

**IN THE SUPREME COURT OF FLORIDA**

**THE FLORIDA BAR,**

**Complainant,**

**v.**

**Case No. SC04-470**

**TFB File No. 2004-01,051(2B)NRE**

**GARY H. UNTRACHT,**

**Respondent.**

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**RESPONDENT AMENDED BRIEF IN SUPPORT OF REINSTATEMENT**

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973-538-5442  
Florida Bar No. 0241271**



## **PRELIMINARY STATEMENT**

Respondent, Gary H. Untracht, will be referred to as such, whereas Complainant/  
Appellant, The Florida Bar, will be referred to as “The Bar”.

References to specific pleadings will be made by title.

## **STATEMENT OF THE CASE AND FACTS**

Respondent adopts the Summary of Proceedings and Findings of Facts as presented by the Report of Referee, dated February 28, 2005, a copy of which has been previously supplied to the Court. Further, Respondent hereby adopts the findings of The Honorable George S. Reynolds III in the Report of Referee dated September 15, 2003 and of The Honorable Nikki Ann Clark, in the Report of Referee dated February 28, 2005.

Respondent concurs with the Statement of the Case and Facts as set forth in the brief filed by the Bar and, therefore, sees no need to repeat same. However, it is critical to note that Complainant, The Florida Bar, does not oppose Respondent's reinstatement to The Florida Bar and has filed its brief solely to have this Court clarify its ruling in The Florida Bar v Sanders, 580 So.2d 594 (Fla. 1991).

## **SUMMARY OF ARGUMENT**

Both Complainant and Respondent are in full agreement that the recommendation of the Referee is appropriate and that Respondent should be reinstated to membership in the Florida Bar in good standing.

## ARGUMENT

As set forth in the brief of Complainant, in accordance with The Florida Bar v Vining, 707 So.2d 670, 672 (Fla. 1998), the referee's findings of fact are presumptively correct and should not be overturned unless clearly erroneous or lacking evidentiary support. Further, a recommended discipline will not be second-guessed "so long as that discipline has a reasonable basis in existing case law." Vining at 673. Also, see The Florida Bar v Lecznar, 690 So.2d 1284, 1288 (Fla. 1997).

Judge Reynolds found that Respondent's conduct did not warrant a disbarment and recommended a two year suspension, *nunc pro tunc* to September 23, 2002, which recommendation this Court adopted by order dated October 2, 2003.

In the Report of Referee dated February 28, 2005, Judge Clark found that Respondent proved by clear and convincing evidence his fitness to practice law in Florida and recommended that he be reinstated to membership in good standing.

## ISSUE 1

**THE SUPREME COURT OF FLORIDA SHOULD REINSTATE RESPONDENT TO MEMBERSHIP IN THE FLORIDA BAR IN GOOD STANDING. AN EXCEPTION TO THE FLORIDA BAR v SANDERS IS UNNECESSARY, INASMUCH AS IT DOES NOT APPLY TO THE INSTANT CASE.**

In The Florida Bar v Sanders, 580 So.2d 594 (Fla. 1991), this Court held that an attorney who has been disciplined in a foreign jurisdiction may not be reinstated to membership in good standing in Florida until the attorney is reinstated in the foreign jurisdiction.

In Sanders, the attorney was suspended in Florida based upon his disbarment in the State of New York for a felony conviction. The Referee declined to recommend reinstatement because the attorney had not been readmitted in New York. He was convicted of a felony, whereas Respondent has never been charged with any type of crime. While Respondent's underlying conduct resulted in disbarment in the State of New Jersey, such conduct did not warrant disbarment in Florida, as determined by Judge Reynolds. Further, in accordance with New Jersey law, mitigating factors are not taken into account in a determination of discipline, whereas such factors are, indeed, to be taken into account in the determination of discipline in Florida. Further, disbarment in New Jersey is permanent, inasmuch as there is no provision for reinstatement.

The ruling in Sanders is contrary to numerous previous rulings of this Court, which

place the responsibility for determining discipline upon the State of Florida and not the foreign jurisdiction. If an attorney disbarred in a foreign jurisdiction is prohibited from being reinstated in Florida until reinstated in the foreign jurisdiction, this would effectively place the determination of discipline in the foreign jurisdiction. This would be fundamentally unfair to the attorney, especially where the law regarding discipline is fundamentally different in the foreign jurisdiction. As previously stated, New Jersey does not take into account mitigating factors in determining discipline whereas Florida does. Respondent's conduct, which may have been a disbarable offense in New Jersey, was found by Judge Reynolds not to have been a disbarable offense in Florida.

As stated in The Florida Bar v Wilkes, 179 So.2nd 193 (Fla. 1965), the Supreme Court stated that "neither comity nor the full faith and credit provision requires that the judgment of disbarment in New York result in disbarment in this state." The Court further stated that "the basic issue always is whether the misconduct of the accused manifests such an unfitness to practice as to require the imposition of discipline to protect the public interest. In order to properly resolve this issue, this court and its agencies must, in every disciplinary proceeding, whether based upon acts of misconduct already adjudicated in another state or upon acts committed in this state, fully inform themselves concerning the nature of the misconduct and all the attendant circumstances." Wilkes at 197. In later cases the Court has consistently held that it is the responsibility of the Florida Bar and, ultimately, the Florida Supreme Court,

to determine the discipline to be imposed. See The Florida Bar v Friedman, 646

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So.2d 188 (Fla. 1994); The Florida Bar re: Susser, 639 So.2d 30 (Fla. 1994); Florida Board of Bar Examiners re: Simring, 802 So.2d 1111 (Fla. 2000); The Florida Bar v Karahalis, 780 So.2d 29 (Fla. 2001). This line of cases clearly sets forth the principle that Florida is to determine the appropriate discipline for the member of the Florida Bar, which is not necessarily the discipline imposed by the foreign jurisdiction. As stated by Judge Clark in the Report of Referee dated February 28, 2005, “The activity for which Mr. Untracht was disciplined in Florida and for which he was disbarred in New Jersey is not a disbarable offense in Florida. The appropriate sanction to be imposed here is not necessarily the sanction imposed by the foreign jurisdiction. Judge Reynolds found that the offense that gave rise to the initial disciplinary action in Florida warranted a suspension, and not disbarment. I agree with that finding.”

Further, Judge Clark held that Sanders is not applicable to the instant case, stating “While I agree that Florida certainly should not become a haven for attorneys who have been disbarred, this case is distinguishable.”

Lastly, Judge Clark found that Respondent, by clear and convincing evidence, met his burden of proof that he has been rehabilitated and is fit to practice law.

While Respondent contends that Sanders is not applicable to the instant case, should the



Court hold otherwise, inasmuch as Sanders is distinguishable in multiple respects, and since this Court is vested with the power to establish an exception to Sanders, respondent would respectfully request that the Court establish such an exception

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and enter an Order reinstating Respondent to the Florida Bar in good standing.

## CONCLUSION

It is clear that Complainant, The Florida Bar, has requested that this Court adopt the findings of fact and recommendations as found in the Report of Referee, and reinstate Respondent to membership in good standing. Inasmuch as there has been no opposition to such reinstatement, Respondent would respectfully request that an Order be entered reinstating respondent to membership in good standing to The Florida Bar.

Dated: June 25, 2005

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing regarding Supreme Court Case No. SC04-470, TFB File No. 2004-01,051 (2B)NRE has been mailed by certified mail, return receipt requested, to Tiffany Renee Collins, Esq., Bar Counsel (Complainant), at 651 E. Jefferson St., Tallahassee, Florida 32399 on this 25th day of June, 2005.

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