IN THE SUPREME COURT OF FLORIDA

Case Number: SC05-1014

THE FLORIDA BAR,

Complainant,

versus

JAMES H. TIPLER,

Respondent

AMMENDED INITIAL BRIEF OF RESPONDENT

JAMES HARVEY TIPLER
P.O. BOX 10
MARY ESTHER, FL 32569
(850-654-6566)

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

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 these cases 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 in Case Number SC03-149, but who did not file anything in this case, and who consistently mentioned that she did not request Respondent in this case. Only Ms. Clyatt was served with the complaint and with the Motion of Summary Judgment in this case. Respondent was never served with any papers in this case. 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, 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 SC03-149, 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 this case, 90 days for the referral fee case, 11 months for SC03-149). Since the Alabama Bar's original discipline was higher than the California Bar (91 days for the referral fee case, 120 days for this case, 15 months for Case Number SC03-149, for a total of 22 months—less than 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 Respondent was never served with papers, his counsel in the first case declined to represent him, and since he had no proper notice of hearing and no opportunity to defend.

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. 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."

Respondent was never served with papers, only his attorney in Case Number SC03-149 was so served. Since she declined representation, Respondent should have been served, and given a proper opportunity to present defenses. Instead, he was given no proper notice of the hearing on the Motion for Summary Judgment, and was only allowed to present evidence on discipline on a later occasion. This proceeding flagrantly violated due process.

II. DISCIPLINE OF 3 YEARS FOR A PLEA IN BEST INTENT TO INTERFERENCE WITH JUDICIAL PROCEEDINGS, A CLASS B MISDEMEANOR, REFLECTS EITHER A LACK OF UNDERSTANDING OF THE UNDERLYING FACTS, OR BIAS.

In the Alabama State Bar, where the underlying conduct happened before a trial judge in an Alabama Circuit Court, the State Bar thought a 120 day suspension was appropriate in the second case. The 120 days was later reversed by the Board of Disciplinary Appeals, who considered the conduct as nothing more than a slowing of the process. It was later reinstated—for 120 days.

In the California State Bar, when the underlying conduct was considered, a stipulation was entered into which awarded a 30 day suspension as the appropriate discipline in the second case. How can the same conduct, which was not heard in its entirety in Florida, with no witnesses and no cross-examination and no consideration on the merits, be appropriate for a three year or 36 month suspension in Florida? The Florida Referee gave a penalty of 9 times the amount in Alabama, the state of original jurisdiction, and 36 times the amount in California.

Here are the facts: As counsel for the plaintiff in a medical malpractice trial involving the death of Harold Rodgers, Respondent obtained from the family a lengthy videotape involving several days of irrelevant family events, but including

footage of a birthday party for the grandson of Mr. Rodgers, held the day before a scheduled surgery for an ulcer.

The central issue at trial was whether the surgery, which killed Mr. Rodgers, was needed. Mr. Rodgers had been diagnosed with Munchhausen Sydrome, the essential symptom of which was constant complaint of pain and discomfort in order to seek out and obtain medical treatment and attention, including surgery. The videotape showed Mr. Rodgers singing in a loud voice, moving about freely, picking up his grandson, and waving to the video camera operator. In short, the videotape showed him to be a man not in need of an operation for an ulcer.

Because the tape was so lengthy and mostly irrelevant, Respondent requested his investigator to produce an edited, short tape, not only for ease of presentation to the jury, but also for judicial economy. The investigator was told to include all footage showing Mr. Rodgers at the birthday party the day before the surgery. The investigator did so, but left out some mumbling of Mr. Rodgers, which could be heard while he was off camera in which he complained of pain.

Because Mr. Rodgers had been diagnosed with Munchhausen Sydrome a decade or so before, the fact that he complained of pain and discomfort, was consistent with the plaintiff's case. Indeed, it proved plaintiff's primary argument. Leaving out the mumbled complaint did not help plaintiff's case, as argued by Bar

counsel. If both videotapes had been viewed and understood in this context, the mistake of the investigator would have been seen for what it was, a mistake.

Mr. Tipler intended to introduce the edited videotape through Bradley Rodgers, the son of the decedent. The following exchange occurred:

> "Q. Was there a birthday party at y'all's house for Harold's grandson, Shawn, on September 8, 1996, the day before this operation?
>
> A. Yes, sir.
>
> MR. ALBRITTON: Object to the form, Judge, leading and it is also irrelevant.
>
> Q. Was your father—
>
> THE COURT: Hold on. What is the relevance of this?
>
> MR. TIPLER: I was going to ask was his father at the birthday party and how did he act the day before the operation.
>
> THE COURT: You can tell about his physical condition.
>
> Q. How was your father at the party physically? Was he able to move around?
>
> A. Yeah.
>
> Q. How was he acting? Was he in great pain?
>
> A. No, sir.
>
> Q. Do you remember what happened at the party or what he did or anything about that?
>
> A. Not really. I don't really remember it.

Q. Did he ever lie down on the floor in pain?

MR. ALBRITTON: Judge, this is classic leading.

Q. Did he sing happy birthday?

A. Yeah.

MR. ALBRITTON: Judge, how many times do you have to tell him not to lead the witness. We object.

MR. TIPLER: Did he do something is not leading, Your Honor.

MR. ALBRITTON: He testified he didn't remember what happened and if Harvey is going to ask him each separate thing that Harvey wants him to remember, that is leading.

MR. TIPLER: That is not leading.

THE COURT: If it suggests a response it is leading. Don't suggest a respsonse.

MR. TIPLER: Yes, sir.

Q. Now that was the day before the operation, is that correct?

A. Yes, sir.

Q. On the next Monday morning?

A. Yes, sir.

MR TIPLER: Your Honor, at this time we would like to introduce the tape.

MR. ALBRITTON: Object.

THE COURT: Is that the end of your examination of this witness?

MR. TIPLER: That is except I wanted him to comment on the tape when I show it of the party.

THE COURT: We might as well deal with this issue. Take the jury back for a minute or two, or as long as it takes.

(Jury was recessed at 10:45 a.m.)

THE COURT: Lay your predicate first.

Q. Have you had an opportunity to view the video tape of the birthday party of Shawn where your father was in attendance on September 8, 1996?

A. Yes.

Q. And does the video tape <u>that you have seen</u> truly and correctly and accurately depict your father's physical condition, your father's condition, the way he looked—I guess I'll say—does it truly and accurately depict the way your father looked and acted on the day before the operation which took place the next morning at 7:30?

Emphasis supplied. (C. 618-620). (Alabama Record)

The edited video tape was never shown to the jury. The entire, unedited video tape was then offered by Respondent, and was excluded due to defense objection. Both videotapes hurt the defense.

Incredibly, and due to a personal agenda of the Covington County District Attorney, Respondent was indicted for perjury because of this question which he posed to Bradley Rodgers:

> "And does the video tape that you have seen truly and correctly and accurately depict your father's physical condition, our father's condition, the way he looked—I guess I'll say it—does it truly and accurately depict the way your father looked and acted on the day before the operation took place the next morning at 7:30?"

(C. 620, Lines 17-24). Emphasis supplied.

Mr. Tipler was directed by the Court to ask that question before the tape was shown to the witness.

> THE COURT: "Lay your predicate first."

(C. 620, Line 12).

Mr. Tipler intended to show the edited tape to the witness and let him view it and comment on it.

> THE COURT: "Is that the end of your examination of this witness?"
>
> MR. TIPLER: "That is except I wanted him to comment on the tape when I show it of the party."

(C. 620, Lines 3-7)

The Class B misdemeanor statute to which the plea in best interest was made, Section (a) (1) states in relevant part as follows:

> "He engaged in disorderly, contemptuous, or insolent behavior…."

Code of Alabama Title 13A-10-130 (a) (1). (C. 22). The reason the commentary to this section calls it "an alternative method by which to punish contempt" is that the section, while broad and certainly ambiguous, covers many

behaviors which have commonly been dealt with by judges with the contempt proceeding, just as was done by Judge McKathan in this case.

There is no difference in the conviction for contempt issued by Judge McKathan in this case and the plea offer accepted by Mr. Tipler on a best interest basis, except that the penalty of $1,000.00 differed from the $100.00 fine and 24 hours jail ordered by Judge McKathan. The "crime" was the same. Indeed, the commentary to Section 13A-10-130 states that double jeopardy would apply, so that Respondent, absent the plea agreement, could not have been convicted under the statute.

Subsection (a) (1) covers situations as broad as speaking too loud in court, bringing a dog to court, using profanity, not wearing appropriate attire, such as a tie, not standing when the Judge enters, or any number of offenses. While none of these behaviors are appropriate, should a lawyer be suspended for 3 years for this kind of behavior?

This was essentially a plea to contempt of court.

Contempt as a criminal or civil charge is probably most often leveled at lawyers, since lawyers are in court more often than everyday citizens. Should every lawyer cited for contempt require suspension for 3 years? As stated by the Board of Disciplinary Appeals in Alabama:

"While the misdemeanor is entitled "interfering with judicial proceedings", §13A-10-130 Code of Alabama, we do not believe that the conduct, and subsequent plea, with which we are presented here meets the requirement of Rule 8 (c) (2) (C) that it involves "interference with the administration of justice." (emphasis supplied). To accept the Bar's position in this case would mean that any time a lawyer committed acts during trial, which later were ruled to be criminal contempt, would also expose that attorney to the risk of suspension and disbarment.

"Tipler's acts did result in some delay in the case being submitted to the jury and imposed some additional work on the trial court in making an evidentiary review and ruling, as well as the subsequent contempt proceedings. We cannot conclude that this slight delay, or imposition on the trial court's resources, under these circumstances had any impact upon the trial itself or its outcome, and thus we find no interference with the administration of justice. "Accordingly, we hereby reverse the order entered by the Disciplinary Board on January 9, 2002, to the extent it determined Tipler had committed, under these facts, a serious crime."

The cases cited by the Bar is support of its position bear no resemblance whatsoever to the facts as they occurred in Alabama. The factual conclusion in the Referee's Report are simply not there in the record. Should not the original jurisdiction's view of appropriate discipline bear some weight?

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 SC03-149 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 this case) should be reduced further by Florida, since it had been reduced in California by stipulation (11 months for the sex case, 1 month for the contempt case). 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 in the first case. Issues of material fact remained for trial. These issues could have been, and should have been, thrashed out by the referee, at trial.

Respondent was never served with papers and had no proper notice of the summary judgment hearing. He was therefore clearly denied 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:

Olivia P. Klein, Esq.
The Florida Bar
651 East Jefferson Street
Tallahassee, FL 32399

_____
James Harvey Tipler

Certificate of Compliance

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

_____

James Harvey Tipler