IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

HERMAN T. ISIS,

Respondent.

_____/

Cases Nos. 71,185, 72,644

ANSWER BRIEF

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TABLE OF CONTENTS

TABLE OF CASES CITED

INTRODUCTION

The Respondent, will refer to the parties as has the Complainant. The Respondent has included herein an Appendix pursuant to the provisions of Rule 9.220, Fla.R.A.P. Reference to the appendix will be made by the letter **"a"**, followed by the page in the appendix. Respondent has included in his appendix a copy of the Report of the Referee and of his Answer to the Complaint. Respondent has numbered the paragraphs of the Referee's Report for identification and reference so that Respondent's comments can be focused accurately upon the proper wording of the report. The Report of the Referee will be referred to as **"rr"**. The Transcript of Testimony will be referred to as **"tr"**.

STATEMENT OF THE CASE

On July 29, 1987, the Respondent pled no contest to two counts of a multi-count information of which six counts referred to him. Respondent was sentenced to serve 18 months on one count and 5 years probation on the other count. As a condition of probation, he was fined and assessed costs.

This court entered its order suspending the Respondent pursuant to the provisions of Rule 3-7.2(e) of the Rules Regulating the Florida Bar.

The Florida Bar, thereafter, filed its complaint for the imposition of additional sanctions. Respondent filed his Answer (A.23-32,inc.). The Honorable Radford R. Sturgis was appointed Referee. A hearing was held in Miami on November 14, 1988. The Referee filed his report on January 5, 1989.

The Referee recommends that Respondent be suspended for a period of three years and be re-admitted to practice only after proving rehabilitation or alternatively, a disbarrment for five years. (rr. par.8)

The Florida Bar filed its Petition for Review. Respondent filed his cross Petition for Review. The issue is what sanctions, if any, should be further imposed upon Respondent.

STATEMENT OF THE FACTS

Respondent is 66 years old, having been admitted to the Bar on June 10, 1953, at the age of thirty. In 1959, he was suspended for ninety days for offering in evidence a document he knew had been altered by his client. (rr 17), (tr.p.51, L.14-21). Otherwise, he has enjoyed an honorable reputation as a practitioner of the law.

The record shows that Respondent became expert in the regulatory field, commencing in 1959 (a.3), at which time while representing a client, had dealings with the Florida Real Estate Commission; then later with the Department of Business Regulation, Division of Florida Land Sales and Condominiums, which initially was an independent agency known as the Forida Installment Land Sales Board. In his legal capacity, he advocated his client's rights against unwarranted intrusions into their businesses by the administrative agencies. Issues developed which prompted Respondent to take a position which he felt was the proper legal interpretation of the law, thereby resulting in resistance to the unauthorized actions of these agencies. On several occasions, he challenged the agency to permit a court to determine the disputed interpretations. (a.3-5). Respondent characterized himself to the referee as an adaptive lawyer.

There came a time when Respondent was asked to represent a Mr. (sic) Broerman, (tr.p.17), who was involved in the business of offering an advisory service in connection with the U. S.

Department of Interior's Oil Lease Lottery. The State of Florida Department of Banking and Finance (Department) sought to prohibit this activity upon the grounds that it violated the state's securities laws. Ultimately, the Department, without a hearing to determine the facts, unilaterally issued a Final Cease and Desist Order directed to approximately fifty-three entities, two of whom were represented by Respondent. This Order was appealed by Respondent's clients. The Third District Court of Appeal found that the Department did not have jurisdiction since the activity was not a security. Yeomans v. State Department of Banking and Finance, 452 So.2d 1011,(DCA 3rd, 1984).

Thereafter, Mr. Broerman's attention was diverted to other activities. He decided to sell oil leases and to drill wells. It was in connection with his representation of Mr. Broerman that Respondent's problems resulted.

Respondent has described all of his activities in his answer which he swore to and placed in evidence at the commencement of the hearing. (a. 3), (tr.p.13, L.9). To now duplicate the matters set forth in the Answer would impose upon the court's time and energies. It is set forth in full in Respondent's Appendix to this Answer Brief. (a.23-32).

At the hearing, the Referee aptly focused on the issue with the pronouncement: (tr.5, L.ll) (a.2)

> "...but there is a great difference between a lawyer who is hired to simply do legal work and it turns out the legal work he did was part and parcel to some other illegal matter."
>
> (L.18)"...And a lawyer at the other end of the

spectrum who fully participates, organizes, participates in the profits, of an illegal activity."

(L.22)"...I do not know where we fall. Somewhere along the line I think it would be extremely helpful to try to see where Mr. Isis falls in that."

(a. 3), (tr.p.8&9, starting at L.24)THE REFEREE: If you read through the charging documents I think it basically furnishes very little information about his specific involvement."

(L.7) But as I said, there is a big difference to me between a lawyer who is careless and caught unawares, so to speak, then later comes to find out what he is involved in and does not extricate himself from it, who is paid an hourly rate, for instance, to do his work, and who does not share in the proceeds."

(L.22) "I just want to know where he falls. I do not want to know all the facts."

The Respondent testified that he made no money except fees. (tr. 29, L.25) (a.3).

The Referee therefore established the purpose of the hearing. His impressions expressed on the record at the conclusion of testimony are important to note.

The Referee noted that the Respondent was walking as close to the line as he can and will take advantage of any loophole in the definition. (a.12),(tr.44,L.12). And (a.12), (tr.46,L.23):

"It does sound to me, Mr. Isis, though, that you are walking awfully close to the line as to the practice of law ..."

"Q. You can appreciate on the one hand the freedom of the individual to be free of regulations, and on the other hand that the unwary and sometime even the aware need to be protected from high pressure sales in certain areas." (a.14), (tr.P.64, L.9)

After all the testimony was concluded, there commenced a colloquay between the Referee and the Florida Bar attorney, Mrs. Randi Klayman Lazarus. (tr., p.84) (a.15, et seq.).

> THE REFEREE: "You understand an Information is simply a finding of probable cause by a prosecuteing attorney. It cannot even be considered by a jury as any evidence to show guilt."(tr.p.86)
>
> "I do not have any question as to what this entire scheme encompassed by looking through the Information. The only question I have coming in is to what extent Mr. Isis participated in that. That I cannot glean from just reading the Information and the no contest plea."(tr. p.87,L8), (a.16)
>
> "To what extent Mr. Isis participated in that and the length of use of his legal profession, that is, a lawyer to the bringing that about is something I know as much about now as I did when I came here. And unfortunately, without retrying the case, it would be very difficult. Sort of like looking at a meal but not being able to taste it. So the potential implications of the conduct on Mr. Isis are serious. Whether or not they actually were, I don't know."(tr. p.103,L14).
>
> "...based on his attitude toward some of these regulatory boards, it would be very easy for him to transmit that hostility toward the Florida Bar if that were his nature and I don't see that here." (tr.,P.107), (a.17)
>
> (Addressing Respondent) I recognize an appreciation of the difficulty of fighting against a state agency, easpecially where you are a worthy opponent, but I also note that you are not a warning track lawyer. A warning track lawyer, like a baseball player, starts slowing down when he gets on the warning track so he doesn't run into the wall. Occasionally, you have butted your head against the wall and even looked for some cracks in between the boards."(tr. P.125, L 11) (a. 17).

POINT ON APPEAL

THERE WAS NO EVIDENCE PRESENTED BEFORE THE REFEREE UPON WHICH A CONCLUSION COULD BE DRAWN THAT "HE RESPONDENT WAS GUILTY OF ANY WRONGDOING WHICH WOULD REQUIRE HIS BEING FURTHER SANCTIONED BY THE SUPREME COURT.

ARGUMENT

The Florida Bar, in instituting this disciplinary proceeding asserts arguments heretofore made by it before this court - that this Court should adopt an automatic disbarment rule whenever an attorney is convicted of a felony. The Court rejected that thesis with its announcement that it will continue to view each case solely on the merits presented therein. The Florida Bar v. Jahn, 509 So.2d 285,286(Fla. 1987). Discipline should be fair to both the public and the attorney. The Florida Bar v. MacKenzie, 319 So.2d 9 (Fla. 1975). This court stated that discipline for unethical conduct by a member of the Florida Bar must serve three purposes:

> First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing a penalty. Second, the judgment must be fair

> to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations. The Florida Bar v. Pahules, 233 So. 2d 130,132 (Fla. 1970); cited in The Florida Bar v. Greene, 515 So.2d 1280 (Fla. 1987), and The Florida Bar v. Harper, 518 So.2d 262, (Fla. 1988).

In a referee trial of a prosecution for professional misconduct, the Bar has the burden of proving its accusations by clear and convincing evidence. The Florida Bar V. Rayman, 238 So.2d 594, (Fla. 1970). Respondent suggests that such proof is not evident and the absence of such proof was obvious to the referee at the conclusion of the hearing. Respondent has heretofore noted in the Statement of the Facts certain portions of the transcript which also appear in the Appendix to this Brief which affirmatively show that the referee knew nothing more about Respondent's conviction at the end of the hearing than he knew at the commencement thereof. It is therefore difficult to understand why the referee would recommend the alternate sanctions.

The Respondent relied upon this court's decision in The Florida Bar v. Pavlick, 504 So.2d 1231 (Fla. 1987) in the preparation of his defense to the Complaint filed by the Bar. Pavlick was suspended for two years after entering an "Alford" plea of guilty to accessory after the fact to a misprison of a felony.

He was sentenced to one year in prison, with parole after serving one-third of his sentence. The Bar initiated disbarment proceedings. Pavlick testified at length to the circumstances which led to the "Alford" plea. He professed innocence and was permitted by the referee to introduce the results of a polygraph exam to reinforce his testimony. He accounted for his "Alford" plea because of family and personal pressures and the risk of greater punishment if he were to be found guilty after a trial. The referee believed Mr. Pavlick and recommended suspension for a period of two years with automatic reinstatement. The Court in overruling the Bar's objection that Pavlick was retrying the offense for which he was convicted stated that the proof of conviction and an adjudication of guilt are sufficient to establish a prima facie case for disciplinary action. Due process, however, requires that the accused lawyer shall be given full opportunity to explain the circumstances and otherwise offer testimony in excuse or in mitigation of the penalty; citing State ex rel. Florida Bar v. Evans, 94 So.2d 730 (Fla. 1957). In Pavlick, the Bar also appealed the denial by the referee of the Bar's motion to delay the conclusion of the hearing so it could garner witnesses to rebut the statements of Pavlick.

There is similarity between the Pavlick case and the case at bar. The Respondent herein disclaims any guilt whatsoever. This was disclosed fully in his Answer to the Complaint (a.23-32,inc.); the uncontroverted testimony of Respondent that he was not a co-conspirator, didn't make any money except his fees.(a. 13).

Respondent investigated his client's business to attempt to become assured that his clients' were conducting an honest operation. This was done by his journeying to Oklahoma to interrogate his client's attorney there, a man who was in a position to know the results of the well drilling operations (a.6&7). He also testified that his feelings about the legitimacy of the operation were reinforced since although each investor knew of him, not one ever registered a complaint to Respondent. (a. 13).

Respondent explained that he was named in the information at the insistence of the Department of Banking and Finance who had their lead attorney appointed as Special Assistant State Attorney to prosecute Respondent.(a.10)(tr.p32,L22). The testimony and the Answer to the Complaint describe reasons why employees of the Department of Banking and Finance would want to have the Respondent criminally sanctioned. He frustrated the Department's every effort to regulate the business activities of his client as a security. He invited legal action to test the security theory, and in fact on one occasion, when the Department attempted to regulate another similar activity as a security, the Third District responded in favor of Respondent's client. Yeomans v. State Department of Banking and Finance, supra.

Respondent then presented testimony of why he plead no contest. His reasons were similar to those of Pavlick.

The Information came as a complete surprise to Respondent. (a. 9),(tr.26,L.27) and to his family, which is best stated by Lillian Isis, his wife:

(a. 15), (tr.82,L.19) "The fear that when all this started was so overwhelming that just out of the clear blue one day you hear, and the panic that sets in is--unless a person has been there, I don't think anybody could possibly understand it."

The purpose of the plea was to try to get back into a life as soon as we could. (a.15).

Respondent's knowledge of his health and of his wife's health resulted in a fear for self survival if he subjected himself to a trial. (tr.p.29, L.25,); (tr.p.30, L.5,11); (tr.p31,L.3).

Respondent too late woke up to the fact that if he were a target of the investigation by the Sheriff and the State's Attorney's office, he would have been approached by the dectective investigating the case and given the opportunity to answer questions. This did not occur.(tr. p.28,L.3) (a.11). Also the later revelation to him of an innocuous report made by an investigator for the Department of Banking and Finance caused him to realize that his involvement in the information was a bright bluff more apt to a poker game but designed to ruin the life of a law abiding attorney. (tr.p.32, L22), (a.10,11).

The Referee made no findings or comments respecting Respondent's explanation of his plea. He made four Findings, "IV FINDINGS", (rr.,p.2)

The referee commented that the charging documents (the Information)

"If you read through the charging documents I think it basically furnishes very little information about his specific involvement." (tr.p.8, L. 24)(a.3).

The report is then basically a blanket recommendation of sanctions none of which are supported by the record. Since the testimony of Respondent was not rebutted by the Bar who has the burden of proving by clear and convincing evidence that Respondent is a "bad lawyer" who should be disbarred, then the Respondent should have been found to have prevailed in this proceeding. The Complaint should not have been filed. The automatic suspension under which Respondent is currently prevented from earning his living from the practice of law should have been recognized as the proper sanction. The referee made no findings on the evidence in his report. Par. #14, (a. 20) the referee poses the question of Respondent's complicity in a conspiracy:

> "If Mr. Isis substantially and knowingly participated in the conspiracy he should be disbarred. If he had a minor role and only constructive knowledge of the fraud, I feel he should be suspended for the maximum three year period and be required to demonstrate proof of rehabilitation. The referee identified this concern over the extent of Mr. Isis' knowledge and participation before the testimony began (page 5, lines 11-25, transcript). The Bar introduced Mr. Isis' convictions, prior misconduct and the charging documents (informations). The referee ordered and included in the record a transcript of Mr. Isis' no contest plea and factual basis for the pleas. The Bar cross-examined Mr. Isis, but offered no additional evidence. In State ex rel.The Florida Bar v. Bass 106 So.2d 77 (Fla. 1958) the referee and Supreme Court faced a similar dilemma regarding state of mind. The court stated at page 78:
>
> > "It goes without saying that the power to disbar or suspend a member of the legal profession is not an arbitrary one to be exercised lightly, or with either passion or prejudice. Such power should be exercised only in a clear case for weighty reason and on clear proof."

The Respondent adopts Bass as a case supporting his position.

In paragraph #15, (a. 20), the referee's report states:

> "I find that The Bar has not presented "clear proof" that Mr. Isis should be disbarred based upon his pleas alone."

What then can be the basis to support either of the referee's recommendations. The referee's review of Florida's Standard for Imposing Sanctions must now be examined in light of the evidence and the comments of the referee made at the hearing at a time after all the evidence was concluded.

Par. # 17 (rr 4) (a.21):

> "Prior Disciplinary Offense (aggravating) (m) Remoteness of Prior offense (mitigating). In State v. Isis, Fla. 223 So.2d 227 (1959) a three month suspension was imposed for intoducing an altered document in a court proceeding (page 51 lines 14-21 transcript). This is a serious disciplinary offense and should be considered as an aggravating circumstance; however, it was very remote in time."

The report cites a prior offense which occurred more than thirty years ago, although the sanction was imposed two years after the incident. In The Florida Bar V. Hooper, 509 So.2d 289, (Fla. 1987), the attorney who was already under suspension imposed in The Florida Bar v. Hooper, 507 So.2d 1078 (Fla. 1987), had abandoned his client because of a fee dispute and then filed an illegal mechanic's lien against the client's property. The court suspended Hooper for one year to run concurrent with the suspension previously imposed.

In The Florida Bar v. Greene, supra, the attorney had been sanctioned four times prior to the hearing then under consideration. The referee recommended a public reprimand. The Court suspended him for 91 days in addition to a two year probation period. The court stated: "...this Court deals more severely with cumulative misconduct than with isolated misconduct." It appears to respondent that a lapse of professional conduct occurring more than thirty years ago should be classified as isolated misconduct.

In The Florida Bar v. Thomson, 500 So.2d 1335, (Fla. 1986), the attorney who had pled no contest to four charges including drug felonies, the court sustained the referee's recommendation of a ninety-one day suspension. In doing so, the Court repeated its oft cited standards of attorney discipline:

> "[W]hile we agree that 'the discipline should be fair to both the public and the attorney, with an object of correcting 'the wayward tendency in the accused lawyer while offering to him a fair and reasonable opportunity for rehabilitation'" The Florida Bar v. MacKenzie, supra; State ex rel The Florida Bar v. Ruskin, 126 So. 2d 142,144 (Fla. 1961).

Louis Vernell had a history of sanctions, having been disciplined by this Court on three prior occasions in 1964, 1974, (reprimands) and a six month suspension in 1979. But in The Florida Bar v. Vernell, 502 So.2d 1228, (Fla. 1987) wherein Vernell had been found to have cheated his client of $ 100,000 in a case where as a referring attorney, he had already been paid a fee of $ 200,000, the Court suspended Vernell for a period of 91 days, thus requiring proof of rehabilitation.

Finally, on this point, in The Florida Bar v. Blum, 515 So.2d 194, the attorney had failed to disclose a serious violation of the standards of ethics for which he was sanctioned in New York. He was suspended for three years for committing serious defalcations involving his clients.

Par.18(rr) (a.21):

> "(b,c,d) Dishonest or Selfish Motive; a Pattern of Misconduct; Multiple Offenses. Mr. Isis pled no contest to multiple (two out of six) charges filed in a 210 count information. The Bar offered only the information and judgments of conviction as proof. Mr. Isis maintained his innocence and responded to these matters on the following pages of the transcript:"(references are omitted)

This standard as applied by the referee presents no basis for the imposition of sanctions.

Par. 19(rr) (a. 21):

> "Mr. Isis' state of mind has been inferred from his plea but has not been established by any direct factual evidence; thus, I find only the no contest plea to multiple offenses clearly proven as an aggravating circumstance."

The referee's interpretation of this standard is inconsistent with the evidence. Testimony already discussed hereinabove was direct factual evidence. (See(a. 9,10,15),(tr.p.29,39,31and 82). The testimony is inserted herein to facilitate the Court's examination:

(tr.,p.29, L.25) "I didn't defend the case because I knew my own physical condition."

(tr.,p.30, L.5) " My teeth were falling out. I got prostate problems. I had ulcers. and I was just in bad

shape."

(tr.,p.30, L.ll) " Lillian had problems of her own. She was an alcoholic. I knew it and she also had a bad back. Two discs removed. She is a nervous person. Any time she gets under tension, she is on a heating pad. Thank God, she went through two treatment programs in the alcoholism and she is recovering, but if we had to go through a trial, I think maybe she may have gone back to it again. That was a fear."

Certainly no aggravating circumstance can be inferred from that testimony. The Bar has the burden of proving by clear and convincing evidence such aggrevating circumstances. Rayman, supra. Yet the referee noted (tr. p. 86) (a.16),

> (to Mrs. Lazarus) " You understand an Information is simply a finding of probable cause by a prosecuting attorney. It cannot even be considered by a jury as any evidence to show guilt."

and (tr.p.91,L.2)

> "Mr. Isis, you are the one with the presumption in your favor."

Most importantly, the referee concludes (tr. p 103, L.14)

> "To what extent Mr. Isis participated in that and the length of use of his legal profession, that is, a lawyer to the bringing that about is something I know as much about now as I did when I came here. And unfortuanately, without retrying the case, it would be very difficult. Sort of like looking at a meal but not being above to taste it.
> So the potential implications of the conduct on Mr. Isis are serious. Whether or not they

actually were, I don't know."

Par. 20.(rr),(a.21):

"(g,j) Refusal to acknowledae wronaful nature of conduct. Indifference to making restitution. Mr. Isis was fined but was not ordered to make restitution. He entered a no contest plea and has maintained his innocence, thus understandably has not offered to make restitution. These factors have not been clearlv proven."

The referee's interpretation of this standard acknowledges that no factors have been clearly proven.

Par. 21,(rr) (a.21):

"(i) Substantial experience in the practice of law. Mr. Isis began practicing law in 1953 at the age of 30. (page 13, line 14, 15, transcript.) Mr. Isis has had substantial experience in the area of the law covered by this criminal charges. He knew or should have known that his legal skills and professions1 license were being used to defraud the public. He has violated his fundamental duty as a lawyer toward the public, by failing to maintain the standards of personal integrity upon which the community relies. I find this to be an aggravating circumstance."

There is no evidence to support this interpretation of the standard. The evidence supports respondent's position to the effect that he was innocent. He testified to the fact that he investigated the results of his client's undertakings; (tr. p.24, L. 14), (a.6,7) by interrogating his client's Oklahoma lawyer, a man in a position to have all of the facts concerning petroleum production. Also, his belief that the business was legitimate was reinforced by the failure to receive any complaints from the investors. (tr. p49, L.19)(a. 13). Also, the fact that his arrest

came as a surprise reinforces the fact that he was engaged in a legitimate legal activity and performing ethically for his clients as required under The Rules of Professional Conduct.

Par. 22,(rr) (a. 21):

> "(c) Personal or emotional problems. Mr. Isis, Mrs. Isis and friend Norman Madan offered testimony relating to Mr. Isis' physical condition and personal problems (pages 29-34, 72-81 transcript), and Mr. Isis gave testimony as to why he pled no contest rather than to go trial on the charges. Bar counsel aptly points out that this mitigating circumstance may refer only to circumstances surrounding the commission of the underlying offenses. If so, then this mitigating circumstance was not established by Mr. Isis.

The referee's interpretation of this standard does not comport to the edicts of this court pronounced in Pavlick, supra and Evans, supra:

> "[D]ue process, however, requires that the accused lawyer shall be given full opportunity to explain the circumstances and otherwise offer testimony in excuse or in mitigation of the penalty."

This standard, then, was not understood by the referee when the report states in error:

> "Bar counsel aptly points out that this mitigating circumstance may refer only to circumstances surrounding the commission of the underlying offenses."

Par. 24(rr) (a. 21):

> "(k) Imposition of other penalties or sanctions. Mr. Isis served 77 days on an 18 month jail term and is currently serving a 5 year probationary period. He was fined $10,000. One would expect to receive punishment for a no contest plea to these criminal charges: however, the sentence imposed is not unduly burdensome and thus I find the penalty actually served to be of minimal value as a mitigating circumstance."

It is difficult for a completely healthy person to evaluate the punishment endured by a man, 64 years old at that time, and not in the best health, unable to eat prison food nor to sleep on steel bunks nor to relax. Also, after enjoying a lifetime of good reputation rebuilt after a 1959 suspension, the shame to be endured for probably the remainder of his life is punishment in and of itself. Respondent seriously disagrees with the referee on this point and feels that he may have been misled by Respondent's youthful appearance.

Par. 25,(rr) (a.21):

> "Lastly, Mr. Isis, throughout his career, has practice close to the line and certainly should have known he was participating in a fraudulent and criminal activity. Mr. Isis at no time mitigated his involvement by renouncing his connection to the fraudulent activity, ceasing to practice law for them, or offering to cooperate with the authorities to uncover the details of the conspiracy. The Florida Bar v. Pettie, 424 So.2d 734 (Fla. 1983).

The referee's interpretation of this standard is a completely unfair and unwarranted conclusion in that there is no violation recognized; only the conclusion of the referee. If Respondent is unaware of criminal activities, how can he assist in the investigation of such activities. No one asked him. If the Sheriff investigating the matter had approached Respondent, the whole matter might have had a different ending, but that didn't happen. Pettie is inapplicable to this case.

Chapter 4, Rules of Professional Conduct Preamble: A Lawyer's Responsibilities. The Florida Bar Journal, September 1988, page 63

"As an advocate, a lawyer zealously asserts the

client's position under the rules of the adversary system."

"While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process."

"Zealous advocacy is not inconsistent with justice..

Toward the end of the hearing, Respondent heard the terms "close to the line" and "warning track lawyer". This can only be considered as the referee's reaction to Respondent's description of his encounters with state administrative agencies. These statements already appearing on pages 5 and 6 of this Brief are repeated:

"It does sound to me, Mr. Isis, though, that you are walking awfully close to the line as to the practice of law..."

"Q. You can appreciate on the one hand the freedom of the individual to be free of regulations, and on the other hand that the unwary and sometimes even the aware need to be protected from high pressure sales in certain areas." (a.14), (tr. p.64, L.9).

"..based on his attitude toward some of these regulatory boards, it would be very easy for him to transmit that hostility toward the Florida Bar if that were his nature and I don't see that here. (tr.,p.107), (a. 17).

(Addressing Respondent) I recognize an appreciation of the difficulty of fighting against a state agency, especially where you are a worthy opponent, but I also note that you are not a warning track lawyer. A warning track lawyer, like a baseball player, starts slowing down when he gets on the warning track so he doesn't run into the wall.

Occasionally, you have buttedyourheadagainst the wall and even looked for some cracks in

between the boards." (tr. p.125, L11) (a.17).

Respondent has asked himself, is it wrong to disagree with an administrative employee's concept of legal language when there are no cases published to give one guidance? Is it proper for a lawyer to interpret a statute or rule as he sees it? Is it improper for a lawyer who in advocating his client's position before an administrative agency which disagrees with his position, to suggest that the agency institute legal action for a judicial determination of the contested ruling?

It is apparent that the referee felt that the incidents described in Respondent's Answer, (a. 23). his testimony (tr. p.13, L. 15) (a. 3) and Respondent's remark that he "became known as an adaptive lawyer and had quite a following was interpreted by the referee as "line walking." It is apparent that no regard was given to Respondent's statement that his clients were kept on a legal path. (a. 5). It is apparent that the referee was most impressed with respondent's dialogue describing the interaction with the Department of Banking and Finance regarding whether a general partnership was a security under Florida law with the suggestion for the Department to "...bring your injunction suit and let's have a court determine whether there is a security involved" (tr. p.21, L. 25, continuing to p. 22), (a.5). This impression was reinforced when respondent described how an investigator from the Department of Banking and Finance was ousted from a private meeting at the Miami Airport Hilton Hotel. (tr. 26, L. 18 continuing to p. 27).

If a lawyer is to practice in fear that his honest disagreement with the agency is going to result in his being disliked to the point where the agency is "out to stop you..." (tr.58 & 59, L.21) for reason that as stated by witness Michael M. Tobin, a lawyer:

> "[T]he teeth that they had and the ability that they had to control the sale of land was very inadequate. And they thought that they were having an unequal battle in any dealing that they had with you as one of the experts in the field."

then how can he honestly comply with the Rules of Professional Conduct?

The Respondent has asked that if the Court imposes any sanctions, that it should be for a three year period to run concurrent with the suspension already in effect. In the event that Respondent's civil rights are restored at an earlier time, he would want to be able to apply for reinstatement. Respondent has adequately demonstrated that no rehabilitation is required of him to resume the practice of law.

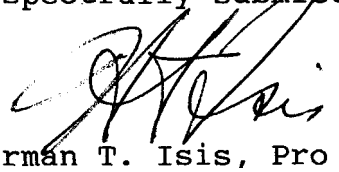
CONCLUSION

The Florida Bar's Miami Office is a very busy office. These proceedings were commenced by a letter inviting the respondent to resign from the Bar without leave to reapply for admission. The Bar had even gone to the effort of preparing a full set of

voluminous documents to accomplish that purpose. The invitation was declined. At that point, the Bar should have investigated the matter to ascertain whether further sanctions were required. The Miami office is too busy and lacks the personnel to make an investigation in every case. It commenced these proceedings for which it attempts to impose its costs upon Respondent. The Bar proved nothing. Respondent was fully cooperative with the Bar and did nothing to delay these proceedings. He would have furnished the Bar with any investigative materials it requested and done anything to avoid this proceeding, just as he would have done if he had been approached by the investigators who did the ground work for the filing of the Information. This is because Respondent is innocent of any wrong doing.

The Bar has proven no conduct on the part of the respondent that warrants further sanctions. The report of the referee should be rejected.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I mailed a copy of the foregoing Answer Brief on March **29, 1989** to the following named persons at the following addresses:

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John F. Harkness, Jr.
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