IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Case No. SC03-149

v.

TFB File No. 2000-00,395(1B)

JAMES HARVEY TIPLER

Respondent.
_____/

THE FLORIDA BAR'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Complainant, THE FLORIDA BAR, will be referred to as "The Florida Bar" throughout this Answer Brief.

Respondent, JAMES HARVEY TIPLER, will be referred to as "Respondent".

References to the Rules Regulating The Florida Bar shall be designated as “Rules” with the appropriate number, i.e., “Rule 3-4.6” or as "Rules."

References to the Alabama Rules of Professional Conduct “Alabama Rule” with the appropriate number, i.e., “Alabama Rule 1.15(a).”

References to the “Report of Referee" dated September 11, 2006, shall be designated as "ROR" followed by the appropriate number, i.e., "ROR-12."

References to the Report and Order of the Alabama Disciplinary Board dated December 5, 2002, attached as Exhibit C to the Florida Bar’s Amended Complaint, shall be designated as “Alabama Report and Order” with the appropriate page number, i.e., “Alabama Report and Order at p. 2.”

References to the Final Order of the Alabama Board of Disciplinary Appeals dated March 9, 2004, attached as Exhibit D to the Florida Bar’s Amended Complaint, shall be designated as “Alabama Appeal Order” with the appropriate page number, i.e., “Alabama Appeal Order at p. 2.”

References to Transcript for the Summary Judgment Hearing on January 12, 2006,

shall be designated as "SJT." with the appropriate number, i.e., " SJT-4."

References to Transcript for the Final Penalty Hearing on April 28, 2006, Volume I, shall be designated as "TI." with the appropriate number, i.e., " TI-4."

References to Transcript for the Final Penalty Hearing on May 12, 2006, Volume II, shall be designated as "TII." with the appropriate number, i.e., " TII-4."

References to The Florida Bar's Exhibits will be designated as "TFB Exhibit" with the appropriate number, i.e., "TFB Exhibit 1".

References to Respondent's Exhibits will be designated as "Respondent's Exhibit" with the appropriate number, i.e., "Respondent's Exhibit 2".

Respondent's Initial Brief will be referred to as "Initial Brief" with the appropriate page number, i.e., "Initial Brief at p. 4."

Respondent's Amended Initial Brief will be referred to as "Amended Initial Brief" with the appropriate page number, i.e., "Amended Initial Brief at p. 4."

References to all other pleadings and documents will be designated by their appropriate title in the record, i.e., Complaint, Motion for Summary Judgment, etc.

STATEMENT OF THE CASE

The Florida Bar hereby submits its own statement of the case for the purpose of clarity. On January 28, 2003, after a grievance committee finding of probable cause, The Florida Bar filed its Complaint and a Request for Admissions based on charges of misdemeanor solicitation of prostitution to which Respondent had pled *nolo contendere* and the sworn statements of four women with whom he had allegedly engaged in sexual conduct while in an attorney-client relationship. Circuit Court Judge Harry Hentz McClellan was appointed as Referee on February 14, 2003. The Florida Bar filed a Notice of Telephonic Case Management Conference dated April 4, 2003. Respondent's counsel filed a Notice of Appearance on behalf of Respondent on April 22, 2003, submitting on the same date, an untimely response to the Complaint and Request for Admissions. On April 29, 2003, The Florida Bar filed a Response to Respondent's Affirmative Defenses.

On July 3, 2003, Respondent's counsel filed a Motion to Amend Pleadings and an Amended Answer to the Florida Bar's Complaint. On July 8, 2003, a telephonic case management conference was held at which Respondent's counsel requested the Referee to stay the proceedings to avoid duplicative litigation in Florida because a similar disciplinary case had been filed by the Alabama State Bar against Respondent, and the trial case was on appeal to the Alabama Board of Appeals. Respondent's counsel agreed

that the parties would await the final decision of the Alabama Supreme Court, The Florida Bar would file an Amended Complaint, and The Florida Bar would proceed to summary judgment on the Amended Complaint pursuant to Rule 3-4.6. See The Florida Bar's Reply Objecting to Motion to Allow Withdrawal of Counsel. On August 12, 2003, The Florida Bar filed a Response to Respondent's Motion to Amend the Pleadings.

On June 30, 2005, The Florida Bar filed an Agreed Motion for Leave to Amend Complaint that was granted by the Referee on July 1, 2005, requiring Respondent's counsel to file an Answer by August 5, 2005. The Florida Bar filed its Amended Complaint on July 6, 2005, attaching a copy of the original Information charging Respondent with misdemeanor solicitation of prostitution (Exhibit A), the *nolo contendere* Plea in Absentia (Exhibit B), the Report and Order of the Alabama Disciplinary Board (Exhibit C), the Final Order of the Alabama Board of Disciplinary Appeals (Exhibit D), and the Final Order of the Alabama Supreme Court affirming the Board of Disciplinary Appeals' decision and imposing a 15-month suspension on Respondent (Exhibit E).

The Florida Bar filed a Notice of Hearing on Complainant's Motion for Summary Judgment scheduling the motion hearing on October 3, 2005, before the Referee in Marianna, Florida. The Florida Bar served its Motion for Summary Judgment on July 27, 2005. Respondent's counsel filed an Answer to the Amended Complaint on August 5, 2005, with Affirmative Defenses to which The Florida Bar replied on August 8, 2005. Respondent's counsel filed a Motion for Order Allowing Withdrawal of Counsel on September 15, 2005. On September 22, 2005, The Florida Bar objected to the Motion to Withdraw because it was prejudicial to delay The Florida Bar's disciplinary case that had been pending for over 2 1/2 years.

On September 28, 2005, Respondent filed an Affidavit in Opposition to Motion for Summary Judgment stating he was not afforded due process in the Alabama proceedings. On October 3, 2005, the morning of the motion hearing in Marianna, Florida, a Motion to Disqualify signed by Respondent with Respondent's Affidavit attached arrived at Bar counsel's office in Tallahassee, Florida. Bar counsel's secretary sent the motion via facsimile to the Referee for his review before the motion hearing. Over objection of Bar counsel, the Referee granted Respondent's Motion to Disqualify, and made no decision on the summary judgment motion. The Florida Bar filed a written Reply Objecting to Respondent's Motion to Disqualify on October 10, 2005.

Subsequently, Judge Don T. Sirmons of Panama City, Florida, was appointed

Referee on October 27, 2005. On November 30, 2005, The Florida Bar filed an Amended Notice of Hearing on its Motion for Summary Judgment. The Amended Notice of Hearing was properly served on Respondent's counsel, rescheduling the summary judgment motion for January 12, 2006.

The day before the motion hearing, Respondent's counsel sent to The Florida Bar via facsimile a Motion to Allow Counsel for Respondent to Appear via Telephone at Hearing. She stated that an "urgent family matter" required her to fly to Houston, Texas, on January 12, 2006, and she wanted to appear at 10:30 a.m., one hour later than scheduled. The Florida Bar agreed to the appearance by telephone at the later hour.

The summary judgment hearing was held on January 12, 2006, before the Referee, at which Respondent did not appear. Respondent's counsel failed to appear by telephone at the scheduled time. The Referee, Bar counsel, and the court reporter waited until approximately 12:00 p.m. for Respondent to appear, at which time, the Referee adjourned the hearing and instructed Bar counsel and the court reporter to return at 2:30 p.m. so that Respondent's counsel could make her appearance via telephone. SJT-3. After consideration of the issues raised in Respondent's Affidavit in Opposition to the Summary Judgment Motion, the argument of counsel, the relevant case law and Rule 3-4.6, the Referee granted The Florida Bar's Motion for Summary Judgment on all the factual allegations including rule violations in an Order issued on February 13, 2006.

On April 5, 2006, a Notice of Final Penalty Hearing was filed scheduling the hearing on April 28, 2006. On April 18, 2006, Respondent's counsel faxed an unsigned copy of a Motion for Order Allowing Withdrawal of Counsel to The Florida Bar with Respondent's written consent attached. The Florida Bar filed a Reply stating that it had no objection to Respondent's counsel withdrawing from the case, but only on the condition that the final penalty hearing was not postponed. On April 24, 2006, Respondent's counsel submitted her Motion to the Referee.

On April 26, 2006, the Referee sent a facsimile to both counsel advising that, if the intent of the motion was to have the penalty hearing continued, then he would need to hold a hearing before granting the Motion to Withdraw. Respondent's counsel advised the Referee that her client had "not requested and/or stated to my office that a continuance should be addressed." The Referee granted the Motion to Withdraw adding the language to the Order : "The penalty hearing shall be heard as scheduled on April 28, 2006."

At the outset of the final penalty hearing on April 28, 2006, Respondent appeared and presented an *ore tenus* Motion for a Continuance claiming that he had not had adequate time to prepare for the hearing. See TI-5. His oral motion was denied by the Referee. See TI-33-42. The Referee continued the final penalty hearing until May 12, 2006, to give Respondent additional time to provide materials to the Referee, and to present any other mitigation evidence. At the penalty hearing on May 12, 2006, the

Referee agreed to consider Respondent's mitigation evidence as applicable to both this case and Case No. SC05-1014. See TII-206-207.

In accordance with the instructions of the Referee, The Florida Bar submitted its proposed Report of Referee and Affidavit of Costs to the Referee on May 31, 2006. The Referee instructed Respondent to file his proposed Report of Referee by June 14, 2006, unless he agreed with The Florida Bar's proposed version. See TI-161. Respondent never submitted a proposed Report of Referee. On September 11, 2006, the Referee submitted his Report of Referee recommending an 18-month suspension, a 3-year contract with Florida Lawyers Assistance, Inc., two years probation following reinstatement, and payment of taxable costs to The Florida Bar.

The following information is pertinent because Respondent raised the issue in this case, rather than in Supreme Court Case No. SC05-1014 where most of the pleadings were filed. The Florida Bar filed a Motion for Respondent to Supplement the Record or Motion to Strike Exhibit #8 in Supreme Court Case No. SC05-1014 on June 1, 2006. Respondent filed subsequent pleadings that also contained both case numbers, and therefore, The Florida Bar will respond to the issues in this brief, and provide any relevant information as if the issue applies to both cases.

In addition to the two motions, The Florida Bar also filed the Declaration of Michael J. Glass on June 1, 2006, and scheduled the motions for hearing on July 28, 2006. After Respondent's secretary had advised Respondent was available for hearing on that date between 1:30 and 5:00 p.m., Respondent failed to appear at the motion hearing. Immediately before the hearing, Respondent sent via facsimile a letter to the Referee requesting additional time to provide more documents to the Referee. The Referee extended the deadline for Respondent's submissions until August 4, 2006, when Respondent sent via facsimile to the Referee an Affidavit of Paul Virgo, and a complete copy of Respondent's Exhibit #8 submitted in Case No. SC05-1014. On August 18, 2006, the Referee signed an Order Granting The Florida Bar's Motion to Supplement the Record or to Strike Exhibit #8 in Case No. SC05-1014.

On August 21, 2006, The Florida Bar filed an Objection to Respondent's filing of

Affidavit of Paul Virgo. On August 22, 2006, The Florida Bar filed an Amended Affidavit of Costs. On August 24, 2006, Respondent submitted to the Referee an Affidavit of Edwin Lear and an audio CD of hearings held in California on August 10 and 11, 2005. On August 31, 2006, Respondent filed a Motion to Strike Declaration of Michael J. Glass, and a Motion for Reconsideration/Rehearing/Motion for Relief from Order.

Almost two months after the Referee closed the case and filed his Report of Referee on September 11, 2006, Respondent filed a Motion to Disqualify the Referee dated November 9, 2006, attaching affidavits and other California materials in this case and in Case No. SC05-1014. None of these materials were timely filed with the Referee, and were not part of the original record before the referee. On November 13, 2006, the Referee ruled that the matters in Respondent's pleadings were moot, and transferred them to the Florida Supreme Court to be included in the record.

On November 9, 2006, Respondent filed a Petition for Review. On December 13, 2006, the Court granted Respondent's Motion for Extension of Time, requiring him to submit his Initial Brief on the merits by January 12, 2007. When Respondent filed his Initial Brief on January 16, 2007, the Court *sua sponte* struck the Initial Brief because Respondent had combined two separate disciplinary cases for which a Report of Referee was issued separately in each case. Respondent was directed to file a separate Initial

Brief in each case by February 6, 2007. Respondent filed the Amended Initial Brief on February 7, 2007, and to date, has failed to serve a copy of the Amended Initial Brief on The Florida Bar. Based on this lack of service, The Florida Bar filed a Motion for Extension of Time to File Answer Brief on February 22, 2007, which was granted by the court, extending the due date for the Answer Brief until March 30, 2007.

STATEMENT OF THE FACTS

The Florida Bar hereby submits its own statement of the facts for the purpose of clarity because no factual statement was included in Respondent's Amended Initial Brief. The Florida Bar's Amended Complaint was based on the factual allegations admitted by Respondent in his Answer to The Florida Bar's Amended Complaint, and on Rule 3-4.6 for reciprocal discipline as set forth in the Exhibits attached to The Florida Bar's Amended Complaint.

Respondent admitted the factual allegations in paragraphs 2 through 13A in his Answer to The Florida Bar's Amended Complaint. Respondent admitted that on September 24, 1999, he was charged in Panama City, Bay County, Florida, by Information, with racketeering pursuant to Fla. Stat. 895.02(3), and four counts of prostitution in violation of Fla. Stat. 796-07(3)(a). On September 29, 1999, Respondent surrendered to the Bay County Sheriff's Department and was released on $25,000 bond. The Information charged that Respondent had engaged in misdemeanor solicitation of prostitution with Candi Lyons, Christie Ann Worley, Rebecca Stevens, and Alana Lynn Booth, and included a RICO charge. On July 11, 2001, Respondent signed a *nolo contendere* Plea in Absentia of guilty to Count IV for misdemeanor Solicitation of Prostitution pertaining to Candi Lyons. The court withheld adjudication and Respondent

was fined $500 plus court costs. See Exhibits A and B attached to The Florida Bar's Amended Complaint.

On or about March 2000, the Alabama State Bar filed a Petition for Interim Suspension that was granted temporarily, but ultimately dismissed. See Respondent's Exhibit 1A at p. 115. Subsequently, the Alabama State Bar brought formal charges against Respondent and, after a full disciplinary hearing on November 12, 2002, before a six-member panel of the Alabama State Bar Disciplinary Board, where Respondent was represented by two counsel, Respondent was found guilty of violating Alabama ethical rules, and a 15-month suspension was imposed on December 5, 2002. See Exhibit C attached to The Florida Bar's Amended Complaint.

The Alabama Disciplinary Board found the following pertinent facts. Respondent represented Candi Lyons, who worked as a dancer at the "Show and Tail", an adult bar, in Bay County, Florida, on a charge of aggravated assault. See Alabama Report and Order at p. 1. Respondent charged Ms. Lyons an attorney's fee of $2,300, and entered into a fee agreement with her that she would be allowed a "credit of $200 for each time she engaged in sex with respondent," and a "$400 credit if she arranged for other females to have sex with him." See Alabama Report and Order at p. 1-2.

The evidence presented at trial included a videotape showing Respondent discussing Ms. Lyons case file and the "sex for fees" agreement, and how the remaining

fees were to be paid. Respondent admitted at the Alabama disciplinary hearing that he had engaged in sex with Ms. Lyons and another female as a means of crediting his bill for legal services per the fee agreement. Respondent admitted that this was his fee agreement with Ms. Lyons. He further admitted that his actions were morally and ethically wrong and he knew it was unethical to engage in sex for fees with a client. See Alabama Report and Order at p. 2. As an aggravating factor, the Alabama Disciplinary Board found that Ms. Lyons was a vulnerable victim, and that Respondent took advantage of Ms. Lyons' young age and circumstances. See Alabama Report and Order at p. 3. She was eighteen years old at the time criminal charges were filed against her, she was already a mother, and she was facing a serious felony charge. She viewed Respondent as her only way to resolve her criminal case and to be released from jail. See Alabama Report and Order at p. 2.

In an appeal to the Alabama Board of Disciplinary Appeals, Respondent raised a variety of jurisdictional and constitutional arguments that were rejected on appeal. See Alabama Appeal Order attached as Exhibit D to The Florida Bar's Amended Complaint. The Disciplinary Appeal Board concluded that "Tipler had a full and complete opportunity to confront witnesses and was represented by extremely competent counsel" at the disciplinary hearing. See Alabama Appeal Order at p. 5. The Disciplinary Appeal Board confirmed the Disciplinary Board's decision on March 9, 2004. On February 22,

2005, the Alabama Supreme Court affirmed the decision of the Disciplinary Appeal Board, imposing a 15-month suspension, without any further opinion. See Exhibit E attached to The Florida Bar's Amended Complaint.

Based on Respondent's admissions to the criminal charge of misdemeanor solicitation of prostitution and the reciprocal discipline findings of misconduct in Alabama, The Florida Bar filed an Amended Complaint pursuant to Rule 3-4.6, and moved for summary judgment. The Referee properly granted The Florida Bar's Motion for Summary Judgment and, after considering the aggravating and mitigating factors, the Florida Standards for Imposing Lawyer Sanctions and the relevant case law, found Respondent guilty of violating Rules 3-4.3, 3-4.4, 3-7.2(j)(1), 4-1.2(d), 4-1.5, 4-8.4(a), 4-8.4(b), 4-8.4(d), and 4-8.4(i). ROR-8-12. The Referee considered the mitigating factor of physical or mental impairment or disability based on Respondent's testimony at the two penalty hearings on April 28, 2006, and May 12, 2006. ROR-12.

On September 11, 2006, the Referee filed his Report recommending an 18-month suspension, two years of probation after reinstatement, a Florida Lawyers Assistance, Inc. ("FLA") contract within 30 days of final judgment, and taxable costs to The Florida Bar.

Respondent represented that he had been evaluated only three days before the April 28, 2006, hearing, and the preliminary evaluation indicated that he needed treatment for sexual addiction and alcohol abuse. TI-107,130. Although Respondent was aware of

these same problems since 2000 during the Alabama proceedings, it was not until California offered him an opportunity to continue to practice law that he undertook the evaluation. See Alabama Appeal Order at p. 4. See also, TI-115. Respondent did not contact FLA until the day before the April 28, 2006, penalty hearing. See TI-121. In this case, the Referee did not take into account any aggravating factor of misrepresentation regarding the finality of the California stipulation in this disciplinary case. See ROR-12.

SUMMARY OF ARGUMENT

The issues raised by Respondent are (1) whether the Referee properly granted summary judgment to The Florida Bar on its Amended Complaint based on Respondent's admissions and pursuant to reciprocal discipline Rule 3-4.6; (2) whether Respondent received due process in the Alabama and Florida disciplinary proceedings; (3) whether the Referee's recommended discipline was reasonable under the Florida Lawyer Standards and the relevant case law; (4) whether the Referee properly considered all the aggravating and mitigating factors presented by Respondent; (5) whether the Referee properly considered Respondent's submissions on the Florida Bar's Motion to Strike Respondent's Exhibit #8 in Supreme Court Case No. SC05-1014.

First, The Florida Bar contends that the Referee properly granted summary judgment to The Florida Bar on the issue of guilt based on Respondent's admissions in his Answer to the Florida Bar's Amended Complaint and on the reciprocal discipline Rule 3-4.6. Second, Respondent was accorded full due process in Florida, i.e, notice and opportunity to be heard on all issues with two summary judgment hearings where Respondent's counsel appeared. After full consideration of the record before him, the Referee found Respondent guilty of violating Rules 3-4.3, 3-4.4, 3-7.2(j)(1), 4-1.2(d), 4-1.5, 4-8.4(a), 4-8.4(b),4-8.4(d), and 4-8.4(i). ROR-8-12.

Respondent failed to meet his burden of proof at the summary judgment hearing to show how the Alabama proceedings were so deficient that it would be unjust to accept Alabama's judgment as conclusive proof of guilt. Respondent was also accorded full due process in the Alabama disciplinary proceeding where he appeared before a 6-member panel, and was represented by two counsel. Many of the same issues as he raised in his sworn affidavit to the Referee were adjudicated by the Alabama Disciplinary Board and the Alabama Board of Disciplinary Appeals, with a per curiam affirmed opinion by the Alabama Supreme Court. See Respondent's Exhibit 1A at pp. 56-66, 106-117.

Respondent's counsel was properly noticed on all the Florida disciplinary proceedings and appeared on behalf of Respondent up through the January 12, 2006, summary judgment hearing. With Respondent's consent, the Referee allowed his counsel to withdraw and Respondent appeared pro se at two disciplinary hearings on April 28, 2006, and May 12, 2006. Respondent was also properly noticed of all proceedings after his counsel withdrew from this case.

Third, the Referee's recommended discipline should be upheld because it has a reasonable basis in the Florida Lawyer Standards for Imposing Sanctions and in the relevant case law. The Referee reasonably imposed an 18-month suspension, two years probation, and obtaining an FLA contract within 30 days of the final judgment, in accordance with Standard 5.12, and 7.2, as well as the relevant case law. Respondent

admitted all The Florida Bar's allegations pertaining to the misdemeanor solicitation of prostitution charge, and has not challenged this issue on appeal.

Fourth, the Referee considered all Respondent's mitigation evidence presented at two penalty hearings.

Finally, the Referee also considered Respondent's untimely submissions regarding the California disciplinary proceedings submitted in August 2006, and after reviewing the aggravating and mitigating factors presented by both parties, recommended an appropriate disciplinary sanction.

This appeal should be limited to the "Record on Review" as defined in Rule 3-7.7(c)(2). Respondent's submissions to the Referee two months after the Report of Referee was filed with the Court should be stricken and considered moot as ordered by the Referee. See Rule 3-7.6(n)(2).

ARGUMENT

ISSUE I

THE REFEREE PROPERLY GRANTED SUMMARY JUDGMENT

The referee properly granted summary judgment to The Florida Bar on the issue of guilt based on Respondent's admissions in his Answer to the Florida Bar's Amended Complaint and on the reciprocal discipline Rule 3-4.6. At the time of the summary judgment hearing, the referee considered the submissions of both parties that were a matter of record, the oral argument of the parties' counsel, and Respondent's Affidavit in Opposition to Summary Judgment. After full consideration of the record before him, the referee found Respondent guilty of violating Rules 3-4.3, 3-4.4, 3-7.2(j)(1), 4-1.2(d), 4-1.5, 4-8.4(a), 4-8.4(b), 4-8.4(d), and 4-8.4(i).

R. Regulating Fla. Bar 3-4.6 states:

> A final adjudication in a disciplinary proceeding by a court or other authorized disciplinary agency of another jurisdiction, state or federal, that an attorney licensed to practice in that jurisdiction is guilty of misconduct justifying disciplinary action shall be considered as conclusive proof of such misconduct in a disciplinary proceeding under this rule.

The Florida Supreme Court interpreted this rule in The Florida Bar v. Wilkes, 179 So. 2d 193 (Fla. 1965)[construing identical language in the predecessor Rule 11.02(6), Integration Rule of The Florida Bar] holding that "the introduction in evidence of a

properly authenticated judgment of discipline entered by a competent agency of a sister state shall operate as conclusive proof of guilt of the acts of misconduct adjudicated in that judgment…" Id. at 197. This holding in Wilkes has become a well-settled principle of Florida law in other reciprocal discipline cases under Rule 3-4.6. See also, The Florida Bar v. Friedman, 646 So. 2d 188, 190 (Fla. 1994); The Florida Bar v. Mogil, 763 So. 2d 303, 306 (Fla. 2000), The Florida Bar v. Kandekore, 766 So. 2d 1004, 1007 (Fla. 2000).

In addition to Respondent's admissions pertaining to the misdemeanor criminal charge, attached to The Florida Bar's Amended Complaint was a 6-page Report and Order issued by a 6-member panel of the Disciplinary Board of the Alabama State Bar, and a 6-page appellate opinion from the Alabama Board of Disciplinary Appeals both of which delineated the specific factual findings at the trial and appellate level. See Exhibits C and D attached to The Florida Bar's Amended Complaint. The Alabama Supreme Court issued an opinion confirming the lower Board's ruling with no opinion, and imposing a 15-month suspension on Respondent. See Exhibit E attached to The Florida Bar's Amended Complaint. These Alabama pleadings meet the requirements of Rule 3-4.6 showing conclusive proof of guilt of the acts of misconduct adjudicated in Alabama.

After The Florida Bar submitted its Amended Complaint with the final adjudication of the Alabama Supreme Court to the Referee, the burden of proof shifted to Respondent to show at the summary judgment hearing that Alabama's disciplinary proceeding:

> was so deficient or lacking in notice or opportunity to be

> heard, that there was such a paucity of proof, or that there was some other grave reason which would make it unjust to accept the foreign judgment as conclusive proof of guilt of the misconduct. . . The burden of showing why a foreign judgment should not operate as conclusive proof of guilt in a Florida disciplinary proceeding is on the accused attorney. See Wilkes, 179 So. 2d at 198.

Respondent, however, failed to meet his burden of proof under the criteria set forth above. In the Friedman case, this Court noted that:

> Friedman was given ample opportunity both before and during his disciplinary proceedings to demonstrate any inadequacies in the New York forum. For instance, he could have made the New York transcript available to the reviewing referee, but failed to do so. See Friedman, 646 So. 2d at 190.

Similarly, in this case, Respondent had almost six months to provide supplemental materials before the summary judgment hearing held on January 12, 2006, on the issue of guilt, and yet failed to produce any competent substantial evidence, including the Alabama transcripts to show how the Alabama disciplinary proceedings were deficient under the Wilkes standard above. Respondent filed an Affidavit in Opposition to the Motion for Summary Judgment on September 25, 2005, making due process arguments that were similar to those considered and rejected in the Alabama disciplinary proceedings. See Respondent's Exhibit 1A at pp. 56-66, 107-117. Respondent had almost four months after filing his Affidavit to properly present to the Referee any supporting documentation before the summary judgment hearing, but failed to do so. See Kandekore, 766 So. 2d at

1006-1007.

In short, Respondent failed to meet his burden at the summary judgment hearing to show that there were any genuine issues of material fact in dispute. In Mogil, in the context of a summary judgment motion, the Court reasoned that once The Florida Bar tenders a final adjudication of a foreign jurisdiction as conclusive proof of guilt:

> the opposing party must come forward with counterevidence sufficient to reveal a genuine issue. It is not enough for the opposing party merely to assert that an issue does exist. [citations omitted] Mogil, 763 So. 2d at 307.

The Court concluded that a letter with unsworn assertions, and copies of documents submitted by the parties in the New York disciplinary case, were not "competent counter-evidence," but rather "amount merely to more assertions and legal arguments." See Mogil, 763 So. 2d at 307-308.

In this case, Respondent did present a sworn affidavit in opposition to the motion for summary judgment that the Referee reviewed at hearing, but it contained vague claims of lack of due process and lack of impartiality of the Alabama judicial process with no other supporting evidence. Respondent's affidavit was replete with bare assertions and unsupported opinions, many of which were previously considered and rejected by the Alabama Disciplinary Board of Appeals. See Exhibit D attached to The Florida Bar's Amended Complaint at pp. 2-5.

ISSUE II

THERE WAS NO LACK OF DUE PROCESS IN THE ALABAMA OR FLORIDA DISCIPLINARY PROCEEDINGS

Due process requires notice and an opportunity to be heard. See The Florida Bar v. Rubin, 709 So. 2d 1361(Fla. 1998). "Due process in Bar proceedings requires that an accused attorney be given a full opportunity to explain the circumstances of an alleged offense and to offer testimony in mitigation regarding any possible sanction." See The Florida Bar v. Baker, 810 So.2d 876, 879 (Fla. 2002). In this case, Respondent was properly noticed on all hearings, had numerous opportunities both in the Alabama and Florida disciplinary proceedings to be heard, explain the circumstances of the offenses and present mitigation evidence.

The record on appeal of the Alabama proceedings filed by Respondent with Bar counsel and the Referee at the second penalty hearing on May 12, 2006, clearly contradicts Respondent's claims of lack of due process in the Alabama disciplinary proceedings. See Respondent's Exhibits 1A, 1B and 1C. The voluminous Alabama record submitted by Respondent reflects that Respondent was represented by two attorneys who presented witnesses and cross-examined the Alabama Bar's witnesses. The fact that the trial was held in Alabama and the misconduct occurred in Florida does not make the Alabama proceeding deficient in due process.

The six-member Alabama Bar panel at the trial level unanimously concurred in finding Respondent guilty of violating Alabama Rules 8.4(d)(Engaging in Conduct Prejudicial to the Administration of Justice and 8.4(g)(Engaging in Any Other Conduct that Adversely Reflects on his Fitness to Practice Law) based on clear and convincing evidence. Respondent was accorded two appeals. The first appeal was to the Alabama Disciplinary Board of Appeals that granted him oral argument, and issued a written opinion. The second appeal was to the Alabama Supreme Court that affirmed the lower appellate court decision without issuing a separate opinion and imposed a 15-month suspension. See Exhibit E attached to The Florida Bar's Amended Complaint.

Similarly, in Florida, Respondent's argument of lack of due process is contradicted by the record. Respondent had numerous opportunities to be heard in this case that was pending over 3 ½ years. Respondent, however, failed to timely take action in the case by responding to pleadings, and by appearing at hearings properly noticed. Due to his own dilatory actions, he cannot now be heard to complain that he was deprived of due process. Respondent delayed the proceedings at every juncture in which The Florida Bar attempted to go forward with this case by filing motions to disqualify, motions for reconsideration/rehearing, motions for continuance, appearing unprepared at the penalty hearing, asking for additional time to file materials and then ignoring the deadlines set by the Referee.

Further, as the record shows, Respondent and his counsel were properly noticed on all hearings. Two summary judgment hearings and two penalty hearings were held. Respondent's counsel was properly served with notice of The Florida Bar's Complaint and Request for Admissions in January 2003. At Respondent's request, the Referee and The Florida Bar agreed to stay the proceedings in Florida in order to avoid the time and expense to Respondent of duplicative litigation on the sex for fees issue. Respondent could have proceeded on this Complaint and received a trial on the merits before a Florida referee, but chose not to do so. In July 2005, The Florida Bar properly served its Amended Complaint on Respondent's counsel to which neither Respondent nor his counsel voiced objection.

In the Florida disciplinary proceeding, Respondent failed to appear at the October 3, 2005, motion hearing but his counsel did appear. Again, on January 12, 2006, Respondent did not appear at the summary judgment hearing, and his counsel requested to appear by telephone 24 hours before the scheduled hearing. Both Bar counsel and the Referee had no objection to Respondent's counsel appearing by telephone, and indeed, waited far beyond the scheduled hearing time for her to appear by telephone. See SJT-3.

Respondent's counsel presented an oral argument based on Respondent's Affidavit in Opposition to the Summary Judgment Motion, but did not present any written documentation, any witness testimony, or specific case law to support any of the

allegations in Respondent's Affidavit. No transcript of the Alabama proceedings was entered into the record at that time. Respondent's counsel represented to the Referee that she had not set the prior Motion to Withdraw because Respondent would not agree, and she would continue to represent him in this case. SJT-17.

After the Referee granted The Florida Bar's summary judgment motion, The Florida Bar set down a penalty hearing date of April 28, 2006, with Respondent's agreement to the date. Yet on the day of penalty hearing, despite prior representations to the contrary by his counsel who was allowed to withdraw, Respondent began to argue an *ore tenus* motion for a continuance to the Referee and was not prepared to go forward with evidentiary exhibits or any witness testimony save his own. Due to Respondent's lack of readiness at the penalty hearing, the Referee continued the hearing until May 12, 2006, granting Respondent a second opportunity to be heard on the mitigating factors in his case. At Respondent's request, the Referee allowed Respondent the opportunity until June 14, 2006, to file a proposed report of referee which he never submitted to the Referee or to The Florida Bar.

At the penalty hearing on May 12, 2006, in support of his mitigation argument recorded in Case No. SC05-1014, Respondent entered an Exhibit #8, purportedly an accurate copy of a California stipulation to discipline, and testified that it was "final." See TI-207 in Case No. SC05-1014. Upon further investigation, however, Bar counsel

discovered that the judge's signature page was missing, and, based on the Declaration of California Bar Counsel, the California stipulation was not "final." On June 1, 2006, The Florida Bar properly served Respondent with a Motion to Strike Respondent's Exhibit #8 in Case No. SC05-1014. On June 27, 2006, after being advised that Respondent was available on July 28, 2007, from 1:30 p.m. until 5:00 p.m., Bar Counsel set the motion hearing on July 28, 2006. Although two months had passed since service of the motion, Respondent again failed to file a reply to the Florida Bar's Motion or to appear at the motion hearing. Instead, on the morning of the motion hearing, Respondent sent via facsimile a letter to the Referee asking for additional time to submit materials without copying The Florida Bar on the letter. The Referee gave Respondent an extension until August 4, 2006, to provide additional materials in support of his position.

On August 4, 2006, Respondent sent via facsimile to the referee an Affidavit of Paul Virgo, and a complete copy of Respondent's Exhibit #8 submitted in Case No. SC05-1014. On August 24, 2006, Respondent untimely submitted to the Referee an Affidavit of Edwin Lear and an audio CD of hearings held in California on August 10 and 11, 2005. In Case No. SC05-1014, the Referee stated that he considered all these mitigation materials before issuing his final report of referee. See ROR in Case No. SC05-1014 at p. 4, 7-10.

Respondent argues at the end of his Amended Initial Brief that because the Referee did not set his Motion to for Rehearing and Motion to Disqualify for hearing, there was a violation of his due process rights. The Referee, however, has the discretion to grant or deny motions in a disciplinary proceeding. See The Florida Bar v. Roth, 693 So. 2d 969, 971-972 (Fla. 1997). Respondent's last-minute motion, directed to the Referee, was a Motion for Reconsideration/Rehearing and/or Motion for Relief from Order Granting The Florida Bar's Motion to Supplement or Strike dated August 18, 2006. The Referee considered all the materials provided by Respondent, even though they were untimely after the August 4, 2006, deadline, and issued his final report without further hearing.

The Referee had granted Respondent one continuance until August 4, 2006, to provide additional materials. The Referee then issued his Order on the Motion on August 18, 2006. He was not obliged to hold another hearing on Respondent's Motions which would in effect have delayed the disciplinary hearing another month or more. The Referee permitted Respondent from June 1, 2006, when he was served with the Florida Bar's Motion until August 4, 2006, to take any action to supplement the record. The Referee was not required to even consider any materials after August 4, 2006, but did so in the interests of due process. See Case No. SC05-1014 at p. 4. Respondent's delaying tactics had prolonged the penalty process long enough. Furthermore, Respondent made

no effort to set his Motion for hearing, and the Referee had no obligation to wait for Respondent to schedule another hearing date.

As to the Motion to Disqualify, Respondent submitted that motion two months after the Referee submitted his Report to the Court and the Record on Review was closed. Once the Referee submitted his Report to the Court, he relinquished his jurisdiction in the disciplinary case, and was not required to take any further action in the matter unless ordered to do so by this Court. He did, however, submit the records to the Court with an order stating the matters contained in the untimely materials were "moot."

Respondent should not now be allowed to rely on documents that were never part of the record before the Referee. Respondent is attempting to have this Court consider matters *de novo*, and to find that his due process rights have been violated because the Referee did not consider documents that were not timely submitted during the disciplinary proceedings. It is a fundamental principle that a party cannot raise on appeal for the first time what was not raised before the trier of fact below. Respondent should not be able to insert arguments in Respondent's Amended Initial Brief based on documents that are outside the record on review. See Thornber v. City of Fort Walton Beach, 534 So. 2d 754(Fla. 1st DCA 1988); see also, Poteat v. Guardianship of Poteat, 771 So. 2d 569 (Fla. 4th DCA 2000).

ISSUE III

THE REFEREE'S RECOMMENDED DISCIPLINE SHOULD BE IMPOSED BY THE COURT BECAUSE IT HAS A REASONABLE BASIS IN THE FLORIDA STANDARDS AND THE RELEVANT CASE LAW.

The Referee's disciplinary recommendation of 18-month suspension recommended by the Referee meets all the prongs of this disciplinary principle. It is a well established maxim that a disciplinary sanction must serve three purposes:

> First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing the penalty. Second, the judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations. The Florida Bar v. Brake, 767 So.2d 1163, 1169 (Fla. 2000). See also, The Florida Bar v. Lord, 433 So.2d 983, 986 (Fla. 1983); The Florida Bar v. Pahules, 233 So.2d 130, 132 (Fla. 1970).

Generally, the Court will not second-guess a Referee's recommended discipline as long as there is a reasonable basis in the case law and it comports with the Florida Standards for Imposing Lawyer Sanctions. See The Florida Bar v. Shoureas, 892 So.2d 1002, 1005-1006 (Fla.2004). See also, The Florida Bar v. Temmer, 753 So. 2d 55, 558 (Fla. 1999). The Court's scope of review as to the referee's recommended discipline is

broader than that afforded to the referee's findings of fact because it is the final arbiter of the appropriate disciplinary sanction. See The Florida Bar v. Miller, 863 So. 2d 231, 234 (Fla. 2003).

The Florida Bar contends that the Referee's disciplinary recommendation of an 18-month suspension, two years probation after Respondent is reinstated, and a contract with Florida Lawyers Assistance, Inc. ("FLA") within 30 days of the final judgment has a reasonable basis under the Florida Standards for Imposing Lawyer Sanctions and the relevant case law. See ROR-8-10. In recommending this disciplinary sanction, the Referee relied on Florida Lawyer Standard 5.12 which supports a suspension for a lawyer who knowingly engages in criminal conduct and Standard 7.2 which supports a suspension for a lawyer who knowingly engages in conduct that is a violation of a professional duty and causes potential injury to a client, the public, or the legal system.

The Referee also relied on The Florida Bar v. Bryant, 813 So. 2d 38 (Fla. 2002). In Bryant, the Court reversed the Referee's decision on a Rule 4-8.4(i) violation reasoning that the issue is "whether a lawyer obtained the sexual activity through an exploitation of the lawyer-client relationship." Bryant, 813 So. 2d at 43. Although taking into account that the client was a prostitute and had consensual sex with the attorney, the Court held that the client "performed these sex acts because she required Bryant's services as a lawyer. Thus, the lawyer-client relationship was exploited….." Id. The

Court concluded that it would "strictly enforce" Rule 4-8.4(i), and imposed a one-year suspension with two years probation as an appropriate discipline. Bryant, 813 So. 2d at 44.

Similarly, the Alabama Record on Appeal presented by Respondent at the May 12, 2006, penalty hearing clearly reflects that Respondent exploited the attorney-client relationship when he engaged in a "sex for fees" agreement with his client Candi Lyons. See Respondent's Exhibit 1B at pp. 183-275. Respondent admitted that what he did was morally and ethically wrong. See Respondent's Exhibit 1B at pp. 341-343, and Respondent's Exhibit 1C at pp. 353-354. Ms. Lyons first consulted with Respondent on a child custody issue, and two months later called him to represent her on a felony charge. She was eighteen-years old, and in jail facing a serious felony charge. Respondent exploited the client at a vulnerable period in her life. Later, when she offered to pay him in cash, he refused, and wanted to hold her to his "sex for fees" agreement.[1] Respondent exploited the attorney-client relationship by his misconduct.

The Florida Bar's Complaint and Amended Complaint also contained allegations relating to Respondent's misdemeanor plea to solicitation of prostitution which was not part of the Alabama reciprocal discipline case. Respondent, however, admitted to all the allegations regarding his criminal charge and Plea in Absentia in both Respondent's

[1] Respondent did not provide a copy of the videotape that is attached to the Alabama Board of Disciplinary Appeals Record on Appeal as the State Bar's Exhibits 1 and 2 to the November 12, 2002, hearing transcript. See Alabama

Answers to the Complaint and the Amended Complaint. The Referee considered these additional charges of criminal misconduct in imposing the discipline of 18-months suspension. See ROR-9. See also, The Florida Bar v. Schreiber, 631 So. 2d 1081(Fla. 1994)(misdemeanor plea warranted 120-day suspension from The Florida Bar).

Record on Appeal, R's Exhibit 1A at p. 86 and R's Exhibit 1C at pp. 483-484.

ISSUE IV

THE REFEREE PROPERLY CONSIDERED ALL AGGRAVATING AND MITIGATING FACTORS PRESENTED BY BOTH PARTIES.

The Referee provided Respondent with two penalty hearings at which to present mitigation evidence. Respondent provided written evidence as well as his own testimony on both days to support his mitigation arguments. The Referee also allowed Respondent to present mitigation evidence after the penalty hearings when Respondent provided more California-related materials on his mental health issues without The Florida Bar being allowed an opportunity to respond in August 2006. The Referee stated in his report in Case No. SC05-1014 that he considered all the mitigation evidence submitted to him by Respondent. See ROR in Case No. SC05-1014 at p. 4.

In this case, the Referee found as aggravating factors Respondent's prior offenses in Florida and Alabama, a dishonest or selfish motive, a pattern of misconduct, multiple offenses, vulnerability of the victim, and substantial experience in the practice of law. The Referee did not find in this case that Respondent submitted false evidence, false statements, or engaged in deceptive practices because that issue was raised under Case. No. SC05-1014 See ROR-12. On the other hand, the Referee did consider as mitigation, Respondent's evidence of personal and emotional problems, physical or mental impairment or disability, the imposition of other penalties and sanctions, and Respondent's expression of remorse at hearing. See ROR-13.

Respondent's arguments that the Referee failed to take into account his mitigation evidence have no basis in fact or in the record. See ROR-4, 7-10 in Case No. SC05-1014. Also, Respondent's argument that if the Referee had properly considered the mitigation evidence, he would not have imposed an 18-month suspension because Alabama imposed a lesser discipline and California is also considering a lesser disciplinary sanction if he completes a rehabilitation program. Florida is not bound by the discipline imposed by a sister state. See Wilkes, 179 So. 2d at 197 ("[Florida] may accordingly order discipline which is more or less stringent than that awarded by the sister state."). See also, The Florida Bar v. Hagendorf, 921 So. 2d 611,614 (Fla. 2006). (Florida may impose a more severe punishment than the punishment imposed by the sister state). The Referee considered the factual allegations and circumstances in this case, weighed the aggravating and mitigating factors, reviewed the Florida Standards and the case law presented by The Florida Bar. Whether Alabama, California or Respondent agree with that disciplinary recommendation should be irrelevant to a final disposition in this case.

CONCLUSION

For the foregoing reasons, The Florida Bar would respectfully request that the Court approve and adopt the Report of Referee in full, finding that the Referee properly granted summary judgment, that there was no due process violation, and that the Referee's recommended discipline of 18-months suspension has a reasonable basis in the Florida Lawyer Standards Imposing Sanctions and the relevant case law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief regarding Supreme Court Case No. SC03-149, TFB File No. 2000-00,395(1B) has been mailed by regular U.S. mail to James Harvey Tipler, Respondent, whose record Bar address is P. O. Box 10, Mary Esther, Florida 32569, on this _____ day of March, 2007

_____

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Copy provided to:
Kenneth Lawrence Marvin, Staff Counsel

CERTIFICATE OF TYPE, SIZE AND STYLE AND ANTI-VIRUS SCAN

Undersigned counsel does hereby certify that the Initial Brief 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.

_____

Olivia Paiva Klein, Bar Counsel