

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

JAMES HARVEY TIPLER,

Respondent.

Case Nos. SC03-2043, SC04-402
TFB File Nos. 2002-00,311(1B);
2003-00,875(1B); & 2004-00,024(1B)

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 "R. Regulating Fla. Bar" with the appropriate number, i.e., "R. Regulating Fla. Bar 3-4.6" or as "Rules."

References to the Alabama Rules of Professional Conduct shall be designated as Ala. R. Prof. Conduct, with the appropriate number, i.e., "Ala. R. Prof. Conduct 1.15(a)" or as "Alabama Rules."

References to the "Report of Referee" dated December 10, 2004, shall be designated as "ROR" followed by the appropriate number, i.e., "ROR at p. 12."

References to the Alabama Supreme Court Opinion dated March 28, 2003, attached as Exhibit B to the Florida Bar's Complaint, shall be designated as "Alabama Opinion" with the appropriate page number, i.e., "Alabama Opinion at p. 4."

References to the Report and Order of the Alabama Disciplinary Board dated March 22, 2001, attached as Exhibit C to the Florida Bar's Complaint, shall be designated as "Alabama Report and Order" with the appropriate page number, i.e., "Alabama Report and Order at p. 2."

References to Transcript for the Summary Judgment Hearing on June 28, 2004, shall be designated as " T." with the appropriate number, i.e., " T-4."

Respondent's Initial Brief will be referred to as "Initial Brief" with the appropriate page number, i.e., "Initial Brief at p. 4."

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

STATEMENT OF THE CASE

The Florida Bar hereby submits its own statement of the case for the purpose of clarity. On November 13, 2003, The Florida Bar filed its reciprocal discipline Complaint and Request for Admissions pursuant to R. Regulating Fla. Bar 3-4.6 in Case No. SC03-2043. The Complaint was based on the Alabama case of James Harvey Tipler v. Alabama State Bar, Case No. 1011865, B.D.A. 01-02, ASB 99-267(A) in which the Alabama Supreme Court suspended Respondent from the practice of law in Alabama for 91 days effective June 18, 2003. Attached to The Florida Bar's Complaint was (1) an Order dated June 18, 2003, imposing a 91-day suspension on Respondent in Alabama, (2) a 30-page Opinion of the Alabama Supreme Court, and (3) a 7-page Report and Order of the Alabama Disciplinary Board. See Exhibits A, B and C attached to The Florida Bar's Complaint.

When Respondent failed to file a timely Answer to the Complaint or Request for Admissions, The Florida Bar submitted a Motion for Summary Judgment to the referee dated March 26, 2004, under Fla. R. Civ. P. 1.370(a) and R. Regulating Fla. Bar 3-4.6. Respondent's counsel was properly noticed on April 5, 2004, that a motion hearing was scheduled for Monday, June 28, 2004, before the referee.

On Thursday, June 24, 2004, Respondent's counsel faxed to Bar Counsel's office an Affidavit in Opposition to Summary Judgment to The Florida Bar, a Motion for Leave to File Response to Admissions, a Response to Request for Admissions, and an Answer

to the Complaint. Having been absent from the office on business, Bar Counsel picked up a copy of the facsimile at the office of Respondent's counsel in Panama City, Florida, on Friday, June 25, 2004, in order to have a copy of the pleadings for the Monday, June 28, 2004, motion hearing. T-8. Both counsel appeared at the motion hearing and presented oral arguments to the referee on the Florida Bar's Motion for Summary Judgment.

After the motion hearing on June 28, 2004, the referee signed an Order Granting Motion for Summary Judgment dated July 13, 2004, that is the focus of this petition for review. A Notice of Hearing on Penalty Phase was issued on July 21, 2004, scheduling a hearing on the appropriate discipline for September 23, 2004. Due to Hurricane Ivan, the hearing was rescheduled for October 25, 2004. The parties engaged in discovery issuing Interrogatories and Requests for Production of Documents pertaining to evidence that might be presented at the penalty hearing. By agreement of the parties, the final penalty hearing was rescheduled for December 2, 2004. On the scheduled day of the penalty hearing, the parties entered into a Joint Stipulation as to Discipline, whereby Respondent agreed to accept a 91-day suspension, and to pay all taxable costs to The Florida Bar.

At the same time, two other disciplinary cases were pending before the referee, SC04-402, TFB File Nos. 2003-00,875(1B) and 2004-00,024(1B), consisting of one rule violation each, i.e., R. Regulating Fla. Bar 4-8.4(g)-failure to respond to The Florida Bar. In these cases, The Florida Bar filed a Complaint and Request for Admissions on March

9, 2004, to which Respondent filed no response. The Florida Bar filed a Motion for Summary Judgment and set these two cases for hearing on the same date as the case above, June 28, 2004. Again, Respondent filed no response to the motion. At the motion hearing, without objection by Respondent's counsel who conceded the issue of guilt, the referee granted The Florida Bar's Motion for Summary for Summary based on Fla. R. Civ. P. 1.370(a). T-33. In the Joint Stipulation as to Discipline, the parties agreed to consolidate Case No. SC03-2043 and Case No. SC04-402, and to include both cases in the one disciplinary sanction of the 91-day suspension. The Final Report of Referee was signed by the referee on December 10, 2004, including all three cases in the 91-day suspension.

On February 14, 2005, Respondent filed a *pro se* Petition for Review challenging the referee's finding of guilt based on The Florida Bar's Motion for Summary Judgment solely in Case No. SC03-2043, TFB File No. 2002-00,311(1B). The Florida Bar filed a Motion to Dismiss the Petition which was denied by the Court. Upon review of the Court docket, the Florida Bar discovered that Respondent filed a Response to the Motion to Dismiss dated March 14, 2005, that was not served upon Bar counsel until a copy was provided by the Supreme Court Clerk's Office on August 23, 2005. Respondent also filed a Motion to Toll Time that was granted by the Court permitting Respondent to file his Initial Brief by July 5, 2005.

Pursuant to R. Regulating Fla. Bar 3-7.7(c)(2), Respondent submitted a Notice of Filing to the Court attaching the transcript of the summary judgment proceedings before the referee on July 28, 2004. In the same Notice of Filing, however, Respondent stated that he was filing a “Notice of Filing by Rhonda S. Clyatt, Esq., including the four volume Transcript of Disciplinary Proceedings, Alabama State Bar, Filed [sic] with the Clerk of the Circuit Court, Washington County, Florida” without any reference to a date or case number. It is important to note that Respondent did not submit any transcript of Alabama Disciplinary Proceedings to the referee at any time prior to the referee having submitted his final Report of Referee to the Court, and therefore it is not part of the Record on Review under R Regulating Fla. Bar 3-7.7(c)(2). Further, the four volumes of the Transcript of the Alabama Disciplinary Proceedings are the record on appeal of James Harvey Tipler v. Alabama State Bar, B.D.A. No. 02-04(Rule 22(a)01-02). This Transcript of the Alabama Disciplinary Proceedings appears to refer to a different Alabama disciplinary case than the one underlying The Florida Bar’s Complaint. (See The Florida Bar’s Objection to Respondent’s Notice of Filing.)

Respondent filed his Initial Brief on July 5, 2005. Upon Motion and Order, the Court granted The Florida Bar an extension to file its Answer Brief until September 6, 2005.

STATEMENT OF THE FACTS

The Florida Bar's reciprocal discipline Complaint is based on the factual allegations set forth in the 30-page Opinion of the Alabama Supreme Court and the 7-page Report and Order by a six-member Disciplinary Board of the Alabama State Bar. See Exhibits B and C attached to the Complaint. The facts contained in both Alabama decisions clearly show that Respondent engaged in acts of misconduct that violated the ethical rules governing attorneys both in Alabama and in Florida. The final adjudication in the Alabama disciplinary proceeding, finding that Respondent was guilty of misconduct justifying a 91-day suspension in Alabama, "shall be considered as conclusive proof of such misconduct" in a Florida disciplinary proceeding. R. Regulating Fla. Bar 3-4.6.

The Alabama Opinion recited the following pertinent facts. On December 10, 1993, Charles Bentley, a client of Francis "Sonny" James ("James"), a principal in the law firm of James & James, in Andalusia, Alabama ("James firm"), entered into a contract with the James firm to represent him in a medical malpractice/wrongful death action. Alabama Opinion at p. 3. On December 13, 1993, the James law firm referred the case to Frank Tipler of the Andalusia law firm, Tipler & Tipler, who was Respondent's father. Alabama Opinion at p. 3. Mr. Bentley knew and did not object to the referral by James to the Tipler law firm. Alabama Opinion at p. 14-15. The referral letter from James to Frank Tipler stated that the Tipler law firm would be entitled to 60% of any legal fees but would be obligated to pay all litigation costs. Alabama Opinion at p. 3. On April 13,

1994, Mr. Bentley signed a separate retainer agreement prepared by the Tipler law firm that established a 50% attorney contingency fee in the event of any recovery. Alabama Opinion at p. 4. Respondent filed a complaint on behalf of Mr. Bentley and designated James in the complaint as being "of counsel." Alabama Opinion at p. 4.

After successfully litigating the Bentley case, Respondent obtained a total judgment of \$2,438,574.06. Alabama Opinion at p. 4. Before Respondent received any of these recovery proceeds, the federal and state taxing authorities appropriated \$659,261.20 of that judgment to satisfy tax liens on Respondent's property. Alabama Opinion at p. 5. Respondent deposited the remaining \$1,779,312.36 into his trust account on September 22, 1999. Alabama Opinion at p. 5. Between October 7 and 13, 1999, Respondent disbursed funds totaling \$1,194,380.29 to Mr. Bentley and his son who shared in the lawsuit proceeds. Alabama Opinion at p. 6.

Between September 22, 1999 and October 19, 1999, Respondent misappropriated the remaining trust funds to pay \$50,000 to his law firm's operating account, \$279,731.08 to Destin Bank to satisfy a line of credit, and \$200,000 to a Montgomery, Alabama, law firm to settle a lawsuit against him by AmSouth Bank. Alabama Opinion at p. 5-6. As of October 19, 1999, Respondent had a trust account balance of \$15,995.74. Alabama Opinion at p. 6. There was never any objection to the referral fee agreement between James and Respondent until after Respondent had appropriated most of the recovery proceeds for his own personal use. Alabama Opinion at p. 6. Upon inquiry by James

about the tax liens in September 1999, Respondent had assured him that the tax liens would not have any affect on the referral fee payment to his law firm because he would hold the proceeds in his trust account. Alabama Opinion at p. 10-11. Respondent did not advise James until October 7, 1999, that due to an alleged ethical conflict, he would not be able to deliver over the referral fee which he had promised to pay to James. Alabama Opinion at p. 6, 16.

The Alabama Opinion held that Respondent was aware of the dispute before he disbursed the trust funds to his own use. Alabama Opinion at p. 16, 18. For failure to hold the recovery proceeds in his Alabama trust account pending the resolution of the dispute over the referral fee payment, Respondent was found guilty of violating Ala. R. Prof. Conduct 1-15(c). Alabama Opinion at p. 30.

Based on the misconduct found by the Alabama Supreme Court, The Florida Bar filed a reciprocal discipline Complaint pursuant to R. Regulating Fla. Bar 3-4.6, together with a Request for Admissions, and moved for summary judgment. The referee properly granted The Florida Bar's Motion for Summary Judgment based on the allegations in its Complaint and based on the acts of misconduct in Alabama, and found Respondent guilty of violating R. Regulating Fla. Bar 5-1.1(b) , 5-1.1(e) , and 5-1.1(f) .

Specifically, Respondent was charged in the present case with violation of R. Regulating Fla. Bar 5-1.1(f) because there is no dispute that it is similar to Ala. R. Prof. Conduct 1.15(c) that was violated. The Alabama Opinion also found that Respondent

represented to Mr. James of the James law firm that he would pay the agreed referral fee within a few weeks after receiving the recovery proceeds, but Respondent failed to deliver to James the trust funds to which he was entitled under the December 1993 agreement, in violation of R. Regulating Fla. Bar 5-1.1(e). Alabama Opinion at p. 16. Respondent violated R. Regulating Fla. Bar 5-1.1(b) because he failed to hold the recovery proceeds for James in his trust account for the specific purpose of paying the referral fee to James, but instead paid them out to satisfy his own personal debts. Alabama Opinion at p. 6-7. The referee found that, based on the acts of misconduct as set forth in the Alabama Opinion, Respondent violated R. Regulating Fla. Bar 5-1.1(b), 5-1.1(e), and 5-1.1(f). ROR at p. 10.

SUMMARY OF ARGUMENT

The sole issue raised on appeal by Respondent is whether the referee properly granted summary judgment to The Florida Bar in Case No.SC03-2043. The Florida Bar contends that the referee properly found Respondent guilty of violating R. Regulating Fla. Bar 5-1.1(b), 5-1.1(e), and 5-1.1(f) on the factual allegations in The Florida Bar's reciprocal discipline. No issue of discipline has been raised because, after the referee granted summary judgment to The Florida Bar on the issue of guilt, Respondent entered into a Joint Stipulation as to discipline on the day of the penalty hearing and agreed that a 91-day suspension was an appropriate discipline to be imposed in all three cases that were consolidated by the referee. Respondent also agreed to pay all taxable costs to The Florida Bar.

Respondent failed to meet his burden of proof at the summary judgment hearing to show how the Alabama proceedings were so deficient that it would be unjust to accept Alabama's judgment as conclusive proof of guilt. Respondent was accorded full due process in the Alabama disciplinary proceeding where he was represented by counsel and many of the same issues as he raised in his sworn affidavit were adjudicated by the Alabama Disciplinary Board, the Alabama Board of Disciplinary Appeals, and the Alabama Supreme Court. Respondent failed to properly prepare the record for review by the referee at the summary judgment hearing that was held on the factual allegations in The Florida Bar's complaint. After considering all the parties' submissions, and the oral

argument of counsel, the referee found Respondent guilty as charged on all the factual allegations in The Florida Bar's Complaint.

This disciplinary appeal is limited to the "Record on Review" as defined in R. Regulating Fla. Bar 3-7.7(c)(2). Respondent should not now be permitted to supplement the record on appeal with arguments based on materials that were never reviewed by the referee before he issued his final report. The referee's findings of guilt on R. Regulating Fla. Bar 5-1.1(b) and 5-1.1(e) should be upheld because they are supported by the Alabama acts of misconduct that are conclusive proof of guilt in the Florida disciplinary proceeding. The Alabama final adjudication precludes any further question as to guilt under R. Regulating Fla. Bar 3-4.6. Based on these same acts of misconduct, the referee can reasonably find Respondent guilty of additional rule violations that were not found in Alabama. There is nothing in R. Regulating Fla. Bar 3-4.6 that requires Florida to charge Respondent with guilt solely on the one rule he was found guilty of in Alabama.

The pursuit of a disciplinary action by The Florida Bar is independent of any other legal or equitable actions that the complainant may be entitled to take. Whether the James law firm was entitled to file a civil action against Respondent based on a "property interest" is irrelevant as to whether Respondent has violated the ethical rules governing attorneys in Florida.

ARGUMENT

ISSUE I

THE REFEREE PROPERLY GRANTED SUMMARY JUDGMENT BECAUSE THE ALABAMA ADJUDICATION OF GUILT IS CONCLUSIVE PROOF OF MISCONDUCT IN THE FLORIDA DISCIPLINARY PROCEEDING.

The referee properly granted summary judgment to The Florida Bar on the issue of guilt based on R. Regulating Fla. Bar 3-4.6. At the time of the summary judgment hearing, the referee considered the submissions of both parties that were a matter of record, the oral argument of the parties' counsel, and Respondent's Affidavit in Opposition to Summary Judgment. After full consideration of the record before him, the referee found Respondent guilty as charged on R. Regulating Fla. Bar 5-1.1(b), 5-1.1(e) and 5-1.1(f).

R. Regulating Fla. Bar 3-4.6 states:

A final adjudication in a disciplinary proceeding by a court or other authorized disciplinary agency of another jurisdiction, state or federal, that an attorney licensed to practice in that jurisdiction is guilty of misconduct justifying disciplinary action shall be considered as conclusive proof of such misconduct in a disciplinary proceeding under this rule.

The Florida Supreme Court interpreted this rule in The Florida Bar v. Wilkes, 179 So. 2d 193 (Fla. 1965) [construing identical language in the predecessor Rule 11.02(6), Integration Rules of The Florida Bar] holding that "the introduction in evidence of a properly authenticated judgment of discipline entered by a competent agency of a sister

state shall operate as conclusive proof of guilt of the acts of misconduct adjudicated in that judgment...” Id. at 197. This holding in Wilkes has become a well-settled principle of Florida law in other reciprocal discipline cases under R. Regulating Fla. Bar 3-4.6. The Florida Bar v. Friedman, 646 So.2d 188, 190 (Fla. 1994); The Florida Bar v. Mogil, 763 So.2d 303, 306 (Fla. 2000), The Florida Bar v. Kandekore, 766 So.2d 1004, 1007 (Fla. 2000).

The Florida Bar’s Complaint contained a final adjudication in a 30-page opinion of the Alabama Supreme Court attached as Exhibit B to the Complaint. The Alabama Supreme Court opinion fully delineated the procedural and factual basis for its conclusion that Respondent was guilty of misconduct justifying a 91-day suspension in Alabama. The 7-page Report and Order of the Alabama Disciplinary Board, attached as Exhibit C to The Florida Bar’s Complaint, contained the factual findings of guilt by the six-member panel at the trial level. These two Alabama documents meet the requirements of R. Regulating Fla. Bar 3-4.6 showing conclusive proof of guilt of the acts of misconduct adjudicated in Alabama.

After The Florida Bar submitted its Complaint with the final adjudication of the Alabama Supreme Court to the referee, the burden of proof shifted to Respondent to show at the summary judgment hearing that Alabama’s disciplinary proceeding:

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. See Wilkes, at 198.

Respondent, however, failed to meet his burden of proof under the criteria set forth above. In the Friedman case, this Court noted that:

Friedman was given ample opportunity both before and during his disciplinary proceedings to demonstrate any inadequacies in the New York forum. For instance, he could have made the New York transcript available to the reviewing referee, but failed to do so. See Friedman, at 190.

Similarly, in this case, Respondent had over seven months to properly prepare the record before the summary judgment hearing on the issue of guilt, and another six months before the final penalty hearing was scheduled, yet failed to submit to the referee any evidence to show how the Alabama disciplinary proceedings were deficient under the Wilkes standard. Respondent never submitted any transcripts of the Alabama disciplinary proceedings before the referee filed his final report. Further, Respondent had over seven months from the filing of The Florida Bar's complaint until the summary judgment hearing to submit responsive pleadings to The Florida Bar's Complaint and Request for Admissions, but failed to do so until two business days before the final summary judgment hearing. In addition, Respondent failed to file any responsive pleading to The Florida Bar's Motion for Summary Judgment filed on March 16, 2004, but again waited until the eleventh hour, two business days before the disciplinary hearing to file an affidavit in opposition to the summary judgment motion with no supporting evidence.

Respondent is now attempting to supplement the record on appeal with transcripts that were never reviewed by the referee at any time during the disciplinary proceedings.

Respondent failed to meet his burden at the summary judgment hearing to show that there were any genuine issues of material fact in dispute. In Mogil, in the context of a summary judgment motion, the Court reasoned that once the Florida Bar tenders a final adjudication of a foreign jurisdiction as conclusive proof of guilt:

the opposing party must come forward with counterevidence sufficient to reveal a genuine issue. It is not enough for the opposing party merely to assert that an issue does exist. [citations omitted] Mogil, at 307.

The Court concluded that a letter with unsworn assertions, and copies of documents submitted by the parties in the New York disciplinary case, were not “competent counter-evidence,” but rather “amount merely to more assertions and legal arguments.” See Mogil, supra, at 307-308.

Respondent did present an affidavit in opposition to the motion for summary judgment that the referee reviewed at hearing, but it contained vague claims of lack of due process and lack of impartiality of the Alabama judicial process with no other supporting evidence. Respondent’s affidavit was replete with bare assertions, many of which were adjudicated by the Alabama court, and unsupported opinions.

In the Alabama disciplinary proceedings, the record clearly contradicts Respondent’s claims of lack of due process. Respondent had a full opportunity to be

heard in Alabama at trial where he was represented by counsel, and in two subsequent appeals where he raised many of the same issues that he raised in his affidavit in the Florida proceeding. The fact that the Alabama trial panel denied his motion for a continuance to bring a witness, Dana Matthews, who was admitted in Florida, but not in Alabama, to testify did not make the Alabama proceedings deficient in due process.

The issue of Mr. Matthews' opinion as to the ethical propriety of the referral fee was fully considered at all levels in the Alabama disciplinary proceedings. The trial court noted that, although testifying to what Mr. Matthews purportedly told him, Respondent failed to present any written opinion or evidentiary basis for Mr. Matthews' opinion. Further, the trial court noted that Respondent failed to seek an ethical opinion from the Alabama State Bar, did not consult an Alabama lawyer, and did not interplead the disputed funds into an appropriate court. See Report and Order at p. 3. Respondent also failed to preserve Mr. Matthews' testimony via deposition or other sworn statement.

In the Florida disciplinary proceeding, Respondent failed to provide any evidentiary support for his claims of lack of due process in his affidavit submitted to the referee. See Friedman, supra, at 190. Respondent had ample time, over seven months before the summary judgment hearing date, to obtain the evidence to show that there was a genuine issue of material fact in dispute that was not resolved by the Alabama proceeding. Respondent failed to depose Mr. Matthews, who is a Florida lawyer, issue a subpoena for

him to testify at the motion hearing, or, *de minimis*, provide an affidavit from Mr. Matthews to support Respondent's bare assertions in his own affidavit.

Respondent had the burden of proof and should have been prepared to present any evidence at the summary judgment hearing to show how the Alabama proceedings were unjust and prejudicial, but he failed to do so. See Mogil, at 308 citing to Friedman at 190 ("Friedman was given ample opportunity before and during the disciplinary proceeding to demonstrate any inadequacies in the New York forum...but failed to do so.") Respondent knew, or should have known, that the granting of The Florida Bar's summary judgment motion would foreclose any further debate on the issue of guilt. Respondent is not entitled to go back now after the issuance of the final report of referee and correct the record that he failed to adequately and timely prepare for the referee in the first instance.

In his affidavit, Respondent raises a vague issue of a choice of laws stating the misconduct occurred in Alabama and not in Florida. Respondent claims that the misconduct in Alabama pertained to Respondent's Alabama trust account and therefore The Florida Bar has no grounds to pursue the reciprocal discipline complaint. The referee also considered similar arguments raised by Respondent's counsel at the summary judgment hearing.

First, there is no choice of laws language in any section of R. Regulating Fla. Bar 5-1.1 found as rule violations by the referee. Second, the fact that the acts of misconduct related to Respondent's Alabama trust account, and not a Florida trust account, does not

preclude the referee from finding him guilty of violating The Florida Bar's ethical rules based on the acts of misconduct found in Alabama. See The Florida Bar v. Weiss, 586 So. 2d 1051(Fla. 1991) (In a reciprocal discipline case under R. Regulating Fla. Bar 3-4.6, the Florida Supreme Court imposed a six-month suspension on attorney, who was admitted in New Jersey and Florida, for violation of Florida ethical rules resulting from shortages in a New Jersey trust account.)

ISSUE II

THE REFEREE'S FINDINGS OF RULE VIOLATIONS ARE SUPPORTED BY THE EVIDENCE IN THE RECORD

The Alabama decisions attached as Exhibits B and C to the Florida Bar's Complaint clearly delineated at length the facts considered in the Alabama proceedings. There is no dispute that Ala. R. Prof. Conduct 1.15(c) is similar to the R. Regulating Fla. Bar 5-1.1(f). Respondent, however, challenges the referee's finding him guilty of violating R. Regulating Fla. Bar 5-1.1(b), and R. Regulating Fla. Bar 5-1.1(e) in the Florida proceeding. There is ample evidence in the record to support the referee's finding of these two additional rule violations in the Florida disciplinary case.

In Wilkes, supra, the Court emphasized that although the final adjudication of a sister state may operate as conclusive proof of guilt, it is essential to examine the acts of misconduct by the accused attorney as reflected in the record in order for Florida to "...determine for itself the fitness of the accused attorney as affected by the acts of misconduct involved." See Wilkes, at 197. Further, the Court concluded that the "... judgment of discipline entered by a competent agency of a sister state shall operate as conclusive proof of guilt of the acts of misconduct adjudicated in that judgment..." Id.

An examination of Respondent's acts of misconduct described in the Alabama Supreme Court decision supports the referee's finding that Respondent violated R. Regulating Fla. Bar 5-1.1(b) and R. Regulating Fla. Bar 5-1.1(e). R. Regulating Fla. Bar

5-1.1(b) states that “Moneyentrusted to an attorney for a specific purpose, is held in trust and must be applied only to that purpose.” The recovery proceeds in the Alabama case were money deposited into Respondent’s Alabama trust account for a particular purpose. It was to pay the attorney’s fees, costs, and to pay the remaining monies to the client. Respondent knew that a portion of the attorney’s fee did not belong to him. It was money that he promised James he would to hold in his trust account and pay out to the James law firm within a few weeks of the receipt of the funds. Indeed, the Alabama trial panel stated that “Respondent actually acknowledged during the hearing that he was obligated to pay the James law firm \$487,000 as their portion of the fee.” See Alabama Report and Order at p.2. Respondent, however, failed to hold the trust funds for the specific purpose of paying James the portion of the proceeds to which he was entitled.

The Alabama record shows that Respondent met with Mr. James in September 1999, and promised to disburse the referral fee from his trust funds to the James law firm. Alabama Opinion at p. 9-12. Within several weeks of receiving the recovery proceeds, however, Respondent disbursed all the remaining trust funds to pay his own personal debts, and then allegedly consulted an attorney about his ethical concerns regarding payment after he had spent most of the money. Alabama Opinion at p. 5-7. Although the Alabama trial panel allowed him an opportunity even after the final hearing to deposit the funds into his trust account, Respondent failed to do so even though he claimed at hearing that it was not a lack of money, he intended to pay the James law firm,

but a potential ethical conflict that kept him from paying out the referral fee. See Alabama Report and Order at p. 2; see also, Alabama Opinion at p. 7.

The acts of misconduct delineated in the Alabama Supreme Court decision also support a violation of Florida's R. Regulating Fla. Bar 5-1.1(e) which requires a lawyer to "promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive..." The Alabama record shows that from December 1993 through October 7, 1999, Respondent never raised any objection to the referral fee agreement between the Tipler and James law firms. Alabama Opinion at p. 6. Further, the Alabama Supreme Court specifically quoted from the trial testimony about ongoing discussions between Respondent and James as to the payment of the referral fee over that period of time. Alabama Opinion at p. 9-12. Moreover, the Alabama decision cited to James' testimony where he was concerned about IRS liens against Respondent. Mr. James testified that Respondent promised "I will write the referral fees out of the trust account and they can't touch the money." See Alabama Opinion at p. 11. Despite his testimony to the Alabama trial panel that he intended to pay the James law firm, Respondent never paid the referral fee. Alabama Opinion at p. 29-30.

Respondent was not able to convince the Alabama trial court or both appellate courts that he had a verifiable, ethical reason for not paying the referral fee to James. The Alabama trial panel considered Respondent's defense of ethical impropriety in the payment of the referral fee. Nevertheless, the trial panel imposed a 91-day suspension on

Respondent for violation of Ala. R. Prof. Conduct 1.1(c) effective May 1, 2001. On the other hand, the trial panel held that if Respondent re-paid the \$487,714.80 referral fee within 30 days after the issuance of the Report and Order, Respondent would receive only a 30-day non-rehabilitative suspension. The Alabama Board of Appeals and the Alabama Supreme Court both affirmed the 91-day suspension because Respondent did not re-pay the moneys over to his trust account during the 30-day grace period. See Alabama Opinion at pp. 29-30.

There is nothing in R. Regulating Fla. Bar 3-4.6 that requires Florida to charge Respondent with a “mirror image” violation of the same rules Respondent violated in the foreign jurisdiction. Under R. Regulating Fla. Bar 3-4.6 and the relevant case law, guilt is based on the acts of misconduct in the foreign jurisdiction, not on the rule violations of the sister state. See Wilkes, at 197.

Just as Florida is not bound by the discipline imposed by a sister state, so Florida should not be constrained to accepting only those rule violations charged by the foreign jurisdiction. Florida looks to the “acts of misconduct” to determine the discipline, and should be able to examine those same “acts of misconduct” to determine what Florida Rules have been violated. See Wilkes, at 197 (“[Florida] may accordingly order discipline which is more or less stringent than that awarded by the sister state.”). See also, Mogil, at 309-311. Thus, based on the record evidence at the time of the summary judgment

hearing, the referee properly held that Respondent was guilty of violating R. Regulating Fla. Bar 5-1.1(b) and 5-1.1(e).

ISSUE III

RESPONDENT'S REFERENCE TO AFFIDAVITS, DEPOSITIONS, AND TESTIMONY, OUTSIDE THE RECORD AS WELL AS RULES NOT CHARGED AS VIOLATIONS BY ALABAMA OR FLORIDA SHOULD BE DISREGARDED BY THE COURT

At several points in Respondent's Initial Brief, he refers specifically to documents that are not part of the record evidence in this case and quotes at length from some of them, e.g., "Affidavits of Charles Bentley, his deposition testimony, and his testimony before the Alabama State Bar." See Initial Brief at pp. 18, 23. Respondent should not now be able to rely on documents that were never part of the record before the referee, and are not part of the record on appeal. Respondent is attempting to have this Court consider matters *de novo*, and to find that the referee erred by his failure to consider documents that were not timely submitted before or during the summary judgment hearing.

It is a fundamental principle that a party cannot raise on appeal for the first time what was not raised before the trier of fact below. Respondent should not be able to insert arguments in Respondent's Initial Brief based on documents that are outside the record on review. See Thornber v. City of Fort Walton Beach, 534 So. 2d 754(Fla. 1st DCA 1988); see also, Poteat v. Guardianship of Poteat, 771 So. 2d 569 (Fla. 4th DCA 2000).

Respondent uses these materials that are outside of the record to support his claim that the payment of the referral fee was unethical under Ala. R. Prof. Conduct 1.5(e), and R. Regulating Fla. Bar 4-1.5(g). Respondent claims that the rules on division of fees in Alabama and Florida prevented him from ethically paying the referral fee to the James law firm. Upon review of the Alabama Rule, however, it appears that the payment of the referral fee would not be unethical. The Florida Rule would not apply in an Alabama division of fee issue.

Under Ala. R. Prof. Conduct 1.5(e)(1)(c), a division of fees is permissible between lawyers who are not in the same firm in a contingency fee case where the division is between referring lawyer and the receiving lawyer. Further, the client had signed retainer agreements with both firms, and knew that James had referred his case to the Tipler law firm. There is nothing in the record to show that the client objected to the referral. Mr. Bentley would have paid the same fee whether Tipler divided it or not, and there was never any objection by the client that the fee was excessive. The client was also notified of the fee split sometime around October 1999. See Alabama Opinion at p. 14. Thus, it appears that the referral agreement between Tipler and James would comply with the Alabama rule on division of legal fees.

ISSUE IV

WHETHER JAMES HAD OTHER LEGAL INTERESTS IN THE RECOVERY PROCEEDS IS IRRELEVANT TO THE DISCIPLINARY PROCEEDING.

There is no dispute that Charles Bentley and his son received all the recovery proceeds to which they were entitled. T-6; Alabama Opinion at p. 6. Therefore, any remaining funds in Respondent's Alabama trust account would be allocated to attorney's fees and costs. Whether or not James had a "property interest" in the Bentley proceeds is irrelevant to a determination of guilt in a Florida disciplinary proceeding.

Even if James filed a civil action naming Respondent as a defendant, it would not affect The Florida Bar's decision of whether or not to pursue additional disciplinary action against Respondent. See R. Regulating Fla. Bar 3-4.2 and R. Regulating Fla. Bar 3-4.3. A disciplinary action against a member of The Florida Bar is a quasi administrative proceeding separate from any other civil action. The Florida Bar can pursue disciplinary actions for infractions relating to the ethical rules regardless of whether any other civil action would or would not result. It also appears that disciplinary proceedings against Alabama attorneys are conducted under the same premise that disciplinary proceedings are conducted independent of any other legal claims against attorneys. See Alabama Report and Order at p. 7.

The term "interests" in R. Regulating Fla. Bar 5-1.1(f) is stated generally and does not require any particular type of interest by the party claiming the funds. It could be any type of interest, not necessarily a "property interest." The Alabama panel also declined to address the issue of how much of a fee might be due to the James law firm, and therefore, did not order any restitution in any particular amount, nor was any issue of

restitution was ever discussed in the Florida disciplinary proceeding. Thus, it is not necessary to legally conclude that there was a viable civil action based on some “property interest” before pursuing disciplinary action against Respondent in Alabama or Florida.

CONCLUSION

For the foregoing reasons, The Florida Bar would respectfully request that the Court approve and adopt the Report of Referee in full, in particular as to the referee's findings of guilt as to the factual allegations in the Florida Bar's Complaint and finding that Respondent violated specific ethical Rules pursuant to R. Regulating Fla. Bar 3-4.6 in Case No. SC03-2043, TFB File No. 2002-00,311(1B), that are the sole issues challenged by Respondent in this appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief, regarding Supreme Court Case Nos. SC03-2043, SC04-402, The Florida Bar File Nos. 2002-00,311(1B), 2003-00, 875(1B), and 2004-00,024(1B), has been forwarded by U.S. Mail, to Respondent, James Harvey Tipler, at his record bar address of 4460 Legendary Drive, Suite 190, Destin, Florida 32541-5380, this _____ day of August, 2005.

Respectfully submitted,

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Copy provided to:
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CERTIFICATE OF TYPE, SIZE AND STYLE AND ANTI-VIRUS SCAN

Undersigned counsel does hereby certify that the 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 Norton AntiVirus for Windows.

Olivia Paiva Klein
Bar Counsel