IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

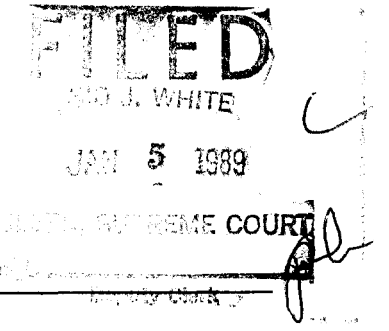
JAMES L. DIAMOND,

Respondent.

_____/

Case No. 71,347 and 72.258

TFB #360627



Initial Brief of Complainant

On Petition for Review

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STATEMENT OF THE CASE AND OF THE FACTS

On October 22, **1987,** The Florida Bar filed its complaint charging Respondent with conduct which arose from his felony conviction.[1] Respondent was named as a principal and co-conspirator in a federal indictment filed in the United States District Court, Southern District of Florida. The indictment alleged, inter-alia, Respondent's complicity and involvement in committing offenses against the United States, to wit: use of mails and transmissions by wire communications of certain matters in furtherance and in execution of a scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses in violation of Title **18,** United States Code Section 2, **371,** 1341 and **1343** [see indictment attached as Exhibit B to Bar cornplaint].

The aforementioned criminal charges were heard by a jury. The jury which found Respondent guilty as to one count of conspiracy to commit mail fraud and five counts of actual mail fraud. Mr. Diamond was sentenced to serve two years as to each count, to run concurrently with one another.

On December **16, 1986** the United States Court of Appeals for the Eleventh Circuit affirmed Respondent's conviction. The Bar's disciplinary proceeding ensued.

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[1] On April 14, **1988,** Respondent filed a Petition for Reinstatement from the felony suspension imposed on June **5, 1985.** That proceeding was stayed by the Referee on November **8, 1988,** pending the outcome of this Court's decision on the matter sub judice.

A final hearing was held before the Honorable Amy Steele Donner, Referee on July 25, 1988. The Bar introduced the indictment and judgment and conviction as evidence. (TR 4) The Respondent introduced six witnesses who attested to his character. (TR 19-50; 53-79) Respondent then testified on his own behalf. (TR 51, 81, 98, 108-119) The Referee indicated that she wished to speak with the sentencing judge regarding his view of the case. The Judge was contacted by telephone in the presence of all parties at the final hearing. (TR 123-127) Consequently, the Honorable Edward C. Davis, United States District Court Judge gave testimony. (TR 130-134)

Subsequent to the final hearing, the Referee issued a Report finding Respondent guilty of all violations charged and recommending that the Respondent be suspended for a period of three years to begin running on November 25, 1986.

The Bar filed its Petition for Review on December 1, 1988 pursuant to direction from the Board of Governors. The Respondent served its Cross Petition for Review on December 5, 1988. This brief follows.

SUMMARY OF THE ARGUMENT

Respondent was found guilty of conspiracy to commit mail fraud and actual mail fraud by a jury. The appellate court upheld the conviction. The Bar sought to disbar Respondent. The Referee disagreed and suspended Respondent for a period of three years.

It is the Bar's contention that this felony conviction was particularly egregious because Respondent utilized his talents as an attorney and knowingly participated in a massive consumer fraud. Thus, disbarment is the appropriate discipline.

POINTS ON APPEAL

POINT I

WHETHER DISBARMENT RATHER THAN A THREE YEAR SUSPENSION IS THE APPROPRIATE SANCTION?

POINT II

WHETHER THE REFEREE ERRONEOUSLY RELIED ON IMPROPER FACTORS WHEN IMPOSING DISCIPLINE?

ARGUMENT

I

DISBARMENT RATHER THAN A THREE YEAR SUSPENSION IS THE APPROPRIATE SANCTION

The Respondent was the President and attorney of an organization which perpetrated a massive fraud on consumers, utilizing "boiler room" and telephone solicitation. (TR 62) The jury believed, by virtue of its verdict, that Respondent was aware of this fraud. Neither The Florida Bar or the government suggested that the Respondent actually telephoned or met with the victims. This Court now has the duty to determine if that behavior warrants disbarment. The words of this Honorable Court in State of Florida, ex rel., The Florida Bar, v. Fishkind, 107 So.2d 131 (Fla. 1958) are applicable.

> As members of this profession we realize that our standing is often measured in the layman's mind by the manner in which we discipline that small minority of our brethren who break the rules of fidelity and trust required by our calling.
>
> Fishkind, at 131.

Clearly, Mr. Diamond did indeed break the fidelity and trust required by our calling. A review of the Florida Standards for Imposing Lawyer Sanctions and several cases lead to the inescapable conclusion that disbarment is appropriate in this instance.

In The Florida Bar v. Cooperman, 500 So.2d 1354 (Fla. 1987) this Court accepted that Respondent's Petition to Resign permanently. Cooperman was a co-defendant in Diamond's criminal

case. In The Florida Bar v. Weinsoff, 498 So.2d 942 (Fla. 1988) the Referee's recommendation of disbarment was upheld where Weinsoff, like Diamond was convicted of conspiracy to commit mail fraud in violation of Title 18, United States Code, Section 371; and five counts of committing actual mail fraud in violation of Title 18, United States Code. In The Florida Bar v. Cooper, 429 So.2d 1 (Fla. 1988) that Respondent was involved in several fraudulent schemes and disbarred without leave to reapply for twenty years. Mr. Haimowitz was disbarred after being convicted of conspiracy to execute a scheme to defraud, obtaining property by false and fraudulent pretenses and of conspiracy to obstruct. The Florida Bar v. Haimowitz, 512 So.2d 200 (Fla. 1987). See also The Florida Bar v. Simons, 521 So.2d 1089 (Fla. 1988); The Florida Bar v. Winecor, 257 So.2d 547 (Fla. 1971).

Diamond's involvement and participation in a scheme which defrauded the public of millions of dollars surely warrants disbarment according to the above case law. In fact, Diamond's conduct may be deemed more severe in light of all of the consumers that it touched. This Court's words in The Florida Bar v. Wilson, 425 So.2d 2 (Fla. 1983) are particularly pertinent.

> [M]ere suspension would not be just to the public. In the case of a conviction of two felonies, the ultimate penalty, disbarment, should be imposed to insure that an attorney convicted of engaging in illegal conduct involving moral turpitude, who has violated his oath and flagrantly breached the confidence reposed in him as an officer of the court, can no longer enjoy the privilege of being a member of the bar. A suspension,

> with continued membership in the bar, albeit without the privilege of practicing, is susceptible of being viewed by the public as a slap on the wrist when the gravity of the offense calls out for a more severe discipline.
>
> Wilson. at 2.

Further, the fact that Mr. Diamond's law practice was used should be considered. In The Matter of Goldbera. **520** A.2d **1147** (N.J. 1987), the attorney was convicted of two felony charges of conspiracy to distribute narcotics. Goldberg's role in the conspiracy in great part employed his skills as an attorney. Mitigating circumstances were presented. They included his character in the community, serious financial circumstances and that his daughter suffered from a serious and degenerative kidney disease. The New Jersey Supreme Court, however, held that the mitigating factors did not override the seriousness of the aggravating factor of Respondent's criminal behavior.

> It must be emphasized that Respondent actively utilized his professional license and his legal skills as an attorney to violate the law. It is obvious that where, as in this case, an attorney's criminal deeds directly involved his law practice, the misconduct is even more egregious in the disciplinary context.
>
> Goldberg, at **1149.**

Additionally, the Florida Standards for Imposing Lawyer Sanctions (a/k/a The Sanctions Project) also provides that a disbarment is the correct sanction. Rule 5.11 states that disbarment is appropriate when:

(a) a lawyer is convicted of a felony under applicable law; or

(b) a lawyer engages in serious misconduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or

(c) a lawyer attempts or conspires or solicits another to commit any of the offenses listed in sections (a) - (d); or

(f) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice law.

Respondent's conduct fits into all of the above categories.

Therefore, based on the seriousness of the felony convictions, the prevailing caselaw and the Sanctions project, Respondent should be disbarred.

II

THE REFEREE ERRONEOUSLY RELIED ON IMPROPER FACTORS WHEN IMPOSING DISCIPLINE

A. GOING BEHIND THE FELONY CONVICTION

Rule 3-7.2(i)(2) of the Rules of Discipline clearly provide that a judgment of guilt shall constitute conclusive proof of the criminal offenses charged. A litany of cases have addressed and interpreted this Rule. Those cases expressly prohibit a Referee from going behind a felony conviction and retrying the case. The Florida Bar v. Onett, 504 So.2d 388 (Fla. 1987); The Florida Bar v. Heller, 473 So.2d 1250 (Fla. 1985); The Florida Bar v. Vernell, 374 So.2d 473 (Fla. 1979). The Florida Bar in prosecuting this case held true to the foregoing. During its case in chief the Bar presented only the indictment and judgment and conviction as evidence. (TR 4) Witnesses were not presented. Therefore, the Bar cannot be accused of "opening the door" to the felony conviction. The Florida Bar v. Jahn, 509 So.2d 285 (Fla. 1987).

At the conclusion of the Respondent's case, the Referee expressed an interest in speaking to the sentencing Judge.

> THE REFEREE: The only thing that interests me, and we don't have any testimony and it would not be appropriate to have testimony, would be from the Court who did the sentencing.
>
> (TR 123)

The Bar advised the Referee that it had no objection to contact with the sentencing Judge as long as there was no attempt to "go behind the conviction".

> MS. LAZARUS: Your honor, my only concern is going behind the conviction.
>
> (TR **125-6**)

The Referee replied as follows:

> THE REFEREE: I don't want to go behind the conviction. I want to *go* behind the sentence -- not behind it, at least concurrent with the sentence, because he made some comment when he sentenced him and I would like to ask him about it.
>
> He seems to have a conflicting view with the Government on this case, which of course, sitting in Court, he sees both sides, both the defense and the prosecution side.
>
> In his view of the case, sometimes the Court is tempered some by the other side.
>
> We expect the prosecution to have a single-minded purpose view of prosecution, the defense the same thing and the Court to be much more impartial to the whole proceeding.
>
> He did seem to have a different view. In fact, his words are, as I look at much of the work that you did, is that what the Government views as part of the conspiracy is really work that a lawyer does in representing a client.
>
> In that letter, it appears, and I haven't read it thoroughly -- is that he was asked to give Mr. Diamond between ten and fifteen years. In fact, I think the words were fifteen years as a starting point. He sentenced him to two on all counts concurrently.
>
> (TR **126-127**)

In fact, Judge Davis was contacted and did testify to his feelings regarding the extent of Respondent's criminal involvement, in addition to whether Respondent could be rehabilitated

become a member of The Florida Bar. One of the factors indicated in the Report of Referee that were relied on in imposing a suspension, rather than disbarment was the testimony of Judge Davis.

> C. The testimony of the Honorable Edward C. Davis that notwithstanding the verdict, he never saw Mr. Diamond as an active participant in an act of fraud, and the fact that mr. Diamond has already had his civil rights restored to him.
>
> (Report of Referee)

Not only has the Referee gone behind the felony conviction, but she has gone contrary to the conviction. The jury heard the testimony and found Respondent guilty. The Referee was in error for soliciting testimony going to the heart of Respondent's guilt or innocence and relying on same when imposing dicipline.

B. CHARACTER WITNESSES

Mr. Diamond presented several witnesses who attested to his good character. Among those was a former Florida Bar President and Mayor of Miami Beach. (TR 53-57; 76-79) In The Florida Bar v. Whitney, 237 So.2d 745 (Fla. 1970), however, it was held:

> The evidence of these witnesses as to the good character of the respondent are impressive, but have little relevancy in arriving at a conclusion concerning his guilt or innocence. The charges made in the Complaint and admitted here go to the very heart of a lawyer's qualifiaction to be entrusted with the great responsibilities of his profession and when--as here--there is shown a total disregard, over an extended period of time, of basic concepts of honesty and reliability

> and a flagrant violation of trust reposed in him, a judgment of disbarment is fully warranted.
>
> Whitney, at **748**.

Consequently, although the witnesses were impressive, their testimony regarding Diamond's character was simply irrelevant. The Referee, however, gave great weight to that testimony when imposing the suspension, as indicated in the Report of Referee.

The Report of Referee does not even allude to the seriousness of the crimes a jury found that Respondent had committed. Neither does it make mention of the impact of the Eleventh Circuit Court of Appeals refusal to overturn Respondent's conviction. It did, however, give undue weight to a statement by the sentencing Judge which the Referee construed as mitigating and the testimony of character witnesses.

CONCLUSION

Based upon the foregoing reasons and citations of authority, The Florida Bar respectfully submits that the Referee erroneously imposed a three year suspension, and would urge this court to disbar the Respondent.

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