IN THE SUPREME COURT OF FLORIDA

Case Number: SC06-1775

THE FLORIDA BAR,

Complainant,

versus

JAMES H. TIPLER,

Respondent

AMENDED INITIAL BRIEF OF RESPONDENT

JAMES HARVEY TIPLER
P.O. BOX 10
MARY ESTHER, FL 32569

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STATEMENT OF THE CASE AND OF THE FACTS

The complaint was filed by the Bar in this case against Respondent, but it was never served upon him. Upon receipt of the Order appointing Honorable Don Sirmons as the Referee, Respondent promptly filed a Motion to Disqualify the Referee, who had demonstrated prejudice against Respondent.

After the Motion to Disqualify was filed, the Bar filed a Motion for Default, which was promptly granted by the Referee. Within ten (10) days thereafter, on March 21, 2007, Respondent filed a Motion for Relief from Default, supported by Affidavits, proving that he had never received the Complaint. The Referee refused to allow any hearing requested by Respondent. He then disqualified himself, based upon Affidavits of prejudice.

Thereafter, a new Referee was appointed, who denied the Motion for Relief from Default. After being ordered to do so, the Bar finally provided a copy of the Complaint to Respondent, less than one (1) week prior to the Final Penalty Hearing. Since all facts as to guilt or innocence had been decided against Respondent without a hearing, only facts in mitigation or aggravation were heard, and disbarment was recommended.

Timely notice of appeal followed.

SUMMARY OF ARGUMENT

Due process requires, at a minimum, the right to know the charges brought against you. Respondent did not know what charges were leveled against him until one (1) week prior to the Final Penalty hearing, in violation of due process.

The Referee who entered default on liability was prejudiced against Respondent. Respondent filed a Motion to Disqualify the Referee in the fall of 2006. The Default was entered in April of 2007. The Referee finally disqualified himself in the summer of 2007, after he entered a Default, even though the Motion to Disqualify was filed before he entered the Default.

Defaults are highly disfavored in Florida, and this one clearly should have been overturned.

ARGUMENT

I. DUE PROCESS

The license to practice law has characteristics of property which cannot be withdrawn without the constitutional application of traditional concepts of due process. The Florida Bar v. Fussell, 179 So. 2d 852 (1965). The repeated refrain of due process, so basic to the American system of law and government, runs throughout the cases, statutes, and rules governing bar proceedings. "Due process requires the giving of reasonable notice…" Rule 3-7.11(c), Rules Regulating the Florida Bar.

It is axiomatic that a minimum level of due process requires that an accused be told what law or rule he is accused of violating. After he is told the nature of his misconduct, he should be allowed to confront witnesses against him, call other witnesses to rebut his accusers, cross-examine his accusers, and all in a meaningful way. Receiving the complaint less than one (1) week before the Final Penalty Hearing, after default has been entered so that Respondent is not allowed to counter the charges, does not rise to that minimum level required by the Constitution.

At the hearing on the Motion for Relief from Default, held on September 19, 2007, the Referee made this query:

The Court: "Are you entitled to cross-examination on these matters?" (RT, hearing 9-19-07, p. 60, l 15-16).

This indicates the clear lack of understanding of the Referee as to the requirements of due process, as applied to a Bar proceeding.

Due process means basic fairness. This proceeding was unfair.

II. SERVICE

Rule 3-7.11(c) of the Rules Regulating the Florida Bar states as follows:

> **(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 the service.
>
> When the respondent is represented by counsel in the matter, due process is satisfied by the service of the complaint upon the respondent's counsel by mailing a copy thereof by registered or certified mail return receipt requested to the last known address of the respondent's counsel according to the records of The Florida Bar or

such later address as may be known to the person effecting the service.

Emphasis supplied.

It is clear and uncontradicted that Respondent never received the Complaint by certified mail, return receipt requested. This fact is proven not only by the sworn affidavits of Respondent, and of his assistant, Shannon Deslonde, but also by the agreement of Bar counsel, Olivia Klein, and by the record evidence, including the "return receipt," unsigned by anyone, and returned to the Florida Bar due to Mr. Tipler's absence from the state.

The phrase "return receipt requested" was included in that portion of this Rule which mandated due process in giving notice to members of the Bar accused of misconduct. Is that phrase meaningless? Why include it unless it is required. Mail can be sent by certified mail, return receipt requested. You can instead get a "Certificate of Mailing," which provides evidence of mailing. You can also send mail "certified," without a return receipt. You may also send mail "registered," or require "signature confirmation," or by "restricted delivery." Any of these would work if all was required was mailing it, and not receipt of it to effect service, and comply with due process.

Section (b) of Rule 3-7.11 uses the phrase certified or registered mail but does not include "return receipt requested." Why include the phrase "return receipt

requested" unless it is mandated for due process. Certainly it was thought that it would provide proof that the individual for whom the Complaint was intended actually received it. In this way, true notice would be given. But what if the attorney involved maintained an office or a business in another state, and was required to be absent from Florida? Should he be penalized in this way?

Bar counsel argued at the hearing on September 19, 2007 as follows:

> The Court: "And I'm going to go back to Ms. Klein and I'm going to ask her to respond to that possible discrepancy between B and C. And when I refer to B --"
>
> Ms Klein: "Yes. Well, I understand the argument he's trying to make there. Well, first of all, that is the type of mail you have to use, registered certified, return receipt requested. That's what they call it at the post office. So that's why that terminology was used."
>
> (RT, 9-19-07, p. 24, l.3)

This argument is clearly specious. The various terminology options of the post office are included herein.

Ms. Klein attempted to skip over the argument that subsection (c) mandated "return receipt requested" because of the Porter case. This case, however, is clearly distinguishable from Porter because the Bar, after Mr. Tipler was unable to

physically claim the Complaint at the post office in time to prevent its return, refused to give Mr. Tipler a copy. That was not the case in Porter.

Knowing of the Porter decision, Bar counsel knew she had an argument which might prevent Respondent from getting a hearing on the merits, so she refused, in writing, to send Mr. Tipler a copy of the Complaint by sending it as an attachment to her e-mail.

After the Motion for Relief from Default was filed, a plethora of e-mails went back and forth between Respondent, his assistant, and Ms. Klein. Ms. Klein wanted a hearing on discipline; Respondent wanted a hearing on the Motion for Relief from Default. On March 19, 2007, seven (7) days after the Default was entered, Respondents' assistant stated as follows:

> "Since Mr. Tipler was never served with a copy of the Complaint, he cannot respond to it. Please e-mail a copy of the Complaint as well as a copy of the Motion of Default, which was also never served upon Mr. Tipler."

The assistant to Ms. Klein responded to that e-mail request with another e-mail about extending a deadline, but did not attach the Complaint nor the Motion for Default. In response, Ms. Deslonde sent another request for the Complaint along with agreement to the Bar's request to extend a deadline, as follows:

> "He has no objection to the extension. Will you please send to us the Complaint and the Motion for Default? If you refuse to send us copies of these pleadings, please let us know that and why."

These two (2) e-mail requests followed numerous phone call requests. As set forth in the affidavits filed in support of the Motion of Relief from Default, requests for copies of the Complaint were also made to the later disqualified Referee, whose assistant refused to retrieve a copy, and told Respondent he could only get it from Ms. Klein.

Ms. Klein finally replied in writing, in pertinent part, as follows:

> "On February 8, 2007, I filed a Notice of Application for Default pursuant to the Florida Rules of Civil Procedure and properly served Mr. Tipler via CRR mail. When he left that letter unclaimed AGAIN at his record Bar address, I filed a Motion for Default and properly served Mr. Tipler again via CRR mail at his record Bar address of P.O. Box 10 Mary Esther, FL. In the letter to the referee dated March 7, 2007, I enclosed a Default Order which was signed and returned to our office on March 12, 2007.

> Have Mr. Tipler review R. Regulating Fla. Bar 3-7.11(b) and (c) if he takes exception to any of the notices or pleadings served in this case. There is nothing in the Bar rules that require me to provide him with repetitive copies of notices and pleadings with which he has already been properly served."

The e-mail of Bar counsel is important for three (3) reasons. First, it is clear that Respondent did not sign for the Complaint. Second, Bar counsel also sent the "Notice of Application of Default" by Certified Mail, which Respondent did not receive. Rule 1500(b) of the Florida Rules of Civil Procedure requires service of the Notice if a party has appeared, but does not require certified mail, return receipt requested. Why did Bar counsel do this, since she knew Mr. Tipler was out of town, and could not retrieve the Notices? Third, it is clear that Bar counsel refused, in writing, to provide either a copy of the Complaint or a copy of the Notice of Default to Respondent.

It is clear from this Record that Bar counsel absolutely refused to provide a copy of the Complaint to Respondent until asked to do so by the new Referee, on September 19, 2007. Respondent's repeated written and oral requests for a copy of the charges against him went unanswered by Bar counsel for six (6) months.

This fact, the refusal to provide a copy upon request, distinguishes this case from Porter.

III. PREJUDICE/DEFAULT

This case is also distinguishable from Porter because here the Referee who granted the Default disqualified himself. After Honorable Don Sirmons was appointed Referee, Respondent filed a Motion to Disqualify. While Motions with regard to disqualification were pending, the Motion for Default was granted. Later, the Referee did in fact disqualify himself. Add to this the fact that the office of Judge Sirmons also refused to give Respondent a copy of the Complaint, and refused to allow Respondent to schedule any hearings unless Bar counsel agreed that a hearing was needed (See Affidavit of Shannon Deslonde), and the case for unfairness and lack of due process grows even stronger.

Rule 1.540(b) of the Florida Rules of Civil Procedure states that a Motion for Relief from Default be made withing ten (10) days after the Order was signed. This also distinguishes this case from Porter, where no such Motion was filed. Respondent filed the Motion for Relief from Default without the benefit of the Complaint, which Bar counsel refused, in writing, to simply scan and e-mail.

Abundant case law from this Court, and from all the District Courts of Appeal in Florida, states the policy of liberality in setting aside Defaults, so that cases are heard on their merits. See North Shore Hospital v. Barber, 143 So. 2d. 849 (1962). Why was this policy not followed here?

In conclusion, Respondent quotes the letter presented by him to the Referee, and placed in the Record, at the Final Penalty Hearing.

> "I have been accused of misconduct by the Florida Bar. I am not guilty of that misconduct, but I have been prevented by the Florida bar, through its representative, Olivia Klein, from presenting any defenses to the charges made.
>
> Olivia Klein repeatedly refused to provide me by e-mail a copy of the Complaint against me. My requests and her refusal were in writing.
>
> Olivia Klein apparently mailed me a copy of the complaint by certified mail, return request requested, to my post office box, when I was in California. The receipt was returned unclaimed.
>
> Olivia Klein states that she mailed me a copy of the complaint by regular mail. Sworn affidavits prove that the complaint was never received by regular mail.
>
> Olivia Klein moved for a Default, but did not provide me with a copy of the Motion. I first learned of this Motion after the Default was granted.
>
> A timely Motion to Overturn the Default was filed by me, but the judicial assistant to the Referee refused to provide me with a

hearing date on the Motion, because Olivia Klein told her no hearing was needed. Also, the previous Referee's assistant refused to provide me with a copy of the complaint.

After the Referee disqualified himself, the Motion to Overturn Default was heard, by you, the new Referee, and you denied the Motion. Only when you required Olivia Klein to provide me with a copy of the complaint did she do so, only one (1) week prior to the Final Penalty Hearing.

I categorically deny any misconduct. Based upon review of the complaint, I am not guilty, and I have valid defenses.

However, due to Olivia Klein's refusal to let me know what the charges were against me, I cannot present any defenses proving my innocence. Rather, I am reduced to having to argue only what discipline should be imposed. How can I argue the amount of discipline when I am not guilty? My position is that no discipline is appropriate.

Due Process requires, at a minimum, the right to know the charges against you, and the right to defend against those charges. Clearly, I have been denied due process. This is unconstitutional. This is unjust.

I have been told by you that I do not have the right to confront witnesses, nor the right of cross examination. If I had been given enough time to prepare, or to conduct discovery, I would need to prepare and to ask questions which go to the heart of the issue-my innocence-not to the imposed discipline.

I will stand on my innocence."

CONCLUSION

This case differs markedly from Porter because here Bar Counsel intentionally hid the charges from Respondent, repeatedly denying his request to even see a copy of the complaint, which he was unable to retrieve due to his temporary absence from the state. Minimum Due Process requires knowing the charges against you so that you can defend yourself. This case should be remanded so that a hearing on the merits can be held.

_____

James Harvey Tipler

Certificate of Service

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing Initial Brief of Respondent has been furnished to the following by regular U.S. Mail, postage prepaid, this 14th day of May, 2008:

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 Initial Brief of Respondent has been furnished to the following by regular U.S. Mail, postage prepaid, this 14th day of May, 2008:

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