IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant, **Case No.: SC06-1775**

v.
JAMES HARVEY TIPLER,

Respondent.

REPLY BRIEF

JAMES HARVEY TIPLER
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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

TABLE OF AUTHORITIES CONT.

Statutes

Rules **Page**

PRELIMINARY STATEMENT

Respondent will adopt and use the same references for the parties and record as indicated and used by The Florida Bar in its Answer Brief for the purposes of ease and consistency.

ARGUMENT

I. RESPONDENT'S PROCEDURAL DUE PROCESS RIGHTS WERE VIOLATED IN THE DISCIPLINARY PROCEEDINGS.

Respondent's contention before this Court is that he was denied his constitutionally protected procedural due process rights when he received inadequate notice of the complaint and charges against him and was afforded no opportunity "to explain the circumstances of an alleged offense and to offer testimony in mitigation regarding any possible sanction." *The Florida Bar v. Baker*, 810 So. 2d 876, 879 (Fla. 2002). While certainly this issue touches upon proper service under Rule 3-7.11(b) and (c), the fact that proper service was effected under the Rule does not in and of itself answer the question of whether the Respondent has been denied his constitutional due process rights.

The Due Process Clause of the Fourteenth Amendment "require [s] that deprivation of life, liberty or property by adjudication be preceded by notice and [an] opportunity for [a] hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S. Ct. 652, 94 L. Ed. 865 (1950). The fundamental right to have a meaningful opportunity to be heard "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Id*. at 314, 70 S.Ct. 652. The United States Supreme Court has explained that in order to

satisfy the requirements of due process, the notice given must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id*. Determining whether a particular method of notice is "reasonably calculated" to provide adequate notice requires "due regard for the practicalities and peculiarities of the case." *Id*. at 314-15.

With regards to Bar disciplinary proceedings, the United States Supreme Court and the Florida Supreme Court have held "that because Bar disciplinary proceedings are quasi-criminal in nature, attorneys must know the charges they face before proceedings commence." *The Florida Bar v. Vernell*, 721 So.2d 705, 707 (Fla. 1998) (citing *In re Ruffalo*, 390 U.S. 544, 88 S. Ct. 1222, 20 L. Ed. 2d 117 (1968), modified on other grounds, 392 U.S. 919, 88 S. Ct. 2257, 20 L. Ed. 2d 1380 (1968)). As explained by the Florida Supreme Court in *Vernell*:

> The absence of fair notice as to the reach of the procedure deprives the attorney of due process. *See [In re Ruffalo] id.* (where attorney in disbarment proceeding had no notice that his employment of certain persons would be considered as an offense until after testimony was taken in disciplinary hearing, attorney was deprived of due process). *See also Florida Bar v. Price*, 478 So.2d 812 (Fla.1985) (rejecting "for due process reasons" referee's finding that attorney committed perjury at trial and during disciplinary hearing where perjury was not charged). Such matters may only be prosecuted after notice and due process concerns are met such as by a new proceeding. We recede from any language in prior opinions that may support a contrary result. *See, e.g., Florida Bar v. Stillman*, 401 So.2d 1306 (Fla.1981).

721 So. 2d at 707.

The cases cited by The Florida Bar in support of the contention that the Respondent has received adequate procedural due process herein are readily distinguishable. In none of the cases cited in the Answer Brief did the Respondent raise the issue of a violation of his or her due process rights. *See The Florida Bar v. Porter*, 684 So. 2d 810, 813 (Fla. 1996) (holding in response to Porter's argument that he had not been properly served with the Bar complaint that service was proper under Rule 3-7.11 and the court would not endorse "knowing decision to ignore his mail"); *The Florida Bar v. Shoureas*, 892 So. 2d 1002, 1005 (Fla. 2004) (raising no argument or issue regarding the default or procedural due process); *The Florida Bar v. Nunes*, 734 So. 2d 393, 397 (Fla. 1999) (holding that the Bar's complaint was deemed admitted by the attorney's default where the attorney did not challenge the default but attempted to ignore the default and argue the merits).

Moreover, The Florida Bar's assertion that the Respondent can not be heard to complain that he was denied due process because of his dilatory actions has no actual application within the due process analysis herein nor any basis under the facts of this case. Under the instant facts, as soon as the Respondent had any actual notice of the service of the Complaint and the default, the Respondent timely filed

a motion for relief from the default on March 21, 2007. *See* MT-54, lines 9-10. The Respondent then attempted to get a hearing on the motion for relief before the previous Referee, Judge Sirmons, who refused to give him any time to hear the motion. *See* MT-6 & 54. The fact that Judge Sirmons was eventually disqualified on June 18, 2007 undermines any claim by The Florida Bar that the Respondent's motions to disqualify were dilatory. Thus, not only were the Respondent's motions to disqualify valid, the fact that the Judge was eventually disqualified supports the Respondent's assertion that he was unable to get a hearing date with the Judge or obtain a copy of the complaint from the Judge.

The most significant fact in the case at bar is that the Respondent did not actually obtain a copy of the complaint until the newly appointed Referee instructed The Florida Bar's counsel to give him a copy during the hearing on September 19, 2007, which occurred seven days prior the final disciplinary hearing. *See* MT-63. It is undisputed that the Respondent attempted numerous times to obtain a copy of the complaint following his receipt of the Default. *See* MT-22-23, 28 44-45. Thus, the claim that the "eleventh hour" motion for a continuance and for mediation was also dilatory and negates the Respondent's due process claim is to no avail where the Respondent did not even know what the charges were against him at the time of the request, seven days before the

disciplinary hearing, and where The Florida Bar's counsel and the previous Referee had refused to provide him a copy of the complaint.

Like in a traditional default case, due process *at a minimum* requires adequate notice and an opportunity to present evidence regarding the mitigation portion of the disciplinary proceedings. *See, e.g., Bowman v. Kingsland Development, Inc.*, 432 So.2d 660, 663 (Fla. 5th DCA 1983) (holding that "[a] defaulting party has a due process entitlement to notice and opportunity to be heard as to the presentation and evaluation of evidence necessary to a judicial determination of the amount of unliquidated damages."). Without knowing the charges against him and which client's case the Bar complaint involved the Respondent had no ability to properly prepare a case for mitigation. Despite the fact that the Respondent did not have adequate notice of the charges against him, the Respondent was still able to show that at least some of the basis of The Florida Bar Complaint was unfounded and incorrect, which should have presented at least some issue with regards to mitigation. *See* TI-72-73; TI-138-140; T2-274-275. However, since the facts as stated in the Complaint were deemed admitted by the default, those incorrect facts remained part of the recommendation for discipline. *See* T2-274-275.

Moreover, there has been no evidence that the failure of the Respondent to actually receive the complaint or the Motion for Default was due to the Respondent's intentional conduct or refusal to pick-up his certified mail or even that the Respondent had any knowledge that a certified letter had been mailed to him as both the complaint and Motion for Default were returned by the Post Office. *See, e.g., The Florida Bar v. Kaufman*, 684 So. 2d 806, 809-810 (Fla. 1996) (holding that the default judgment entered by the referee in the Bar disciplinary hearing did not violate the attorney's due process rights where the attorney deliberately failed to comply with discovery orders). In fact, the only evidence is that the Respondent was out of the state at the time and had no knowledge of the service of the complaint or Motion for Default. *See* MT-66. While *Porter* addresses adequate service of a complaint rather than the constitutional mandates of due process, it is significant to note that this Court in *Porter* found that his conduct in "knowingly ignoring" his mail was unacceptable to excuse the fact that he did not receive the complaint. *See* 684 So. 2d at 813. There was no such finding here nor was there any evidentiary hearing to determine whether or not the Respondent was aware that the complaint had been served. In *Porter*, counsel for The Florida Bar had personally informed Porter that the complaint was being mailed. *See id.* While the Respondent knew that a complaint

had been filed with the court, the Respondent understood and believed that he would be served with the complaint. *See* MT-41. The Respondent did not have any knowledge that The Florida Bar had mailed the complaint. Once the Respondent actually learned that the complaint had been served and a default entered, he timely filed a motion to set aside that default.

The Respondent has tried at every turn to receive the process he is due under the United States Constitution. As the Florida Supreme Court held in *Department of Law Enforcement v. Real Property* 588 So.2d 957, 960 (Fla. 1991):

> Procedural due process serves as a vehicle to ensure fair treatment through the proper administration of justice where substantive rights are at issue. Procedural due process under the Florida Constitution
>
> > guarantees to every citizen the right to have that course of legal procedure which has been established in our judicial system for the protection and enforcement of private rights. It contemplates that the defendant shall be given fair notice[ ] and afforded a real opportunity to be heard and defend [ ] in an orderly procedure, before judgment is rendered against him.

(quoting *State ex rel. Gore v. Chillingworth*, 126 Fla. 645, 657-58, 171 So. 649, 654 (1936) (citations omitted)); *accord, e.g., Fuentes v. Shevin*, 407 U.S. 67, 80, 92 S. Ct. 1983, 1994, 32 L. Ed. 2d 556 (1972) (procedural due process under the fourteenth amendment of the United States Constitution guarantees notice and an opportunity to be heard at a meaningful time and in a meaningful manner).

Moreover, "[t]here is no single, inflexible test by which courts determine whether the requirements of procedural due process have been met." *Department of Law Enforcement*, 588 So. 2d at 960. The Respondent attempted numerous times to receive a copy of the complaint, to obtain a hearing on the motion for relief from default, to disqualify the conflicted Referee and to determine the extent of the charges that were being brought against him. These pursuits have for the most part been thwarted by the conduct of The Florida Bar or the initial Referee. How can this Court find that the Respondent has been "ensure[d] fair treatment through the proper administration of justice" in this matter where even his acknowledged attempts to obtain that justice have gone unheard and unmet. *Id*.

Under the Florida Rule of Civil Procedure 1.500 "when a party against whom affirmative relief is sought has failed to plead or otherwise defend as provided by these rules or any applicable statute or any order of court, the court may enter a default against such party; provided that if such party has filed or served any paper in the action, that party shall be served with notice of the application for default." *See also Maranto v. Dearborn*, 687 So.2d 940, 941 (Fla. 3d DCA 1997) (holding that "[a]ny default entered in violation of the due process notice requirement of Rule 1.500 [Fla. R. Civ. P.] must be set aside without any regard as to whether a meritorious defense is presented or excusable neglect is

established."). Here the Respondent had filed the Motion to Disqualify the Referee prior to the default; therefore he was entitled to be served with notice of the application for default. While The Florida Bar correctly asserts that it "served" the application for default upon the Respondent, The Florida Bar had actual knowledge that the Respondent did not receive that application for default as it was sent back from the postal service unclaimed. While service is effective upon mailing, where the Respondent has not actually received the notice the dictates of due process should at a minimum require an evidentiary hearing to determine whether the Respondent knowingly ignored the mail or whether there was excusable neglect for the failure to pick-up the certified mail. *Compare Beneficial Florida, Inc. v. Washington*, 965 So.2d 1211, 1213 (Fla. 5th DCA 2007) (holding in the context of jurisdictional issues under the general rules of civil procedure that a evidentiary hearing must be held where the defendant who has been subject to a default asserts that he did not receive service of process).

Generally speaking, in order for a trial court to grant a motion to set aside a default final judgment, the moving party must show: "(1) the failure to file a responsive pleading was the result of excusable neglect; (2) the moving party has a meritorious defense; and (3) the moving party acted with due diligence in seeking relief from the default." *Hepburn v. All American General Const. Corp.*, 954

So.2d 1250, 1251-1252 (Fla. 4th DCA 2007) (citing *Cinkat Transp., Inc. v. Maryland Cas. Co.*, 596 So.2d 746 (Fla. 3d DCA 1992)). The Respondent acknowledges that Florida's general Rules of Civil Procedure do not apply herein with regards to proper service of process because "[e]very member of The Florida Bar is within the jurisdiction of the Supreme Court of Florida" Rule 3-7.11 (c). Thus the concerns regarding the court's proper jurisdiction that underlie the basis of the cases addressing the setting aside of default and improper service of process are inapplicable herein. This fact, however, makes all the more crucial the necessity that the courts carefully consider the person's due process rights in such circumstances. Disciplinary Bar proceedings are by definition "quasi criminal" and concern the deprivation of a significant property interest, the protections of due process which ensure proper notice of the charges and an opportunity to be heard should be afforded substantial weight herein, especially where a default is entered and the Respondent does not have the same protections as typical defendants with regards to obtaining proper jurisdiction over the Respondent.

While the case of *J.B. v. Florida Dept. of Children and Family Services*, 768 So.2d 1060 (Fla. 2000) does not address Bar disciplinary proceedings, its discussion of the caution that must be used in entering a default against a party in violation of that party's due process rights is enlightening and persuasive in the

present context. In *J.B.*, a father's parental rights were terminated when the court entered a default under section 39.462(1)(d), Florida Statutes (1995) because the father did not attend the advisory hearing or call to explain why he could not attend. 768 So. 2d 1062. In holding that providing a twenty-four hours' notice to the Father of the advisory hearing and failing to appoint counsel for the Father in the adjudicatory hearing was a violation of his due process rights, this Court recognized that where crucial interests are at stake the mere fact that the state had followed the statutorily mandated procedure does not necessarily in all cases mean that the person has adequately been afforded his procedural due process rights. *See id.* at 1068. As aptly explained by this Court therein:

> While there is no laundry list of specific procedures that must be followed to protect due process guarantees, an analysis of the United States Supreme Court's prior decisions identifies certain procedures that are typically required before an individual can be deprived of a property or liberty interest. In all situations, the Court has required fair procedures and an unbiased decisionmaker. Additionally, the Court has also required notice of the government's action and an opportunity to respond before termination of the interest.

Id. at 1064. The facts of this case rise to that same level as discussed in *J.B.*

Finally, the Respondent asks this Court to consider the well reasoned opinion of *In the Matter of Williams*, 464 A.2d 115 (D.C. 1983). *Williams* facts are virtually identical to the case at bar as the respondent, Williams, was properly served in compliance with District of Columbia rules by registered certified mail to

his address listed with the Bar and as a result of Williams failure to receive the complaint a default was entered against Williams. 464 A.2d at 118. Based upon the allegations of the complaint, which were deemed admitted under the default, the hearing committee concluded that disbarment was the appropriate. *See id.* at 119. Williams contended that he had been denied the protections of due process. *See id.* at 118 -119. While the District of Columbia court found that Williams had been properly served, it overturned the finding of disbarment based upon the violation of the respondent's due process rights. *See id.* In so holding, the court explained: "As we have previously noted disciplinary proceedings are quasi-criminal in nature. Persons charged with crime in our courts cannot be convicted on default judgments unsupported by proof." *Id*. at 119.

The Respondent here has been afforded none of the protections of due process. He was unable to receive actual notice of the charges filed against him until a week prior to the hearing. He was afforded no opportunity to challenge or explain the allegations against him. He was unble to adequately proepsre any case in mitigation of the sanction. As such, the finding of the disbarment by the Referee and the denial by the Referee to set aside the default judgment were an abuse of discretion. The Respondent is owed his constitutional protections under the Fourteenth Amendment of the United States Constitution to due process of law.

II. THE REFEREE'S RECOMMENDED DISCIPLINE SHOULD NOT BE IMPOSED BY THIS COURT.

The Florida Supreme Court's scope of review when considering a referee's recommended discipline "is broader than that afforded to the referee's findings of fact because, ultimately, it is [this Court's] responsibility to order the appropriate sanction." *Shoureas*, 892 So.2d at 1005. In deciding the appropriate sanction for the attorney's conduct, the Court should consider the three purposes of lawyer discipline:

> 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 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.

Id.

In the case at bar, the sanction of disbarment is not fair to the Respondent, especially in light of the fact that the findings of fact in support of the disbarment are a result of a default. Moreover, within the disciplinary hearing, the Respondent was able to demonstrate in cross-examination several instances where those facts as alleged by The Florida Bar and believed by the complaining clients were simply

incorrect. *See* TI-72-73; TI-138-140; T2-274-275. It is not unusual in the practice of law that clients are unaware of certain aspects of the investigation, legal research, or other steps that the lawyer has taken in their case, as these are part of the tactical decisions made by the attorney that clients entrust to their lawyer and do not involve or require clients' input or decision. *See* Rule 4-1.2 Comment ("In questions of means, the lawyer should assume responsibility for technical and legal tactical issues but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected"); *see also The Florida Bar v. Rose*, 823 So.2d 727, 730 (Fla. 2002) (stating that "the courts permit a certain amount of deference to an attorney's trial strategy or tactical decisions"). Based upon the fact that the Respondent demonstrated in the hearing that the complaining client was unaware of certain work he had performed or in one case that the Complaint had actually been filed a couple months before the termination and was then re-filed due to a problem with the filing fee adequately demonstrates that the disbarment of the Respondent is not fair and is more severe than necessary to encourage reformation and rehabilitation.

Disbarment is an extremely harsh penalty and plays a "limited role is the disciplinary process." *Shoureas*, 892 So.2d at 1006.

> [D]isbarment is the extreme measure of discipline and should be resorted to only in cases where the lawyer demonstrates an attitude or

> course of conduct wholly inconsistent with approved professional standards. It must be clear that he is one who should never be at the bar.... A removal from the bar should therefore never be decreed where any punishment less severe, such as reprimand, temporary suspension or fine would accomplish the end desired.

The Florida Bar v. Thomson, 271 So.2d 758, 761 (Fla.1972) (quoting *State ex rel. Florida Bar v. Murrell*, 74 So.2d 221, 223 (Fla.1954)); *see also The Florida Bar v. Simring*, 612 So.2d 561, 571 (Fla.1993) ("[D]isbarment is the extreme measure of discipline and should be resorted to only in cases where the lawyer demonstrates an attitude or course of conduct wholly inconsistent with approved professional standards.") (quoting *The Florida Bar v. Pahules*, 233 So.2d 130, 131 (Fla.1970)). As succinctly stated by this Court disbarment "occupies the same rung of the ladder in these proceedings as the death penalty in criminal proceedings." *The Florida Bar v. Summers*, 728 So.2d 739, 742 (Fla.1999) (quoting *The Florida Bar v. Hirsch*, 342 So.2d 970, 971 (Fla.1977)).

As the Respondent herein did not know the charges against him until a week before the disciplinary hearing and was afforded no opportunity to challenge or explain the circumstances of those alleged offenses, the penalty of disbarment is unfair and unwarranted in this matter.

Respectfully submitted,

_____
JAMES HARVEY TIPLER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to: Olivia Paiva Klien, Esquire, 651 E. Jefferson St, Tallahassee, Florida 32399-2300, by regular United States mail this 6TH day of August 2008.

_____
JAMES HARVEY TIPLER

CERTIFICATE OF TYPE SIZE AND STYLE

This brief is typed using Times New Roman 14-point font, which complies with the requirements of Fla. R. App. P. 9.100(l) and that the brief has been filed by email in accord with the Court's order of October 1, 2004.

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JAMES HARVEY TIPLER