IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,	Case No. SC06-1775
Complainant,	TFB File Nos. 2004-01,318(1B), 2005-00,311(1B)
v.	2005-00,457(1B), 2005-00,481(1B) 2005-01,037(1B), 2006-00,301(1B)
JAMES HARVEY TIPLER,	2006-00,429(1B), 2006-00,591(1B)
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", i.e., "Rule 3-4.6" or as "Rules."

References to the "Report of Referee" dated January 9, 2008, shall be designated as "ROR", i.e., "ROR at p. 12."

References to Transcript for the Motion Hearing on September 19, 2007, shall be designated as "MT", i.e., "MT-7."

References to Transcript for the Final Penalty Hearing on September 26, 2007, Volume I, shall be designated as "TI" , Volume 2 shall be designated as T2, i.e., "TI-4, T2-8."

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

STATEMENT OF THE CASE

The Florida Bar hereby files its statement of the case for purposes of clarity and accuracy. On September 5, 2006, The Florida Bar served its complaint on Respondent pursuant to Rule 3-7.11(b) and (c) via certified return receipt to Respondent's record Bar address. See The Florida Bar's Motion for Default, Exhibit A attached. The Florida Bar's complaint was returned to The Florida Bar on October 3, 2006, and the envelope was marked "unclaimed" by the U.S. Post Office. On October 4, 2006, the Florida Bar sent a letter to Respondent attaching a *second copy* of the Florida Bar's complaint and mailed it via regular U.S. Mail to Respondent's record Bar address of P.O. Box 10, Mary Esther, Florida 32569. The cover letter and the attached complaint were never returned to The Florida Bar by the U.S. Post Office. See The Florida Bar's Motion for Default, Exhibit B attached.

On November 21, 2006, Respondent filed a Motion to Disqualify Judge Henty McClellan in this disciplinary case. The referee, Judge Don T. Sirmons, who was appointed to this disciplinary case on September 19, 2006, denied Respondent's Motion to Disqualify as "legally insufficient" on November 29, 2006.

When Respondent failed to file any responsive pleadings, on February 8, 2007, The Florida Bar filed a Notice of Application for Default and mailed it certified return receipt mail pursuant to Rule 3-7.11(b) and (c) to Respondent at his record Bar

address. The Notice of Application for Default was returned to The Florida Bar on March 6, 2007, and the envelope marked "unclaimed" by the U.S. Post Office. See The Florida Bar's Motion for Default, Exhibit C attached. On March 7, 2007, The Florida Bar filed its Motion for Default again serving it on Respondent pursuant to Rule 3-7.11(b) and (c) which was returned "unclaimed" by the post office. On March 12, 2007, the referee entered a Default against Respondent in this disciplinary case.

On March 21, 2007, Respondent filed a Motion for Relief from Default. On April 19, 2007, The Florida Bar sent an Amended Notice of Hearing to Respondent via certified return receipt mail and regular mail. Both notices were received by Respondent. The final penalty hearing scheduled for April 18, 2007, was rescheduled for June 29, 2007, before the Referee. On April 30, 2007, Respondent filed a Corrected Motion to Disqualify the Referee, Judge Don T. Sirmons, who denied the Corrected Motion on May 7, 2007.

In preparation for the final penalty hearing, The Florida Bar sent Requests for Admissions, a Request for Production of Documents, and Interrogatories to Respondent at his record Bar address. On May 15, 2007, Respondent filed a two-line Motion for Rehearing Motion to Disqualify which was denied by the Referee on May 29, 2007, stating that Respondent was not entitled to a rehearing on the motion to

disqualify. On May 18, 2007, The Florida Bar filed an Objection to Respondent's Motion for Relief from Default, setting forth the legal and factual basis for its objections. On June 5, 2007, Respondent filed a third Motion to Disqualify the Referee which was granted on June 18, 2007.

A second referee, Judge Kevin Grover, was appointed to continue the disciplinary proceedings on August 6, 2007, and the final penalty hearing was rescheduled for the third time on September 26, 2007. On September 4, 2007, Respondent filed a Notice of Hearing on Motion to Overturn Default and scheduled it for September 19, 2007. On September 17, 2007, Respondent filed a Notice of Hearing on Motion for Relief from Default, to Continue Final Penalty Hearing and Motion for Mediation. He also filed a Motion for Continuance of Final Penalty Hearing and Motion for Mediation to which The Florida Bar responded in writing on September 24, 2007. After a hearing at which Respondent and Bar counsel appeared on September 19, 2007, the referee allowed Respondent several addition days to provide support for his claims, and then issued an Order Denying Respondent's Motion for Relief from Default on September 24, 2007. After a final penalty hearing on September 26, 2007, the referee issued his final report of referee on January 9, 2008.

Respondent and his attorney filed a Notice of Appeal for review of the referee's report on January 22, 2008, and January 28, 2008, respectively. On March 5, 2008, when no initial brief had been timely filed with the Court, an order dated March 5, 2008, gave Respondent 15 additional days to file an Initial Brief or be subject to dismissal of his appeal. On March 18, 2008, Respondent filed a Motion for Enlargement of Time to submit his initial brief, and on the same day, Respondent's counsel moved to withdraw. The Florida Bar objected to Respondent's motion for enlargement of time to file his Initial Brief but it was granted by the Court on April 2, 2008, acknowledging that Respondent had filed an Initial Brief on March 24, 2008. In a separate Order, on the same day, the Court *sua sponte* struck Respondent's Initial Brief, directing that he file a brief in compliance with the appellate rules by April 22, 2008. Respondent filed a second Initial Brief on April 22, 2008, that was again struck *sua sponte* by the court for failure to comply with the appellate rules, and he was instructed to file a proper amended brief by May 15, 2008. Respondent filed an Amended Initial Brief with the court on or about May 15, 2008. The Florida Bar received an extension to file its Answer Brief until June 27, 2008, since it did not receive a copy of Respondent's Amended Initial Brief until May 30, 2008, when the Clerk's Office forwarded a copy to The Florida Bar.

STATEMENT OF THE FACTS

The Florida Bar hereby sets forth its statement of facts for the purpose of clarity. The first referee, Judge Don T. Sirmons, properly granted a Default on all the allegations and rule violations claimed in The Florida Bar's Complaint on March 12, 2007. The second referee, Judge Kevin Grover, denied Respondent's Motion to for Relief from Default on September 26, 2007. Therefore, all the factual allegations and rule violations in The Florida Bar's Complaint were deemed admitted. The sole issue remaining for hearing on September 26, 2007, before the referee, was the appropriate disciplinary sanction.

Set forth below is a brief synopsis of the factual allegations and rule violations in the final report of referee pertaining to the eight underlying disciplinary complaints:

Carol K. Stout – Respondent was hired by Ms. Stout in August 2002 to represent her on a first offense DUI, and quoted her a fee of $5,000 which she paid. Subsequently, Respondent collected $10,000 in costs from Ms. Stout to pay for expert fees, and $10,000 for a cash bond to have an expert examine an Intoxilizer machine. He assured her the deposit would be returned after the inspection was complete. When the court denied the motion to inspect the Intoxilizer machine, Respondent did not return the costs to Ms. Stout. Similarly, in documentation provided to The Florida Bar, Respondent could show that only $1,000 had been expended in expert fees, and

failed to refund the balance of the expert fee costs to Ms. Stout. Despite numerous requests from Ms. Stout's Tennessee lawyer to account for and deliver over the balance of the costs, Respondent refused to comply. Pursuant to The Florida Bar's auditor, no deposits were made into Respondent's trust account for this time period. ROR at pp. 3-8.

The referee found that Respondent violated the following Rules: 4-1.3 (Diligence), 4-1.4 (Communication), 4-1.5 (Legal Fees for Services), 4-1.16(d) (Protect Client's Interests), 4-8.4(b) (Engage in Criminal Activity), 4-8.4(g)(1) (Failure to respond to The Florida Bar), 5-1.1(b) (Application of Trust Funds for a Specific Purpose), 5-1.1(e) (Delivery and Accounting for Trust Funds). ROR at p. 27.

Scott E. Schutzman, Esq. - Respondent was hired by Robert Mudd and Charles Lawless in November 2002 to represent them in a copyright infringement suit. After paying Respondent $3,000, he negotiated a tentative settlement of the issues with the opposing parties who paid $20,000 to him to be held in escrow until the final settlement agreement was signed on or before March 14, 2003. Respondent continued to negotiate various offers between the parties but failed to keep his clients fully informed. Respondent failed to advise his clients of a counteroffer and after March 2003 abandoned his clients' legal case.

When Mr. Schutzman filed a federal lawsuit in California on behalf of Mudd and Lawless, the opposing party counterclaimed for fraud because Respondent had not returned the $20,000 escrow deposit as he was required to do under the escrow agreement. The Florida Bar's auditor could find no deposits into Respondent's trust account for these monies during this time period. ROR at pp. 8-14.

The referee found that Respondent violated the following Rules: 4-1.2(a) (Scope of Representation), 4-1.3 (Diligence), 4-1.15 (Safekeeping of Property), 4-1.16(d) (Protect Client's Interests), 4-8.4(b) (Engage in Criminal Activity), 4-8.4(c) (Misrepresentation, Fraud, Deceit), 4-8.4(g)(1) (Failure to respond to The Florida Bar), 4-8.4(g)(2) (Failure to respond to Grievance Committee), 5-1.1(b) (Application of Trust Funds for a Specific Purpose), 5-1.1(e) (Notice of Receipt of Trust Funds, Delivery, Accounting), 5-1.1(f) (Disputed Funds). ROR at p. 28.

Marion Schlachter - Respondent was hired by Ms. Schlachter for $4,500 in October 2004 to represent her in a dissolution case. Respondent neglected his client's case and refused to return the fees. ROR at pp. 14-15. The referee found that Respondent violated the following Rules: 4-1.3 (Diligence), 4-1.4 (Communication), 4-1.5 (Fees for Legal Services), 4-1.16(d) (Protect Client Interests), 4-8.4(d) (Conduct Prejudicial to the Administration of Justice), and 4-8.4(g)(2) (Failure to respond to the grievance committee). ROR at p. 28.

Dana Keeney – Respondent was hired in May 2004 and paid $5,000 to represent Mr. Keeney in a defamation action. Respondent failed to communicate with his client or to pursue the civil suit. The day after Mr. Keeney terminated Respondent's legal services in October 2004, the complaint was filed. After that date, Respondent abandoned his client's case, but did not withdraw as attorney of record until March 2006. The court dismissed Mr. Keeney's case for lack of prosecution and assessed fees and costs against him. ROR at pp. 15-18.

The referee found that Respondent violated the following Rules: 4-1.3 (Diligence), 4-1.4 (Communication), 4-1.5 (Fees for Legal Services), 4-1.16(d) (Protect Client Interests), 4-8.4(d) (Conduct Prejudicial to the Administration of Justice), and 4-8.4(g) (Failure to respond to The Florida Bar). ROR at p. 28.

Ron and Joyce Terry – Respondent was hired in March 2002 to represent the Terrys in two separate personal injury claims against Okaloosa County. Out of a $4,750 settlement, the Terrys received together about $1800 total in funds. Respondent alleged that he would use the remainder of the proceeds to pay their medical bills, but failed to give a signed fee contract or closing statement to the Terrys despite numerous requests from his clients. Subsequently, when the Terrys wanted to obtain a loan, they learned that the outstanding medical bills had not been paid by

Respondent. Mr. Terry was sued on one of the medical bills and a judgment for almost $2500 plus interest was entered against him. ROR at pp. 18-21.

The referee found that Respondent violated the following Rules: 4-1.3 (Diligence), 4-1.4 (Communication), 4-1.5(a), (Illegal, Prohibited, or Clearly Excessive Fees and Costs), 4-1.5(f)(1), 4-1.5(f)(2), 4-1.5(f)(4)(A), 4-1.5(f)(5) (Contingent Fees), 4-1.15 (Safekeeping of Property), 4-8.4(a) (Violate Bar Rules), 4-8.4(c) (Fraud, Deceit, Misrepresentation), 5-1.1(a) (Commingling of Funds), 5-1.1(b) (Application of Trust Funds for a Specific Purpose), and 5-1.1(e) (Notice of Receipt of Trust Funds; Delivery; Accounting). ROR at p. 29.

The Florida Bar – Respondent filed a voluntary bankruptcy petition in September 2003, verifying under penalty of perjury that the information contained in the petition was true and correct. After an adversary hearing in September 2005, the bankruptcy judge issued a 37-page opinion stating that Respondent had made "numerous false and conflicting statements under oath," and had "knowingly and fraudulently made a false oath or account in connection with his bankruptcy petition." ROR at pp. 21-23. The referee found that Respondent violated the following Rules: 3-4.3 (Misconduct and Minor Misconduct), 4-8.4(c) (Fraud, Deceit, Misrepresentation), 4-8.4(d) (Conduct Prejudicial to the Administration of Justice), and 4-8.4(g) (Failure to Respond to the Florida Bar). ROR at p. 29.

Bob Delaney – Respondent was hired on June 20, 2005, for $2,500 to represent Mr. Delaney in a law suit against his former employer. Later that same day, Mr. Delaney discovered there may be a conflict of interest with his former employer, and asked Respondent to delay any further action on his case. Despite numerous requests, Respondent failed to return the unearned fee and misrepresented to the grievance committee that the fee was for legal services for Mr. Delaney's wife. Respondent knew, or should have known, that he represented the former employer and it would be a conflict of interest to represent Mr. Delaney in his case. ROR at pp. 23-25.

The referee found that Respondent violated the following Rules: 3-4.3 (Misconduct and Minor Misconduct), 4-1.5 (Fees for Legal Services), 4-1.16(d) (Protect Client's Interests), 4-1.7 (Conflict of Interest-General Rule), and 4-8.4(g)(1) (Failure to respond to The Florida Bar). ROR at p. 29.

Sharon Santisteven – Respondent was hired in June 2005 for $5,000 by Ms. Santisteven to represent her in a real estate dispute. Respondent wrote two letters to opposing counsel and then took no further action on behalf of his client. In October 2005, when Ms. Santisteven was sued in the real estate matter, Respondent failed to return her messages. Unable to reach Respondent, Ms. Santisteven hired another attorney who charged her $910 and resolved the dispute in 9 days. ROR at pp. 25-27.

The referee found that Respondent violated the following Rules: 4-1.2(a) (Scope of Representation), 4-1.3 (Diligence), 4-1.4 (Communication), 4-1.5 (Fees for Legal Services), 4-1.16(d) (Protect Client's Interests), 4-8.4(b) (Engage in Criminal Activity), 4-8.4(d) (Conduct Prejudicial to the Administration of Justice), 4-8.4(g)(1) (Failure to respond to The Florida Bar), 5-1.1(a)(1) (Trust Account Required), 5-1.1(b) (Application of Trust Funds for a Specific Purpose), and 5-1.1(f) (Disputed Ownership of Funds). ROR at p. 29.

A full evidentiary hearing was held on September 26, 2008, at which The Florida Bar presented Respondent's former clients and an expert witness to testify on the issue of restitution. Respondent was able to cross examine the witnesses and present any rebuttal evidence. Although Respondent could have requested the referee to provide another day to present mitigation evidence, he chose not to do so. MT-78-79, T2-271.

The referee found the following aggravating factors: (a) prior disciplinary offenses, (b) dishonest and selfish motive, (c) pattern of misconduct, (d) multiple offenses, (h) vulnerability of the victims, (i) substantial experience in the practice of law, and (j) indifference to making restitution. Although Respondent was present at the final penalty hearing, he put on no mitigation case and the referee found no mitigating factors. ROR at pp. 37-39.

The referee recommended disbarment for five years, taking into account the Florida Standards for Imposing Lawyer Sanctions and the relevant case law. as set forth in his report. ROR at pp. 30-31. Further, based on lay and expert testimony at the final penalty hearing, the Referee recommended restitution as follows:

(A) $19,000 in costs to Carol K. Stout
(B) $20,000 to Kids Songs are You, LLC, Mr. Mudd's company
(C) $4,000 to Marion Schlachter
(D) $4,250 to Dana Keeney
(E) $2,933.44 at 7% to Stokes & Clinton , P.A.; $470 to Okaloosa County EMS; $482 to Dr. Marcene Kreifels; $45 to Johnson Chiropractic Clinic
(F) $2,250 to Bob Delaney
(G) $4,250 to Sharon Santisteven

ROR at pp. 31-34.

The referee also recommended the payment of taxable costs in the amount of $8,576.97 to The Florida Bar. ROR at pp. 34, 39.

SUMMARY OF ARGUMENT

Respondent's claims that his due process rights were violated in the disciplinary proceedings are without merit. The Florida Bar served its complaint on Respondent pursuant to Rule 3-7.11(b) and (c) which provides sufficient notice and service of process. After The Florida Bar received back the complaint marked "unclaimed," it sent a *second copy* of the complaint to Respondent via regular U.S. Mail. The Florida Bar is not required to provide repetitive copies of pleadings to Respondent under the Rules.

Respondent was properly served under Rule 3-7.11(b) and (c). Respondent's miscellaneous claims of prejudice are not credible based on the record in this case. Finally, the Referee's recommendation of disbarment, restitution and taxable costs should be adopted in full by the court because it is based on the Florida Standards for Imposing Lawyer Sanctions and the prevailing case law.

ARGUMENT

ISSUE I

THERE WAS NO VIOLATION OF DUE PROCESS IN THE DISCIPLINARY PROCEEDINGS

Respondent's claim that his due process rights were violated in the disciplinary proceedings is without merit. 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); see also The Florida Bar v. Carricarte, 733 So.2d 975, 979 (Fla. 1999). In this case, Respondent was properly noticed on all hearings, had the opportunity to appear at a motion hearing on his motion for relief from default, and to appear at a final penalty hearing to explain the circumstances of the offenses and to present mitigation evidence.

Respondent states that, since Bar counsel did not provide him with a third copy of The Florida Bar's Complaint, he did not timely receive the complaint and therefore did not receive a fair hearing. First, Respondent's argument of lack of due process is contradicted by the record. The Florida Bar filed its complaint on September 5, 2006, properly serving it by certified return receipt on Respondent. See Rule 3-7.11(b). The

U.S. Post Office attempted to serve the complaint on Respondent at his record Bar address on three separate occasions. See The Florida Bar's Motion for Default, Exhibit A attached. The Florida Bar's complaint was returned to The Florida Bar on October 3, 2006, marked "unclaimed." The next day, Bar counsel sent a letter to Respondent enclosing a second copy of the complaint via regular U. S. Mail in order to insure that Respondent would be noticed on the complaint, and would not be able to claim any due process violation. See The Florida Bar's Motion for Default, Exhibit B attached. The second copy of the complaint and the cover letter were never returned to The Florida Bar.

Second, Respondent knew, or should have known, that a complaint had been filed in September 2006. Respondent admitted that he received the notice appointing a referee and he filed a motion to disqualify the referee in November 2006 (albeit with the name of the wrong referee). See Respondent's Motion for Relief from Default at paragraph 8. Respondent did not take any action at that time to obtain a copy of the Bar's complaint. Since he was served twice by The Florida Bar and via two different types of mail, Respondent's attempts to feign ignorance of the Bar's complaint are not credible.

Respondent states in paragraph 5 of his Motion for Relief from Default that if he had received the Notice of Application for Default via regular mail, "he

undoubtedly would have received it." In the same pleading, however, he denies that he was ever served with a copy of the Bar's complaint via regular mail. See Respondent's Motion for Relief at paragraph 5.

Rule 3-7.11(b) and (c) do not require The Florida Bar to comply with Respondent's requests for repetitive copies of the pleadings. Once The Florida Bar sent its Complaint via certified return receipt mail on September 5, 2006, it had complied with due process notice under the Bar rules. The Florida Bar could have filed a motion for default in October 2006, and asked the referee to enter a default at that time. By the time Respondent requested the third copy of the complaint from The Florida Bar on March 20, 2007, the Referee had granted the Motion for Default, and entered the Default on all the allegations in the Bar's complaint. See Respondent's Motion for Relief from Default, emails attached.

After the Default was issued, the sole issue remaining was the appropriate disciplinary sanction unless Respondent could convince the referee to vacate the default. Respondent filed a Motion for Relief from Default on March 21, 2007, but did not set it for hearing until September 19, 2007. Once the referee denied Respondent's Motion for Relief from Default, the disciplinary hearing went forward on September 26, 2007, to determine the appropriate discipline based on all the admitted allegations in The Florida Bar's Complaint. Respondent also provided no

support for his allegations that he could not obtain a copy of the complaint from the Clerk's Office. See Motion for Relief from Default, last page of emails attached.

Due to his own dilatory actions, Respondent cannot now be heard to complain that he was deprived of due process. Respondent delayed the proceedings at every juncture by filing repetitive motions to disqualify the referee, motion for rehearing and reconsideration, "eleventh hour" motion for continuance and for mediation, asking for additional time to file materials and then not complying with deadlines set by the referee. MT-53-56, 82-83.

Respondent had ample notice and an opportunity to be heard. The Florida Bar set the final penalty hearing three times between April and September 2007. Further, The Florida Bar filed its Objection to Respondent's Motion for Relief from Judgment on May 18, 2007. Respondent had time to set a hearing on his motion from March through September 2007, but failed to do so until the beginning of September 2007, after The Florida Bar set the final penalty hearing before the referee for September 26, 2007.

Respondent argues in his Amended Initial Brief that because the first Referee did not set his Motion for Relief from Default, and the second Referee asked a question based on the referee's manual that he was deprived of due process. See Amended Initial Brief at p. 3. These arguments are without merit. There is no support

in the record for Respondent's conclusory opinions. MT-54. It is not the responsibility of the referee to set down motion hearing dates. Further, an inquiry as to an item in the referee's manual does not rise to the level of a due process violation. MT-60-62.

Respondent's due process claim is also contradicted by the applicable case law. The Supreme Court of Florida has approved the entry of default against an attorney in a disciplinary proceeding. See The Florida Bar v. Porter, 684 So.2d 810 (Fla. 1996). In Porter, which is very similar to the facts in this case, The Florida Bar sent its Complaint via certified mail, and after three attempts to deliver the complaint, the post office returned it to the Bar. The Bar's counsel had advised Porter that there was a complaint coming in the mail before it was returned to the Bar. Porter also ignored the notice of default sent by the Bar via certified mail to his record Bar address.

The Court concluded that Porter had been properly noticed and upheld the referee's decision to enter the default pursuant to Fla. R. Civ. P. 1.500(b). The Court reasoned: "We cannot endorse Porter's knowing decision to ignore his mail." Porter, 684 So.2d 810, 813 (Fla. 1996). See also The Florida Bar v. Shoureas, 892 So.2d 1002 (Fla. 2004) (When the attorney failed to answer the Bar's complaint, the referee entered a default that the Court held was competent, substantial evidence to support his factual findings and recommendation of guilt. Id. at 1005). The Florida Bar v.

Nunes, 734 So.2d 393 (Fla. 1999) (When attorney failed to answer two Bar complaints, the referee granted the Bar's motions for default, and denied the attorney's motions to set aside default. Id. at 396).

Respondent claims that he has not been afforded due process because he was served with the Notice of Application for Default and Motion for Default via certified mail pursuant to R. Regulating Fla. Bar 3-7.11(b) and (c). Due process requires notice, and The Florida Bar's Rules provide for proper notice and service of pleadings via certified mail to an attorney's record Bar address. Rule 3-7.11(b) states that the mailing of papers or notices via certified mail to the attorney's record Bar address "shall be sufficient notice and service…."

In order to comply with The Florida Bar Rule to insure proper notice and service, the Notice of Application for Default and the Motion for Default were sent to Respondent at his record Bar address via certified return receipt mail. There is no requirement for The Florida Bar to email pleadings or mail them again to Respondent once he has been properly noticed and served at his record Bar address pursuant to Rule.

The referee also 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). In The Florida Bar v. Lipman, 497 So.2d 1165 (Fla. 1986), the Court held "It is within

the sound discretion of the referee, assigned by this Court to preside over a disciplinary proceeding such as this, to grant or deny a motion for a continuance. Such a ruling will not be disturbed by this Court absent a clear abuse of discretion." Id. at 1167-1168. See also Rules 3-7.6(4) and (5)(B).

The referee properly granted The Florida Bar's Motion for Default on March 12, 2007, for Respondent's failure to file a timely Answer or other responsive pleading to The Florida Bar's Complaint. The referee after listening to the parties' argument on September 19, 2007, properly denied Respondent's Motion for Relief from Default. The referee's granting and denying of these motions should not be disturbed because Respondent has shown no clear abuse of discretion.

The Florida Bar scheduled a final penalty hearing on September 26, 2007, at which Respondent was given due process, i.e., he was permitted to cross examine witnesses, explain the circumstances of the alleged offenses and to offer testimony in mitigation of any penalty to be imposed. See The Florida Bar v. Carricarte,733 So.2d 975, 979 (Fla. 1999). If an attorney is given the opportunity to be heard, and chooses not to respond, then it is not a violation of due process. See The Florida Bar v. Daniel, 626 So.2d 178, 183 (Fla. 1993).

ISSUE II

RESPONDENT WAS PROPERLY SERVED UNDER RULE 3-7.11(B) AND (C)

Every attorney in The Florida Bar is required to provide an official Bar mailing address and to promptly notify The Florida Bar of any changes to that mailing address. See Rule 1-3.3. As of October 27, 2005, Respondent's official Bar record address has been, and continues to be according to his Amended Initial Brief, P.O. Box 10, Mary Esther, Florida 32569. MT- 17. Since that date all certified and regular mail in all his disciplinary proceedings has been sent to that record Bar address. Numerous other documents mailed to Respondent form The Florida Bar have reached him both by regular and certified mail at that address in this disciplinary case.

Rule 3-7.11 states in pertinent part:

> **(b) Process**. Every member of the Florida Bar is charged with notifying The Florida Bar of a change of mailing address or military status. Mailing of registered or certified papers or notices prescribed in these rules to the last mailing address of an attorney as shown by the official records in the office of the executive director of The Florida Bar shall be sufficient notice and service unless this court shall direct otherwise.
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> . . . .
>
> **(c) Notice in Lieu of Process**. Every member of The Florida Bar is within the jurisdiction of the Supreme Court of Florida and its agencies under these rules, and service of process is not required to obtain jurisdiction over respondents in disciplinary proceedings; but due process requires the giving of reasonable notice and such shall be effective by the service of the complaint upon the

> respondent by mailing a copy thereof by registered or certified mail return receipt requested to the last-known address of the respondent according to the records of the Florida Bar or such later address as may be known to the person effecting service.

The rules clearly state that service of process and compliance with due process is complete *upon mailing*, not upon receipt of the papers or notices sent to a respondent by The Florida Bar. See MT-16. In this case, The Florida Bar complied with the above rules once it had mailed its complaint via certified return receipt to Respondent at his record Bar address on September 5, 2006. No other action was required by The Florida Bar to meet the due process requirements of the Rule.

Respondent stated in his summary of the argument that the Referee who entered the Default was prejudiced against him, that the Default was entered in April 2007, and the Motion to Disqualify was entered before (sic) he entered the Default. See Amended Initial Brief at p. 4. The record clearly contradicts Respondent's assertions. At the time the Default was entered by the Referee on March 12, 2007, there was no pending motion to disqualify the Referee. Respondent's Motion to Disqualify on November 21, 2006, was denied on November 29, 2006 by the Referee. Respondent did not file a "Corrected Motion to Disqualify the Referee" until April 30, 2007, and it was denied on May 7, 2007. The third Motion to Disqualify the Referee was filed on

June 5, 2007, and was granted based on the Fla. R. Jud. Admin. 2.330 for the reasons stated by the Referee in the Order dated June 18, 2007.

These disciplinary proceedings commenced in September 2004, when the first complaint by Carol Stout was filed with The Florida Bar. Respondent was provided with all materials filed at staff and grievance committee level, as well as notices of probable cause stating what rule violations were found by the grievance committee. Respondent knew, or should have known, that based on these notices that a complaint would be forthcoming. He was aware of the issues at the staff and grievance committee level, as well as the rule violations, and had responded to them in some instances so he cannot now plea ignorance of the issues or rule violations in these disciplinary cases.

ISSUE III

RESPONDENT'S MISCELLANEOUS CLAIMS OF PREJUDICE ARE NOT CREDIBLE

Respondent has set forth several miscellaneous claims of prejudice relating to the granting of a default against him by the referee. Respondent presents several distinctions without a difference between the Porter case and the instant case. The Motion to Disqualify the referee by Respondent in this case does not change the facts or the holding by the Court in Porter. Respondent's statement that "While Motions with regard to disqualification were pending, the Motion for Default was granted." See Amended Initial Brief at p.14. The record does not support this statement. The Motion to Disqualify the referee was filed and denied in November 2006 by the referee. The next motion was not filed until April 30, 2007, long after the Default was granted on March 12, 2007.

There is no support in the record for Respondent's statement that the referee's office refused to schedule hearings unless Bar counsel agreed that a hearing was needed except for unsupported assertions in affidavits submitted by Respondent. The issues in the Motion for Default were procedural and did not rely on the facts in The Florida Bar's Complaint. The fact that in Porter the attorney did not file a Motion for Relief from Default is irrelevant.

The referee acknowledged at the motion hearing that he was aware of the liberal policy in this state of setting aside defaults, but declined to do so because the issue in this case was clear under Rules 3-7.11(b) and (c). MT-44. The referee also allowed Respondent to put his letter to the referee on the record, but plainly did not give it much weight or credibility in his final report.

ISSUE IV

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

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).

The Florida Bar contends that the referee's recommended discipline of a disbarment has a reasonable basis under the Florida Standards for Imposing Lawyer Sanctions and the relevant case law and should be upheld. 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 a discipline of disbarment, the referee considered the Florida Standards for Imposing Lawyer Sanctions, namely, 4.11 (Failure to Preserve Client's Property), 4.41 (Lack of Diligence), 4.61 (Lack of Candor), 5.11(f) (Failure to Maintain Personal Integrity), 6.11 (False Statements, Fraud, and Misrepresentation), 7.1 (Violation of Other Duties Owed as a Professional), and 8.1 (Prior disciplinary Orders). The referee determined that Respondent's repetitive misconduct by misappropriation of his clients' trust funds, by taking substantial legal fees and not performing the legal services for which he was retained, and by misrepresentation to the federal bankruptcy court, warranted disbarment. He also considered the numerous aggravating factors presented by The Florida Bar at the final penalty hearing and the fact that Respondent did not present any competent substantial evidence of mitigation.

The case law also supports the referee's recommendation of disbarment for attorneys who demonstrate a pattern of misconduct and a history of discipline involving multiple rule violations. See The Florida Bar v. Cox, 718 So.2d 788 (Fla. 1998) (attorney's misconduct with prior discipline for 27 rule violations in four cases including dishonesty and misrepresentation warranted disbarment. Id. at 794). In The Florida Bar v. Springer, 873 So.2d 317 (Fla. 2004), where the attorney had committed multiple offenses involving lack of competence, diligence and communication with

clients, as well as demonstrated a pattern of misconduct, the Court, in a special concurrence by Justice Lewis, held that "[a]s the uncontested facts demonstrate, Springer violated a multitude of rules governing the legal profession numerous times over many years, and the ill effects of his misconduct seriously injured not one, but multiple clients." Id. at 324.

In Porter, supra at 684 So.2d 810 (Fla. 1996), the Court upheld a default entered against the attorney, and imposed disbarment for misuse of trust funds, the attorney's prior disciplinary record, and the absence of any mitigation. Id. at 813. The rule violations in this case are also similar to prior disciplinary offenses for which Respondent previously received an admonishment, a public reprimand and a 91-day suspension. ROR at pp. 35-36. See The Florida Bar v. Knowles, 572 So.2d 1373 (Fla. 1991) ("repeated instances of similar misconduct should be treated cumulatively so that a lawyer's disciplinary history can be considered as grounds for more serious punishment." Id. at 1375).

Based on the lay and expert testimony presented by The Florida Bar at the final penalty hearing, the referee also recommended restitution to be paid to seven former clients to reimburse them for costs and fees that had been misappropriated by Respondent. ROR at pp. 31-34. The restitution is to be paid within one year of the

final judgment in this case. Under Rule 3-7.6(q), the referee also awarded taxable costs to The Florida Bar.

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 the Default, and denied Respondent's Motion for Relief from Default, that there was no due process violation, and that the Referee's recommended discipline of disbarment and restitution has a reasonable basis in the Florida Lawyer Standards Imposing Sanctions and the relevant case law.

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. SC06-1775 has been mailed by regular U.S. mail to James Harvey Tipler, Respondent, whose record Bar address is Post Office Box 10, Mary Esther, Florida 32569, on this 27th day of June, 2008.

_____

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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 Florida Bar's Answer 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 Symantec AntiVirus.

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Olivia Paiva Klein, Bar Counsel