IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

MERRILL TUNSIL,

Respondent.

_____/

Case No. 66,743

(TFB No.'s 03-81N10 and 03-84N22)

COMPLAINANT'S REPLY BRIEF

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ARGUMENT AND REBUTTAL

Respondent's Answer Brief asserts that The Florida Bar does not challenge the accuracy or substance of the Referee's reference to plea negotiations as a mitigating factor. (Paragraph 5, Appendix to Initial Brief, A-5). This is not the case. The Florida Bar did state in its Initial Brief that "The facts of this case are not in dispute. . . ." However, this statement refers to the underlying facts, as set forth in the Stipulation of Facts, which give rise to the disciplinary rule violations with which Respondent is charged. (Appendix to Initial Brief, A-10).

Plea negotiations, to the extent that they influenced the recommended discipline, were improperly considered by the Referee in this case. At the final hearing before the Referee, Bar Counsel acknowledged the existence of various negotiations between the Bar and Respondent but pointed out that the exact terms had never been agreed to or put into final form, and that the negotiations ultimately fell through. (T. pp. 59-61).

Respondent overlooks the fact that a conditional guilty plea may not be relied upon as accepted until it

completes the approval process. Integration Rule 11.13(b)(6) requires the designated reviewer and referee to approve the plea. Ultimately, the Supreme Court has the final approval. The circumstances surrounding the case at hand never proceeded beyond mere negotiations between Bar counsel and Tunsil. These negotiations were only the beginning of the bargaining process and as such, did not warrant strict adherence. No bargain was finalized between the parties.

The consideration of plea negotiations in determining appropriate discipline is contrary to the policies underlying the Florida Statutes, the Florida Rules of Criminal Procedure and The Florida Bar Integration Rule.

With reference to settlement of civil disputes, Section 90.408 of the Florida Statutes provides that evidence of an offer to compromise a claim as well as any relevant conduct or statements made during negotiations are inadmissible to prove liability. Case law supports a similar view. See Atwater v. Gulf Maintenance and Supply, 424 So.2d 135, 136 (Fla. 1st DCA 1982). The rule requires a controversy and genuine compromise offer. See H.R.J. Bar-B-Q, Inc. v. Shapiro, 463 So.2d 403, 404 (Fla. 3rd DCA 1985). Otherwise, there is nothing on which to

compromise. The obvious policy behind the rule is to encourage settlements out of court. An offer to compromise does not necessarily imply that the adverse party's claim is meritorious. Offers of settlement would soon become non-existent if statements made in attempts to compromise were admissible against the offering party. Although the above cited statute and cases deal with civil matters, the policy is equally applicable to discipline cases. Neither party in disciplinary proceedings would attempt to negoitate if their statements could be used against them. The same reasons applied in the civil context would apply in the discipline context.

Section 90.410 of the Florida Statutes would also support an argument that the referee improperly considered plea negotiations. The rule provides that evidence of a withdrawn guilty plea, an offer to plead guilty, or a nolo contendere plea is inadmissible in any civil or criminal proceeding. It would appear that the policy behind the rule is to protect the defendant and encourage plea discussions between the defendant and the prosecution. See Groove v. State, 458 So.2d 226, 228 (Fla. 1984) and Cruz v. State, 437 So.2d 692, 695 (Fla. 1st DCA 1983). The rule promotes frank and open discussion while protecting the defendant's Fifth Amendment rights. It

applies to situations where there is actually bargaining or negotiating between both the state and the defendant.

Florida Rules of Criminal Procedure follow a similar theme. Rule 3.172(h) of the Rules of Criminal Procedure provides that evidence of an offer or withdrawn guilty plea or pleas of nolo contendere and statements made during negotiations are inadmissible in any civil or criminal proceeding against the person making the offer. The rule and its basis are similar to F.S. Section 90.410. Arguments supporting F.S. Section 90.410 would also support Rule 3.172(h) in its application to the case at hand. Likewise, statements made by the prosecution during plea negotiations should not be used against it. To do so would discourage future ngotiations on the part of the prosecution. Bar Counsel in disciplinary proceedings is analgous to a prosecuting attorney in a criminal proceeding. In disciplinary proceedings, the use of statements made during plea negotiation as a mitigating factor would have the effect of discouraging negotiations in future cases.

The fact that The Florida Bar and Respondent entered into negotiations or the details of those negotiations are simply not relevant to determination of appropriate

the facts involved and the law as set forth in the Disciplinary Rules and Florida Bar Integration Rule as interpreted by previous cases. At the final hearing and in its Initial Brief, The Florida Bar cited ample case law to support the imposition of a period of suspension of at least one (1) year's duration, with proof of rehabilitation, probation for two (2) years upon reinstatement with conditions as set forth in the Referee's Report.

Respondent, in his Answer Brief, requests that he be awarded reasonable attorney fees for this appeal. The Florida Bar respectfully submits that there is no basis in The Florida Bar Integration Rule or in case law for award of attorney fees in Bar disciplinary proceeding against either party.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the foregoing Initial Brief of The Florida Bar 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 James T. Golden, Attorney for Respondent, 101-B West First Street, Sanford, Florida 32771, this 16th day of April 1986.

Susan V. Bloemendaal