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IN THE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 74-1499

FREEMAN & BASS, SAMUEL E. BASS, and SAM FREEMAN,

Plaintiffs-Appellants,

-vs.-

STATE OF NEW JERSEY COMMISSION OF INVESTIGATION, JOHN F. McCARTHY, JR., CHARLES L. BERTINI, WILFRED P. DIANA, RONALD S. DIANA, and MARTIN G. HOLLERAN,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR APPELLANTS

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether personnel of a state investigation commission may, under the guise of a limited inquiry into matters of public concern, conduct a destructive, illegally functioning, open-ended investigation into the affairs of a private law firm.

2. Whether personnel of a state investigation commission, operating without any internal procedures or controls and without any consideration for the constitutional rights of their "targets," may turn over the fruits of their investigation to other public authorities.

3. Whether a state investigation commission, whose personnel hold office illegally and which functions in total disregard of state law, may turn over the fruits of its investigation to other public authorities.

4. Whether an injunction should issue to prohibit state investigation commission personnel from turning over materials to other public authorities which have been collected during the course of a harassing, unlimited, illegal investigation into appellants' practice of law and their personal affairs.

5. Whether this Court, given the extensive, basically uncontroverted record before it, and in light of the failure of the court below to make findings of fact and conclusions of law, can make its own findings.

6. Whether appellants, on the basis of the present record and because the court below failed to comply with the instructions of this Court and otherwise denied appellants their procedural rights, are entitled to injunctive relief.

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PRELIMINARY STATEMENT

This is a civil rights suit. The appellants are attorneys who charge the State of New Jersey Commission of Investigation, its Commissioners, Special Counsel and agents (hereinafter collectively referred to as "SCI") with, in the words of this Court when describing

the nature of this action in an earlier appeal, "... having conducted an unconstitutionally broad investigation for the purpose of harassing and intimidating [appellants] and their clients, resulting in serious impairment of [appellants'] professional reputation as well as deprivation of [appellants'] right to petition for the redress of grievances on behalf of their clients." Freeman & Bass v. SCI, 486 F.2d 176, 177 (3d Cir. 1973).

Appellants' complaint alleges that their clients are largely poor, non-white, working class people who rely heavily upon their law firm for representation, and that their law firm often represents unpopular causes. See Freeman & Bass v. SCI, 359 F. Supp. 1053, 1055-56 (N.J. 1973). Prior to the filing of the motion which is the subject matter of this appeal, appellants had obtained a restraining order from the Honorable Leonard Garth, then a District Court judge, which, inter alia, prohibited the SCI from using its public hearings to damage appellants' reputation. This Court vacated that order because it found the record at the time to be insufficient to support injunctive relief and because the District Court had failed to make findings of fact and conclusions of law. This Court remanded the case for a hearing on the issue as to whether the SCI was proceeding against the appellants in bad faith with the purpose of harassment.

Appellants thereafter unsuccessfully sought an order -- the subject of this appeal -- in the court below before the Hon. Vincent P. Biunno: [1]

1. Preliminarily enjoining, pending trial, the transmittal of all evidence, testimony, documents, exhibits, memoranda or statements of any other material concerning the law firm of Freeman & Bass or Samuel E. Bass or Sam Freeman by the State Commission of Investigation or any other agency, public or private;

2. In the alternative, restraining the defendants, as indicated above, pending an early hearing on this application for preliminary injunction in which evidence may be taken pursuant to the opinion of the United States Court of Appeals in this case, dated October 1, 1973 (454a-455a). [2]

The court below denied appellants an evidentiary hearing, denied oral argument, and denied the relief requested. Thereafter, it denied a motion for reconsideration (464a, 468a-473a, 530a), and denied a motion for injunction pending appeal to this Court (542a).

1/ This case was reassigned to Judge Biunno after Judge Garth's elevation.

2/ "a" refers to appellants' appendix.

A timely notice of appeal was filed on May 10, 1974 (544a-545a) and this Court granted an injunction pending the outcome of this appeal on May 28, 1974 (567a).

PROCEDURAL HISTORY

Because an understanding of the procedural history is central to clarify the issues in this appeal, appellants will outline the stages of this litigation before setting forth the facts as they appear from the entire record.

A. The Complaint and Amended Complaint

Appellants filed their verified complaint on February 14, 1973 (2a). Named as plaintiffs are Samuel E. Bass, Sam Freeman, and Freeman and Bass, a professional corporation. Named as defendants are the SCI, the three SCI Commissioners at the time, Wilfred Diana, John McCarthy and Charles L. Bertini, SCI Executive Director Martin Holleran, and SCI Special Counsel Ronald Diana. The complaint also names as defendants Ronald Heymann, State of New Jersey Commissioner of Labor and Industry, and his Special Assistant, Charles Rosen. The case against Heymann and Rosen was dismissed however, by Judge Garth on June 14, 1973 (381a-384a). No appeal was taken from this order.

Permission to amend the complaint was granted on March 11, 1973 (4a). The amended complaint alleges four causes of action.

Jurisdiction in the first cause of action is alleged under 42 U.S.C. §1983. This cause of action sets forth plaintiffs' broad background of representing minority clients and taking on unpopular causes (14a-15a). It alleges that the SCI has been conducting an investigation into workmen's compensation programs and into the affairs of appellants without standards or guidelines or regulations to determine its scope; that the investigation has been vague and overbroad; that the defendants have been illegally releasing information to the press in order to damage plaintiffs' professional reputation and inhibit their representation of clients; that the defendants have been engaging in a pattern of intimidating appellants' clients, have been illegally seizing records from appellants, have interfered with their attorney-client relationships, and have engaged in a bad-faith investigation of appellants in order to harass them (16a-20a). The second cause of action alleges jurisdiction under 42 U.S.C. §1985, being based upon a conspiracy claim arising out of the same facts alleged in the first cause of action.

The third and fourth causes of action assert pendent state claims arising from a common nucleus of operative fact. These causes of action allege a variety of State law violations ranging

from improper authorization to conduct the investigation (Complaint ¶32); improperly broad scope (¶¶32 and 34), preemption by other State bodies (¶¶39 and 40); and illegal conduct of the investigation due to the fact that the SCI official in charge of the investigation, Ronald Diana, was a part-time employee in violation of State law (¶35) (399a-402a).

The amended complaint also alleges that the SCI investigation is further tainted because of the illegal status of Commissioner Diana in that at the time of the investigation he held more than one public office in direct violation of N.J.S.A. 52: 9M-1. (¶37, 400a). The SCI has not answered this latter allegation; it has denied the other substantive paragraphs or pled insufficient information to form a belief. 3/

B. The initial motions for preliminary injunction

Simultaneously with filing the complaint, appellants moved for both a temporary restraining order and preliminary injunction. This motion, which sought an order prohibiting further investigation of appellants' professional and personal activities, further investigating or intimidating appellants' clients or employees, and enjoining the enforcement of all outstanding subpoenas pending a determination

3/ The complaint appears at 12a-26a. The answer appears at 210a-214a. The amended complaint is reproduced at 389a-402a. The SCI filed no answer to the amended complaint.

on the merits, was supported by a series of affidavits and exhibits. These documents outline the knowledge that appellants had at that time of the investigative techniques which had been employed against them by the SCI. Among other things, these moving papers complained of the fact that SCI agents had removed Freeman & Bass checks from their accountant's office without authorization and complained of an SCI subpoena which, if enforced, would have required Freeman & Bass to turn over entire client files in certain designated cases (29a, 135a). Prior to the motion's return date, the SCI engaged in additional practices which led appellants to file a second motion for a temporary restraining order, supported by additional affidavits (136a-163a). After the SCI filed answering papers attempting to justify their conduct (164a-208a), the court below heard oral argument on February 26, 1973. See minutes, 650a-729a. Upon the representation of SCI counsel that it would withdraw its subpoena seeking attorney-client files and serve a new subpoena exempting privileged attorney-client materials, the court below declined to enjoin enforcement of this subpoena. It also denied the broad injunctive relief requested but ordered the checks which had been removed without authorization returned (304a-305a). The court also found jurisdiction, later filing a lengthy opinion to this effect (306a-325a).

C. The initial discovery procedures and the second round of injunctive motions.

On March 2, 1973, to expedite the case, the District Court ordered that appellants could begin taking depositions (209a). Nonetheless, SCI officials refused to attend depositions until the court issued a further order on March 19, 1973 compelling their attendance (779a).

The failure of SCI agents to answer certain deposition questions as well as their techniques in their continuing investigation into appellants' affairs led to the filing of further motions seeking sanctions and restraining orders on March 27, 1973 (291a-303a). The court below held oral argument on April 9, 1973 (792a-846a). Although no sworn testimony was taken, the SCI counsel admitted that the Commission was just beginning to conduct its own inquiry into the allegations of misconduct made in appellants' affidavits. The court below urged the SCI to clean its own house (812a, 820-821a), stating at one point, "I don't like to interfere with a State body doing its job. But when matter -- when my nose is rubbed in it, what do you expect me to do, sit back and ignore these things?" (814a). Upon the SCI's agreement that it would not take certain actions which could be damaging to Freeman and Bass without giving at least one week's prior notice (836a-837a), the court ordered discovery to go forward,

stating that Special Counsel Diana should answer certain categories of questions which he had refused to answer previously (841a).

D. The injunctive order with regard to SCI public hearings

During May, 1973, the SCI began a series of public hearings on the issue of workmen's compensation. Adverse publicity to Freeman & Bass generated by the manner in which the SCI presented testimony led to the signing of an order to show cause by the Hon. Lawrence A. Whipple on May 11, 1973. The relief requested was an order prohibiting the SCI from further referring to appellants at its public hearings (347a-358a). Judge Garth, on May 14, 1973, after hearing oral argument, granted the relief requested, ruling that the SCI had no legislative purpose in creating adverse publicity for appellants for publicity's sake only (869a-871a, 359a-360a). Judge Garth denied a stay of his order on May 22, 1973 after another oral argument (888a-940a). This order was appealed and later vacated by this Court (442a-453a).

This Court affirmed Judge Garth's finding of jurisdiction (449a), but found that the court below had not focused its inquiry "on whether SCI had transgressed its investigatory function..." (449a). Specifically, the Court found that the District Court had made no findings of fact and conclusions of law in support of its order (450a). In

vacating the injunction, the Court remanded, stating:

> We believe the District Court should receive testimony with respect to the alleged incidents relied upon by Freeman and Bass in support of the charge that the SCI was conducting its investigation in an accusatory fashion.
> (452a)

E. The proceedings below while the first appeal was being processed

While the appeal from Judge Garth's limited order with regard to publicity was being processed, appellants continued taking depositions in preparation for a hearing seeking the broader relief outlined in the complaint and in prior motions. Again, an SCI commissioner refused to comply with deposition notices until ordered to do so by Judge Garth on June 11, 1973 (958a-966a).

Thereafter, appellants filed another motion for preliminary relief seeking an injunction prohibiting the transmittal of evidence concerning Freeman & Bass to other public agencies. This motion was returnable on September 10, 1973 (404a-439a). Prior to this date, Judge Garth was elevated to this court and the case was reassigned to Judge Biunno (9a). On September 7, 1973, both parties agreed not to go forward on the motion on the basis of an SCI commitment to give appellants prior notice of any transmittal so that the motion could be reactivated, if necessary (457a-458a).

F. The motion which led to this appeal

On November 2, 1973, appellants' counsel was notified that the SCI was preparing to transmit certain materials to other agencies (458a). As a result the motion now under review was filed (454a-455a). It was scheduled for Judge Biunno's next motion calendar on January 14, 1974. Prior to that date, appellants' counsel became aware of certain facts which raised the question as to whether the judge should disqualify himself. Thereafter, the judge told counsel to incorporate his information in an appropriate letter to the court. He complied on January 7, 1974 (462a-463a).

On January 9, 1974 the court below denied the motion for preliminary injunction in a one-page letter which set forth neither conclusions of fact nor law (464a). Appellants' counsel, being informed orally of the decision, wrote the court, suggesting that the issue of disqualification was a threshhold question. In the event the court refused to disqualify itself, counsel requested reconsideration and the opportunity to argue prior to decision (465a-467a).

The following day, the court issued another letter opinion declining to disqualify itself, and refusing to hear argument. The court did rule that the denial of relief was without prejudice and that it would reconsider on the basis of additional papers, but warned that it would decide without argument (468a-473a).

Appellants thereafter moved for (1) reconsideration of the disqualification issue, (2) the right to argue the motion, and (3) reconsideration on the merits. The latter motion was accompanied by a 98-page analysis of the record (474a-484a). On February 22, 1974, appellants supplemented the record by filing another affidavit with 23 exhibits attached thereto (487a-529a).

On February 25, 1974, the court below allowed argument only on the issue as to whether there would be oral argument on the motion (997a). The court below, on April 19, 1974, denied all appellants' motions. Again, there were no findings of fact or conclusions of law issued (530a).

A motion for injunction pending appeal was denied by the court below on May 10, 1974 (542a-543a). This Court granted an injunction pending appeal on May 28, 1974.

STATEMENT OF FACTS

A. Introduction

Because the court below did not hold an evidentiary hearing, this statement of facts will be drawn from the affidavits, exhibits, oral argument minutes, and depositions on file at the time that the order appealed from was entered.

B. The Prelude to the SCI Investigation

The SCI became involved in the workmen's compensation investigation at the request of Ronald Heymann, former New Jersey Commissioner of Labor and Industry (deposition of Heymann, 1456a). Prior to involving the SCI, Heymann testified that he received complaints regarding workmen's compensation from "industrial groups," representatives of the Chamber of Commerce, the New Jersey Manufacturers Association and self-insureds (1438a, 1495a-1496a). From these sources, the Commissioner collected "unconfirmed rumors and stories" of illegal practices (1453a). At the advice of State Attorney General Kugler, the Commissioner referred the matter to the SCI in the fall of 1971. He was unaware of what statutory authority, if any, he was acting under in making the referral, which was made orally without the issuance of any formal paper, letter or request (1454a-1456a).

Commissioner Heymann hired a Special Assistant, Charles Rosen, to investigate workmen's compensation (Rosen deposition, 1564a; Heymann deposition, 1518a). Immediately prior to this assignment, Rosen had worked for five-and-one-half years as an industrial relations specialist with the New Jersey Manufacturers Association, a lobbying organization, and as its attorney (1520a-1523a). During the summer and fall of 1971, Rosen testified, he learned of allegations against Freeman & Bass (1535a), all of which came from employers (1548a),

stating that he turned over his notes of these allegations to SCI Chief Counsel Dennis O'Connor in the fall of 1971 (1538a). Rosen testified that during 1971 and 1972 he had contact with many SCI officials concerning Freeman & Bass (1560a, 1575a, 1584a-1585a, 1979a). Rosen said he kept no notes regarding appellants (1540a-1541a).

Rosen also testified that he told SCI officials that the problem areas in workmen's compensation were second injury fund cases, multi-carrier cases, occupational disease cases, and minor orthopedic cases. In all these areas Rosen felt the settlements and awards to the claimants were too high; he was aware that Freeman & Bass was active in behalf of claimants in many of these areas (1555a-1560a).

C. The SCI's Legislative Authority

The SCI is established in accordance with N.J.S. 52:9M-1 through 52:9M-18. The SCI's investigative powers are set forth in 52:9M-2, 3 and 4. These powers have been interpreted by the courts to be investigative, rather than accusatory. Zicarelli v. New Jersey, 55 N.J. 249, 261 A.2d 129 (1970), aff'd 406 U.S. 472; United States ex rel Catena v. Elias, 465 F.2d 765 (3d Cir. 1972).

The SCI, under N.J.S. 52:9M-8, is given authority to refer evidence of crimes to the public prosecutor and evidence of misconduct by public officers to the appropriate authority for the removal of such public officers. This section does not authorize referral

involving private citizens to any other agency than the prosecutor's office.

N.J.S. 52:9M-1 states that the Commission shall consist of four commissioners. The legislative scheme is silent with regard to the number of commissioners required to authorize an investigation or authorize transmittal of information regarding any individual to any other public entity.

D. The Commissioners, their Special Counsel, and their Internal Procedures.

In 1971, when the investigation commenced, the SCI had three commissioners. They were Chairman John McCarthy, Commissioner Charles Bertini, and Commissioner Wilfred P. Diana. Both Commissioner McCarthy and Commissioner Bertini were in the general practice of law (1657a, 1690a-1692a), the latter handling workmen's compensation cases during the workmen's compensation investigation (1697a).

Commissioner Diana also practiced law (2334a). In addition, he held public employment as the township attorney of Berkeley Heights, New Jersey (2335a), was the attorney for the Bedminster, New Jersey Board of Adjustment (2355a-2356a), and served as the attorney to the Planning Board in Warren Township (2356a) as well as to the Board of Adjustment in Watchung, New Jersey. At the

time he was representing these planning and zoning bodies, the SCI was investigating the planning and zoning practices of another municipality in the same county (2358-2359a).

The SCI enabling statute, N.J.S. 52:9M-1, provides in part: "... no member or employee of the Commission shall hold any other public office or public employment... "

The record does not indicate whether any individual commissioner was assigned by SCI resolution to oversee the workmen's compensation investigation. Internal memoranda submitted by SCI agents to higher SCI authority, however, list Commissioner Diana as the only commissioner to receive copies (167a, 168a, 190a-191a).

Commissioner Diana's brother, Ronald Diana, was hired by the Commission as "a part-time counsel" (1662a) on an impermanent basis (2374a). Commissioner Diana recommended his brother to the SCI (2374a). He was given the title "Special Counsel" (1662a). According to Ronald Diana, he "was employed by the SCI to make a preliminary investigation of the charges brought to its attention by the Commissioner of Labor & Industry ..." (171a). Thereafter, he was placed in charge of the entire investigation (1599a). He did not report through the SCI's chief counsel, but directly to the Executive Director and the Commission itself (870-871a).

N. J. S. 52:17A-13 forbids the employment of special counsel by any state board, commission or body. N. J. S. 52:17A-11 requires an attorney in the employment of any body to be employed on a full-time basis.

As attorney-in-charge, Diana led the investigation, presented whatever testimony he wanted to the Commission, presented "the case the way he [felt] it should be presented" and made "the decisions as among the staff." (Deposition of Commissioner Bertini, 1717a.) Counsel for the SCI stipulated that all the agents of the SCI were assigned to work under Mr. Diana on the investigation because "he had sort of a priority program.... Mr. Diana's investigation requirement were such that he may need all seven [agents] at any given time and they would all automatically be available to him." (1928a-1929a).

The Commissioners do not supervise or exercise control over their agents; instead they rely on their education and training to carry out instructions (deposition of McCarthy, 1686a). Nor are there any specific rules or guidelines laid down by the Commissioners to insure internal control (1706a-1707a). When Commissioner Bertini was asked "what methods exist to supervise what the staff is doing by the Commissioners," he answered, "Well, I think that it's been the practice, I thought, for the Chairman to kind of keep his hand on the throttle and know about all the crank letters that come in. At least,

I think, the staff makes him aware of that. And I think before it gets to the point where we get too deeply involved, a formal resolution is passed by the Commissioners resolving that we investigate such and such a matter." (1694a-1695a).

On April 9, 1973, after this case had been in litigation for six weeks, SCI counsel informed the court below that the Commissioners still had not looked into the allegations which had been made (812a), stating that the Commission was requiring Diana to submit a report (814a).

On April 9, 1973, SCI counsel Sapienza announced in court that Commissioner Diana was no longer an active Commissioner, having handed in his resignation (833a-834a). Mr. Sapienza also announced that a new Commissioner, Mr. Farley, had been appointed (814a). Thereafter, Freeman & Bass clients were interviewed in a workmen's compensation case in which the employer was represented by Mr. Farley's law firm (affidavits of Harvey Wilder and Nettie Wilder, 425a-429a); Commissioner Farley also continued to practice in the New Jersey workmen's compensation courts (430a-437a).

E. The SCI Authorizing Resolutions

The SCI did not pass a resolution authorizing an investigation into workmen's compensation until December 13, 1972 (1412a). On February 1, 1973, the SCI passed an additional resolution extending

its investigation into the liability field (183a). Executive Assistant Carter testified that this extension was inspired at least in part by the examination of appellants' books and records, as set forth infra (2531a).

When asked whether he was aware of the fact that the SCI was using its subpoena power in the workmen's compensation investigation prior to the passage of a resolution, Commissioner Bertini indicated that he was not (1695a). When asked whether an investigation can take place without a resolution, Chairman McCarthy answered, "No, I don't believe so. I think all the Commissioners would vote on whether we should conduct an investigation." (1665a)

F. The SCI Investigation Prior to Diana's Employment

SCI Chief Counsel Dennis O'Connor was originally involved in the SCI workmen's compensation investigation. O'Connor testified that he met with Rosen during the fall of 1971. O'Connor said that Rosen told him he wanted Freeman and Bass and two or three other firms investigated "because of the heavy volume of workmen's comp they did. But he didn't say anything specific as to what he would be looking for." (1730a). He stated that Rosen gave him nothing in writing concerning the firm of Freeman & Bass. Upon checking his files, O'Connor verified that he had received nothing. (1727a-1728a). O'Connor

testified that at neither his initial meeting with Rosen nor at any subsequent meetings was he ever informed of any specific allegations of abuses committed by Freeman & Bass (1733a-1737a). The record is clear that the SCI took no steps to investigate appellants or their clients until after Mr. Diana appeared on the scene.

G. Enter Ronald Diana

Ronald Diana was employed by the SCI in May of 1972 (1267a). He could not remember the source of information with regard to Freeman & Bass and saw no memoranda or reports concerning them (1296a-1297a). He spoke with Rosen at least a dozen times (1552a-1553a).

Soon after coming to work for the Commission, Diana began "to speak with the informants upon whose information the Commissioner of Labor & Industry originally brought his charges to the SCI." Shortly thereafter, Diana "retained on behalf of the SCI the services of an undercover operative in an attempt to substantiate the original charges. Another objective of the undercover operative was to develop additional leads." (171a-172a). The undercover agent worked on the investigation regarding Freeman & Bass (1334a, 1342a-1343a, 2474a-2476a).

During this period, SCI personnel went to insurance companies to check on fees paid to claimants' attorneys (1760a-1762a). At New Jersey Manufacturers Insurance Company, they were told records

were kept only on a claim basis, not by attorney. But New Jersey Manufacturers Insurance Company did have appellants' checks segregated when the SCI agent arrived (1779a). The SCI also subpoenaed records of appellants, among others, from insurance companies, including Allstate, Hartford, Employers of Wausau, and Aetna (1784a-1788a), and obtained information regarding the payment of attorneys' fees (1835a-1836a). According to Special Agent Gildea, the SCI had no prior information of alleged improprieties involving Freeman & Bass at the time it inspected these records (1843a-1844a).

Ronald Diana was asked at his deposition how the SCI determined what cases to look into and answered, "The method was not to look into Freeman & Bass cases." (1623a). He stated that it was "purely by accident" that he and his agents analyzed Freeman & Bass cases and spoke to their clients (1623a-1626a). This testimony was contradicted, however, by SCI Executive Assistant Carter, who testified that he received a memorandum from Mr. Diana requesting specific data from the State Department of Labor and Industry, relative to Freeman & Bass cases (2528a-2536a). Carter testified that Diana requested files with regard to the firm of Freeman & Bass only (2536a). An SCI agent was assigned to work at the Department of Labor and Industry analyzing cases in which only appellants were involved (2536a-2537a).

H. The SCI Subpoenas Freeman & Bass Records

Diana testified that he couldn't remember when he decided to subpoena Freeman & Bass records, but that it could have been between August and September, 1972, as he left the SCI on September 2 (1321a) and did not return until the end of October 1972 (1333a). When asked why he wanted the books and records of Freeman & Bass subpoenaed, Mr. Diana answered, "I don't recall." (1322a). When further asked whether he had allegations concerning kickbacks paid out by Freeman & Bass at the time he issued the SCI subpoena, Diana answered, "I don't recall when I got that information, if I got such information." (1325a).

On September 11, 1972 the SCI served a subpoena duces tecum on Freeman & Bass, requiring it to produce literally all of its books and records from 1970 to date (62a). At the time the subpoena was served, Diana was working on a private case. Prior to leaving, Diana asked one of the SCI agents to ask one of the SCI attorneys, Mr. Sapienza, to sign the Freeman & Bass subpoena (1320a-1321a). 4/

4/ With regard to what clearance was necessary to sign a subpoena duces tecum, Mr. Sapienza stated on the record that such subpoenas could be issued by counsel and that there was no procedure requiring that any of the Commissioners be notified in advance (1329a-1330a).

Sapienza testified that the September 11 subpoena "was cleared with me, insofar as Mr. Cayson [the agent] came to me and said that the investigation was proceeding, he had an idea of what he needed or wanted, and one of the things Mr. Cayson wanted was to look at the books and records of Mr. Freeman and Mr. Bass. I said, 'Was this something that you have good reason for.' Answer: 'Yes.' He discussed it with Mr. Diana. 'Yes.' And I signed it and that's how it was issued." (1331a-1332a).

According to Cayson, at the time the subpoena was issued to Freeman and Bass, the SCI had specific allegations against appellants (55a, 2112a). Prior to its issuance, Diana told Executive Assistant Carter he wanted the subpoena issued to look for patterns of misconduct (2456a-2458a).

Appellants immediately sought information from the SCI in order to determine the subpoena's scope and purpose (37a). Appellants were merely informed that the SCI was trying to get "insight into workmen's compensation" (37a) and information to determine whether certain practices detract from the effectiveness of the workmen's compensation programs (63a). SCI Chief Counsel O'Connor advised appellant Bass in a phone conversation that appellants were not a target of any particular investigation; nor did the SCI have any specific complaint against them (deposition of O'Connor, 1739a). Thereafter, on October 19, 1972,

four days before the agreed-upon adjourned date for production of the subpoenaed materials, SCI Chief Counsel O'Connor wrote appellants, informing them that they were not "considered by this Commission to be subjects of this investigation.... I might also add that you are not a witness because of any complaint received by our Commission (202a).

The inspection of appellants' books began on October 23, 1972 in their offices. At his deposition, Diana was asked whether he gave any instructions to the agents conducting the inspection. He answered:

> You don't go out with the specific idea of looking for something. It's just -- we had general categories of abuses which might appear in the books and records.
> (1620a)

When agent Cayson was asked what he was looking for, he stated:

> Well, that's -- that's difficult to say ... many examinations take many different tacks.
> (1920a).

He then went on to say that among other things he was trying to determine the appellants' volume of workmen's compensation practice and how much each partner was making. When asked what relevance these facts had to the investigation, Cayson answered, "Nothing, really ... in other words, my supervisors, Mr. Sapienza or Mr.

Diana or a Commissioner might say 'Well, what kind of gross would there be? What is their workmen's compensation gross? Mr. Heymann's office says one thing. What did your examination disclose?' That is -- I want to be prepared to answer that question." (1920a-1921a).

I. The Unlimited Review by the SCI of Freeman & Bass Affairs

SCI agents began their inspection of Freeman & Bass records on October 23, 1972. Appellants' books and records were made available either at their offices or at the offices of their accountant from that date through the end of December. During that period, examinations were conducted on five or six days (41a-45a). During many of these visits, the appellants' accountant was present to answer questions.

SCI agents did not content themselves with looking into books and records relating to workmen's compensation. They asked to see the trustees' accounts, which related to liability cases only, and were subsequently given these upon a representation of confidentiality (41a-43a). 5/ SCI agents also asked to see the personal income tax returns of appellants, their personal accounts and withdrawals, the payment of salaries and personal loans to shareholders of the corporation, and for all payroll records (42a). They sought the stock books

5/ Earlier, O'Connor had told Bass the SCI was not interested in these accounts (1740a).

of appellants to determine who the shareholders were (40a); they asked questions concerning what work Lottie Freeman, appellant's wife, performed in the office (41a); they questioned the accountant concerning whether appellants had a firm account with any travel agents and whether tickets were charged through travel agents (41a). They asked whether a Freeman & Bass investigator, Jack Kelly, was related to a workmen's compensation judge by the name of Kelly and received a negative response (41a). They interrogated the accountant concerning appellants' private investments, their pension funds, their savings banks deposits, and the reasonableness of their salaries (44a-45a).

On November 21, 1972, the SCI served a subpoena on appellants' accountant, asking for the production of work papers, New Jersey franchise tax returns, and correspondence files (43a). These documents, as well as others, were produced on November 30, 1972 and photocopied by SCI agents (44a).

When their depositions were taken, these agents testified that they were looking through Freeman & Bass books and records in order to find evidence of illegal payments, kickbacks or payoffs (1922a-1923a). They also testified they were looking for funds for "illegal purposes." (1945a-1946a). As another agent put it, the SCI was trying to "determine whether there was potential for funds being used for affecting the personnel in the compensation agency." (1241a).

After the SCI inspection was completed, Freeman & Bass accountants checked their records and discovered that over 200 checks were missing (45a-46a). These checks were taken without the knowledge of the Commissioners, one of whom commented at his deposition, "I would doubt that you were telling me the truth" when questioned about the incident (1707a).

J. The 1972 SCI Client Interviews

Contemporaneously with the inspection of Freeman & Bass books, SCI clients were interviewing appellants' clients in their homes and at their jobs. Two such clients, John Williams and Alexander Berna, filed uncontroverted affidavits that the SCI agents told them they were trying to "make sure that the doctors and lawyers didn't get over-paid" (84a) and were checking "to see if the men deserved the mon ey." (86a).

Prior to these interviews, the SCI agents "positively ... had no prior information regarding any possible rumors or allegations of ... misconduct regarding the cases of these clients." The names of these clients were obtained from insurance company checks (deposition of Gildea, 1843a). 6/

6/ Ronald Diana filed an affidavit stating precisely the opposite (175a). Diana then proceeded to recite what an SCI agent learned at an interview with Alexander Berna after his name was obtained from the insurance company records. When Diana recited the same facts in open court

K. The Jesse Tyree Subpoena and the SCI Use of the Press

In October 1972, the SCI subpoenaed Freeman & Bass client Jesse Tyree. Tyree, who was totally disabled (113a), was served with the subpoena after he told the SCI agents he had a heart and lung condition (114a). Appellants sought to quash the subpoena on behalf of Tyree. After the motion to quash was denied in State court, the Newark Sunday Star Ledger ran an article which discussed the Tyree subpoena, quoted Diana with regard to the extent of the SCI probe and quoted him as stating that "I think they [Freeman & Bass] are using one of [their] clients as a form of discovery for this firm." The article further stated how much appellants earned from workmen's compensation fees in the previous year (111a).

Tyree died on December 3, 1972, before the return date of the subpoena. Appellant Bass learned of his death the following day and notified Diana of the circumstances on December 5, 1972 (57a). The Star Ledger carried a story on December 6, 1972, which stated that an SCI spokesman viewed Tyree's death as only "a minor setback." The article then described the circumstances of Tyree's death, setting forth the facts which Bass had related to Diana the day before. Again the article referred to improprieties in workmen's compensation, and again Freeman & Bass fees were listed (112a).

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before Judge Garth (699a-702a), the court stated, "There is nothing before me, nothing that even shows a kick-back with respect to Berna (702a).

In an affidavit filed after this action was commenced, Diana denied the December 5 conversation with Bass (176a). But at his deposition, SCI agent Cayson testified that he learned of Tyree's death from Diana after Diana received a telephone call from Bass (2154a). See also, the affidavit of Agnes King, an employee of appellants, which sets forth that Diana called appellants' office on December 5, seeking information with regard to the death of Tyree, and asking Bass to return his call (197a-198a), as well as appellants' phone bill of December 5, 1972, which establishes that a lengthy phone call took place between appellants' office and the SCI offices on December 5, 1972. At his deposition, Diana claimed he read of Tyree's death in the Newark Star Ledger (1427a). That article, however, did not appear until December 6 (112a).

L. The Dr. Lippman Investigation

While reviewing appellants' books, SCI agents noticed the name of Dr. Harold Lippman, a person with whom they had no prior familiarity. Immediately thereafter, they had discussions with Ronald Diana concerning Dr. Lippman (2129a). On November 20, 1972, Dr. Lippman and his attorney, Matthew P. Boylan, met with Ronald Diana and other SCI representatives. He was questioned about transfers of funds between his office and the office of workmen's compensation

attorneys (147a). Thereafter, his accountant was served with a subpoena duces tecum requiring him to produce work sheets relating to his gross receipts and taxes. These records were turned over to Diana (147a-149a).

On January 4, 1973, Dr. Lippman received a subpoena duces tecum requiring him to produce 56 patient files (149a-150a). In order to protect his physician-patient privilege, Dr. Lippman brought a motion to quash in state court. After the hearing, Diana advised one of Dr. Lippman's attorneys that if he would cooperate with the SCI and give them certain information related to padded medical bills, he would be in a position to offer Dr. Lippman complete immunity. Diana told Dr. Lippman's attorney that he had sufficient information to indicate that Dr. Lippman had violated certain sections of the Internal Revenue Code and stated that unless Dr. Lippman cooperated he would transfer this information to the Internal Revenue Service (150a). Dr. Lippman advised Diana through counsel that information concerning padded medical bills did not exist and he would not commit perjury to satisfy Diana (151a). Several days later, Dr. Lippman was served with an additional subpoena duces tecum requiring production of all patient files from 1969 to date "with respect to patients treated by you in workmen's compensation and liability cases for the firm of Freeman & Bass." (151a).

On February 7, 1973, the SCI served another subpoena duces tecum on Dr. Lippman, seeking patient files, reports and bills, with regard to "a list of some 400 names derived from subpoenaed records of Freeman & Bass." (Affidavit of Diana, 327a.) Dr. Lippman produced 73 of the 400 files, claiming the balance had been destroyed in a fire which occurred in April 1972 and as a result of water damage from a burst steam pipe on January 9, 1973 at his old Elizabeth Avenue office (328a). When the Commission questioned Dr. Lippman's credibility, his attorney suggested that "the best course of conduct would be to make an arrangement for an independent examination." (336a-337a). The following day, Diana went to Dr. Lippman's old office at the Elizabeth Avenue address and entered it without authorization (289a). Diana admitted that he searched the office and made a list from correspondence he found there involving Freeman & Bass clients. On the basis of this list, he served Dr. Lippman with another subpoena duces tecum calling for the production of additional Freeman & Bass records (329a-330a).

In March 1973, Diana personally served subpoenas on Dr. Lippman's two medical assistants (329a). Marian Kingsbury, one of the medical assistants, stated in an affidavit that prior to the SCI hearing, she and her attorney met privately with Ronald Diana in his office. Diana asked her whether she had children, and she answered in the affirmative. Then Diana told Kingsbury that he

"didn't think Dr. Lippman would be in practice much longer. He told me they would do what they could about another job, but there wasn't any guarantee." (353a)

The other medical assistant, Flora Ware, swore in an affidavit that Diana also spoke to her in the presence of her attorney prior to her testimony. Ware stated, "[Diana] asked me if I wanted my children to be educated well. He asked me why was I afraid of Dr. Lippman. He said Dr. Lippman is not paying you too much.... Mr. Diana said I would have a job, and even if I didn't have a job, things would be taken care of." (356a). After these conversations with Diana, both Kingsbury and Ware testified at SCI private hearings (353a, 356a). Neither the Kingsbury nor Ware affidavits have been controverted.

M. The SCI Subpoena of Appellants' Client Files

On January 3, 1973, the SCI served a subpoena duces tecum on appellants seeking 56 complete client files (68a-71a). Because these files contained privileged attorney-client materials (47a) and because the SCI had indicated that the information collected through the use of its subpoena power could be made public at its discretion (47a), appellant Bass wrote the SCI's Executive Director, Martin Holleran, requesting information with regard to the authorization and purpose of the subpoena. Mr. Holleran declined to supply appellants with any

of the requested information (47a-49a, 72a-80a). When Judge Garth ruled on February 26, 1973 that he would enjoin enforcement of the privileged attorney-client materials encompassed in this subpoena (721a-722a), Diana agreed to withdraw it in order to avoid the entry of an order (726a).

N. The 1973 SCI Interviews of Appellants' Clients

1. The Number of Freeman & Bass Clients Interviewed.

It is not known how many of appellants' clients were interviewed by the SCI. One investigative agent, Anthony Rosamilia, who was hired by the SCI on January 2, 1973 (2167a), testified that of the 40 persons he interviewed during the course of the workmen's compensation investigation, approximately 15 were appellants' clients (2216a). When Rosamilia went out on interviews, he was provided with patient cards by Ronald Diana (2195a); some of these cards contained the initials "S.F." whom Rosamilia knew to be Sam Freeman (2196a-2197a). Within the first week on the job, Rosamilia knew that appellants were the "subjects of the investigation." (2204a). He testified he was trying to determine whether "a fraud had been committed by anyone" (2178a).

SCI Executive Assistant Carter also testified that he participated in certain interviews whom he knew in advance were appellants' clients. Asked how he knew, Carter answered, "Well, I was informed so by Mr. Diana." (2466a).

2. The Use of Blank Subpoenas. Rosamilia testified that on several occasions he went out with "three or four subpoenas that were blank, as far as to a name of an individual." (2188a). He explained that he would have a list of names to interview, and "if I interviewed a subject who refused to answer any of my questions, I'd subpoena him." (2190a). Rosamilia testified that he subpoenaed Freeman & Bass client Jacob Morris for this reason (2192a).

3. Appellants' clients advised to get other attorneys. Rosamilia testified that he may have indicated to appellants' clients that because of Freeman & Bass' involvement in this investigation, it would be wise for them to seek other attorneys (2210a-2211a).

4. The Grady Wilkerson Incident. Grady Wilkerson filed an affidavit in this case in which he stated that he was a client of appellants in a workmen's compensation case. While at work in February 1973, he was called into his boss's office to talk to two SCI agents. He stated the agents wanted to talk to him about appellants and asked him how he knew them. The affidavit goes on: "I asked him what this was all about, and he said they were trying to get Freeman & Bass. To the best of my recollection the exact words they said were 'We're trying to get these guys.' The way I understood them they were trying to say, like, Freeman and Bass were crooks." (142a). The Wilkerson affidavit further states that he asked why he had to get involved and was told it might help his case and then was asked to sign a statement. He was

told that if he gave the agents the information they wanted, he would not have to get a subpoena. He was further told that he couldn't use Freeman & Bass as his lawyers, as they were "defendants." Ten days later, SCI agents returned and served him with a subpoena (142a-144a). Wilkerson's affidavit has not been controverted.

5. The James Buie Incident. James Buie's affidavit of June 5, 1973 is uncontroverted. Buie states that he was upset about the fact that his compensation case was taking so long to be heard and contacted a workmen's compensation panel headed by Mr. Debevoise, who put him in contact with Mr. Heymann. Buie indicated to Mr. Heymann's office that his lawyers were Freeman & Bass. Within a day or so he was interviewed by two SCI agents, including Anthony Rosamilia. These agents were trying to find out if the appellant Bass was involved in any illegal practices, and asked whether Bass offered him any money to recommend clients to him. Buie answered that Bass had not. Buie then said that the agents told him they were trying to build a case against Bass. Two weeks later, they returned and took a statement from Buie.

Buie told the agents that a Mr. Frank Strange had recommended him to Freeman & Bass. Rosamilia then asked Buie to call Strange on the phone. After the agents attached a recording device to the phone, Buie asked Strange about his relationship with appellants. Strange told Buie that Bass had never paid him any money for sending clients and

further told him he did not believe Bass had any special connections with judges (415a-419a).

Buie saw Rosamilia at another interview which took place at 111 Raymond Boulevard, which was attended by Ronald Diana. Buie told Diana that other lawyers had offered him money to send cases to them. After this conversation, Buie spoke to SCI agents about moving his case along. Diana told him that he would talk to the Travelers Insurance Company about moving his case. Later, Buie attended a closed SCI hearing. At that hearing, Diana only asked him questions about his relationship with appellants. Buie also stated that he testified at the public hearings but was told by Diana not to mention anything about his other lawyers who had offered to pay him to send clients to them (415a-424a).

6. The Annie Moore Incident. In her affidavit of March 14, 1973, Annie Moore states that she was interviewed on March 13, 1973 by two SCI agents about a pending negligence case in which she was represented by Freeman & Bass and had been treated by Dr. Lippman. After talking to the agents for a short while, she became nervous and decided not to say anything more until her husband came home from work. The agents then served her with a subpoena (253a-256a). Contained in this record are the Superior Court papers in the case of Annie Moore v. Howard Savings Bank, et al. These papers include a cross-claim

against one Pat Leardo and an answer filed in his behalf by the law firm of Lum, Biunno and Tompkins.

O. SCI Involvement in Pending Cases

In January 1973, appellant Bass appeared in a Newark compensation court in the case of Franklin v. Angelo Miele and Sons. In a chambers conference, the attorney for the employer told the workmen's compensation judge that the SCI had interviewed him, stating that files concerning Freeman & Bass were under investigation. These statements were made in front of a deputy state attorney general who represented the Second Injury Fund. Shortly thereafter, this case went to trial before the same workmen's compensation judge (58a-59a).

P. The SCI's Use of the Press

Appellant Bass received a call from Robert Kalter of the Newark Star Ledger on July 5, 1972, stating that Kalter understood Bass had received a subpoena from the SCI in a workmen's compensation investigation (54a). Eleven days later, Kalter published an article in the Sunday Star Ledger, stating that the SCI was beginning a workmen's compensation investigation the following day and that the newspaper had learned that subpoenas had been issued to an unknown number of persons actively engaged in compensation work (107a). SCI policy prohibits informin g the press about the issuance of subpoenas (2418a-2419a) as they are confidential (1425a).

In December 1972, the Star Ledger covered the Tyree matter, including Diana's statements to the press attacking appellants as noted above.

When this case was first heard in Federal Court before Judge Garth, all of the original affidavits were sealed by court order. Appellants moved to have the record made public, and Diana, appearing on behalf of the SCI opposed on the ground of confidentiality pursuant to state law. The judge reserved decision (653a). Shortly thereafter, the court recessed to read additional papers which had been filed (655a). During the recess, Diana made available the sealed affidavits to a reporter from the Newark Star Ledger. Counsel for appellants found out what had transpired and informed Diana that they would inform the court (279a-281a). As soon as the court reconvened, Diana informed the court that the SCI would waive its confidentiality rule (656a).

In the article which appeared in the Star Ledger the following day, Diana's unsubstantiated allegations that two of appellants' clients had kicked back a portion of their compensation awards was quoted extensively. After leaving court, Diana was also quoted as stating that appellants were to be called as witnesses in the SCI probe (520a-521a).

On April 26, 1973, the New York Times carried a news article which stated that the SCI would begin public hearings to publicize evidence of alleged corruption in New Jersey's workmen's compensation system

that one source said involved lawyers and physicians 'by the fistful.' The Commission's investigation, reliable sources reported, will disclose evidence of alleged fraudulent payments for faked injuries, kickbacks to doctors for phony medical testimony, conspiracies by lawyers to defraud the state out of hundreds of thousands of dollars in medical payments and kickbacks to compensation judges." (524a). Only Freeman & Bass was mentioned by name in the Times story (525a).

On May 10, 1973, the New York Times, in covering the SCI public hearing, ran a story headlined, "Firm Suing to Halt Inquiry Linked to Accused Doctor" (358a). This article led to the hearing before Judge Garth on May 14, 1973 on an application to enjoin further public accusations. When questioned by the court, SCI counsel Sapienza stated, "We feel that Freeman and Bass have been mentioned in the category known and tabulated by us as abuses, rather than violations of criminal law" (868a). When asked what legislative purpose their name served, SCI counsel replied, "Other than identifying the perpetrator of the abuses so the system itself can correct it. So the judges within the workmen's compensation system can realize who it is that is performing these acts and perhaps some others" (869a). The court below enjoined the use of appellants' names at further public hearings as a violation of the Jenkins doctrine. As discussed above, this Court vacated that order and remanded for further proceedings.

On May 19, 1973, another series of articles appeared in the press, relating to the SCI workmen's compensation hearings. In these hearings, a Dr. Edward Gordon, according to press reports, testified that several law firms in New Jersey, including appellants, asked him to pad bills in workmen's compensation cases (508a, 509a, 510a). Press reports on following days indicated that the SCI had arranged for the dismissal of criminal charges and charges pending before the state medical board in return for Dr. Gordon's testimony (513a, 514a, 515a). Appellants have filed uncontroverted affidavits in the court below, stating that Freeman and Bass never had a case in which Dr. Gordon treated a client (491a, 517a-519a).

Q. The SCI Subpoena to Appellant Bass

On March 21, 1973, the SCI subpoenaed appellant Bass to testify before a closed hearing on March 28, 1973 (301a). This subpoena was issued two days after Diana stated in federal court that he intended to subpoena appellant Bass to test his credibility (773a). Diana had urged to court to enter a protective order blocking the taking of his and the Commissioners' depositions, based on the following argument:

> Has your Honor ever considered the analogy between the conduct of a Grand Jury investigating and the proceeding before the State Commission of Investigation and whether or not it would be countenanced by a State or Federal Court deposing of the prosecutor or the Grand Jury investigators during the course of the Grand Jury investigation? (753a)

After the Bass subpoena was served, appellants moved in federal court on the next available court date, April 9, 1973, for injunctive relief with regard to this subpoena on the ground that they were a target of the investigation (300a-302a). On March 28, appellant Bass and counsel appeared at the SCI and requested an adjournment until the federal court had the opportunity to rule. Despite the fact that the law is clear that a person under subpoena should have the right to test the subpoena before being compelled to comply, the Commissioners not only denied an application to adjourn until after April 9, but denied appellant the right to seek a court hearing the same day to test the validity of the subpoena (822a-824a, 362a-363a). Thereafter, Diana immediately started examining appellant (824a). The transcript of this private proceeding is one of the documents which the SCI may release if not enjoined.

ARGUMENT

I

SCI'S PATTERN OF HARASSMENT IN CONDUCTING AN OPEN-ENDED INVESTIGATION MANDATES INJUNCTIVE RELIEF

Precedent establishes that the federal courts should grant injunctive relief to protect personal rights where (1) those rights fall within the scope of civil liberties, and (2) it has been shown that public

authorities have engaged in a pattern of violations. Allee v. Madrano, ___U.S.___, 40 L.Ed.2d 566 (1974); Lewis v. Kugler, 446 F.2d 1343 (3d Cir. 1971); Lankford v. Gelston, 364 F.2d 831 (5th Cir. 1966); NAACP v. Thompson, 357 F.2d 831 (5th Cir. 1966).

The court below, per Judge Garth, at the very outset of this litigation, determined that appellants have jurisdiction to protect their constitutional rights in a case of this nature (310a-317a). This Court, in its earlier decision, approved Judge Garth's jurisdictional conclusions, stating:

> [A] Commission such as the SCI might conduct its inquiry vis-a-vis an individual or association in bad faith with the purpose of harassment and ultimately making and publicizing findings with respect to the guilt of such individual in transgression of its statutory mandate and in violation of 42 U.S.C. §1983. In such event a court is not without power to protect a person whose civil rights are being violated.
>
> (449a).

The prior decision of this Court is consistent with other federal decisions under the Civil Rights Act in cases involving allegations of harassment of attorneys. See Jordan v. Hutcheson, 323 F.2d 597 (4th Cir. 1963); Taylor v. Kentucky State Bar Assn., 424 F.2d 478 (6th Cir. 1970); Sobol v. Perez, 289 F.Supp. 392 (E.D. La. 1968).

In cases of this nature, the courts have uniformly looked to determine whether a pattern of harassing conduct has taken place in order to determine whether injunctive relief is appropriate. Proof of

such a pattern resolves any issues as to whether the public officials involved have been acting in bad faith. Allee, supra; Lewis v. Kugler, supra; Lankford, supra; Thompson, supra.

No case of which appellants are aware presents a clearer and more forceful pattern of harassment than this one. Appellees practiced deception to obtain appellants' books and records. They conducted an open-ended investigation into these records for the specific purpose of finding some evidence of an incriminating nature which they could use against appellants. They harassed a medical doctor whose name they obtained from appellants' records and threatened him in order to make him testify against appellants. They burglarized this doctor's office to obtain evidence against appellants. They harassed appellants' clients and told these clients that they were trying to build a case against appellants. They offered appellants' clients and others inducements to testify against appellants. They manipulated the press in order to smear appellants. The list of violations is almost inexhaustible.

The facts in this case are absolutely clear that appellees and their agents treated the civil liberties provisions of the United States Constitution, as well as both federal and state statutes, as if they were nonexistent. Agents were allowed to function without any supervision; the Commissioners, who were theoretically responsible for the guidance and control of the SCI, had no idea how the agency was actually functioning.

The courts have issued injunctions to prevent civil rights and civil liberties abuses in far less heinous situations. In Allee, the Court enjoined a pattern of police arrests directed at organizational labor picketing. In Lewis v. Kugler, the court enjoined the police from arbitrarily stopping and searching vehicles. In Lankford, the court condemned massive police searches of homes in an attempt to locate two criminal suspects. In Thompson, the court condemned the practice of public officials who used local ordinances in order to harass civil rights advocates.

Here the authorities have engaged in a wide variety of unconscionable and illegal practices, all of which have the inevitable effect of destroying appellants' ability to represent their clients. In no case is the destructive effect of official misconduct so self-evident as it is here.

Although the pattern of misconduct is unmistakable when the evidence is viewed in its totality, it is worthwhile to focus some attention on the individual categories of violations which appellees have committed.

1. Deception in Issuing Subpoenas. When appellees lied to appellants as to the reasons behind the issuance of their subpoenas, they caused appellants to waive their right to judicial review as provided for under §52:M-12, N.J.S.A. The deception practiced by appellees admits to obvious analogy in the field of criminal law. Such practices mandate

that the material and information obtained by public officials may not be used against those who have been victimized. State v. Sarcone, 96 N.J. Super 501, 233 A.2d 406 (1967). Cf., Miranda v. Arizona, 384 U.S. 436 (1966) and its progeny. For a civil law analogy, see D. H. Overmeyer Co. v. Frick Co., 405 U.S. 174 (1972), which condemned deceptive practices in the obtaining of confessions of judgment.

2. The Many Subpoenas which were Improperly Issued.

The record is clear that the subpoenas issued to appellants and their clients were never subjected to any independent or impartial agency review. One man, Ronald Diana, who clearly perceived himself as a prosecutor, had absolute discretion to issue subpoenas both to appellants and to their clients. His discretion was so open-ended that field agents under his control could issue blank subpoenas based on their own judgment. This total lack of procedural regularity contravenes the well-established principle that the application for a subpoena must "be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." Johnson v. United States, 333 U.S. 10, 14 (1948); Giordenello v. United States, 357 U.S. 480, 486 (1958); Coolidge v. New Hampshire, 403 U.S. 443 (1971); Spinelli v. United States, 393 U.S. 410 (1969); Mancusi v. De Forte, 392 U.S. 364, 371 (1967).

In Mancusi, supra, at 371, the United States Supreme Court explicitly ruled that a subpoena duces tecum ordering a labor union to produce its records does not qualify as a valid search warrant where the subpoena is issued by a public officer engaged in an investigation of that union precisely because it omits the "indispensable condition" of judgment by a neutral and detached magistrate.

3. Appellees' Improper Use of their Subpoena Power. Boyd v. United States, 116 U.S. 616 (1886) explicitly holds that papers in the possession of an individual cannot be the subject of a lawful search and seizure if the exclusive justification for the search and seizure is the criminal evidentiary value of the material sought. It is indisputable in this record that appellees sought access to appellants' files, not to develop knowledge as to how workmen's compensation programs function, but only in order to develop specific evidence of criminal malfeasance. Appellees' agents were looking for evidence of fraud, kickbacks, payoffs, and other criminal activity. They had no intention of carrying out a valid legislative purpose. Hentoff v. Ichord, 318 F. Supp. 1175 (D.D.C. 1970) prohibits such conduct.

4. The Overbreadth of Appellees' Subpoenas. Appellees were on an unmitigated fishing expedition, looking for anything and everything they could find which they could use against appellants. This use of the

subpoena power was explicitly condemned in Hale v. Henkel, 201 U.S. 43 (1906). See also, F.T.C. v. American Tobacco Co., 264 U.S. 298 (1924); United States v. Kirschenblatt, 16 F.2d 202, 203 (2d Cir. 1926), condemning the perusal "at will in search of whatever will convict."; State v. Bisaccia, 113 N.J. 504, 213 A.2d 185 (1965). The rationale of these cases has been applied to state investigative commissions. In re Hague, 104 N.J. Eq. 31, aff'd 104 N.J. Eq. 369, 144 At.546 (E.&A. 1929); Quinn v. Lane, 231 N.Y.S.2d 840 (Sup. Ct. 1962).

5. The Improper Use of the Press to Stigmatize Appellants. In Watkins v. United States, 354 U.S. 178, 200 (1957), the late Chief Justice said for the Court, "We have no doubt that there is no Congressional power to expose for the sake of exposure...." The evidence is clear -- the statements to the press and the blatant disregard for either accuracy or truth -- that appellees, and in particular, Ronald Diana, were engaged in precisely this course of conduct. Hentoff v. Ichord, supra, is to the same effect.

6. Appellee Diana's Improper Use of the SCI's Investigative Powers. Watkins, 354 U.S. at 187, warns that, "No inquiry is an end in itself; it must be related to and in furtherance of a legitimate task of the Congress. Investigations conducted solely for the personal aggrandizement of the investigator or to 'punish' those investigated are indefensible." Both abuses have taken place here. Hentoff v. Ichord is also directly on point.

7. The Failure to Allow Appellant Bass Time to Test his Subpoena. Appellees' failure to allow appellant the opportunity to test the validity of appellees' subpoena in an impartial forum is a clear violation of due process. See v. Seattle, 387 U.S. 543, 545 (1967); Essgee Co. v. United States, 262 U.S. 151, 155-157 (1923); United States v. Stanack Sales Co., 387 F.2d 849 (3d Cir. 1968). Even after appellants cited these authorities when seeking an adjournment (362a-364a), appellees persisted in using their contempt powers to compel testimony. Added to all the other abuses in the record, this clear abuse of power, undertaken after this case was filed, is indicative of the lengths to which appellees were willing to go to harass and punish Bass for his refusal to relinquish his constitutional rights.

8. The Selective Nature of the Investigation. The record reveals that from the outset appellees zeroed in on appellants. The Department of Labor and Industry's Charles Rosen told the SCI Chief Counsel he wanted Freeman & Bass investigated because of the volume they did (1730a). Diana sent an agent to the Department of Labor & Industry to obtain files on appellants' cases only (2528a-2537a). SCI agents were sent out specifically to interview Freeman & Bass clients (2466a). Appellants were barraged with subpoenas. The press publicity centered on Freeman & Bass. Witnesses, who had knowledge of unethical practices

committed by other attorneys, were asked to testify against appellants only (affidavit of Buie, 415a-424a).

As Ronald Diana stated so well in a caption in an affidavit filed in the District Court, the workmen's compensation investigation soon developed into "THE INVESTIGATION INTO FREEMAN & BASS" (175a). Since Yick Wo v. Hopkins, 118 U.S. 356 (1886), the selective enforcement of the laws has been prohibited. In another context, the Yick Wo doctrine has been applied to guarantee the right of attorneys to earn a livelihood. In re Griffiths, 413 U.S. 717 (1973). Application of the Yick Wo doctrine to the appellants in this case is particularly appropriate for, as Judge Garth pointed out in his jurisdictional decision, an attack on attorneys is an obstruction "of the right of legal access and legal action" which "necessarily infringe upon First Amendment guarantees." (312a).

II

INJUNCTIVE RELIEF IS WARRANTED TO RECTIFY APPELLEES' NUMEROUS VIOLATIONS OF STATE LAW

The Amended Complaint alleges both federal and state causes of action arising out of the same operative facts. Appellees' violations of state law are legion. Here are the most glaring:

1. New Jersey law prohibits legislative commissions from conducting "wide open inquisitions." In Re Hague, 104 N.J. Eq. 31 (Ch. 1929), aff'd 104 N.J. Eq. 369, 144 At.546 (E & A 1929).

Every aspect of appellants' practice and personal affairs became the subject of investigation. Appellees shifted into a liability investigation after seeking appellants' books to investigate their workmen's compensation practice. Unlike the initial investigation, this broadening was not requested by any New Jersey department of government, nor was it even discussed by the Commissioners until long after the fact when a pro forma resolution was passed (1637a-1639a; see also the resolution, 183a-184a). Appellants' salaries, their gross volume, pension funds, private investments, one of appellants' wife's work, the family tree of one of appellants' investigators, doctors who received payments on appellants' cases, and their clients -- all were fit subjects for SCI investigators. SCI investigators admitted they were operating without specific instructions (1620a), trying to determine whether "a fraud had been committed by anyone." (2178a). This is precisely the type of investigation which was condemned as a fishing expedition in In Re Hague.

2. At the time the original subpoena duces tecum to appellants was issued, appellees were seeking to uncover any evidence of any illicit activity which would support the accusation of any criminal charge. Ronald Diana himself analogized his role to that of the prosecutor and the Commissioners' roles to that of Grand Jurors (753a). Regardless of whether the SCI was authorized to function as a Grand Jury, it was

acting in that capacity. Therefore, it was required to inform appellants that they were targets of the investigation. Instead, appellees practiced deception to obtain appellants' books and records. Such conduct has been prohibited in State v. Sarcone, 96 N.J. Super 501, 233 A.2d 406 (1967).

3. The record is clear that Ronald Diana appeared before the Commissioners to present evidence, argue legal issues (e.g., 1600a) and generally act as "the prosecutor" (753a) while his brother was a Commissioner. New Jersey law prohibits relatives from appearing before each other in situations such as this where rulings may be required. State v. Deutsch, 34 N.J. 190, 168 A.2d 12 (1961); Board of Education v. International Union of Engineers, 109 N.J. Super 116, 262 A.2d 426 (App.Div. 1970); New Jersey/Board of Optometrists v. Nemitz, State 21 N.J. Super 18, 36-37, 90 A.2d 740 (App.Div. 1952); Aldom v. Borough of Roseland, 42 N.J. Super 495, 127 A.2d 190 (App.Div. 1956). The remedy in these cases is invalidation. These cases are consistent with the Supreme Court's admonition that due process requires, as a minimum, the appearance of fairness. In Re Murchison, 349 U.S. 133 (1955).

4. Commissioner Farley, upon being appointed to the SCI in early 1973, continued to maintain a workmen's compensation practice (430a). He represented an employer in a case in which appellants represented the claimant. Before the claimant received final payment in this case, SCI investigators came to his home to interview him (425a-429a).

Another Commissioner also continued to practice in the workmen's compensation courts during the investigation (1697a). The "appearance of fairness" cases cited above apply with equal weight to these obvious improprieties.

5. One SCI Commissioner held many public offices during the time respondents were conceiving and implementing their investigation, in violation of N.J.S. 52:9M-1. This Commissioner, Wilfred Diana, was the recipient of inter-office memos addressed to no other Commissioner involving appellants (167a, 168a, 190a-191a).

Again, the "appearance of fairness" doctrine should apply to this violation of state law.

6. Appellees take the position that they may forward materials regarding appellants to any public agency they choose, and, in fact, have forwarded some material prior to this Court's stay to public authorities other than the prosecutor. 7/ The SCI enabling statute, however, gives appellees no authority to act as a general referral agency of materials that it gathers with regard to private citizens. N.J. 9.52:9M-8 limits the SCI's power of referral in matters involving private citizens to evidence of crime which may be referred to the prosecutor. Only where public officials are involved is the referral power broader.

7/ SCI counsel informed Judge Garth that appellees had categorized appellants' conduct "as abuses, rather than violations of criminal law." (869a). One would therefore expect that all transmittals would be to other than prosecutorial authorities.

It is now settled that attorneys, although officers of the court, are not public officials. In Re Griffiths, supra, 413 U.S. at 729. Therefore, any referral involving appellants violates state law, even in the absence of all the other violations of state and federal law.

III

BECAUSE THE MATERIAL FACTS ARE UNDISPUTED, THIS COURT SHOULD MAKE ITS OWN FINDINGS AND REMAND THE CASE FOR THE ENTRY OF AN APPROPRIATE INJUNCTION

This Court in October 1973 issued instructions to the court below with regard to how it wanted this case handled. The Court instructed the District Court to "receive testimony with respect to the alleged incidents relied upon by Freeman & Bass in support of the charge that the SCI was continuing its investigation in an accusatory manner." (452a)

After this Court's remand, appellants moved in the District Court for a preliminary injunction based on all the prior proceedings and additional supporting affidavits (454a). Appellants also asked for "an early hearing on this application for preliminary injunction, in which evidence may be taken pursuant to the opinion of the United States Court of Appeals...." (455a).

This motion was set down for January 14, 1974. Prior to the return date, appellants' counsel became aware that there could be a

conflict of interest if the presiding judge remained on the case. When this was communicated to the court, counsel was advised to submit this information in letter form to the court. Counsel did so on January 7, 1974. 8/

On January 14 the Court denied the motion for preliminary injunction without granting appellants either an evidentiary hearing as requested or permitting counsel to argue the case. The Letter Opinion contained no findings of fact or conclusions of law. Nor did it deal with the issue of disqualification (464a). Appellants' counsel, having been informed of the Judge's decision by telephone the same day, wrote to the court requesting reconsideration (465a-467a). On January 10, 1974 the court issued a memorandum in which it declined to disqualify itself or to reconsider the motion or its denial of an evidentiary hearing or oral argument. The court, however, noted that the denial of injunctive relief was without prejudice and could be resubmitted on further papers, but without the possibility of any form of hearing (468a-473a).

8/ The conflict of interest was not based upon a claim of personal bias but rather on a claim pursuant to 28 U.S.C. §455, which requires a judge to disqualify himself in any case in which he "... has a substantial interest or ... has been of counsel ... or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial or other proceeding therein." Central to the claim under this statute was the fact that the District Court had only recently been a member of the firm of Lum, Biunno & Tompkins, which represented a defendant in the Annie Moore matter referred to on page 36, supra. Appellants' counsel claimed that the District Court judge would have to decide whether or not "the SCI interfered with ongoing litigation during the time that you were a member of the law firm which represented the defendant." (462a).

Thereafter, an appropriate motion for reconsideration was filed, with a request for oral argument. [9/]

The court held oral argument only on the issue as to whether it would hear oral argument on the motion for preliminary injunction. Notwithstanding the claim that the motion was extremely complex, the court denied counsel the right of oral argument (1012a-1013a, 530a). On April 19, 1974, the court once again denied relief in a one-page Letter Opinion devoid of findings of fact or conclusions of law (530a). Given the voluminous record before the District Court, its failure to file findings of fact and conclusions of law make it impossible to determine the basis for the denial of relief.

The failure of the court below to hold evidentiary hearings in conformity with this Court's order to make determinations with regard to appellants' allegations of accusatorial conduct can only be justified on a theory that no factual contradictions exist with regard to the appellants' allegations, and all the facts disprove those allegations. Appellants strongly submit that the record evidence should have led the court below to precisely the opposite conclusion. The uncontroverted facts in the record support

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9/ Appellants also asked for a reconsideration of the disqualification motion based upon the allegation that the 1973 Martindale-Hubbell directory listed the Judge's former law firm's representative clients as including Aetna Casualty Insurance and Hartford Fire Insurance Company. As the depositions summarized above indicate, SCI agents obtained information about appellants' cases from these sources. The court denied this motion for reconsideration. (476a)

appellants' allegations. Assuming the court below did not believe these uncontroverted facts were sufficient in and of themselves to support injunctive relief, then the court below was required to resolve those facts which were controverted at an evidentiary hearing. See Sims v. Greene, 161 F.2d 87 (3d Cir. 1947). Nor is there any way to justify the court's refusal to grant counsel the minimal right of oral argument. The denial of the motion for preliminary injunction, coming as it did at a critical stage in the proceedings, literally amounted to the granting of summary judgment. On such a motion, as a matter of law, oral argument is required. Enoch v. Sisson, 301 F.2d 125 (5th Cir. 1962); Dredge Corp. v. Penny, 338 F.2d 456 (9th Cir. 1964); Bowdidge v. Lehman, 252 F.2d 366 (6th Cir. 1958); Brown v. Quinlan, 138 F.2d 228 (7th Cir. 1943). Only where the issue on such a motion is clearly one of law can oral argument be denied. Parish v. Howard, 459 F.2d 616 (8th Cir. 1972).

Because so much of the material evidence which exposes appellees' conduct comes from their depositions and their agents' depositions, as well as from uncontroverted affidavits, there are no genuine issues of disputed facts. Therefore, this Court may pass upon the facts and remand merely for the entering of an appropriate injunctive order. King v. C.I.R., 458 F.2d 245 (6th Cir. 1972); Philadelphia Marine Trade Assn. v. International Longshoremen's Ass'n., 365 F.2d 295 (3d Cir. 1966), reversed on other grounds, 389 U.S. 64 (1967). See generally, Wright & Miller, Federal Practice and Procedure, §2577.

In the event, however, this Court determines that enough of appellants' factual claims are controverted to require resolution at an evidentiary hearing, then this Court should grant injunctive relief pending an appropriate hearing below. Certainly, appellants have presented facts indicating a clear likelihood of success. Appellants should not be prejudiced because of both the procedural and substantive errors of the court below. As this Court noted in its earlier decision, Judge Garth "characterized certain actions by the SCI as 'Gestapo-like tactics [and] 'witch-hunting.'" (45la). The record, as it presently exists, now fully supports such characterizations. Given the fact that the court below did not comply with this Court's instruction to hold appropriate hearings, appellants could not possibly have made a better, more fully substantiated showing than they have made through the use of depositions, affidavits which are in large part uncontroverted, and exhibits.

CONCLUSION

For all of the above reasons, this Court should reverse the decision below, and remand for the entry of an appropriate injunction. In the alternative, it should remand with instructions that the court conduct a hearing to resolve disputed facts and enter an appropriate injunctive order pending resolution of the issues.

Respectfully submitted,

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