IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC96,648

TFB CASE NO.: 1997-51,446 (07C)

DOROTHY V. MAIER,

Petitioner.

vs.

THE FLORIDA BAR,

Respondent,

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PETITIONER'S INITIAL BRIEF

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CASE NO.: SC 96,648
DOROTHY V. MAIER vs. THE FLORIDA BAR

CERTIFICATE OF INTERESTED PERSON

COMES NOW, Counsel for Petitioner, DOROTHY V. MAIER, and certifies that the following persons and entities have an interest in the outcome of this case.

1) Patricia Ann Toro Savitz, Esquire
   Bar Counsel
   The Florida Bar

2) John Anthony Boggs, Esquire
   Staff Counsel
   The Florida Bar

3) J. David Bogenschutz, Esquire
   Counsel for Petitioner

4) Dorothy V. Maier
   Petitioner

5) Judge Peter Evans
   Acting as Referee

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with the Florida Supreme Court Administrative Order, issued on July 13, 1998, and modeled after Rule 28-2(d), Rules of the United States Court of Appeals for the Eleventh Circuit, counsel for Petitioner, Dorothy V. Maier, hereby certifies that the instant brief has been prepared with 14 point, Arial, a font that is proportionately spaced.

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PRELIMINARY STATEMENT

Petitioner, Dorothy V. Maier, a member of the Florida Bar, was complained against by the Respondent on September 2, 1999. That complaint resulted in a Stipulation as to Facts and Rule Violations entered into by Petitioner on the date that the disciplinary hearing commenced, March 16, 2000. The hearing proceeded and concluded on that same date. The Court, acting as a referee, requested proposed orders to be provided.

In April, 2000, the Court issued its Report of Referee, in essence, recommending that the Petitioner be suspended from the practice of law for ninety-one (91) days.

The transcript of the disciplinary hearing and the reference thereto in this appeal, shall be noted as (TR-).

This matter was then lodged for this Honorable Court for review on June 16, 2000.

STATEMENT OF THE CASE AND FACTS

Respondent filed a complaint against Petitioner alleging violations of several Rules Regulating the Florida Bar: 4-1.3 for failing to act with reasonable diligence and promptness in representing a client; 4-1.4 for failing to keep a client reasonably informed; 4-8.4(g) for failing to respond in writing to an inquiry by a disciplinary agency (herein the Florida Bar).

In a separate pleading, on the date that the hearing began, the Petitioner stipulated as to the facts and the rules violations. Respondent and the Petitioner were substantially far apart in their recommended discipline. The Respondent asked for a ninety-one (91) day suspension and the Petitioner asked for something less than ninety-one (91) days, and suggested that the Court should place the Petitioner on three years probation, impose a public reprimand, LOMAS and a Florida Lawyers Assistance Contract (which was signed and handed to the Court as an Exhibit) and continued evaluation and treatment in the Family Institute which was recommended by FLA, which she had been doing since December of 1999. (TR-6) The

hearing then proceeded as a hearing on discipline only. (TR-14)

Dr. William G. Ryan was called as a witness. Dr. Ryan received his Ph.D. at Adelphi University in 1969, and is currently a clinical psychologist as well as "faculty member" of Nova Southeastern University where he supervises Ph.D. students (TR 16-17). He testified that he is a licensed psychologist and a certified psychoanalyst, as well as a certified addictionologist and a diplomate to the American Board of Forensic Examiners and the American Board of Psychological Specialties and Child Custody Evaluations and Substance Abuse. He is also a consultant to the Physician's Recovery Network (PRN) and a consultant to The Florida Lawyers Assistance Program (FLA). He has been accepted as an expert and testified therein "close to a thousand times and is on the Court roster for independent appointments by judges in criminal cases". (TR 18-19) Petitioner came to him on a voluntary referral from FLA in December 1999.

Dr. Ryan's first impression was that Petitioner was extremely distraught with periods of sobbing (TR 22) and was fragmented internally; he noted that one of the difficulties she was experiencing

was a break up of her marriage, and that she believed that it was ill-fated from the start. Dr. Ryan gave Petitioner the MMPI and scored it as having "in order" validity scales. There were signs of "hysterical mechanisms associated with denial." (TR 25) He further testified that what he observed on the MMPI results and what he observed about Ms. Maier were consistent. (TR 27).

Petitioner then became a regular member of group sessions (TR 27) and now has a very favorable prognosis. (TR 28) He further felt that she was interested in doing something about her underlying depression, and how that fragmented her life. (TR 28-29) Dr. Ryan testified that her prognosis as to the clinical matters is excellent and she had been placed on an anti-depressant which she was continuing in treatment in that form as intended. He testified that she would be kept monitored in terms of whether she needed a supplement in her medication such as mood stabilizers, (TR 29) and that, under the circumstances, it would be detrimental to her practice to suspend her. (TR 30)

He further testified that suspension would further be detrimental

to her clinical progress. (TR 31) She is compulsive about meeting her obligations and, even when she had difficulty making the $20 for group, she made arrangements to have a check sent in futuro. (TR 31) "She (Petitioner) was really suffering from a very severe depression with some posttraumatic elements and I think that's in remission," according to the witness. (TR 32) Further, Dr. Ryan testified that the progress she had made had been continual and upward. He believed that she was a role model for her honesty. (TR 33)

He also testified, on cross-examination, that she suffers from a despondent disorder and a depressive disorder NOS with post traumatic features and that both of the diagnoses were amenable to treatment. (TR 37) He opined that at the present, Petitioner is a "different Dorothy" from the Dorothy that presented as really depressed, fragmented and knew vaguely that something was wrong with her but was not really able to identify it. (TR 36-37) There were consequences that occurred in her life where that life "really was shattered" (TR 34) and that although her reality is now strengthened, she thought that some "creative disposition" would

benefit Petitioner, even a minimal suspension. (TR35)

Next, the Petitioner called attorney Bruce Wagner. (TR 40) Mr. Wagner has been practicing law since 1970, and is a former Assistant United States Attorney and former chief of the criminal division in the Southern District of Florida, and has been in the private practice of law since 1977. He is also a member of the Federal Bar Association and former past president of the Broward County Chapter of the American Bar Association. Mr. Wagner's practice was primarily a collection practice with his largest client being American Express. (TR 41-42)

Petitioner worked with Mr. Wagner as a secretary, went to law school, and came back to him as a lawyer until 1986. (TR 24) She then left to open her own practice at or about the time she was divorced. (TR 43) He testified that "she was an excellent attorney." (TR 43) Mr. Wagner also testified that he had "a great deal of confidence in her and she was a hard worker." (TR 43) Approximately two years ago, she came back to him again (TR 43) part time for about 20-30 hours a week. (TR 44) In the two years she had been

with him this time, she was a great help to him, and he had been extremely satisfied with her work. (TR 45) According to him, "it has been a real pleasure and a bonus to have her on staff again." (TR 45) Mr. Wagner further indicated that if she were suspended for any length of time, he would have to replace her because she had become such an intricate part of his practice that " I need another person like her, or her." (TR 47)

The Petitioner then took the stand on her own behalf. She testified that she is 53 years old and has been a member of the Bar since April 12, 1982. (TR 49) She testified that on the very date of the hearing she had signed a contract for FLA (TR 50) and that prior to November of 1999 was not even aware that there was a group entitled the Florida Lawyers Assistance. (TR 50) She explained the failure to respond to the Bar's complaint, without contradiction, occurred as a failure to receive the complaint itself and that she only knew that one had been filed, by the receipt, in an office in Fort Lauderdale, of a certified copy of the Motion for Default. (TR 51-52) She was in the middle of a very difficult separation and eventual

divorce that was virtually unanticipated by her. (TR 53) Ms. Maier had given up her life in Fort Lauderdale, with a good practice, to support her husband in his move to Volusia County for a job with Walgreens. She also took in her nephew, Michael, who was influenced by drugs and alcohol in Fort Lauderdale, as her own child in order to give him assistance. (TR 54) He now is full time employed, and is taking two or three classes a semester. (TR 54-55) This was her second marriage and her husband suddenly moved everything out of the home after the move to Volusia and "he told me that he didn't want to be married anymore, that he didn't love me and that he just wanted out." (TR 56)

After she spoke with Ms Savitz, Bar Counsel, the default was set aside on stipulation. (TR 57) Ms. Savitz suggested, because Petitioner sounded very upset, (she spoke to Ms. Savitz immediately after being stunned by her husband's pronouncement) that she call Florida Lawyers Assistance. Ms. Maier had previously been in therapy for approximately three years. (TR 57-58) She testified about the scenario of her marriage falling apart, that she had opened a solo practice in

Fort Lauderdale in civil litigation, real estate, marriage and family, and in 1995 came home to hear her husband tell her that his company wanted to transfer him to Volusia County so that he could become a manger within a year. Although it meant taking her 250 miles away from her practice, and she did not want to necessarily want to do that, she did it anyway. She had asked her husband to give her a year so that she could clear up her practice (TR 60-61) but he "pushed" it and would not agree to that. (TR 61) She later found out that the entire scenario was a lie, and his motives for the move were personal and ulterior.

Petitioner's father was hospitalized at that time in Fort Lauderdale and it necessitated travel from Daytona Beach on Monday morning to Ft. Lauderdale, travel to the office, meetings with clients and then picking her mother up from Pembroke Pines and taking her back and forth to the hospital. She did that four to five days a week until Friday and would try to get out of Broward County at least by noon time on Friday to get back to Daytona in a reasonable time. (TR 62). This went on for a year and a half. (TR 62)

Her finances were "horrendous," (TR 63) and, although she still had a decent law practice going, it was winding down and she was turning away work because she did not want any new work that would keep her tied to Ft. Lauderdale.

Her husband did, in fact, become a Walgreens manger during 1997. (TR 64) He subsequently lost that job (TR 64-65) in March of 1998. He then went to work for a convenience store chain in central Florida for approximately six to seven months and then moved on to K-mart for four months. At this time, Petitioner was still in Daytona attempting to keep the marriage together. (TR 65) She even took two jobs to keep the family afloat: in 1996 or 1997 she gift wrapped for JCPenney part-time during the holidays and then in January she went to work at the Garden Center in K-Mart running a cash register. (TR 66-67) At the same time, she tried to practice law and support a failing marriage and never really took any legal work in Daytona of any note. (TR 67) She also worked at the Adams Mark Hotel in a gift shop in 1998. All the money she was making on the side, and in Ft. Lauderdale, was being used to pay bills. (TR 68) This financial struggle

was destroying her self-worth.

At that time, during this crush of finances, job changes, a husband out of work, a failing marriage, and constant travel back and forth between Ft. Lauderdale and Daytona on a weekly basis, including her father being in the hospital with a collapsed lung, there was a lot of "turmoil." She believed she went through a period of depression. (TR 69) She really didn't think she realized how she really felt at that point. She was just trying to "hang in there" and believed that "some where along the lines I would be okay I would get through this." (TR 69) After these Bar proceeding began, and when she finally began to deal with Dr. Ryan and the referral to him by FLA, her attitude and her ability to cope have begun a significant upswing. (TR 70)

Dr. Ryan gave her some reading materials about co-dependents in a dependent relationship and "when I read this stuff, it impacted me profoundly because I think it's been there for a long time. And I think that it is something that has affected me probably through out my whole life and never ... never put a label on it, never

have been able to say what it was." (TR 71) She learned that one of her problems was that she was co-dependent and that she had an overwhelming need to protect other people. "You always put yourself last,"(TR 71) which is exactly what she had done. She testified that she now felt that "knowing that I had that group, other lawyers and other people there that are going through difficult times too, it makes me feel like I'm not so alone." (TR 72)

She testified that she was willing to go through the FLA three year contract, whether it was ordered or not. (TR 73) She was "devastated" by the proceedings and admitted that she and her current counsel had several confrontations about even calling Bruce Wagner as a witness, because she didn't "want somebody that I thought that much of to have to be here either in person or on the phone." (TR 73) As to the issue of remorse, she candidly testified to the court that she felt "horrendous." (TR 74) She also feels like she is a good lawyer, and felt that she could practice law and continue being a good lawyer. (TR 74)

As to the ninety-one (91) day suspension, she suggested that

the effect on her financial situation would be catastrophic. (TR 75) She took over the financial responsibility for her household and has been going from pay check to pay check and her absent husband, who left her in November, is paying for nothing. (TR 75) Any kind of a suspension would set her back to the point where she would probably end up losing her home; she already owes her father over $13,000.00 as a result of her husband's negative impact financially on her life, and all of the setbacks and job changes. (TR 75)

Having grown up in a household with alcoholism as a central force, dealing with the anger and hostility (as opposed to assertiveness) is something that she is learning from her program, although it is something that "is very hard for me to deal with." (TR 76-77) She is learning that where a co-dependent takes over, she becomes less important and she gets into the protection issues previously stated. Dr. Ryan is trying to make her see that she doesn't have to do all that and "that I am worth something and that I am just as good and that I can deal with this kind of a situation from a standpoint of being an assertive person who is capable of sticking up

for her rights." (TR 77) Her nephew is still living in her house and if the house is lost it would be "a catastrophe" for him as well. (TR 77)

She felt a commitment to her nephew because she had promised him that if he went back to school, maintained employment and grades, and no drugs or alcohol, that he didn't have to worry about a place to live. (TR 78) "He doesn't deserve to be affected by all of this. And when my husband left in November, he left my nephew as well as me. He hasn't contacted him. He hasn't called him, has made no effort. And my husband was my nephew's hero. He was like all the stuff that my nephew should have been able to have in a relationship with my brother, he took that and put it over on my husband, and he trusted him. Because I trusted him." (TR 79)

She is currently "carrying the full load for the house" (TR 80) and continues to commute between Daytona Beach and Fort Lauderdale where she stays with her parents. (TR 80) She currently still works for Mr. Wagner, and she was continuing to commute and working with him three days a week. She is paid by the day (TR 81)

and this is her only income at present. (TR 82) Despite all of the problems and all of the difficulties she has faced both emotionally and financially, she is current with her mortgage, utilities, and auto insurance. (TR 85-86)

Her nephew pays for all of the food for the household and takes care of the yard, eliminating the need for a yard maintenance company. He also looks after a dog making it possible to the leave animal in Daytona, when she commutes. She intends to continue to work with Mr. Wagner, if possible, and has submitted notices monthly about her trust account, (TR88) and she wishes to continue with therapy and medication for Dr. Vfaz, who is in Dr. Ryan's office and had no objection of any of that component being added into her contract with FLA. (TR 91-92)

The Florida Bar then presented evidence of three prior disciplines by way of admonishment (1994), minor misconduct (1996) and a thirty (30) day period of suspension followed by three years probation (1999). Respondent's position was that Petitioner committed a violation of 6.2 and 6.22 "abuse of the legal process."

(TR104) The motion to default that was stipulated to be vacated, 7.0 and 7.2 "affirmative duty to her client, Ms. Suder, a duty to keep her reasonably informed, a duty to proceed forth(sic) diligently and, more importantly, a duty to the Florida Bar, as a whole, because practicing is a privilege not a right." (TR 105)

Respondent further argued that aggravating factors pursuant to 9.22 existed and, specifically, three (3) aggravating factors to wit: (a) prior disciplinary offenses (b) pattern of misconduct (the repetitive rules that have been violated in this very complaint) and (c) multiple offenses, which said offenses have taken place over the years. Furthermore, the Respondent argued (d) bad faith obstruction of the disciplinary process by failing to comply with rules or order the disciplinary agency, (e) vulnerability of victim seeking status from immigration and (f) substantial experience in the practice of law. As to "mitigating factors," the Bar recognized the same under (b) absence of a dishonest or selfish motive, (c) personal emotional problems and (l) remorse.

The Petitioner responded that, under 4.4, lack of diligence, a

public reprimand was appropriate where a lawyer is negligent and "does not act with reasonable diligence in representing a client causes injury or potential injury to that client." (TR 124) Counsel suggested that the actions of the Petitioner fell in that category rather than the knowing and wilful actions suggested by Respondent.

As to 6.2, the same argument applied, and that is, the Petitioner's position is that the action of violating a court order or rule was not knowing but "negligent" in this case, especially under the totality of the circumstances. It is obvious that it was negligent, and that also supports a public reprimand. (TR 124-125)

Petitioner agreed that the same argument applied as to 7.0 and 7.3, which similarly make a distinction between "knowingly" and "negligently." As to aggravation, the Petitioner agreed that section (a) applies as there are prior disciplinary offenses. Furthermore, the Petitioner objected to the "pattern" argument set forth by Respondent, indicating that there were multiple violations on the same factual issue. (TR 126-127) Petitioner argued that it cannot be both a "pattern" of misconduct and multiple offenses under these

facts. In this particular case it was the same factual offense, but with different violations of the rules. Thus, only one of these aggravators would apply and therefore only one point should be added for a total, to this point, of two. (TR 127)

As to "bad faith" obstruction of disciplinary proceedings, Petitioner argued that this was inappropriate as there was an obvious attempt by Ms. Maier, as soon as she learned of the complaint filed by the Respondent, to call the very bar counsel prosecuting this case and set up an answer which was filed. The default was vacated by the Court and the paperwork was completed. (TR 127) It should be noted that counsel argued that there must be a "bad faith" obstruction - the facts in this case clearly do not indicate that any obstruction occurred, but even if it did, it certainly was not "bad faith" nor was it "willful." (TR 128)

Petitioner further argued to the Court that the Respondent had never of any type of therapy (except marital) and never had the money to go to "a doctor." She had never been seen by anyone like Dr. Ryan or the Family Institute. (TR 134) Since 1995, she was in a co-

dependent relationship with “a man who wanted her to do everything for him and wanted to do nothing for her.” (TR 135) She is in group therapy every week despite the fact that she drives form Daytona to Ft. Lauderdale on a weekly basis. She has signed an FLA contract for a potential three years and is dealing with her prior history issues with an experienced health care professional. (TR 135-136)

Petitioner argued that she qualifies, under mitigators, for (b)”absence of a dishonest motive,” (c)“personal or emotional problems,” (e)“full and free disclosure to disciplinary board or a cooperative attitude towards the proceedings” (g)character or reputation, (h) physical or mental disability or impairment, (i) remorse and (j) interim rehabilitation. (TR 137) Petitioner suggested respectfully that there exist seven mitigators and three (assuming the “vulnerability” issue stands) aggravators.

With that, the evidence and argument were closed and the court requested suggested orders from counsel.

SUMMARY OF ARGUMENT

Whether a ninety-one (91) day suspension (along with a three year probation, mandatory counseling sessions, and all affiliated court costs) constitutes an excessive punishment in Bar proceedings against an attorney who has been found guilty of violating Rules Regulating the Florida Bar, specifically rules 4-1.3, 4-1.4 and 4-8.4(g), when the mitigating factors are far more numerous than the aggravating factors.

ARGUMENT

THE REFEREE'S RECOMMENDATION OF NINETY ONE (91) DAYS SUSPENSION WAS EXCESSIVE IN THE UNIQUE FACTS AND CIRCUMSTANCES OF THIS CASE.

The recommendation of the Referee, a ninety-one (91) day suspension, is respectfully suggested under the circumstances, to be excessive and unwarranted. Petitioner urges this Honorable Court to review the referee's decision and to reject the ninety-one (91) day suspension and order a lesser sanction. Although a review of a referee's decision is not warranted in every situation, in the case of Petitioner, it is appropriate. "A party contesting a referee's finding of fact 'carries the burden of demonstrating that there is no evidence in the record *or that the record evidence clearly contradicts the conclusions*'." (Florida Bar v. Williams 753 So. 2d 1258, 1261 (Fla. 2000) citing Florida Bar v. Spann 682 So.2d 1070, 1073 (Fla. 1996) (emphasis added). Applying the following analysis, the "record evidence" in the Bar's case against Ms. Maier "clearly contradicts the conclusions" reached by the referee. The evidence urges a penalty which is less than that recommended by the referee.

The Florida Standards for Imposing Lawyer Sanctions (hereinafter

"FSILS") provide that referees and the Supreme Court of Florida consider each of the following before recommending or imposing appropriate discipline: (1) duties violated, (2) the lawyer's mental state, (3) the potential or actual injury caused by the lawyer's misconduct and (4) the existence of aggravating or mitigating circumstances. It is the position of Petitioner that the referee failed to take into account any of the mitigating circumstances that should have lessened the penalty imposed by the referee. This Honorable Court is urged to consider the entire events contributing to the charges against Petitioner and to impose the appropriate discipline based on the criteria listed above.

In order of appearance, first and foremost is the matter of the "duties violated." Petitioner previously stipulated to violation of the Rules that she was charged with, and did not dispute the charges. However, it is her position that these violations occurred as a result of negligence, not as a result of wilfulness or intentional violation of the rules. Additionally, although this negligence is not excusable, it is explainable and supports a public reprimand.

Secondly, Petitioner points to "the lawyer's mental state." Dr. W. G. L. Ryan, Ph.D, testified that Petitioner was first seen by him as a result of a

referral from the Florida Lawyer's Assistance Program (FLA) in December of 1999, and that she had been in counseling for co-dependency since December 21, 1999. Dr. Ryan testified that his first impression of Petitioner was that she was "distraught," (T. 22) that she was "fragmented internally and that mirrored her external – where she was coming out of a relationship that was devastating." Through the course of Dr. Ryan's testimony and Petitioner's testimony, it was discerned that at the time of the stated violations, Petitioner had moved over 250 miles away from her practice to support a husband in his career choice – a husband who eventually walked out on her leaving her with all the financial responsibilities of a home – and none of the wherewithal to support that home.

In addition to the deterioration of her marriage, and despite the fact that she was commuting from Volusia County to Fort Lauderdale for several days a week, Petitioner at this time was also attempting to take care of an elderly mother and a hospitalized ailing father. Each of these events is intensely traumatic on its own, but when combined they overwhelmed Petitioner, as they would overwhelm most, if not all, individuals. Her mental state was so affected so as to easily qualify for a mitigator. Things began to "slip through the cracks" and, unfortunately, some were the details of

everyday life, and everyday office procedures. However, at no time was this a knowing, deliberate, willful, or intentional disregard for, or disrespect of, Petitioner's clients.

Per the FSILS, "knowing is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular deed." The gist of Dr. Ryan's testimony, is that it is clear not only did Petitioner not have any intent (the conscious objective or purpose to accomplish a particular result), but that, in all likelihood, she probably did not even "know" that she was not living up to her duties to her clients; thus, her actions were, in essence, negligent. This negligence was a result of an overwhelmed individual attempting to take care of everyone and everything in her own life before she took care of herself and her needs – including, and specifically, in this instance the needs of her own law practice.

This lack of attention to her own needs and the needs of her practice begs the matter of the potential or actual injury caused by the lawyer's misconduct. When taking into account the injury, potential or actual, consideration must be given to actual harm to the client, the public, the legal system, or the profession which results from the lawyer's misconduct.

Although the potential for injury to Petitioner's clients may have been present, arguably it did not lead to actual harm. Petitioner made full restitution and the client who initially brought charges, has had her legal matters settled by another attorney. There was no harm, potential or actual, to the public caused by Petitioner's misconduct, nor was there any harm to the legal system or to the profession as a whole.

Finally, the existence of aggravating or mitigating factors must be considered. Petitioner has stipulated to the aggravating factors of prior disciplinary actions and either a pattern of misconduct or multiple offenses (but not both). Petitioner's counsel disagreed with the Bar's assessment of "bad faith" obstruction of the disciplinary proceedings stating that Petitioner "made a telephone call to Ms. Savitz herself after she realized when she got in the mail a motion for default that there had been, for the first time, a complaint filed against her." (T 127). This is clearly not evidence of bad faith. At best, it is misadventure.

In reference to the prior disciplinary actions, it must be noted that in each of those prior disciplinary actions, Petitioner was a pro se litigant; that is, she did not retain counsel to assist her. Her mental state throughout the final years of her marriage was less then optimal, and her diligence in

representing herself was even less than it was in representing paying clients. At that time in her life, and in the particular living situation that she was in, she was incapable of putting herself at the top of her list of priorities according to Dr. Ryan's testimony, as opposed to the present, when she is learning through counseling how to better cope with life. Additionally, in the first disciplinary proceeding, it was determined that she had become involved in the field of probate, a specialized area of law in which she had very little experience, in order to help a friend "almost as if a gratis type situation."

For this well meaning, albeit inexperienced effort, Petitioner garnered herself an admonishment from the Grievance Committee, as it was determined that she should have done things more correctly or more competently in the probate matter. It should be noted that at that time it was determined that there was an absence of a dishonest motive and an absence of harm to the plaintiff in the case. Consequently, held against her in the instant proceeding, as an aggravating factor, is a prior proceeding which was the result of a favor (to a family member) gone wrong. Had Petitioner hired independent counsel, counsel who may have been more practiced in the specialized area of Bar proceedings, she may have

mitigated this discipline further: for instance, it might have been argued that simply because the client was not satisfied with the results, there was no reason to hold the lawyer accountable. In essence, the messenger should not be killed merely because the message wasn't pleasing. However, she was not only tarred with an admonishment, but was given the first of the strikes that are being held against her in the current proceeding – a prior disciplinary record.

She does not contest the second disciplinary proceeding; however, it should not be lost upon this Honorable Court, that had she not had the prior proceeding on her record, the probate matter, she would not have been penalized in the second proceeding, to the extent that she was, there being no aggravating factors against her, other than substantial experience in the practice of law.

Finally, the 1998 disciplinary proceeding was a result of irregularities in trust accounts that were found as the result of a Bar audit for the period August '96 through May '97. As a result of this proceeding, Petitioner was suspended for thirty (30) days and placed on probation. Again, Petitioner suggests that she was uncounseled; and although this suspension did occur, its imposition for an alleged trust account deficiency is transparent as

to the minor seriousness of what has come to be viewed as a most egregious violation under most circumstances.

It is submitted to the court that these prior proceedings all stem from the same nagging problem: negligence and an inattention to detail – not from willfully or intentionally deceptive business practices. Accordingly, they should be viewed as a pattern of negligent behavior as opposed to numerous, non-related events. The FSILS is clear in stating that the "Bar *will* use these standards to determine recommended discipline to referees ..." (Emphasis added). The standards that are referenced include taking into consideration both aggravating and mitigating factors prior to a referee or a judge making a recommendation regarding discipline. However, in the case of Petitioner, it is clear that the referee did not take into account any of the many mitigating factors in her favor, while the referee did in fact take into account the aggravating factors, without specifically stating that is what he was doing.

For instance, on page 5 of the Report of the Referee, the last sentence of the first paragraph which speaks of the violations that have been found reads "[a]ll of these acts were committed while the respondent was on probation for previous similar offenses." Additionally, under the

Personal History and Past Disciplinary Record, the referee states that he considered the Petitioner's prior disciplinary record. In contrast, at no point in the Referee's report does he make mention of any of the seven mitigating factors in Petitioner's favor. The Referee's neglect or failure to consider the same is a driving reason for this Court's reduction of the currently recommended disciplinary ninety-one (91) day suspension.

One of the foremost of these mitigators is lack of selfish motive. At no time, in any proceeding, current or prior, has Petitioner ever been accused of misconduct to directly benefit herself. There are numerous other mitigating factors set forth in Section 9.0 of FSILS. Those which pertain to the instant case are: b) the absence of a dishonest or selfish motive, c) personal or emotional problems, e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings; g) character or reputation; h) physical or mental disability or impairment; j) interim rehabilitation; and l) remorse.

The referee did not consider <u>any</u> of these mitigating factors, although each clearly applies to Petitioner. Nor did he consider the additional Mitigating Factors set forth in Section 11.0 of FSILS, to wit: In addition to those matters of mitigation listed in Standard 9.32, good faith, ongoing

supervised rehabilitation by the attorney, through FLA, Inc. and any treatment program(s) approved by the FLA, Inc., whether or not the referral to said program(s) was initially made by FLA, Inc., occurring both before and after disciplinary proceedings have commenced may be considered as mitigation.

In this matter Petitioner contacted the FLA voluntarily. She started counseling sessions, and has been regularly attending those sessions since December, 1999. It is noteworthy that Petitioner's attendance at these rehabilitative counseling sessions was not as a result of her signing a contract with the Respondent as part of these disciplinary proceedings. When she finally realized that there was a problem, that her life had gotten out of control both personally and professionally, she took steps to regain control of it voluntarily and "consistently." Petitioner began counseling well before it was suggested that it be a mandatory requirement of the pending disciplinary hearings, not as a result of these hearings, nor as a means of reducing her impending disciplinary sanctions.

Instead of considering any of these mitigating factors, and weighing the entirety of the circumstances surrounding Petitioner's case, the referee did not consider mitigating factors at all. The transcripts reflect the referee's

request for help from the attorneys and for guidance in making recommendations for sentencing. (TR 129 &130) However, the referee did not adequately consider the proposed report submitted by counsel on behalf of Petitioner, and instead imposed even more "penalties" than were asked for by the Respondent (the referee used the Bar's proposed recommendation for disciplinary measures almost verbatim, with the addition of supervision of client representation after the suspension has been served. Referee's Report p. 5). This lack of consideration of any of the many mitigating factors in this case has resulted in an inequitable recommendation that is excessive and unwarranted. Furthermore, and as proof of this Court's authority to review the decision and to amend the recommendation, counsel for the defendant submits "*that the record evidence clearly contradicts the conclusions*'." Florida Bar v. Williams 753 So. 2d 1258, 1261 (Fla. 2000)

In Standards 1.1 and 1.3 of the Lawyer Sanction Standards, "[t]he purpose of lawyer discipline proceedings is to protect the public and the administration of justice..." Accordingly, "[t]he Standards constitute a model, setting forth a comprehensive system for determining sanctions, permitting flexibility and creativity in assigning sanctions in particular cases of lawyer

misconduct. They are designed to promote (1) consideration of all factors relevant to imposing the appropriate level of sanctions in an individual case; (2) consideration of the weight of such factors in light of the stated goals of lawyer discipline; (3) consistency in the imposition of disciplinary sanctions for the same or similar offenses within and among jurisdictions." Based on the Referee's Report, it is clear that there was an insufficient consideration of these purposes. The Referee (1) did not give consideration to all factors – he never considered any mitigation factors; (2) did not give appropriate consideration to the weight of such factors, because as previously stated, he never considered them at all; and (3) as a result of the non-consideration of the numerous mitigating factors, there was not consistency in the imposition of disciplinary sanctions for the same or similar offenses in this or other jurisdictions.

In considering relevant case law, the Referee mentioned only one case, the case of The Florida Bar v. Grigsby, 640 So.2d 1341 (Fla. 1994), which he distinguished from the case at bar and summarily dismissed as being inapplicable, much less controlling as had been suggested by counsel for Petitioner. The reason the referee cited for distinguishing Grigsby was that the underlying complaint against the defendant had no merit and was

therefore dismissed. In Petitioner's case, the underlying complaint has been settled. Accordingly, Grigsby should be considered by this court when contemplating what disciplinary action should be taken against Petitioner. Moreover, in The Florida Bar v. Kaplan, 576 So. 2d 1318 (Fla 1991), the Supreme Court took into account the fact that the attorney was having marital problems and had lost his father during the time that he violated certain Bar Rules. Despite having three (3) prior proceedings, the Court realized that the mitigating circumstances far outweighed aggravating circumstances, and approved a public reprimand.

As to the issue of a ninety-one (91) day suspension versus a ninety (90) day suspension in cases where there have been prior disciplinary proceedings against the attorney, the Supreme Court of Florida has held that the *negligent* maintenance of trust account records warranted a ninety (90) day suspension rather than a ninety-one (91) day suspension (emphasis added) See: The Florida Bar v. Nesbitt, 626 So. 2d 190 (Fla. 1993). Although dealing with maintenance of trust account records (which normally is an even greater defalcation for a lawyer than lack of communication with a client and lack of diligence), the Supreme Court noted that "the proceeding was filed ... after the commencement of another

disciplinary proceeding in which we publicly reprimanded Nesbitt for client neglect." The court noted that "[n]o intentional taking of client funds, dishonesty, or client complaint or injury was found." In Petitioner's case, there was no allegation or proof of intentional misconduct and although there was a client complaint, the actual injury to the client was not great (although, the potential for injury was arguably present.)

In Nesbitt, although the Bar argued that there were aggravating circumstances that justified the imposition of a ninety-one (91) day suspension, the Referee and the Supreme Court took into account the presence of mitigating factors. As in Petitioner's case, Nesbitt "ascribes most of his inattention and neglect of his practice to his personal problems." The Supreme Court noted that "[g]iven that the neglect at issue arouse during the same period as the neglect in the prior proceeding, we find that this mitigation is, in part, applicable here. Consequently, we find that Nesbitt's conduct at issue in this cases, *even when combined with the neglect of client matters as articulated above*, warrants a ninety (90) day suspension, rather than the ninety-one (91)day suspension recommended by the referee."

Nesbitt has more aggravating factors than Petitioner and those factors

(particularly Nesbitt's uncooperative attitude in the disciplinary proceeding) support the conclusion that it constitutes a stronger case for a ninety-one (91) day suspension in Nesbitt, than in Petitioner's case. If Nesbitt's conduct did not rise to the level of a ninety-one (91) day suspension, certainly neither did Petitioner's. Finally, Nesbitt suggests that this Court may reduce the sanction recommended by a Referee and that mitigating circumstances can and should be taken into consideration at any stage in the proceedings.

Historically, prior disciplinary proceedings against an attorney, although to be considered by the Court, have not limited the Court from assessing less than a ninety-one (91) day suspension. For example, where an attorney was disciplined for "neglecting a legal matter and failing to keep a client advised at all times," this Court has determined, after taking into consideration the fact that the attorney had already been disciplined twice, that the appropriate discipline was a sixty (60) day suspension and three years probation "given the lack of a corrupt(i've) motive." The Florida Bar v. Neale, 432 So.2d 432, (Fla. 1983).

Similarly, in Florida Bar v. Corbin, 701 So.2d 334 (Fla. 1997), when making a determination as to discipline this Court viewed all the

circumstances surrounding the charges and concluded that even with three (3) prior disciplinary proceedings, and a total of four (4) aggravating factors, that a ninety (90) day suspension was the total penalty necessary, even though in that case the attorney was found guilty of misrepresenting material facts to the court and knowingly making false statements to the Bar.

Other applicable, and more recent, case law is the case of Florida Bar v. Pipkins, 708 So.2d 953 (Fla. 1998). Although Pipkins was a case dealing with trust account violations, it also dealt with an attorney who committed such violations while serving an earlier suspension and probation for similar misconduct. In Pipkins, the Supreme Court again "overturned" the referee's decision. However, even though they imposed a harsher sentence than the referee, the Supreme Court did not find a ninety-one (91) day suspension appropriate for the violations of probationary terms that were imposed for similar misconduct offenses (as was suggested by the Bar) . The court in Pipkins stated that discipline consisting of a ninety (90) day suspension "is fair to society, fair to Pipkins, and severe enough to deter other attorneys from engaging in similar misconduct."

Applying the Pipkins court's rationale to Petitioner's situation, it would seem to urge that less than a ninety-one (91) day suspension for Petitioner

satisfies all criteria: fair to society, fair to Petitioner, and severe enough to deter others from engaging in similar misconduct. Petitioner did not intentionally violate the conditions of her prior probation "in direct contradiction" to orders of the court, as was determined in Pipkins; instead, at most, she acted negligently. And under extreme mental and emotional circumstances she has been a good lawyer. She is voluntarily dealing with her difficulties and making excellent progress. A suspension would be, in her words, catastrophic and all parties moved by a lesser sanction. The appropriate sanctions for negligence are public reprimand or suspension – but the standards do not say for how long the suspension should be imposed. Instead the standards say that both aggravating AND mitigating factors should be considered in the referee's determination. It is apparent from the recommendation of the referee, that none of the many mitigating factors in Petitioner's case were considered. As such, the Referee's recommendation should be rejected by the Court and a less severe sanction should be imposed.

CONCLUSION

The Referee in Petitioner's case, in his imposition of sanctions, specifically in reference to the ninety-one (91) day suspension, failed to take into account mitigating factors despite their obvious presence in the facts. There is ample case law to support a less than ninety-one (91) day suspension especially on the record below. This Honorable Court is urged to take into account the mitigating factors, and the Record as a whole, that the Referee did not take into account (either intentionally or inadvertently), and reject the Referee's recommendation, and to impose a sanction substantially less than the ninety-one (91) day suspension recommended.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copy of Petitioner's Initial Brief, has been furnished by U.S. Mail this ___ day of July, 2000, to: Patricia Ann Toro Savitz, Esquire, Bar Counsel, The Florida Bar, 1200 Edgewater Drive, Orlando, Florida, 32804-6314; John Anthony Boggs, Esquire, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300.

Respectfully submitted,

_____

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