction him.

Altman views this proceeding as an attempt by the Commission to enforce provisions of NYCPR codified at 22 NYCRR 1200.1 et seq. He argues that, to be fair, the Commission must consider rules and programs that exist in the State of New York. He argues that, if this matter arose in New York, it would probably have been diverted from the disciplinary system to a program for attorneys who raise the issue of alcohol or other substance abuse issues as a factor in their conduct. (Altman Post-Hearing Br. 91-94.) Altman cites to several cases for the proposition that New York disciplinary authorities and the courts consider substance abuse and psychological issues to be mitigating factors.[29] Altman claims that his conduct was not substantially more serious than the conduct described in the cited cases. (Altman Post-Hearing Br. 94.) Altman maintains that the cases OGC cites in its briefs show that the courts consider psychological issues in mitigation of ethical violations.[30] (Altman Post-Hearing Br. 95-96.)

CONCLUSIONS OF LAW

The OIP directs that a determination be made on whether Altman is subject to discipline pursuant to Section 4C of the Exchange Act and Commission Rule of Practice 102(e)(1)(ii) because his conduct allegedly violates NYCPR DR 1-102(A)(4), (5), and (7).

Section 4C of the Exchange Act states:

> (a) *Authority to Censure.* The Commission may censure any person, or deny, temporarily or permanently, to any person the privilege of appearing or practicing before the Commission in any way, if that person is found by the Commission, after notice and opportunity for hearing in the matter -
>
> (1) Not to possess the requisite qualifications to represent others;
> (2) To be lacking in character or integrity, or to have engaged in unethical or improper professional conduct; or

[29] In re Ocasio, 223 A.D.2d 339 (N.Y. App. Div. 1996); In re Krouner, 216 A.D.2d 786, 787 (N.Y. App. Div. 1995); In re Huyck, 207 A.D.2d 88 (N.Y. App. Div. 1994); In re Barry, 241 A.D.2d 53 (N.Y. App. Div. 1998).

[30] In re Vanderbilt, 279 Kan. 491, 494-95 (Kan. 2005); In re Asbell, 135 N.J. 446, 452 (N.J. 1994); In re Ragucci, 112 N.J. 40, 43 (N.J. 1988); see also United States v. Johnston, 979 F.2d 396, 401 (6th Cir. 1992).

(3) To have willfully violated, or have willfully aided and abetted the violation of any provision of the securities laws or the rules and regulations issued thereunder.

Commission Rule of Practice 102, Appearance and Practice Before the Commission, provides:

> * * *
> (b) *Representing Others.* In any proceeding, a person may be represented by an attorney at law admitted to practice before the Supreme Court of the United States or the highest court of any state.
>
> * * *
> (e) *Suspension and Disbarment.*
> (1) *Generally.* The Commission may censure a person or deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found by the Commission after notice and opportunity for hearing in the matter: -
>
> * * *
> (ii) to be lacking in character or integrity or to have engaged in unethical or improper professional conduct; . . . .

Section 602 of Sarbanes-Oxley, 15 U.S.C. § 78d-3, codified Rule 102(e) as Section 4C of the Exchange Act. Rule 102(e) has been the primary vehicle available to the Commission to protect its processes and ensure the competence of professionals (including attorneys) who appear and practice before it. See Implementation of Standards of Professional Conduct for Attorneys; Proposed Rule, 78 SEC Docket 3239, 3241 (Dec. 2, 2002).

Authority for the proceeding

I reject Altman's position that this proceeding should be dismissed because Altman is not within the scope of Rule 102(e)(1)(ii) because he was not appearing or practicing before the Commission at the time and he did not violate the securities statutes.

Neither Section 4C of the Exchange Act nor Rule 102(e)(1)(ii) requires a violation of the securities statutes. This proceeding alleges violations of Rule 102(e)(1)(ii), but Altman's argument is based on language from Rule 102(e)(1)(iii) that requires a violation of the Federal securities laws or rules and regulations thereunder. The language of (iii) does not carry over to (ii). Rule 102(e)(1)(ii), which is a disjunctive statement meaning that the three parts of Rule 102(e)(1) are "expressed by mutually exclusive alternatives joined by or." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 333 (10th ed. 2001).

The definition of "practicing before the Commission" from Rule 102(f) is not a requisite for the applicability of Rule 102(e)(1)(ii).[31] Neither Section 4C of the Exchange Act nor Rule 102(e)(1)(ii) require that the conduct occur while a person was appearing or practicing before the Commission. Section 4C of the Exchange Act encompasses "any person," and Rule 102(e)(1)(ii) encompasses "a person." In addition, Armstrong, 85 SEC Docket at 3033 (June 24, 2005), held that "the text of Rule 102(e) contains no requirement that a person must be appearing and practicing before the Commission at the time of the conduct on which the Commission's findings are based."

Even though appearing and practicing before the Commission is not required for Rule 102(e)(1)(ii) to be applicable to Altman, Altman was in that status when he spoke to Einhorn in January and February 2004. As an attorney transacting business with the Commission on behalf of a client, Altman was appearing and practicing before the Commission during that time period. Altman represented Rosen, who he knew the Division wanted to talk with as a prospective witness, when he spoke to and exchanged voice messages with the Division on Rosen's behalf from January 28 through March 10, 2004. He was Rosen's legal representative when the Division interviewed Rosen by telephone on March 8, 2004, and when the Division conducted an in-person interview before Rosen testified in Harrison Sec. on March 10, 2004. Rosen testified in Harrison Sec. that everything went through her attorney. (OGC Ex. 13 at 1674.) Altman's claim that he was not practicing before the Commission because his client had not been served with a subpoena, had not been scheduled to testify, and had not testified, is unpersuasive.

Lack of notice

I reject Altman's claims that: (1) he had no notice because the Commission is doing something that it said for twenty years it would not do; (2) he has been singled out for prosecution; and (3) the Commission is enforcing standards that it has not articulated. First, Rule 102(e) has not changed significantly since it took effect in 1935, and attorneys who deal with the Commission should be aware of its existence.

> Rule II (l) The Commission may, in its discretion, deny admission to, suspend, or disbar, any person who does not possess the requisite qualifications to represent others, or who is lacking in character, integrity, or proper professional conduct. Except as provided in paragraph (m) of this rule, a person who has been admitted to practice can be suspended or disbarred only after he has been afforded an opportunity to be heard.

[31] Rule 102(f) states that practicing before the Commission shall include, but shall not be limited to:

> (1) transacting any business with the Commission; and
> (2) the preparation of any statement, opinion or other paper by any attorney, accountant, engineer or other professional or expert, filed with the Commission in any registration statement, notification, application, report or other document with the consent of such attorney, accountant, engineer or other professional or expert.

(First Annual Report of the Securities and Exchange Commission, Fiscal Year Ended June 30, 1935 at 52.)

Second, attorneys are always on notice that their conduct must be in accord with the applicable ethical standards established by the state bar to which they belong. Third, Altman's claims are based in large part on a speech by a Commission General Counsel twenty-two years before the conduct at issue. A speech by a Commission official is not a statement of Commission policy, and the General Counsel did not opine that the Commission lacked authority to initiate an action under Rule 102(e), rather, "He further suggested that the Commission should focus its attention on bringing Rule 102(e) proceedings against attorneys when the alleged misconduct represents 'a violation of established state law ethical or professional misconduct rules and has a direct impact on the Commission's internal processes.'" Implementation of Standards of Professional Conduct for Attorneys; Proposed Rule, 78 SEC Docket 3239, 3242 n.20 (Dec. 2, 2002) (citing Edward F. Greene, Lawyer Disciplinary Proceedings before the Securities and Exchange Commission, Remarks to the New York County Lawyers' Association, (Jan. 18, 1982), Fed. Sec. L. Rep. (CCH) ¶ 83,089). Moreover, this proceeding involves allegations that Altman's conduct was a violation of state ethical rules with a direct impact on the Commission's internal processes so it is within the scope of what Mr. Greene suggested should be the Commission's focus. In a 2005 speech, Commission General Counsel Giovanni P. Prezioso noted that OGC was "investigating professional misconduct of attorneys and 'focusing on evidence of potentially serious misconduct: subrogation of perjury.'" (OGC Reply Br. 3.)

The second basis for Altman's claim is a portion of a 1988 Commission release that addresses arguments about the Commission's purported lack of expertise to conduct public Rule 102(e) proceedings.

> With respect to attorneys, the Commission generally has not sought to develop or apply independent standards of professional conduct. The great majority of Rule 2(e) proceedings against attorneys involve allegations of violations of the *law* (not of professional standards); thus, the Commission, as a matter of policy, generally refrains from using its administrative forum to conduct *de novo* determinations of the professional obligations of attorneys. Indeed, the Commission has generally utilized Rule 2(e) proceedings against attorneys only where the attorney's conduct has already provided the basis for a judicial or administrative order finding a securities law violation in a non-Rule 2(e) proceeding. Accordingly, Rule 2(e) proceedings rarely entail the adjudication of questions concerning professional standards that govern the conduct of attorneys. On the contrary, with respect to attorneys, such proceedings serve primarily as a vehicle for protecting the Commission against further practice by attorneys who have been the subject of other judicial or administrative proceedings involving securities law violations.

Disciplinary Proceedings Involving Professionals Appearing or Practicing Before the Commission, 41 SEC Docket 448, 452 (July 13, 1988).

The 1988 release did not state that the Commission would not, or could not, make a *de novo* determination in a Rule 102(e) proceeding. It said it generally did not do so, which the case law shows to be accurate.[32]

Altman's claims that the Commission acted in an arbitrary and capricious manner, singled Altman out for "very special treatment without a rational basis to do so," and that Altman could not have anticipated that the Commission would seek to enforce the NYCPR ethical standards against him have no support in the record. (Altman Post-Hearing Br. 36-37.) The material that Altman cites for support, however, states:

> Rule 102(e) does not establish professional standards. Rather, the rule enables the Commission to discipline professionals who have engaged in improper professional conduct by failing to satisfy the rules, regulations or standards to which they are already subject, including state ethical rules governing attorney conduct . . . .

Implementation of Standards of Professional Conduct for Attorneys; Proposed Rule, 78 SEC Docket 3239, 3241 n.13 (Dec. 2, 2002).

Finally, After the very public matters of record that occurred during the hearing in Harrison Sec., the Commission had little choice but to act in order to protect the integrity of its enforcement activities. Altman, not the Commission, is responsible for the initiation of this administrative proceeding.

Altman acted knowingly and with scienter.

Altman is wrong that his situation is similar to the respondents in Checkosky and Marrie and that he did not know the standard by which his conduct would be judged. At the prehearing conference on April 25, 2008, I inquired whether OGC believed negligence was sufficient for the alleged violations or whether scienter was required. OGC responded that it believed "there is clearly intentional conduct, so we haven't fully addressed whether there would be a situation in which a lesser standard would be appropriate." (April 25, 2008, Prehearing Conference Tr. 4-5.) An intentional wrong is "[a] wrong in which the *mens rea* amounts to intention, purpose, or design. - Also termed a *willful wrong.* BLACK'S LAW DICTIONARY 1606 (7th ed. 1999). The OIP alleges that Altman's knowing conduct violated DR 1-102(A)(4), (5), (7). (OIP at 2.)

Altman and OGC agree that:

> Altman did not suffer from any medical condition that caused him to commit the violations alleged in the OIP, prevented him from forming the intent necessary to

[32] This appears to be one of the few proceedings brought against an attorney for an ethical violation pursuant to Commission Rule of Practice 102(e)(1)(ii) and its predecessor Rule 2(e). See Kivitz, 475 F.2d at 962 (reversing the Commission's imposition of a two-year bar because it could not find that the evidence supporting the Commission's position was substantial.)

> commit the violations alleged in the OIP, or mitigates his responsibility for his own conduct.

(OGC Proposed Findings of Fact 119 (citing Tr. 28, 29, 511 and OGC Ex. 29 at ¶ 32-35); Altman's Proposed Findings of Fact A.)

> At all relevant times, Altman understood his ethical obligations, was able to tell the difference between right and wrong and understand the nature and consequences of his actions.

(OGC Proposed Findings of Fact 120 (citing Tr. 520, 522, 580 and OGC Ex. 29 at ¶ 32-35); Altman's Proposed Findings of Fact A.)

Altman's expert, Dr. Hoffman, testified that Altman's "adjustment disorder and his conduct, disturbance of excessive alcohol" did not: (1) render Altman unable to differentiate between right and wrong; (2) render him unable to understand the consequences of his actions; (3) impair him to a degree he could not practice law; or (4) prevent him from understanding his ethical obligations as an attorney. (Tr. 520-22.)

Altman did not claim: (1) in his investigative testimony; (2) in his Wells submission; (3) in his Answer; or (4) in his testimony in this proceeding that he was drunk at the time of any of his conversations with Einhorn or that the statements he made to Einhorn were caused by his consumption of alcohol. (Tr. 387-88, 393-95.)

In what appears to be a change of position in his post-hearing brief, Altman characterizes Dr. Mills's expert opinion that he was not intoxicated when he talked with Einhorn as "incredible" and "preposterous," and he contends that drinking affected his judgment while he was intoxicated and "in general."[33] (Altman Post-Hearing Br. 18, 18 n.9, 78-81.) He maintains that he was "probably intoxicated" on one phone call and "almost certainly intoxicated" on another. (Altman Post-Hearing Br. 69, 76-77.) Altman's explanation for his change of position is that he did not admit to being an alcoholic until March 16, 2008. (Tr. 395-96.) However, his testimony in this proceeding occurred on May 6-7, 2008.

The evidence is persuasive that Altman is an alcoholic who was not intoxicated, or otherwise intellectually impaired, when he initiated the contact with Einhorn and in subsequent conversations with Einhorn during the period January 28 through February 10, 2004. On learning that Einhorn represented Rosen's former employer, Altman contacted Einhorn and informed him that the Division had contacted Rosen as a prospective witness in Harrison Sec. In these conversations with Einhorn, Altman went further and questioned whether Einhorn's

[33] Altman did not object to the admission of Dr. Mills's expert opinion that he suffers from alcohol abuse. (Motion to Exclude Expert testimony of Mark Mills at 9; Tr. 634.) A person with an alcohol abuse diagnosis always has the condition, but does not necessarily drink alcohol on a particular day and, even if he drinks, he does not necessarily become intoxicated or disinhibited. (Tr. 646-47.)

clients, who had denied two similar requests, would now provide Rosen with the benefits she sought previously and stated, or, at the very least, directly implied, that Rosen would reciprocate by acting in a manner that would benefit Einhorn's clients. Altman knew this conduct was wrong because any lawyer knows that, in litigation, secretly contacting a respondent, when representing a witness for the other side, is improper and unethical. The seriousness of Altman's conduct is amplified by the facts that he is an experienced litigator and that his client was being called by the Division, whose efforts are to protect the investing public.

In addition to acting knowingly, Altman acted with scienter, "[a] mental state consisting in an intent to deceive, manipulate, or defraud." BLACK'S LAW DICTIONARY 1347 (7th ed. 1999). I reach this conclusion because Altman's failure to disclose his conversations with Einhorn to the Division was a deliberate deception of a material fact. Furthermore, it is reasonable to assume that Altman knew the Division was seeking Rosen to testify in rebuttal, so that he knew that the Division believed it needed her testimony to refute respondents' position. Altman was manipulating the Division to further the interests of his client.

Altman violated NYCPR DR 1-102(A)(4), (5), and (7) and thus Commission Rule of Practice 102(e)(1)(ii) and Section 4C of the Exchange Act.

The NYCPR, effective January 1, 1970, as amended effective January 1, 2002, provides:

> CANON 1 A lawyer should assist in maintaining the integrity and competence of the legal profession.[34]
>
> NYCPR DR 1-102 [§ 1200.3] Misconduct
>
> A. A lawyer or law firm shall not:
> . . .
> 4. Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
> 5. Engage in conduct that is prejudicial to the administration of justice.
> . . .
> 7. Engage in any other conduct that adversely reflects on the lawyer's fitness as a lawyer.

(New York State Bar Association Lawyer's Code of Professional Responsibility.)

The preponderance of the evidence is that Altman knowingly and intentionally violated Canon 1 of the NYCPR and DR 1-102(A)(4), (5), and (7), while representing a person in a Commission administrative proceeding because he willfully and with scienter acted in a manner

[34] The Appellate Divisions of the New York courts have consistently held that the standard of proof in attorney disciplinary proceedings is a fair preponderance of the evidence. See In re Capoccia, 453 N.E.2d 497, 498 (N.Y. 1983).

that did not maintain the integrity and competence of the legal profession.[35] Altman's violations amounted to unethical and improper professional conduct as those terms are used in Rule 102(e)(1)(ii) and Section 4C of the Exchange Act.

In the transcribed conversations that follow, Altman offered to have his client act in ways that would thwart the Commission's prosecutorial activities in exchange for benefits for his client. By seeking benefits for a client in exchange for behavior and/or testimony by the client that would adversely impact a Commission administrative proceeding, Altman engaged in conduct that involved dishonesty, fraud, deceit, and misrepresentation. The fact that Altman's offer was not accepted does not change the fact that he violated DR 1-102(A)(4) by engaging in conduct that involved dishonesty, fraud, deceit, and misrepresentation. See In re Kiczales, 36 A.D.3d 276, 279-80 (N.Y. App. Div. 2006); See also Geoghan, 253 A.D.2d 205 (holding an attorney violated Dr 1-102(A)(4), (5), (7) where he offered to have client testify falsely in exchange for payment).

Altman violated DR 1-102(A)(5) by conduct that was prejudicial to the administration of justice. Prejudicial is defined as "tending to injure or impair: detrimental." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 917 (10th ed. 2001). Altman's attempt to get benefits for his clients from the subject of a Commission proceeding in exchange for certain actions violated DR 1-102(A)(5) because it could have injured or impaired the ultimate outcome of the Harrison Sec. proceeding. In addition, Altman's actions caused turmoil in the Harrison Sec. hearing, and, as a result, the Commission expended considerable time, effort, and resources on this proceeding defending the legitimacy of its enforcement efforts. A violation of DR 1-102(A)(7) occurred because Altman failed in his responsibility as an officer of the court to prevent false or perjured testimony. See Shapiro, 128 N.Y.S. at 858.

The following exchange occurred in the first taped conversation:

> MR. EINHORN: Well, suppose she gets a subpoena to appear at the hearing?
>
> MR. ALTMAN: Well, you know if she gets served, then, you know, she is going to be any other human being. I, of course, can't advise her to evade the process, but . . . Memory fades and the like. And you know I don't know.
>
> MR. EINHORN: So, what you are saying is if they reach some agreement, she would be more favorably inclined?

[35] The term "willful" as used in the Exchange Act simply requires the intentional doing of the wrongful acts – no knowledge of the rule or regulation is required. See Wonsover v. SEC, 205 F.3d 408, 414 (D.C. Cir. 2000); United States v. O'Hagan, 139 F.3d 641, 647 (8th Cir. 1998); Tager v. SEC, 344 F.2d 5, 8 (2d Cir. 1965). Rule 102(e)(3)(i)(B) does not allow a temporary suspension if a person was found not to have committed a willful violation.

> MR. ALTMAN: That would be my guess as to what her recollection would be, you know. I don't have the personal knowledge, and I haven't done a full debriefing of her. I know Fred, I met him, as he may have told you.[36]

(OGC Ex. 18 at 1647-48.)

In their third taped conversation, which appears to have occurred on February 9, 2004, Einhorn informed Altman that Blumer would not provide Rosen a severance package. (Tr. 45-46; OGC Ex. 8.)

> MR. EINHORN: Anyway I spoke to Fred, and he has no control over, you know, anything that you are suggesting. He feels that this is an extortion attempt, trying to, you know, buy her a severance agreement. If he gets [Adoni] to do this, her testimony will be more favorable to him. And he just – he doesn't want to get involved in something like that. So she will do what she wants to do and testify however she wants to testify, and that will have to be it.
>
> MR. ALTMAN: Okay. That's probably unfortunate for you, but --
>
> MR. EINHORN: you know, look --
>
> MR. ALTMAN: --I am certainly not going to facilitate any untruthful testimony. And,
>
> * * *
>
> MR ALTMAN: My understanding is that she is going to directly say that there was no – I don't have my notes in front of me, but, bug in his computer that precipitated any loss of records. The truth is there were no records. She had access to all of them, that was part of the grist of the work of what she did, even though she was technically an employee of Nextgen and not Harrison.
>
> MR. EINHORN: If Nextgen settled with her, she wouldn't remember that?

[36] Altman and OGC differ on the proper transcription of Altman's last response. Altman would have it read as follows:

> MR. ALTMAN: That would be my guess. What her recollection would be, you know. I don't have the personal knowledge, and I haven't done a full debriefing of her, I know Fred, I met him, as he may have told you. (OGC Ex. 18A.)

I accept the Division's version because it more closely resembles the original version. (OGC Exs. 13, 18, and 18A.)

MR. ALTMAN: You know, I don't even know – you know, she was not a registered person. And you know, I don't even know what her address is. The SEC can find her or not find her.

MR. EINHORN: Well, you know, it is up to them. You know, what you are saying, she doesn't have a subpoena, she doesn't have to cooperate, but she will go in there and burn them unless they agree to pay her some severance and make her happy financially. And,

MR ALTMAN: No, I think they should have done that anyway. I am reinvigorating the offers I made to Jay, you know, a year ago.

MR. EINHORN: Well –

MR. ALTMAN: Well, I thought he made a misjudgment in doing that now, and I think he is probably making a misjudgment now. It is kind of – you know, think about her testimony. Here is a $60,000 a year secretary who's required to be – The president is such a bad manager of his own financial affairs, that it was required for him to get two car leases, that she co-signed it and despite repeated demands that she be relieved from that co-obligation, the president denied. It is you know its just terrible, terrible.

MR. EINHORN: I can tell you why. The guy is separated from his wife, and he has had problems, but that is neither here nor there. Just I don't know why she agreed to it, but you know she agreed to do it, and I am sorry she is not happy with her bargain and things didn't work out for her. But we're not gonna. He doesn't want to buy her silence, OK?

MR. ALTMAN: That's not what this is about anyway.

MR. EINHORN: What the hell is this about?

MR. ALTMAN: You pays your money, you take your chances. They should have settled with her a long time ago. This was another opportunity to do that, you didn't do that. There are consequences to that, some of which are controllable, some are not.

MR. EINHORN: Okay. Well. All right. You know, I just feel I am not – Fred has decided he is not going to buy her silence.

. . .

MR. ALTMAN: . . .

This reaction doesn't surprise me because [Adoni] doesn't seem to be the kind of guy that you back into a corner and I regret that [Adoni] is perceiving it

this way. What he really should do is take care of this gal who worked for . . . for many years, and these things all just disappear and everyone goes on with their lives. . . .

MR. EINHORN: Okay. Steve I can only pass the message along to you. That is all I am doing.

MR. ALTMAN: I hear you. I hear you. Colossal, colossal mistake, Irv. Personally, because, I like [Blumer] personally. It's regrettable, really regrettable. Just so, so stupid.

(Tr. 49; OGC Ex. 18 at 1652-56.)[37]

In the final taped conversation, Altman calls Einhorn and informs him that Rosen is going to speak with the Division. (OGC Ex. 18 at 1659.)

MR. ALTMAN: If there's not some other way to figure out some last clear chance to get out of it, because, you know, there is no –

MR. EINHORN: What is it gonna take? What is the bottom line? What is it going to take? What kind of package is this? I am a communicator here. What is the package that she wants to, you know, not cooperate or whatever?

MR. ALTMAN: Get her off those leases and, you know, a year's salary, and you can even pay it out over a year. As long as we've got . . .

MR. EINHORN: What will we get if they do that, she won't cooperate or she won't remember?

MR. ALTMAN: Uh, Probably both.

MR. EINHORN: Ok. All right. Let me pass it on to the client one more time, and --

* * *

MR. EINHORN: And tell him what you said and that she is going in next week unless something else happens.

MR. ALTMAN: Help me, help me not do this. I don't want to do this.

(OGC Ex. 18 at 1660-65.)

[37] Altman disagrees with the transcription at OGC Ex. 18 at 1652. (OGC Ex. 18A.)

None of the explanations or defenses that Altman offers can change the plain meaning of the words he spoke. His attempt to distinguish between a legitimate request to continue to get Rosen's name off the leases and an illegitimate request to change her testimony is tortured, invalid, and high level sophistry. The plain fact is that Rosen's status had changed after Altman learned on or about January 28, 2004, that the Division wanted to call Rosen as a witness. After that, Altman could not ethically or legitimately seek benefits for Rosen from the persons who were the subject of the proceeding using her status as a prospective government witness as leverage to obtain benefits for her.

Altman's position that he was not seeking benefits for Rosen in exchange for her action, but that he was only pointing out how silly Blumer would look if Rosen testified that she co-signed car leases is unpersuasive. (Tr. 359.) The Division was not interested in the car leases so the subject would likely not come up. In addition, Blumer could have been in considerable trouble if he agreed to give a government witness $60,000 and other benefits.

Altman argues that, contrary to his tape recorded statements, he could not have been offering to have Rosen avoid service of a subpoena because the Division was experienced in serving subpoenas. This defense is unpersuasive. The phone calls between Altman and Einhorn occurred between January 28 and February 10, 2004. The Division wanted Rosen to testify at a hearing on March 10, 2004. Rosen was served with a subpoena on March 2 or 3, 2004, to appear on March 9, 2004. (OGC Ex. 9.) If Rosen chose to avoid service, the Division had only about seven days before the March 10, 2004, hearing to locate her. It is noteworthy that the Division deliberately waited until after Rosen was served with the subpoena before notifying Altman because, based on dealings with Altman, "just to be on the safe side, [the Division attorney] didn't want there to be any issue." (Tr. 277-78.)

Altman also argues that he could not have been offering to have Rosen change her testimony because the NASD and the Division knew Rosen's testimony. This defense is unpersuasive. The Division had no sworn statements from the witness when she took the stand in Harrison Sec. on March 10, 2004.[38] Lacking material with which to impeach her, the Division had no ability to assure that Rosen testified to what she had told it and the NASD previously.

I find Altman not to be candid and credible based on my observations of his demeanor and the following. Altman testified that the Division knew from him and from other sources what Rosen's testimony would be in Harrison Sec. (Tr. 384.) When challenged as to whether he had told the Division the nature of Rosen's testimony, Altman changed his testimony to say in his mind it was implicit in his conversations with the Division what Rosen's testimony would be. (Tr. 384-86.) Altman testified that he did not return the Division's calls because Rosen was not a high priority client matter to him. (Tr. 34.) In fact, Altman spent twelve days after the Division's initial call trying to reach an agreement with Einhorn concerning Rosen's status as a Division witness. Altman contends that he never intended to bill Rosen, but Rosen testified on March 10, 2004, that she expected Altman to bill her. (Answer; Tr. 341, 354; OGC Ex. 13 at

[38] The Division began trying to talk with Rosen on February 2, 2004, but Altman did not make her available until a phone interview on March 8, 2004.

1671-72.) In 2005, Altman denied using, or having used, cocaine to Dr. Hoffman when, in fact, he had used cocaine in college. (Tr. 502, 555-56.) Altman did not tell Dr. Saraydarian, with whom he is in a continuing course of treatment, that he had been admitted to the hospital for cocaine abuse, as well as for alcohol abuse. (Tr. 350, 558.)

SANCTION

The purpose of Rule 102(e)(1)(ii) and Section 4C of the Exchange Act is remedial. The Commission has applied the following factors to determine whether to impose sanctions on individuals where it has found a violation: (1) the egregiousness of the respondent's action; (2) the isolated or recurrent nature of the infraction; (3) the degree of scienter involved; (4) the sincerity of the respondent's assurances against future violations; (5) the respondent's recognition of the wrongful nature of his conduct; and (6) the likelihood of future violations. See Herbert M. Campbell II, Esq., 83 SEC Docket 4000, 4009 (Oct. 27, 2004). Deterrence is also a factor to be considered. See Berko v. SEC, 316 F.2d 137, 141 (2d Cir. 1963); PAZ Secs., Inc. v. SEC, 494 F.3d 1059, 1066 (D.C. Cir. 2007) (citation omitted) ("[A]though general deterrence is not, by itself, sufficient justification for expulsion or suspension . . . it may be considered as part of the overall remedial inquiry.")

The egregiousness of the respondent's action.

Altman's conduct was egregious. As a member of a profession responsible for upholding honest and ethical standards, he engaged in dishonesty, deceit, fraud, and misrepresentation. Deceit is defined as the "act of intentionally giving a false impression." BLACK'S LAW DICTIONARY 413 (7th ed. 1999). While Altman gave the Division the impression he was arranging a meeting with his client, who the Division believed had knowledge that would buttress its position in Harrison Sec., Altman initiated discussions with the Division's adversary. During these conversations, Altman suggested that, in exchange for benefits, his client might be more favorably inclined towards the Division's adversary, that she might be difficult for the Division to subpoena, that, if subpoenaed, she might not remember, and that she might not cooperate with the Division. (OGC Ex. 18 at 1648, 1653-54, 1660.)

Altman engaged in fraud, defined as a "knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment," because he did not disclose his contacts with the Division's adversary, a material fact, and the Division relied on him to its detriment in calling his client as a rebuttal witness where she was "thoroughly impeached on cross-examination" and found not to be a reliable witness. BLACK'S LAW DICTIONARY 670 (7th ed. 1999); (OGC Ex. 19 at 11.) Altman's actions were prejudicial to the administration of justice and adversely reflected on his fitness to practice law because his objective was to interfere with truthful disclosure of the facts in a formal Commission proceeding.

The isolated or recurrent nature of the infraction.

Altman's conduct occurred over a twelve-day period in six separate phone calls with Einhorn in the period from January 28 through February 10, 2004, and in conversations with the

Division in the period from January 28 through March 10, 2004, where he failed to disclose material information. Altman's infractions were recurring.

The degree of scienter involved.

I reject Altman's contention that the response to his conduct should be softened because of mitigating circumstances.

> [T]o the extent that [he] is held to have violated his ethical duties, he did so under mitigating circumstances that included his personal circumstances both generally in early 2004 and during the relevant telephonic conversations, his pursuit by a determined adversary (Irving Einhorn), his lack of intent to follow through with any corrupt bargain, and his substance abuse and intoxication. His degree of scienter was low because he did not carefully plan to commit any violations but at the very worst committed them during an isolated period of days.

(Altman Post-Hearing Br. 90.)

The record does not show anything unique about Altman's difficulties in 2004 dealing with his ex-wife and his desire to spend time with his children who lived with her that would make them mitigating. Altman's characterization of his dealings with Einhorn as pursuit "by a determined adversary (Irving Einhorn)" is incorrect. (Altman Post-Hearing Br. 90.) The evidence is that Altman was the one who initiated and continued the conversations. Altman first contacted Einhorn and made three of the six telephone calls (first unrecorded, second taped, fifth taped). Einhorn's calls to Altman (first taped, third taped, fourth taped) were to respond to inquiries Altman posed to Einhorn's clients.

I reject Altman's argument that he was making empty threats as demonstrated by his failure to tell Rosen about his conversations with Einhorn.[39] (Altman Post-Hearing Br. 73.) The only evidence that Altman provided to support his position is Rosen's testimony in Harrison Sec. where she was considered an unreliable witness. (OGC Exs. 13 at 1640-42, 1667, 19 at 11.) Altman did not call Rosen as a witness. On May 20, 2006, Rosen gave notice that she would exercise her right under the Fifth Amendment to the U. S. Constitution not to testify in response to an investigative subpoena in this proceeding. (Tr. 596-600; OGC Ex. 27.)

I conclude that Altman had a high degree of scienter when he committed the violations in 2004. He is well educated, and, in 2004, he had been practicing law successfully for over fifteen years. Altman's substance abuse issues did not cause him to commit the violations. It is, therefore, illogical that any sanction be mitigated because of his lifestyle choices.

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

The sincerity of the respondent's assurances against future violations and recognition of the wrongful nature of his conduct.

Altman maintains:

> He also understands the wrongfulness of some of the statements that are at issue in this action. (Tr. 453-54, 483-84) The words "probably both" will cause him to wince for the rest of his life. He knows that he brought excruciating and enduring pain to himself and his family, jeopardized his children's futures and his family's name, and caused gross inconvenience for the Commission and its staff. He assures this tribunal and the Commission staff that he will never put himself (and them) in that position again. The attitude of carelessness and false machismo that brought him to this low point in his life is, together with his former drinking habits, a thing of the past.

(Altman Post-Hearing Br. 88-89.)

It is impossible to accurately assess whether Altman recognizes that his conduct was wrong and whether his assurances that he will not commit future violations are sincere. Altman is articulate, smart, professionally successful, and appears to have caring parents and a fiancée as a support network.[40] He is also willful, self indulgent, and not credible. In April 2008, more than four years after the conduct at issue, Altman left a twenty-eight day treatment program after eight days despite recommendations from the hospital and Dr. Saraydarian that he stay for the remainder of the program. (Tr. 469, 595.) The hospital record indicates that Altman left because he considers himself a quick study and would not benefit from staying longer in an in-patient program.[41] Altman's denial of what appears on the hospital discharge report is a recent example of his lack of credibility. (Tr. 397-98.)

The likelihood of future violations.

In addition to the assurances quoted above, Altman cites his violation-free conduct for seventeen years before 2004 and from 2004 to the present, as support for his claim that he is highly unlikely to violate his ethical obligations again. (Altman Post-Hearing Br. 89.)

The Commission has consistently rejected the argument that a lack of a disciplinary record should be considered as a mitigating factor in connection with the imposition of a sanction. See Michael A. Rooms, 85 SEC Docket 444, 450 (Apr. 1, 2005) aff'd, 444 F.3d 1208, 1215 (10th Cir. 2006); Robert J. Prager, 85 SEC Docket 3413, 3436 n.66 (July 6, 2005) (citing Ernest A. Cipriani, 51 S.E.C. 1004, 1007 (1994)). The acts at issue would not have come to light

[40] His parents and fiancée attended every day of the hearing in New York City.

[41] The discharging physician overruled someone and authorized the discharge to an intensive out-patient program at a different facility. (Tr. 398.)

without Einhorn's action of taping the conversations. Given the case law and the difficulty of uncovering ethical and regulatory violations, Altman's compliance record is of little weight in assessing the likelihood that he will not commit future violations.

Based on Altman's lack of credibility, his demeanor during the hearing,[42] the burdens he faces in continuing the financial support he claims to provide for three biological children and a fiancée and her child, the chances are no better than fifty-fifty that Altman will not commit future violations. It is necessary in the public interest to temporarily suspend Altman from appearing or practicing before the Commission for a substantial period considering the public interest factors enumerated above, the need to deter Altman and other attorneys from committing ethical violations, and to protect the integrity of future oversight of the securities industry by self-regulatory organizations and the Commission.

RECORD CERTIFICATION

Pursuant to Rule 351(b) of the Commission's Rules of Practice, 17 C.F.R. § 201.351(b), I certify that the record includes the items described in the record index issued by the Secretary of the Commission on December 19, 2008.

ORDER

Based on the findings of facts and conclusions of law set forth above, I find the public interest requires the following:

I ORDER, pursuant to Section 4C of the Securities Exchange Act of 1934 and Rule 102(e)(1)(ii) of the Commission's Rules of Practice, that Steven Altman, Esq., is denied the privilege of appearing before the Securities and Exchange Commission for a period of nine months.

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice, 17 C.F.R. § 201.360. Pursuant to that Rule, a party may file a petition for review of this Initial Decision within twenty-one days after service of the Initial Decision. A party may also file a motion to correct a manifest error of fact within ten days of the Initial Decision, pursuant to Rule 111 of the Commission's Rules of Practice, 17 C.F.R. § 201.111. If a motion to correct a manifest error of fact is filed by a party, then that party shall have twenty-one days to file a petition for review from the date of the undersigned's order resolving such motion to correct manifest error of fact. The Initial Decision will not become final until the Commission enters an order of finality. The Commission will enter an order of finality unless a party files a petition for review or motion to correct manifest error of fact or the Commission

[42] I have not relied on Dr. Mills's expert opinions, which are unrefuted and which I find to be accurate, because, except for Dr. Mills's public finding that Altman was not intoxicated during the phone conversations, they do not impact Altman's conduct that is the basis for this proceeding. It is reasonable to assume that Altman will have to deal with Dr. Mills's expert opinions contained in the CONFIDENTIAL portion of this Initial Decision, which rebut Altman's two experts, but I have relied on the public evidence in deciding the proper remedial sanction for Altman's violations.

determines on its own initiative to review the Initial Decision as to a party. If any of these events occur, the Initial Decision shall not become final as to that party.

_____

Brenda P. Murray
Chief Administrative Law Judge