

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

MERRILL TUNSIL,

Respondent.

_____ /

Case No. 66,743

(TFB File No.'s 03-81M10 and

03-84N22)

RESPONDENT'S REPLY BRIEF IN OPPOSITION TO
PETITION FOR REVIEW

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STATEMENT OF THE CASE

The Respondent agrees with The Florida Bar's statement of the case with the following exception:

The referee's recommendation was not that the Respondent receive a suspension for a period of three (3) months followed by automatic reinstatement, together with a subsequent period of suspension of another two (2) years. The recommendation of the referee was that the Respondent be placed on probation for a period of two years.

STATEMENT OF THE FACTS

The Respondent agrees with The Florida Bar's statement of the facts with the following exceptions:

The Respondent never plead guilty to grand theft as alleged in paragraph 4, page 5, of the brief of The Florida Bar. The Respondent plead nolo contendere as alleged in paragraph 3, page 5, of The Florida Bar's brief.

SUMMARY OF ARGUMENT

THE FLORIDA BAR HAS FAILED TO DEMONSTRATE THAT THE RECOMMENDED DISCIPLINE OF THE REFEREE IS ERRONEOUS OR UNJUSTIFIED AS A MATTER OF LAW, GIVEN THE FACTS OF THE CASE.

The Respondent would argue that none of the cases cited by The Florida Bar are dispositive of the issue brought before this Court on a Petition For Review by The Florida Bar. In essence, The Florida Bar seeks to have the recommended discipline by the referee increased because the recommended discipline would be a "mere slap on the wrist" of the Respondent. The facts of the case clearly indicate that the recommended discipline of the referee is sufficient to achieve the purpose of protection of the public, and the administration of justice, as well as the protection of the legal profession through the discipline of members of The Florida Bar. Moreover, the recommended discipline is severe enough to deter others who might be tempted or prone to engage in similar conduct as displayed by Respondent.

To substitute the recommended discipline of The Florida Bar for the recommended discipline of the referee would make The Florida Bar both the finder and trier of fact and make the disciplinary proceedings herein a mere formality with a foregone conclusion. Namely: What The Florida Bar wants, The Florida Bar gets!

ARGUMENT

In the referee's report it is specifically noted as a mitigating factor that:

"...throughout 'plea bargaining' discussions in this and the criminal case, the Bar tentatively agreed to a proposal for a short (90 day) period of suspension to be followed by probation. Before final hearing the Bar abandoned this position in favor of the half-hearted recommendation of disbarment articulated by it at final hearing..."

The Florida Bar does not challenge the accuracy of the statement as to its form or substance nor as to its content or context. Indeed the first statement in the argument of the brief of The Florida Bar is that "...The facts of this case are not in dispute...". It appears therefore that The Florida Bar is simply seeking to have this Court supplant the findings of fact of the referee with findings of fact in other cases and use the facts in those cases as a basis for determining the appropriate discipline in the instant case. This Court should not second-guess the recommended discipline of the referee on the pretext of error and/or lack of justification in light of the absence of any proof of same by The Florida Bar, pursuant to the very cases cited by The Florida Bar in its brief.

In The Florida Bar v. Breed, 378 So. 2d 783 (Fla. 1979), and The Florida Bar v. Pincket, 398 So. 2d 804 (Fla. 1981), this Court decreased the recommended discipline of the referee. In The Florida Bar v. Anderson, 395 So. 2d 551 (Fla. 1981), The Florida Bar v. Baker, 419 So 2d 1054 (Fla. 1982), and The Florida Bar v. Sheldon, 446 So 2d 1081 (Fla. 1984), the discipline recommended by the referee was upheld. In the instant case, The

Florida Bar is seeking to have the recommended discipline of the referee increased. Respondent would therefore argue that none of the above cited cases are applicable and could not be dispositive of the issues raised herein. Specifically should the referee's judgment be abandoned in favor of The Florida Bar solely because the recommended discipline is not as severe as The Florida Bar thinks it should be in the absence of error and in light of the referee's detailed justification for the recommended discipline. Moreover, all of the cases cited herein by The Florida Bar were available for the referee's consideration at the time the referee's report was being prepared. There is nothing in The Florida Bar's brief to suggest that the referee did not consider the cases cited herein and nonetheless still made the recommendation that was made.

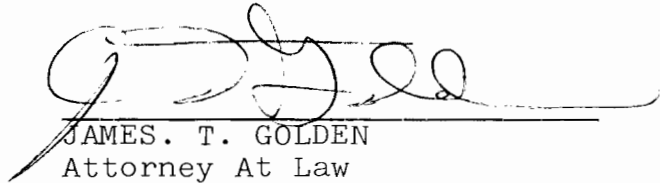
In two cases cited by The Florida Bar, the discipline recommended by the referee was increased. However, the facts in those cases are clearly distinguishable from the facts in this case. In The Florida Bar v. Leopold, 399 So 2d 978 (Fla. 1981), the Respondent had not made restitution completely and had once previously been before this Court and The Florida Bar in 1975 and 1966 respectively. The Respondent in this case has never been before this Court, had only one private reprimand, and had made complete restitution.

In The Florida Bar v. Morris, 415 So 2d 1274 (Fla. 1982), the Respondent was accused of spending trust funds which were to be applied in liquidation of an account owed by the client. In the instant case, the funds were being held by the Respondent for guardianship purposes and were not owed to a third party.

CONCLUSION

For the reasons set forth herein, the Respondent would respectfully request that this Court accept the report of the referee in its entirety, deny costs of these proceedings to The Florida Bar, and award reasonable attorney's fees to the Respondent for this appeal.

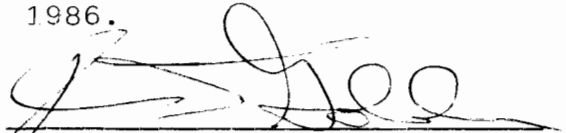
Respectfully submitted,

A handwritten signature in dark ink, appearing to read "J. T. Golden", is written over a horizontal line. The signature is fluid and cursive.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing Reply Brief have been hand delivered to the Supreme Court of Florida, and that a copy has been mailed by regular U.S. Mail to Merrill Tunsil, Respondent, 505 East Duval Street, Suite B, Lake City, Florida 32055, and to Susan V. Bloemendaal, Bar Counsel, The Florida Bar, Tallahassee, Fl 32301, this 31 st day of March, 1986.



JAMES T. GOLDEN

*Resp Ref
Br in Opp
to Pet for Rev*
