IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Case No. SC05-1014

v.

TFB File No. 2000-01,445(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 Alabama Supreme Court Opinion dated December 30, 2004, attached as Exhibit B to the Florida Bar’s Complaint, shall be designated as “Alabama Opinion” with the appropriate page number, i.e., “Alabama Opinion at p. 2.”

References to the Final Order of the Alabama Disciplinary Board dated January 19, 2005, attached as Exhibit D to the Florida Bar’s Complaint, shall be designated as “Alabama Board Final Order.”

References to the Order of the Alabama Disciplinary Commission dated November 5, 2002, attached as Exhibit I to the Florida Bar’s Complaint, shall be designated as “Alabama Commission Order” with the appropriate page number, i.e., “Alabama

Commission 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 Transcript for the July 28, 2006, Motion Hearing shall be designated as "MHT." with the appropriate number, i.e., "MHT-4."

References to The Florida Bar's Exhibits shall be designated as "TFB" with the appropriate number, i.e., "TFB 5."

References to Respondent's Exhibits shall be designated as "Respondent's Exhibit" with the appropriate number, i.e., "Respondent's Exhibit 8."

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 June 8, 2005, The Florida Bar filed its Complaint and a Request for Admissions in this reciprocal discipline case, and properly served Respondent's counsel. On June 30, 2005, The Honorable Harry Hentz McClellan was assigned as Referee. Neither Respondent nor his counsel filed any Answers to the Complaint or Request for Admissions. After contacting Respondent's counsel's office, The Florida Bar filed a Notice of Telephonic Case Management Conference, a Motion for Summary Judgment and a Notice of Hearing on Motion for Summary Judgment on July 27, 2005. Neither Respondent nor his counsel appeared at the Telephonic Case Management Conference set on September 20, 2005. See Order on Case Management Conference dated October 3, 2005.

Subsequent to the Case Management Conference, Respondent's counsel filed a Motion for Order Allowing Withdrawal of Counsel on September 28, 2005. Respondent filed a Motion to Disqualify, signed by him, and mailed to the Referee and Bar counsel allegedly on September 29, 2005. The Florida Bar filed a Reply Objecting to the Motion to Withdraw dated September 30, 2005.

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, since counsel had no Order from the Referee allowing her to withdraw.

Neither Respondent nor his counsel appeared in person or by telephone at the scheduled hearing on January 12, 2006. Immediately before the hearing time, however, Respondent sent a letter via facsimile addressed to the Referee consenting to summary judgment on liability, and to the withdrawal of his counsel in this case. In light of Respondent's written consent, with no objection to the summary judgment motion, 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. An Order allowing Respondent's counsel to withdraw was also entered on the same date.

On March 1, 2006, a Notice of Final Penalty Hearing was filed with a hearing date of April 19, 2006. At Respondent's request, an Amended Notice of Final Penalty Hearing was filed on April 5, 2006, with a hearing date set on April 28, 2006. On the hearing date, Bar counsel received a copy of Respondent's Motion for Rehearing that was dated February 20, 2006, and was not set for hearing. After argument by counsel, the Referee denied the Motion for Rehearing. See TI-24. When time expired on the first penalty hearing date, at Respondent's request, the final penalty hearing was continued and completed on May 12, 2006, to give Respondent additional time to provide materials to the Referee, and to present any other mitigation evidence. TI-67-70. At the penalty hearing on May 12, 2006, the Referee agreed to consider Respondent's mitigation evidence as applicable to this case and to Case No. SC03-149. See TII-206-207 in Case No. SC03-149.

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 on June 14, 2006, unless he agreed with The Florida Bar's proposed version. See TI-258, 262. Respondent never submitted any proposed Report of Referee.

On June 1, 2006, The Florida Bar filed a Motion for Respondent to Supplement the Record or Motion to Strike Exhibit #8, and filed the Declaration of Michael J. Glass,

California Deputy Trial Counsel. The motions were scheduled 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. MHT-3. Immediately before the hearing, Respondent sent via facsimile a letter to the Referee requesting additional time to provide more documents to the Referee. MHT-3-6. 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.

On August 21, 2006, The Florida Bar filed an Objection to Respondent's filing of Affidavit of Paul Virgo, one of Respondent's California counsel, based on the fact that 1) The Florida Bar was not provided with copies of the items sent to the Referee; 2) no notice of filing was attached to the submission to the Referee; and 3) the Affidavit was not properly sworn or dated and did not include the place of execution. 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.

On September 11, 2006, the Referee filed his Report with the Court stating that he had listened to the audio CD submitted by Respondent and had considered the affidavit of David Lear, Respondent's California counsel. The Referee concluded, however, that no further testimony was necessary for him to resolve the issues in this case. See ROR-4.

Almost two months after the Referee closed the case and filed his Report of Referee, 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. SC03-149. 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 on 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 reciprocal discipline Complaint is based on the factual allegations set forth in (1) the Order of the Alabama Supreme Court imposing a 120-day suspension, (2) the Alabama Supreme Court Certificate of Judgment reversing and remanding to Alabama Board of Disciplinary Appeals, (3) the 14-page Opinion of the Alabama Supreme Court reversing the decision of the Alabama Board of Disciplinary Appeals, (4) the Final Order by the Alabama Board of Disciplinary Appeals after the reversal, (5) the criminal contempt proceedings in Covington County Circuit Court, Andalusia, Alabama, (6) the criminal proceedings by the District Attorney in Covington County Circuit Court, Andalusia, Alabama, where Respondent was indicted by a grand jury on first degree perjury charges, (7) the 8-page Order on Petition for Determination of Serious Crimes by the Disciplinary Board of the Alabama State Bar, and (8) the Order of the Alabama Disciplinary Commission on the Alabama Rule 22(a) Petition. See Exhibits A, B, C, D, E, F, G, H and I attached to The Florida Bar's Complaint.

The facts contained in all of the above disciplinary and criminal proceedings for contempt and perjury clearly demonstrate that Respondent engaged in acts of misconduct that violated the ethical rules governing attorneys both in Alabama and in Florida. The

final adjudication in the Alabama disciplinary proceeding that Respondent was guilty of misconduct justifying disciplinary action of a 120-day suspension in Alabama "shall be considered as conclusive proof of such misconduct" in a Florida disciplinary proceeding. See Rule 3-4.6.

The pertinent facts underlying the 120-day suspension imposed by the Alabama Supreme Court are as follows. Respondent represented a plaintiff in a medical malpractice case arising out of the death of Harold Rogers. During the course of the trial, Respondent attempted to offer a videotape of Harold Rogers the day before his surgery that allegedly resulted in his death as evidence that the surgery was unnecessary. Respondent questioned Harold's son, Bradley Rogers, to authenticate the videotape, and asked Bradley if it accurately depicted Harold's condition the day before his surgery. The videotape that Respondent attempted to enter into evidence was edited from the original version of the tape that Bradley had seen and some of the scenes that would have been harmful to plaintiff's case had been deleted or moved. Bradley had never viewed the edited tape and thus unknowingly gave false answers to Respondent's questions. After the defense objected to the admission of the videotape, the trial court judge conducted an independent inquiry and disallowed both the original tape and the edited version of the tape.

Respondent's answers to the trial court's questions during its inquiry about the

videotape resulted in the trial court judge holding Respondent in criminal contempt of court after a show cause hearing. The trial judge laid out in great detail the basis of his findings in an Order to Show Cause and a Final Order Finding that Respondent Has Committed An Act of Criminal Contempt and Imposing Judgment and Sentence on Account Thereof. See Composite Exhibit E attached to the Florida Bar's Complaint.

Based on the events in the Harold Rogers case, a Covington County Grand Jury indicted Respondent for a first-degree felony of perjury and the Covington County District Attorney brought criminal charges against Respondent. See Composite Exhibit F attached to the Florida Bar's Complaint. On the trial date, Respondent pled guilty to a misdemeanor charge of Interfering with Judicial Proceedings. See Exhibit G attached to the Florida Bar's Complaint.

The Alabama State Bar petitioned the Disciplinary Board to determine whether Respondent's misdemeanor conviction involved a "serious crime" that would require Respondent's suspension or disbarment from the practice of law in Alabama. After an evidentiary hearing, the Disciplinary Board determined it was a "serious crime" under Alabama Rule 22(a), and the Disciplinary Commission, after a penalty hearing, imposed a 120-day suspension on Respondent. See Exhibits H and I attached to the Florida Bar's Complaint.

In Alabama, Respondent appealed the 120-day suspension to the Board of

Disciplinary Appeals which, after oral argument, reversed the Disciplinary Board's decision that Respondent had been convicted of a "serious crime" that warranted suspension. The Alabama State Bar appealed to the Alabama Supreme Court that reversed and remanded the Board of Disciplinary Appeals' decision. See Exhibit C attached to The Florida Bar's Complaint. On remand, the Board of Disciplinary Appeals affirmed the 120-day suspension on January 19, 2005. See Exhibit D attached to The Florida Bar's Complaint.

In Alabama, Respondent argued that "he was not accorded his due process rights to fair notice and an opportunity to be heard in a meaningful way." In the Alabama Supreme Court Opinion, however, the Court agreed with the Alabama "Board of Disciplinary Appeals holding that the 'record reflects that [Tipler's hearing before the Disciplinary Board] was extensive and broad ranging." See Alabama Opinion at p. 12. The Alabama Supreme Court did not agree with Respondent that he had been denied any due process of law, and concluded that Respondent's conviction under Alabama law was a "serious crime" under Alabama Rule 8(c)(2)(C). See Alabama Opinion at p. 13.

Based on the acts of misconduct found by the Alabama Supreme Court in its Opinion, as well as the criminal contempt and criminal charges in Covington County, Alabama, The Florida Bar filed a reciprocal discipline Complaint, Request for Admissions, and moved for summary judgment relying on Rule 3-4.6 stating that the Alabama's final

adjudication was conclusive proof of guilt on the acts of misconduct. The referee properly granted The Florida Bar's Motion for Summary Judgment based on the allegations of Alabama misconduct in its Complaint, and found Respondent guilty of violating Florida Rules 3-4.3(Misconduct), 3-4.4(Criminal Misconduct), 3-7.2(j)(1) (Professional Misconduct in Foreign Jurisdiction - Notice), 4-3.3(a) (Candor Towards Tribunal), 4-3.4(a)(b)(Altering, Concealing and Fabricating Evidence), 4-8.4(b)(Criminal Acts), 4-8.4(c)(Fraud, Deceit, Misrepresentation), 4-8.4(d)(Conduct Prejudicial to the Administration of Justice).

After two penalty hearings at which Respondent was present and was given ample opportunity to present mitigation evidence, the Referee recommended an appropriate disciplinary sanction of three-years suspension, taking into account the mitigating and aggravating factors under the Florida Lawyer Standards 9.22 and 9.32, as well as the relevant case law. ROR-10-16. The Referee also assessed taxable costs against Respondent that he has not challenged on appeal. ROR-16-17

SUMMARY OF ARGUMENT

The issues in dispute are (1) whether the Referee properly granted summary judgment to The Florida Bar pursuant to reciprocal discipline Rule 3-4.6; (2) whether Respondent received due process in the Alabama and in the 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.

The Florida Bar contends that the Referee properly granted summary judgment to The Florida Bar on the issue of guilt based on Respondent's consent to liability at the January 12, 2006, hearing, and on the reciprocal discipline Rule 3-4.6. Respondent was accorded full due process, 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 as charged on Rules 3-4.3(Misconduct), 3-4.4(Criminal Misconduct), 3-7.2(j)(1) (Professional Misconduct in Foreign Jurisdiction - Notice), 4-3.3(a) (Candor Towards Tribunal), 4-3.4(a)(b)(Altering, Concealing and Fabricating Evidence), 4-8.4(b)(Criminal Acts), 4-8.4(c)(Fraud, Deceit, Misrepresentation), 4-8.4(d)(Conduct Prejudicial to the

Administration of Justice).

Respondent was accorded full due process in the Alabama disciplinary proceeding where he was represented by counsel and many of the same issues as he raised in the Florida disciplinary proceedings were adjudicated by the Alabama Board of Disciplinary Appeals and the opinion issued by the Alabama Supreme Court.

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 was also properly noticed of all proceedings after his counsel withdrew from his case. Respondent appeared pro se at two disciplinary hearings on April 28, 2006, and May 12, 2006, having a full opportunity to explain the circumstances of the Alabama offenses and to offer testimony to mitigate any sanction.

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 a three- year suspension, in accordance with Standard 5.12, and 6.12, as well as the relevant case law. The Referee considered all Respondent's mitigation evidence presented at two penalty hearings, as well as 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.

ARGUMENT

ISSUE I

THE REFEREE PROPERLY GRANTED SUMMARY JUDGMENT

Respondent's argument that summary judgment should not have been granted is without merit based on the record in this disciplinary proceeding. Respondent's appellate argument is not applicable to the record in this case. He has filed a "mirror image" argument objecting to summary judgment that is different only as to the last paragraph in this case and in Case No. SC03-149. See Amended Initial Brief at p. 12. See Case No. SC03-149, Amended Initial Brief at pp. 7-12.

The referee properly granted summary judgment to The Florida Bar on the issue of guilt based on all the factual allegations in its Complaint and Request for Admissions because Respondent consented to the entry of summary judgment. Respondent failed to appear at the noticed hearing. Immediately before the summary judgment hearing on January 12, 2006, however, Respondent sent a letter by facsimile to the Referee stating the he consented to summary judgment being entered on liability. See Respondent's letter dated January 11, 2006, in the record. This letter was also read in full into the record by the Referee at the summary judgment hearing. See TI-3-5. In that same letter Respondent admitted that his counsel had been representing him on various Bar matters, and he consented to her withdrawing from this case. He also understood that subsequent

to the summary judgment hearing, there would be a penalty hearing at a later date. See TI-3-4.

In the Order Granting the Florida Bar's Motion for Summary Judgment, the Referee found that the Final Order of the Alabama Supreme Court was "conclusive proof of guilt" pursuant to Rule 3-4.6, and Respondent had, via his letter, agreed to the entry of summary judgment on all the factual allegations and rule violations charged in The Florida Bar's Complaint. After full consideration of the Alabama record before him, Rule 3-4.6, and Respondent's written consent to liability on the motion, the Referee properly granted summary judgment to The Florida Bar on all the allegations in its Complaint, including Rules 3-4.3(Misconduct), 3-4.4(Criminal Misconduct), 3-7.2(j)(1) (Professional Misconduct in Foreign Jurisdiction - Notice), 4-3.3(a) (Candor Towards Tribunal), 4-3.4(a)(b) (Altering, Concealing and Fabricating Evidence), 4-8.4(b)(Criminal Acts), 4-8.4(c)(Fraud, Deceit, Misrepresentation), 4-8.4(d)(Conduct Prejudicial to the Administration of Justice).

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).

Respondent's argument on summary judgment in his Amended Initial Brief in this case is replete with misstatements. Neither Respondent nor his counsel ever filed any responsive pleadings to The Florida Bar's Complaint or Request for Admissions. Further, neither Respondent nor his counsel ever filed any Affidavit of Tipler objecting to the summary judgment motion in this case before the hearing date. Respondent was not served with papers because, as he admitted in his January 11, 2006, letter, he was represented by counsel. See TI-5-8. See also Order on Case Management Conference, and Motion for Order Allowing Withdrawal of Counsel with Exhibit 1 attached.

After signing a certified return receipt accepting service of the Complaint and Request for Admissions, and setting the October 3, 2005, date for The Florida Bar's

Summary Judgment Motion, it was not until August 11, 2005, that Respondent's counsel advised Bar counsel that she would no longer represent Respondent. She did not withdraw from Respondent's representation in this case until February 13, 2006, by Order of the Referee. Until that point in time, The Florida Bar was required to serve all pleadings and communicate only with Respondent's counsel. Respondent's counsel also stated in her August 11, 2006, letter that she had forwarded a copy of the Complaint and Request for Admissions to Respondent, and therefore, he had a copy of the pleadings almost 5 months before the final summary judgment hearing. See Exhibit 1 attached to Respondent's Motion to Allow Withdrawal of Counsel dated September 28, 2005. Respondent has carefully couched his objections in terms of not having been "served" with the Complaint, but has never asserted he never "received" a copy of the Complaint and Request for Admissions from his counsel.

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 disciplinary proceedings requires that the accused attorney be given a full opportunity to explain the circumstances of the 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 in the 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, 1C, and 1D. The voluminous Alabama record submitted by Respondent reflects that Respondent was represented by counsel in his criminal contempt and on his criminal charges. At the trial level there were two hearings, one on guilt and one on the disciplinary sanction. Respondent appealed to the Disciplinary Board of Appeals; on appeal again, the Alabama Supreme Court agreed with the lower appellate tribunal, that Respondent had not been denied due

process at any level of the Alabama proceedings. See Alabama Opinion at pp. 12-13.

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 for almost 1-1/2 years. Respondent, however, failed to timely take action in the case by responding to pleadings and appearing at hearings. 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, asking for additional time to file materials and then not complying with the deadlines set by the Referee.

Further, as the record shows, Respondent and his counsel were properly noticed on all hearings. Respondent's counsel was properly served with notice of The Florida Bar's Complaint and Request for Admissions in June 2005. Two summary judgment hearings and two penalty hearings were scheduled. 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, but, with no notice to the Referee or Bar counsel, chose to submit a letter via facsimile. See SJT-3-5.

After the referee granted The Florida Bar's summary judgment motion, The

Florida Bar set down a penalty hearing date of April 19, 2006, with Respondent's agreement to the date. Then, at Respondent's request, the Florida Bar agreed to postpone the hearing until April 28, 2006, and filed an Amended Notice of Hearing. Yet on the day of penalty hearing, 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 submit 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, Respondent entered an Exhibit #8, purportedly an accurate copy of a California stipulation to discipline, and testified that it was "final." TII-207. 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. 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, Mr. Tipler again failed to file a reply to the Florida Bar's Motion or to appear at the motion hearing. MHT-3. 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. MHT-3-4. The Referee gave Respondent an extension until August 4, 2006, to provide additional materials in support of his position. MHT-5-6.

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. 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. Nevertheless, the Referee stated that he considered all these mitigation materials before issuing his final report of referee. See ROR-4, 7-10.

Respondent argues at the end of his Amended Initial Brief that because the Referee did not set his Motion for Rehearing and Motion to Disqualify for hearing, there was a violation of his due process rights. See Amended Initial Brief at p.26. The Referee 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 was for relief from an Order Granting The Florida Bar's Motion to Supplement or Strike dated

August 18, 2006. The Referee did consider all the materials provided by Respondent, and issued his final report without further hearing. See ROR-4, 7-10.

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. Respondent's delaying tactics had prolonged the penalty process long enough. Respondent made no effort to set his Motion for hearing, and the Referee had no obligation to do so.

As to the Motion to Disqualify, Respondent submitted that motion two months after the referee submitted his Report to the Court and 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 DISICPLINE SHOULD BE IMPOSED BY THE COURT BECAUSE IT HAS A REASONABLE BASIS IN THE FLORIDA STANDARDS AND THE RELEVANT CASE LAW.

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 a 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).

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).

The Referee's disciplinary recommendation of a three-year suspension meets all the prongs of this disciplinary principle.

The Florida Bar contends that the referee's recommended discipline of a three-year suspension has a reasonable basis under the Florida Standards for Imposing Lawyer Sanctions and the relevant case law. See ROR-10-12, 14. See The Florida Bar v. Vining, 707 So. 2d 670, 673 (Fla. 1998) (the referee's recommendation is presumed correct and will be followed if reasonably supported by existing case law and not "clearly off the mark"). 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 6.12 which supports a suspension for submitting false statements to the court.

The referee also relied on The Florida Bar v. Klausner, 721 So. 2d 720 (Fla. 1998) in which the Court imposed a three-year suspension for forging documents and misrepresentation to the court where the attorney had no prior disciplinary record, and the attorney was inexperienced in the practice of law. The Court considered the numerous cases researched by the referee before making his decision, and followed his disciplinary

recommendation because it was reasonably supported by the case law. See also, The Florida Bar v. Mogil, 763 So. 2d 312-313 (Fla. 2000).

In Klausner, Court reasoned:

> Generally, the Court has imposed harsh punishment on lawyers who intentionally lie under oath, lie to the court, or present false of forged documents, Indeed, this court has stated that no ethical violation is more damaging to the legal profession and process, and "[a]n officer of the court who knowingly and deliberately seeks to corrupt the legal process can logically expect to be excluded from that process." [citations omitted]. Klausner, 721 So.2d at p. 721.

In this case, Respondent knowingly and intentionally tried to mislead the Alabama court. Despite the fact that Respondent tried to portray his actions as merely an inadvertent mistake and blame it on his investigator, he knowingly and intentionally had his own witness give false answers to his questions in court. Further, Respondent twice tried to mislead the trial judge into believing that both the shorter and longer versions of the tape portrayed the same evidence. But for the diligent inquiry of the Alabama trial judge, Respondent would have entered the misleading evidence into the record to the detriment of the defendant in the case. See Exhibit G attached to The Florida Bar's Complaint.

Again, at the disciplinary hearing, Respondent introduced Exhibit #8 alleging that it was evidence of a final Stipulation in his California disciplinary proceedings, and

failing to submit page 15 of the Stipulation that would have shown the judge's signature page. Moreover, Respondent's references and citations to the Alabama Disciplinary Board of Appeals that reversed the decision of the Alabama Disciplinary Commission are also misleading. See Amended Initial Brief at pp. 19-20. The Alabama Board of Disciplinary Appeals was reversed by the Alabama Supreme Court. See Exhibits B and C attached to The Florida Bar's Complaint. Unlike Florida, Alabama considered only the criminal charge of interference with judicial proceedings. The Florida Bar's Complaint included not only Respondent's misdemeanor charges in Alabama but also Respondent's actions before the local trial judge in Alabama resulting in criminal contempt.

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. The Referee stated in his report dated September 11, 2006, that he considered all the mitigation evidence submitted to him by Respondent. See ROR-4, 7-10.

In this case, the referee found as aggravating factors Respondent's prior offenses in Florida and in Alabama, a dishonest or selfish motive, a pattern of misconduct, multiple offenses, submission of false evidence, false statements, or other deceptive practices during the disciplinary process, and substantial experience in the practice of law. ROR-14-15. On the other hand, the referee also considered in 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-15-16.

Respondent's arguments that the referee failed to take into account his mitigation

evidence have no basis in fact or in the record. Respondent has argued that the Referee has recommended another FLA contract which is redundant. See Amended Initial Brief at p.23. The Referee did not recommend any FLA contract for Respondent in this case. See ROR-10-13. Respondent's argument, that if the Referee had properly considered the mitigation evidence, he would not have imposed a three-year suspension because Alabama imposed a lesser discipline and California is also considering a lesser disciplinary sanction if he completes a rehabilitation program, is without merit. Florida is not bound by the discipline imposed by a sister state. See The Florida Bar v.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, Mogil, 763 So.2d at 309-311. In The Florida Bar v. Hagendorf, 921 So. 2d 611 (Fla. 2006), the Court reiterated that Florida was free to impose a more severe punishment that the punishment imposed by a sister state. Id. at 614.

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. He recommended a three-year suspension based on his consideration of these various factors. 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 recommendations of the Referee in his 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 a three-year 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 The Florida Bar's Answer Brief regarding Supreme Court Case No. SC05-1014, TFB File No. 2000-01,445(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, FL 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