IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

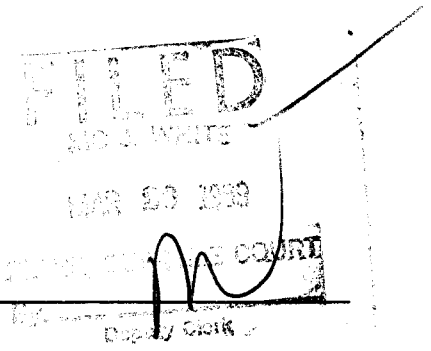
v.

HERMAN T. ISIS,

Respondent.

_____/

Case No. 71.185
and 72,644



Initial Brief *of* Complainant
On Petition for Review

RANDI KLAYMAN LAZARUS
Bar Counsel
TFB #360929
The Florida Bar
Suite 211, Rivergate Plaza
Miami, Florida 33131
(305) 377-4445

JOHN F. HARKNESS, JR.
Executive Director
TFB #033748
The Florida Bar
Tallahassee, Florida 32399-2300
(904) 222-5286

JOHN T. BERRY
Staff Counsel
TFB #217395
The Florida Bar
Tallahassee, Florida 32399-2300
(904) 222-5286

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities
Continued,

INTRODUCTION

The Florida Bar, Complainant, will be referred to as the "the Bar" or "The Florida Bar". Herman T. Isis, Respondent, will be referred to as the "Respondent". The symbol "TR" will be used to designate the transcript of the final hearing which was held on November 14, 1988. All emphasis has been added.

STATEMENT OF THE CASE AND OF THE FACTS

On June 24, 1988, The Florida Bar filed its complaint charging Respondent with conduct which arose from his felony conviction. Respondent pled no contest to conspiracy to commit an organized fraud in violation of Florida Statute 817.036 and unlawful use of boiler rooms in violation of Florida Statute 517.312. Respondent was sentenced to serve eighteen months incarceration on these charges.

A final hearing was held before the Honorable Radford R. Sturgis, Referee on November 14, 1988. The Bar introduced the judgment and sentence as evidence. (TR 11, 12) Respondent testified on his own behalf. (TR 13 - 56) He then presented three witnesses. (TR 56-70, 71-81; 81-84)

Subsequent to the final hearing, the Referee issued a Report finding Respondent guilty of all violations charged and recommending that as minimum Respondent should be suspended for a maximum period of three years and at a maximum, that he be disbarred for five years.

The Bar filed its Petition for Review on February 13, 1989 pursuant to direction from the Board of Governors. The Respondent's Cross Petition for Review was received on February 14, 1989. This brief follows.

SUMMARY OF THE ARGUMENT

Respondent was found guilty of conspiracy to commit organized fraud and unlawful use of boiler rooms. The Bar sought to disbar Respondent. The Referee disagreed and recommended that as a minimum Respondent be suspended for three years and at a maximum, that he be disbarred for five 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 schemes to defraud the public. Additionally, there were several aggravating circumstances. Thus, disbarment is the appropriate discipline.

POINTS ON APPEAL

POINT I

WHETHER THE REFEREE'S RECOMMENDATION IS CONTEMPLATED BY THE RULES REGULATING THE FLORIDA BAR *AND* SHOULD BE MODIFIED TO REFLECT THE IMPOSITION OF A DEFINITE PERIOD OF DISCIPLINE?

POINT II

WHETHER THE REFEREE'S FINDINGS OF FACT AND DISCIPLINARY VIOLATIONS COMMITTED MANDATES DISBARMENT?

ARGUMENT

I

THE REFEREE'S RECOMMENDATION OF DISCIPLINE IS NOT CONTEMPLATED BY THE RULES REGULATING THE FLORIDA BAR AND SHOULD BE MODIFIED TO REFLECT THE IMPOSITION OF A DEFINITE PERIOD OF DISCIPLINE

The Referee made a recommendation that as a minimum Respondent should be suspended for a maximum period of three years and at a maximum, that he be disbarred for five years.

> I recommend that disbarment or suspension from the practice of law be effective August 15, **1987** (stipulated, page **118**, line **4** transcript) as the date Mr. Isis closed his law practice. The date of conviction was July **29**, **1987** and the date of interim suspension was October 30, **1987**.
>
> Report of Referee, Page 5

This Honorable Court was confronted with a similar situation in The Florida Bar v. Byron, **424** So.2d **748** (Fla. **1982**). There, the Referee initially recommended that the Respondent be suspended indefinitely. The Bar filed a Motion for Clarification arguing that article XI, Rule **11.10(4)** of the Integration Rule requires that suspensions be for a time certain. The Referee responded that "Respondent should be suspended for three years or until proof of rehabilitation.... is shown". Byron, at **749**. Thus, even after a request for clarification, the discipline remained indefinite. This Court stated the following:

> We agree that the Referee must recommend a definite term of suspension.
>
> Byron, supra.

In the case sub judice the Referee's finding was also indefinite.[1]

Additionally, Rule 3-7.5(k) of the Rules of Discipline provide that the Report of Referee shall include the "recommendation as to the disciplinary measures to be applied..." It does not appear that the Rule contemplates a range for discipline.

It has been held repeatedly that a Referee's findings of fact are presumed correct and should be upheld unless clearly erroneous or lacking in evidentiary support The Florida Bar v. Stalnaker, 485 So.2d 815 (Fla. 1986). Therefore, it is the Florida Bar's contention that the Referee's findings of fact and commission of ethical violations are correct. In light of the lack of definite discipline, this Honorable Court must act in the stead of the Referee, and impose discipline.

'Although this matter is procedurally under the Rules Regulating The Florida Bar, effective January 1, 1987, the Rule has remained substantially unchanged. see Rule 3-5.1(e) Rules of Discipline.

II

THE REFEREE'S FINDINGS OF FACT AND DISCIPLINARY VIOLATIONS COMMITTED MANDATES DISBARMENT

The Respondent pled no contest to two counts of a multi count indictment which alleged his involvement in the unlawful use of boiler rooms. Those counts are partially delineated below.

Count 4

1. On or about January 1985 and continuing through October 1986 Herman T. Isis, and others established a series of 'boiler rooms', primarily in Broward County, Florida, for the purpose of selling fraudulant [sic] 'investments' to residence [sic] of Florida and other States.

2. On or about August 1984 and continuing through October 1986 Herman T. Isis, and others created sales literature and a telephone sales script to carry out said fraudulent plan.

3. On or about January 1985 and continuing through October 1986 Herman T. Isis, and another assisted in the organization plan of the enterprise, creation of the investment documents and conducing [sic] of the initial organizational meeting for each group of investors.

4. On or about January 1985 and continuing through October 1986 Herman T. Isis, and others or their representatives met together from time to time to organize and coordinate the sale of fraudulant [sic] and essentially worthless "investments" in the names of Wilson and Plummer, Pennington and Scott, Heritage Company, Frontier Enterprises, William and Associates, Landmark Associates, D&D Associates, Masters and Sinclair, McKenzie, Masters, and Sinclair, M&M Purveyors, Miller and McKenzie, McKenzie, Pederson, and Tanner.

5. On or about January **1985** and continuing through October **1986** Herman T. Isis, and others established agreements with oil and gas operators to drill low-costs wells in oil-producing States but without regard to actual production from those wells.

Count 210

1. On or about January **1985** and continuing through October **1986** in or from Broward County, Florida, Herman T. Isis, and others did directly or indirectly manage, supervise, control, or own either alone or in association with others, one or more "boiler rooms" to wit: an enterprise in which two or more persons engaged in telephone communication with members of the public using two or more telephones at one location in a common scheme or enterprise, which sold or offered for sale a security or investment through fraud, falsification, or concealment of facts, contrary to Florida Statutes 517.312 (1)(b), F.S. 513.312(1) (a), F.S. 777.011, and F.S. 517.302.

Although the Referee found Respondent guilty of all ethical violations charged, the discipline imposed is unclear. The Bar asserts that the adjudication of guilt of this particular crime, together with all aggravating circumstances warrants disbarment.

Respondent was adjudicated guilty of crimes wherein he conspired and participated in the unlawful creation and operation of boiler rooms. Many cases involving participation in fraudulent schemes and felony adjudications have resulted in

[2] The full text of the information is attached as Exhibit 1 to The Florida Bar's complaint.

disbarment for errant attorneys. In The Florida Bar v. Weinsoff, 498 So.2d 942 (Fla. 1986) that Respondent was adjudged guilty of conspiracy to commit mail fraud and was disbarred. In The Florida Bar v. Haimowitz, 512 So.2d 200 (Fla. 1987) this Court held that conspiracy to use the postal service to execute a scheme to defraud, obtaining property by false and fraudulent pretenses and conspiracy to obstruct interstate commerce by extortion and mail fraud warrants disbarment. The Florida Bar v. Simons, 521 So.2d 1089 (Fla. 1988) imposed a twenty year disbarment where Respondent's acts constituted theft and were in furtherance of an attempt to defraud an insurance company.[3]

Moreover, after reviewing the Florida Standards for Imposing Lawyer Sanctions, the Referee found the existence of several aggravating circumstances. It was found that the Respondent's three month suspension in 1959 for having introduced an altered document in a court proceeding, although remote in time, was aggravating. Section 9.22(a), Standards for Imposing Lawyer Sanctions.

---

[3] The Florida Bar v. Diamond, Case No. 71,347 and 72,258 is currently pending before this Court. That case is similar, only in terms of the type of activity engaged in by the Respondents; In Diamond, supra the Respondent was the President and attorney of an organization which utilized "boiler rooms" in furtherance of its scheme to defraud. The Florida Bar is appealing the Referee's recommendation in Diamond, supra that a three year suspension be imposed. Briefs have been filed recently.

It is interesting to note that Respondent believed he was deserving of some special consideration since he did not deny his misdeed thirty years earlier.

> THE REFEREE: What really concerns me about the prior is that it touches upon a question of integrity. And albeit you can make a mistake, never make that mistake again. It at least shows--
>
> MR. ISIS: I could have compounded that mistake and you wouldn't know about that. I could have denied it.
>
> THE REFEREE: Maybe, maybe not. Maybe you would have been found out.
>
> At any rate, I don't see that I can consider that you have a mitigating factor.
>
> MR. ISIS: I just wanted you to know I could have denied it and then the Referee was a lawyer and who is he going to believe on the $350 check? It wasn't a big deal.
>
> (TR 104-105)

This Court has consistently held that the presence of a previous disciplinary history increases discipline. The Florida Bar v. Bern, 425 So.2d **526** (Fla. **1983);** The Florida Bar v. Katz, 491 So.2d 1101 (Fla. **1986).**

The Referee also found that the fact that the Respondent pled no contest to multiple offenses constitutes an aggravating factor pursuant to the standards for Imposing Lawyer Sanctions, Section 9.22(d), Standards for Imposing Lawyer Sanctions.

Respondent's substantial experience in the particular area of law covered by the criminal charges was enumerated as another

aggravating circumstance. Section 9.22(i), Standards for Imposing Lawyer Sanctions. The Referee elaborated on that finding by stating:

> [M]r. Isis, throughout his career, has practiced 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).
>
> Report of Referee, Pages 4-5

In a similar vein, the Referee found Respondent's use of his professional license and legal skills to violate the law as aggravating. The Matter of Goldberg, 520 A.2d 1147 (N.J. 1987).

In mitigation, the Referee found that Respondent had a cooperative attitude. Section 9.32(k) Standards for Imposing Lawyer Sanctions, and the fact that Respondent served 77 days of an 18 month jail term to be of minimal value as a mitigating circumstance.

In The Florida Bar v. Mims, 501 So.2d 596 (Fla. 1987) the Referee found the Respondent guilty of several violations and imposed a three year suspension. This Court, however, increased the discipline to disbarment after recognizing the existence of several aggravating circumstances and only one mitigating factor.

In light of the serious nature of the felony conviction and the attendant circumstances, this Court's words of wisdom in The Florida Bar v. Wilson, 425 So.2d 2 (Fla. 1983) are applicable.

> [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.

CONCLUSION

Based upon the foregoing reasons and citations of authority, The Florida Bar respectfully submits that the Referee erroneously imposed an indefinite term of discipline, and would urge this court to disbar the Respondent.

RANDI KLAYMAN LAZARUS
Bar Counsel
TFB #360929
The Florida Bar
Suite 211, Rivergate Plaza
444 Brickell Avenue
Miami, Florida 33131

JOHN F. HARKNESS, JR.
Executive Director
TFB #033748
The Florida Bar
Tallahassee, Florida 32399-2300
(904) 222-5286

JOHN T. BERRY
Staff Counsel
TFB #217395
The Florida Bar
Tallahassee, Florida 32399-2300
(904) 222-5286

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the above and foregoing Complainant's Initial Brief on Petition for Review was sent Federal Express to Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida **32399-1927** and that a true and correct copy was mailed to Herman T. Isis, Respondent, at his record Bar address P.O. Box **144567,** Coral Gables, Florida **33114-4567** on this 17 day of March, **1989.**

RANDI KLAYMAN LAZARUS
Bar Counsel