IN THE SUPREME COURT OF FLORIDA

Case Number: SC03-149

THE FLORIDA BAR,

Complainant,

versus

JAMES H. TIPLER,

Respondent

AMENDED INITIAL BRIEF OF RESPONDENT

JAMES HARVEY TIPLER
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STATEMENT OF THE CASE AND OF THE FACTS

This case was originally assigned to Honorable Henty McClellan. Judge McClellan recused himself in response to a Motion to Disqualify. That Motion argued that only a Referee outside the area of Bay County, Florida, could sit on this case without prejudice or bias, due to the intense negative media exposure which the underlying events had generated. The case was then assigned to Honorable Don Sirmons, in Panama City, Florida, the center of the media exposure.

Initially, Respondent was represented by Rhonda Clyatt, Esq., who filed an answer and an affidavit in opposition to summary judgment. Summary judgment was granted and Respondent was denied an opportunity to present his defense, in violation of due process.

Indeed, Ms. Clyatt apparently appeared at the summary judgment hearing by telephone, at an airport on the way to Texas. Only after the matter was essentially over did Respondent have an opportunity to appear before Judge Sirmons, and then only to present evidence as to the amount of discipline.

The Referee held a ½ day hearing on discipline on both this case, and on Case Number SC05-1014, told Respondent and counsel from the Bar that he would

hold any additional hearing thought necessary by either, and then refused to hold requested hearings.

Respondent had been a member of the California Bar for almost thirty (30) years. A stipulation had previously been entered into by Respondent and the California Bar that both this case and Case Number SC05-1014, plus another case already decided by this Court—the referral fee case, would be resolved for a total of fifteen (15) months. (30 days for SC05-1014, 90 days for a referral fee case, 11 months for this case). Since the Alabama Bar's original discipline was higher than the California Bar (91 days for the referral fee case, 120 days for the SC05-1014 case, 15 months for this case, for a total of 22 months—less that 2 years), Respondent argued that since California had stipulated to 7 months less than the original state of discipline, Florida should reduce the discipline imposed by at least that, and more since Respondent had sought and undergone treatment approved by F.L.A., Inc.

An issue was later raised by the Bar as to whether said stipulation was "final", and the Bar presented an inadmissible Declaration that each was not "final".

Respondent was given no opportunity to respond with admissible evidence, before the decision was made, but later presented evidence in two (2) forms, a computer disc of the hearings in California before the State Bar Court, and a

transcript of the State Bar Court hearings, in which the State Bar Judge expounds upon the 15 month stipulation, calling it "final" not less than eleven (11) times in two (2) days.

The Florida Referee suspended Respondent for four and a half (4½) years on these two cases. The same two (2) cases in the original jurisdiction, after a full hearing on the evidence, merited only 19 months, and in California only 12 months. He then refused to grant even a hearing on the Motion of Rehearing, when all the admissible evidence had finally been received from California.

A Motion to Disqualify the Referee was then filed, and the Referee did not even rule on it, but instead sent the matter on to the Supreme Court. Notice of Appeal of both cases was then timely filed.

SUMMARY OF ARGUMENT

A number of issues were raised by the Petition of Review, but the two (2) primary ones are as follows:

One, summary judgment should not have been granted, since an opposition affidavit was filed.

Second, the original jurisdiction, Alabama, after full evidentiary hearings, found that 19 months was appropriate discipline, California felt that the 12 months was appropriate discipline, yet the Referee ruled for 4½ years, for this and for SC05-1014 Said discipline is unwarranted and inappropriate, and reflects either a complete misunderstanding of the underlying facts, or extreme bias and prejudice against Respondent.

Other arguments will be developed as this intial Brief unfolds.

ARGUMENT

I. SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The first issue of this appeal is that the lower court granted summary judgment when issues of triable fact had been raised, and/or when Respondent had no proper notice of the hearing. For these reasons, clear error occurred, and Respondent was denied a trial on the merits which he was due in accordance with the clear prior decisions of this Court.

To prevail on a motion for summary judgment, the moving party must conclusively demonstrate that no genuine issue of material fact exists and that the moving party is entitled to a judgment as a matter of law. See Fla.R.Civ.P. 1.510(c); Holl v. Talcott, 191 So. 2d 40, 43 (Fla. 1966). "The proof must be such as to overcome all reasonable inferences which may be drawn in favor of the opposing party." Daniel v. Village of Royal Palm Beach, 4DOC-688 (4TH DCA 2004) citing to Holl, 191 So. 2d at 43. All evidence and inferences must be resolved in the light most favorable to the non-moving party. Citation omitted, Trujillo v. Banco Cent. del Ecuador, 17 F.Supp. 2d 1334, 1337 (S.D. Fla. 1998).

Summary judgment is only proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that

there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fla.R.Civ.P. 1.510(c).

"[S]ummary judgment should be sparingly granted so as not to infringe on the constitutional right to a . . . trial; that a summary judgment is not a substitute for trial, and should not be granted unless the facts are so crystallized that nothing remains but questions of law." Green Valley School v. Cowles Florida Broad, 327 So.2d 810 (1st DCA 1976) at 817.

Even though Rule 3-4.6 of the Rules Regulating The Florida Bar provides that final adjudication in a disciplinary proceeding by another jurisdiction is conclusive proof of misconduct, this Court has consistently recognized exceptions to the "conclusive" rule, all of which would present factual determinations to be made, if evidence in opposition is proffered by the Respondent.

Here, as argued by Respondent's Counsel before the lower tribunal, the Affidavit of James Harvey Tipler, timely served prior to the scheduled hearing on the Motion for Summary Judgment, clearly set forth material issues in dispute, and a trial on the merits should have occurred. In the seminal case of The Florida Bar v. Wilkes, 179 So.2d 193 (Fla. 1965), this Court stated, as follows:

"Right and justice require that when the accused attorney shows that the proceeding in the foreign state 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 involved, Florida can elect not to be bound thereby."

In the Wilkes case, the referee did not examine, as requested by Mr. Wilkes, the record of the New York proceedings and ruled that "they are regular and show on their face full compliance with all due process jurisdictional prerequisites." This Court stated that the referee was "in error" in rejecting the Respondent's argument.

"In a case brought on a foreign judgment, how the referee, the Board of Governors, or this Court could arrive at an informed conclusion as to the Respondent's fitness to practice law and, consequently, the discipline to be awarded, without considering the record which explains in detail the misconduct and the circumstances surrounding it."

The Court in Wilkes concluded that "[e]xcept in the unusual circumstance discussed herein, proof of the foreign judgment constitutes proof of the acts of the guilt of misconduct adjudicated thereby." However, as further set forth in Wilkes, "[i]f the accused attorney shall in the Florida proceedings properly raise the issues, we may be required to determine whether the proceedings in the sister state were so deficient as to make the foreign judgment unreliable as an automatic adjudication of guilt.

The U.S. Supreme Court has held that in a proceeding for disbarment, it would recognize state disbarment as warranting disbarment by it, unless from an intrinsic consideration of the record of the state proceedings it found "(1) that from want or notice or opportunity to be heard, due process was lacking; (2) that there was such an infirmity of proof that the Court could not accept the judgment as final; or (3) some other grave reason not to accept the natural consequences of the judgment." Selling v. Radford, 243 U.S. 46. "Some other grave reason" was further defined in Theard v. United States, 354 U.S. 278. What more clear issue of fact to be determined could there be than "some other grave reason". If issues have been raised by the Respondent which could constitute some other grave reason, in a sworn affidavit, then a trial must occur. These issues were properly raised and the first case should have been heard at a trial, not by summary judgment.

The fact that these issues should be considered by the Court if proper evidence is presented has been reiterated in a number of Florida decisions. In The Florida Bar v. Friedman, 646 So.2d 188 (Fla. 1994) the Respondent argued on appeal that New York disciplinary proceedings were deficient or lacking in due process, but summary judgment was not granted. In that case, the Court ruled that Friedman was given ample opportunity before and during his disciplinary proceeding to demonstrate any inadequacies in the New York forum. In The

Florida Bar v. Mogil, 763 So.2d 303 (Fla. 2000), Mogil presented a letter, but no sworn affidavit. As the Court in Mogil stated:

"The record plainly refutes Mogil's present claim that he was denied an opportunity to show that his New York proceedings were deficient. Clearly he had such an opportunity and could have pursued this route by submitting any competent counter evidence he may have had in making arguments thereon at the summary judgment hearing."

As the Court further stated:

"As the party opposing partial summary judgment in the present case, Mogil failed to meet his burden. His unsworn assertions in his letter to the referee suggesting a hard of hearing politically controlled judge are just that - assertions, not supported by affidavit or otherwise."

There follows in the Mogil case a string of citations upholding summary judgment when the opposing party failed to demonstrated by affidavit or otherwise a genuine issue of material fact. Here, Respondent submitted a sworn affidavit not an assertion.

In The Florida Bar v. Kandekore, 766 So.2d 1004 (Fla. 2000), the Court stated:

"Kandekore presented no evidence whatsoever at the hearing to challenge the fairness or the validity of the disciplinary proceeding in New York."

Also, in the Kandekore decision, this Court, citing Wilkes, noted that it is "not automatically bound by an out-of-state determination of guilt by a disciplinary agency . . . [if] there was some other grave reason which would make it unjust to accept the foreign judgment as conclusive proof of guilt of the misconduct involved."

In The Florida Bar v. Carricarte, 733 So.2d 975 (Fla. 1999), this Court stated, as follows:

"An attorney is entitled to due process in disciplinary proceedings (citations omitted) . . . despite the fact that Respondent had clear notice an evaluation was being sought, ample time for preparation of a defense, and an opportunity to present the evidence he felt was appropriate, he presented no evidence to refute the Bar's recommendation."

In the case before this Court, Respondent presented sworn evidence.

II. THE STANDARD FOR SEX WITH A CLIENT, WITH WHOM NO PRE-EXISTING RELATIONSHIP EXISTED, FOR SEX THAT OCCURRED DURING THE REPRESENTATION PERIOD, IS ONE YEAR IN FLORIDA.

This is a case involving reciprocal discipline from the State of Alabama. Alabama has no rule dealing with sex between attorney and client. Florida does. Alabama believed that 15 months was appropriate discipline for the conduct. Florida has a rule under the terms of which Respondent could be considered innocent of wrongdoing. Rule 4-8.4 (i) of the Rules Regulating the Florida Bar states that a lawyer shall not "engage in sexual conduct with a client that exploits the lawyer-client relationship". This conduct occurred in 1999. The comment to Rule 4-8.4 in 1999 stated in relevant part as follows:

> "A sexual relationship between a lawyer and a client that exists before commencement of the lawyer-client relationship does not violate this subdivision if the lawyer and client continue to engage in sexual contact during the legal representation."

It is undisputed that the dating relationship involving sex between Candi Lyons and Respondent existed for several months before Respondent was asked to help her get out of jail. It is undisputed that Respondent was able to get her felony charge of aggravated assault with a deadly weapon dismissed, and that he secured her release from jail and at that point the lawyer-client relationship ended. It is

undisputed that during the entire period of representation, Candi Lyons was in jail, and therefore it is undisputed that no sex between the two of them could have occurred during the period of representation. It is undisputed that the sex between them which occurred prior to the lawyer-client relationship was consensual, between two adults. Ms. Lynn was the mother of two and a stripper/prostitute by profession. There was no coercion. There are the facts which would have been developed at trial had the Referee not granted summary judgment, and with a fair and complete hearing, Respondent could well have been found not guilty in Florida, under the express terms of the comment to the Rule.

The cases cited by the Bar in support of its position that a 18 month suspension is appropriate involved flagrant sexual misconduct with clients. The Florida Bar v. Senton, 29. Fla. L. Weekly S463 involved two (2) separate acts of intercourse with a client with whom no previous relationship existed, the sex occurred during the representation and the client was told by the attorney that he would not help her unless she agreed. The Florida Bar v. Scott, 810 So. 2d. 893 involved an attorney who ejaculated in his client's face who had no previous relationship, the sex occurred during the representation, and under threat of no representation.

The closest case cited by the Bar is The Florida Bar v. Bryant, 27 Fla. L. Weekly S166. The attorney in that case accepted legal fee payments from a

prostitute with whom he had no previous dating relationship, the sex occurred during the attorney-client relationship and was coercive in nature. This Court stated the relevant facts as follows:

> "The Bar challenges the referee's conclusion that Bryant did not violate rule 4-8.4 (i) during his representation of Rodehaver. In concluding there that was no violation, the referee focused on the fact that Rodehaver, being a prostitute, bartered her services for Bryant's legal services. The referee noted that this arrangement was in violation of the criminal law proscribing prostitution but concluded that there needed to be a showing of exploitation to find a rule 4-8.4 (i) violation.
>
> The referee found as fact that Bryant told Rodehaver, "The happier you keep me, the harder I will work." *Florida Bar v. Brant*, SC94965 & SC00-801, report of referee at 12 (report filed Nov. 18, 2000). The referee also found that, prior to the commencement of the legal representation, there was no previous relationship between Bryant and Rodehaver. Also relevant is the referee's finding that Bryant and Rodehaver engaged in sexual relations which commenced during the period of legal representation.

> Bryant testified that he made the "happier you keep me, the harder I will work" statement to Rodehaver. FDLE Agent Mullen testified that Bryant admitted to Mullen that Bryant made this statement. Further, Bryant testified that he met Rodehaver after she was arrested on the municipal ordinance violation and that he engaged in sexual relations with Rodehaver."

The Referee in Bryant, supra, imposed only a public reprimand under the facts. This Court disagreed, found a violation of Rule 4-8.4 (i), and imposed a one year suspension.

Here, under facts which were much less egregious, under facts which according to the comment to Rule 4-8.4 (i) may have resulted in a "not guilty" finding at trial, had summary judgment not been granted, the Referee ruled that 18 months, not one year, was appropriate. Since Respondent had sought treatment and was undergoing voluntary rehabilitation, less than one year was appropriate. The Bar in Alabama thought 15 months. The Bar in California thought 11 months. Yet neither Alabama nor California has the rule, with comments, that Florida does, and the Florida rule specifically meets this situation.

III. THE REFEREE FAILED TO CONSIDER ANY MITIGATING FACTORS, AND IGNORED EVIDENCE OF REHABILITATION AND TREATMENT REQUIRING MITIGATION OF DISCIPLINE, NOT AGGRAVATION OF DISCIPLINE.

The Respondent for the Referee in this case and in Case Number SC05-1014 failed to consider the mitigating factors offered at the discipline hearing. Rule 9.3 of the Florida Standards for Imposing Lawyer Sanctions includes the following factors which were not considered by the Referee: 9.32 (c), (e), (h), (j), (k), and (l). Discussion of each is set forth in the transcript which has not yet been received by Respondent.

Furthermore, the Court heard a great deal of evidence with regard to the voluntary ongoing supervised rehabilitation by Respondent, through the Lawyer's Assistance Program of the California State Bar, in cooperation and with the approval of the F.L.A., Inc. Specifically, Respondent had attended the respected Pine Grove Program in Hattiesburg, Mississippi, and a respected program in Los Angeles, California. Respondent had voluntarily agreed to a three year commitment for treatment and rehabilitation with and through the California Bar, and the Florida program has agreed that no purpose will be served by treatment supervised by two (2) states.

Not only did the Referee fail to consider or even mention this evidence in mitigation, he ordered a second program of treatment which the F.L.A. Inc. has specifically ruled redundant.

IV. THE COURT FAILED TO CONSIDER ADMISSIBLE EVIDENCE, OR EVEN TO HOLD A HEARING TO REJECT OR ADMIT SAID EVIDENCE, AS TO THE REAL SITUATION BEFORE THE CALIFORNIA STATE BAR.

At the hearing in Florida, Respondent argued that the original 19 months in Alabama (15 months for SC03-149, 4 months for SC05-1014) should be reduced further by Florida, since it had been reduced in California by stipulation (11 months for SC03-149, 1 month for SC05-1014). Respondent further explained that California had a different system of assessing mitigation of the discipline in the event the attorney had voluntarily sought treatment or rehabilitation for an emotional problem which had contributed to the conduct.

Since Respondent had signed a three year commitment with LAP (Lawyer's Assistance Program) in California, and had undergone treatment at respected centers for treatment, the California State Bar Court has admitted Respondent into the ADP, or Alternative Discipline Program. If Respondent remains in treatment and in good standing with the LAP, evidence was submitted to the Florida Referee that the 12 months for these two cases in California will be greatly reduced, to probably less than six (6) months total.

The issue later developed as to whether the initial stipulation in California was considered "final".

The Florida Bar submitted an unsworn written declaration that the Stipulation was not "final". Respondent argued, by letter since no hearing was held to definitively determine the matter, that the unsworn Declaration should be stricken as not admissible, that the stipulation was "final" in the way in which his testimony indicated, i.e., final unless reduced by the Alternative Discipline Program Judge. Respondent submitted a sworn affidavit from California counsel to that effect, and attempted to obtain a transcript of the hearing in California in which this issue was discussed. Since the matter was still considered confidential in California, California Counsel for Respondent could not easily obtain the required transcript, but did send a computer disc, which was very garbled and hard to understand. Later, a transcript was obtained, which proved the accuracy of Respondent's statements, and a Motion for Rehearing was timely filed. The Referee in Florida failed to look at the evidence, refused to hold any hearing or take any testimony from Respondent or any of the California witnesses who actually heard the issues, and understood the procedures.

This is significant because a very damaging finding was added by the Bar (and signed by the Referee) concerning this issue. If the Referee will not hear the admissible evidence submitted or proferred by one side, but will only hear inadmissible evidence submitted by the other , it indicates prejudice or bias. For

this reason, a Motion to Disqualify was filed by Respondent and no ruling on said Motion was ever rendered.

Due process requires, at least, a hearing, and consideration of all competent evidence.

CONCLUSION

For the reasons which are set forth in this brief, "grave reasons" exist from which a referee could find that the Alabama State Bar proceedings did not afford due process, and those facts were established before and at the summary judgment hearing by sworn affidavit. Issues of material fact remained for trial. These issues could have been, and should have been, thrashed out by the referee, at trial.

Clear error occurred when the referee granted summary judgment and refused to conduct a simple trial, to include testimony on the "grave reasons" which clearly existed not to grant conclusive power to the Alabama disciplinary proceeding, and its lack of due process.

For Florida to accord a 4½ year suspension on a reciprocal discipline case, with no new evidence, and with the attorney involved voluntarily seeking rehabilitation and treatment, when the original jurisdiction only gave 19 months, and California gave only 12 months and perhaps less under the ADP, is simply wrong. The result is so out of bounds as to indicate bias on the part of the Referee.

This matter should be reversed and sent to a new Referee to clarify why.

Respectfully submitted,

_____

James Harvey Tipler

Certificate of Service

I HEREBY CERTIFY that the foregoing Initial Brief of Respondent has been furnished to the following by regular U.S. Mail, postage prepaid, this 6th day of February, 2007:

Florida Supreme Court
Attention: Clerk's Office
500 South Duval Street
Tallahassee, Florida 32399-1927

_____
James Harvey Tipler

I HEREBY CERTIFY that one (1) copy of the foregoing Brief of Respondent has been furnished to the following by regular U.S. Mail, postage prepaid, this 6th day of February, 2007:

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Certificate of Compliance

I hereby certify that the font requirements of the Rule have been complied with in this brief.

_____

James Harvey Tipler