

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Case No. SC04-470

v.

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

GARY H. UNTRACHT,

Respondent.

_____ /

AMENDED INITIAL BRIEF

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PRELIMINARY STATEMENT

Complainant/Appellate, The Florida Bar, will be referred to as such, or as the Bar. Respondent/Appellee Gary H. Untracht will be referred to as Respondent, or as Mr. Untracht throughout this brief.

References to specific pleadings will be made by title.

STATEMENT OF THE CASE AND FACTS

The Florida Bar adopts the Summary of Proceedings and Findings of Facts as presented by the Report of Referee.

The Florida Bar adopts the findings of the referees who presided over the disciplinary and reinstatement cases. In April 2000, Respondent's sole plaintiff's negligence practice was the subject of a random audit by the New Jersey Office of Attorney Ethics (OAE). The audit of Respondent's trust account showed that he had not kept proper trust accounting records, including his failure to keep individual ledger cards for receipts and disbursements. The OAE later filed formal charges alleging that Respondent had intentionally misappropriated client trust funds. Respondent promptly repaid \$55,437.06, the amount of the shortfall identified by the OAE investigator, with his own personal funds by June 31, 2000, which was less than 60 days from the date that the shortfall was identified.

Although Respondent cooperated fully in the New Jersey investigation and admitted that funds were taken from the trust account prior to when they were due and owing, he denied that the misappropriation was intentional due to his state of mind from 1998 to 2000, which was the period encompassing the alleged violations.

During that time, Respondent was representing himself in a very contentious divorce action which had been pending since 1994. The divorce action occupied a large amount of Respondent's time and pulled him away from his law practice. Respondent was

unable to hire a secretary or accountant because of the large amount of child support that he was paying for his two children, who were then in the custody of his ex-wife.

Respondent's ex-wife was diagnosed with multiple psychiatric disorders, including bi-polar disorder and paranoid schizophrenia. Because of his ex-wife's actions, Respondent was forced to fight for custody of the children throughout the time period of the allegations and was extremely concerned about their welfare. Respondent was in court on the divorce matter at least 2-3 times per month and was responsible for preparing, typing, filing, and arguing multiple motions in that case. In addition, Respondent provided primary care for his mother, who was the victim of a stroke. In New Jersey disciplinary proceedings, mitigating factors are considered only to determine intent or lack thereof, and an accused attorney is not permitted to present mitigating circumstances after a finding of guilt. Therefore, a finding of intent automatically results in disbarment, regardless of the state of mind of the attorney and mitigating facts and circumstances. By order of the Supreme Court of New Jersey dated September 23, 2002, Respondent was permanently disbarred from the practice of law.

On June 23, 2003, a disciplinary hearing was conducted in Florida. The Honorable George S. Reynolds, III, found Respondent guilty of violating Rules 4-1.15, 4-8.4(a), 4-8.4(c), 4-8.4(d), 5-1.1(a), and 5-1.2, Rules Regulating The Florida Bar. Judge Reynolds considered Respondent's lengthy legal career, which spanned over twenty-five years, as an aggravating factor. Judge Reynolds also considered the following mitigating factors: (1) lack

of prior disciplinary history; (2) absence of a dishonest or selfish motive; (3) personal and emotional problems; (4) timely good faith effort to make restitution or to rectify consequences of misconduct; (5) good character and reputation; (6) physical or mental disability or impairment; (7) interim rehabilitation; and (8) remorse. Judge Reynolds recommended that Respondent be suspended from the practice of law for a period of two years *nunc pro tunc* to September 23, 2002, the effective date of Respondent's discipline in New Jersey.

On January 10, 2005, a hearing regarding Mr. Untracht's Petition for Reinstatement was conducted. The Honorable Nikki Ann Clark found that Respondent established, by clear and convincing evidence, his fitness to practice law in Florida. Accordingly, Judge Clark recommended that Respondent's Petition for Reinstatement be granted upon the conditions that Respondent pay all disciplinary costs and pay to The Florida Bar all unpaid annual membership fees.

SUMMARY OF ARGUMENT

The recommendation of the referee is appropriate and, under the limited circumstances of this case, Respondent should be reinstated to membership in good standing, notwithstanding the holding in The Florida Bar v. Sanders, 580 So.2d 594 (Fla. 1991).

ARGUMENT

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

Judge Reynolds found that Mr. Untracht's conduct did not warrant disbarment and recommended a suspension from the practice of law for two years *nunc pro tunc* to September 23, 2002, the effective date of Respondent's discipline in New Jersey. By order dated October 2, 2003, this Court adopted the referee's recommendation and imposed a two-year suspension.

In 2005, Judge Clark found that Respondent proved his fitness to practice law in Florida and recommended that he be reinstated to membership in good standing.

ISSUE I

UNDER THE LIMITED CIRCUMSTANCES OF MR. UNTRACHT'S CASE, THE SUPREME COURT OF FLORIDA SHOULD REINSTATE MR. UNTRACT TO MEMBERSHIP IN GOOD STANDING AND CREATE AN EXCEPTION TO THE HOLDING IN THE FLORIDA BAR V. SANDERS.

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. Sheldon J. Sanders was suspended in Florida based upon his felony conviction in the state of New York. Mr. Sanders was subsequently disbarred by the Supreme Court of New York. After Mr. Sanders' suspension period ended in Florida, Mr. Sanders sought reinstatement to membership in good standing. The referee declined to recommend reinstatement because the attorney had not been readmitted in his home state, although he had applied for readmission three times. The referee relied upon the special concurring opinion of Justice Ehrlich in The Florida Bar In re Sickmen, 523 So.2d 154 (Fla. 1988), in making his recommendation to deny reinstatement. In that opinion, Justice Ehrlich concurred in the majority per curium opinion and, in a special concurring opinion, where he said:

If New York had instituted its disciplinary proceedings first and had disbarred Mr. Sickmen, there is no doubt in my mind that this

Court would have imposed the same discipline, and would not readmit him to The Florida Bar unless and until the State of New York had done likewise.

This Court rejected Mr. Sander's petition for reinstatement and stated "we should not allow the practice of law in Florida of one disbarred in his home state." Sanders at 1. Pursuant to the holding in Sanders, an attorney who is permanently disbarred in a foreign jurisdiction, such as Mr. Untracht, is prohibited from being reinstated in Florida.

While Mr. Untracht was disbarred in New Jersey, the facts in the instant case are distinguishable from those in Sanders. First, Mr. Sanders was convicted of a felony. Mr. Untracht was not charged or convicted of a felony. While the underlying misconduct which led to Respondent's disbarment involved trust accounting violations, this misconduct did not result in disbarment in Florida. Second, Mr. Sanders sought readmission to the State Bar of New York, to no avail. In the instant case, Respondent was not afforded the opportunity to seek reinstatement in New Jersey, because in that jurisdiction disbarment is permanent. Third, Mr. Untracht's case involved several mitigating factors, which the referee in the disciplinary hearing noted in making his recommendation for a suspension of two years. Last, the referee who presided over the reinstatement hearing found that Respondent had been rehabilitated and proved his fitness to practice law. Accordingly, the referee recommended that Respondent be reinstated.

While The Florida Bar does not oppose the referee's recommendation to reinstate

Mr. Untracht, The Florida Bar is not empowered to displace the decision of this Court in Sanders. The Court is vested with the authority to establish an exception to the existing case law. Under the limited circumstances of Mr. Untracht's case, reinstatement is appropriate.

CONCLUSION

For the reasons set forth above, The Florida Bar respectfully requests that this Court adopt the findings of fact and recommendations as found in Report of Referee, and reinstate Respondent to membership in good standing.

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 #7004 1160 0004 5673 7058, return receipt requested, to Gary H. Untracht, Respondent, whose record Bar address is 401 Penns Way, Basking Ridge, NJ 07920, on this 1st day of June, 2005.

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Copy provided to:
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CERTIFICATE OF TYPE, SIZE AND STYLE AND ANTI-VIRUS SCAN

Undersigned counsel does hereby certify that the Amended Initial Brief of The Florida Bar is submitted in 14 point proportionately spaced Times New Roman font, and that the brief has been filed by e-mail in accord with the Court's order of October 1, 2004. Undersigned counsel does hereby further certify that the electronically filed version of this brief has been scanned and found to be free of viruses, by Norton AntiVirus for Windows.

Tiffany Renee Collins, Bar Counsel