IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

SUPREME COURT CASE
No. SCO1-116

COMPLAINANT,

v.

THE FLORIDA BAR FILE

Nos.

SAUL CIMBLER,

1999-71,000 (11H)
2000-70,519(11H) and
2000-71,321(11H)

RESPONDENT,

______________________/

____

RESPONDENT'S ANSWER BRIEF

____

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TABLE OF CONTENTS

TABLE OF CONTENTS.. 2

TABLE OF AUTHORITIES.. 3-4

STATEMENT OF THE CASE AND OF THE FACTS...................ÿ 5-11

SUMMARY OF ARGUMENT...ÿ 11-12

ARGUMENT... 13-18

THE DISCIPLINE RECOMMENDED BY THE REFEREE IS SUPPORTED BY CASELAW AND IS FAIR TO SOCIETY, FAIR TO THE RESPONDENT AND WILL SUFFICIENTLY DETER OTHERS FROM SIMILAR MISCONDUCT

CONCLUSION... 19

CERTIFICATE OF SERVICE... 20

CERTIFICATE OF TYPE, SIZE AND STYLE
AND ANTI-VIRUS SCAN.. 20

TABLE OF AUTHORITIES

The Florida Bar v. Niles,
664 So.2d 504 (Fla. 1999)ÿÿÿÿÿÿÿÿÿÿ.. 13

The Florida Bar v Stalnaker,
485 So.2d 815 (Fla. 1986)¼¼¼¼¼¼¼¼¼¼. 13

The Florida Bar v MacMillan,
600 So.2d 457 (Fla. 1992)ÿÿÿÿÿÿÿÿÿÿ. 13

The Florida Bar v. Hooper,
509 So.2d 289 (Fla.1987)ÿÿÿÿÿÿÿÿÿÿ.. 13

The Florida Bar v. Lecznar,
690 So.2d 1284, 1288 (Fla. 1997)ÿÿÿÿÿÿÿ. 13

The Florida Bar v Cox,
794 So.2d 1278, 1281 (Fla. 2001)ÿÿÿÿÿÿÿ. 13

The Florida Bar v Brakefield,
679 So.2d 766 (Fla. 1996)ÿÿÿÿÿÿÿÿÿÿÿ 15

The Florida Bar v . Morse,
784 So.2d 414 (Fla. 2001)ÿÿÿÿÿÿÿÿÿÿ. 16

The Florida Bar v. Maier,
784 So.2d 411 (Fla. 2001)ÿÿÿÿÿÿÿÿÿÿ. 16

The Florida Bar vs. Michelle Ann Konig
(Referee Case - Case no. SC00-759
decided June 7, 2001; not reported)ÿÿÿÿÿÿÿ 17

The Florida Bar vs. Eileen Marie Kirsch,
(Referee Case - Case no. SC00-2610
decided February 2001; not reported)ÿÿÿÿÿÿ. 17

The Florida Bar v Poplack,
599 So.2d 116, 118 (Fla. 1992)¼¼¼¼¼¼¼¼¼. 19

Other Authorities:

Rules Regulating the Florida Bar:

Rule 1-3.3 5

Rule 4-1.16(a)(2) 7

4-1.3 5

4-1.4 5

Standards for Imposing Lawyer Sanctions:

9.32(d) 7

9.32(e) 7

9.32(g) 7

9.32(h) 7

9.32(j) 7

9.32(l) 7

STATEMENT OF THE CASE AND OF THE FACTS

The Bar filed a three-count complaint. Many of the factual matters were resolved by stipulation, which are included in the Referee's Report. Notwithstanding, the presentation of evidence still took approximate four full days of hearings. Additional factual findings made by the Referee are also included in the report. The only issue before this Court is whether a ninety (90) day suspension is an adequate sanction. That sole issue was raised by the Bar's Petition for Review.

The Referee found that Respondent was guilty of violations of the Rules of Professional Conduct. Specifically, the Referee found that the Respondent was guilty of two intentional violations of Rule 1-3 .3 (Official bar name and address); two violations of Rule 4-1.3 (Diligence), and three violations of Rule 4-1.4 (Communication) including violations of both subsections (a) (Informing client of the status of representation) and (b)(Duty to explain matters to the client), of the Rules of Professional Conduct. The Referee found as follows:

A. COUNT I

As to Case No. SC2000-71, 321 (11H) (CRABTREE)

Based upon the facts presented at the hearing and stipulated to by Respondent I recommend that the Respondent be found guilty of violating Rule 1-3 .3 which provides that a lawyer shall promptly notify the executive director of any changes in mailing address and business telephone, and Rule 4-1.3 which provides that a lawyer shall act with reasonable diligence and promptness in representing a client. Respondent admitted his failure to record the subject warranty deed or pay the real estate tax payment and associated post closing fees in a timely manner as required.

B. COUNT II

As to Case No. 1999-71,000 (11H) (DOMINGUEZ)

In the Dominguez case the Respondent violated Rules(s)1-3.3, in failing to maintain and/or notify of address and telephone changes making it virtually impossible for Dominguez to contact Respondent, therefore I recommend Respondent be found guilty of violating Rule 1-3.3, and Rule 4-1.4 (a) and (b) providing that a lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. Further a lawyer shall explain a matter to the extent reasonably

necessary to permit the client to make informed decisions regarding the representation. There is ample evidence that the damage suffered by Mr. Dominguez arose as a direct result of Respondent's negligent abandonment of his practice without notice to Dominguez as to the status of his specific performance action during a two-year period (May 1995-August 1997).

> COUNT III
> As to: Case No. 2000-70, 519 (11H) (TODD & COREY NARSON)
> I recommend that the Respondent he found guilty of violating Rules) 4-1.4 as stated above in Count II. Respondent again failed to communicate relevant information regarding the Narsons' pending case, including the court ordered attendance at depositions for both Todd and Cory Narson. Further Rule 4-1.3 provides a lawyer shall act with reasonable diligence and promptness in representing a client. Respondent did not seek to vindicate his clients' cause, nor dedicate himself to the interests of the Narsons with zeal. Respondent also failed to thoroughly investigate the legitimacy of the breach of lease cause of action, and/or notify his clients of the potential for suffering monetary damages related to the counter-claim brought by the Narson's landlord for rent arrearage. Lastly, Rule 4-1.16 (a) (2) which provides that a lawyer shall withdraw from the representation of a client if:
> (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client. *Report of Referee – Pages 9-11*

The Referee also found that the Respondent was suffering from physical and psychological health impairments, as follows:

> 46. The Respondent has been diagnosed as suffering from both recurrent and severe depression as well as suffering from avoidant personality disorder; in addition Respondent has, at times concomitant to the events described herein, exhibited signs of diminished psychological, social, and occupational functioning which would effect his ability to practice law and would go unnoticed or not be apparent to the Respondent's clients. (See testimony of Dr. Stephen Kahn, M.D). *Report of Referee – Page 9*

The Referee found that the Respondent failed to terminate representation after being diagnosed with said impairments once it became necessary to protect his clients from potential loss as a result of his avoidance personality syndrome and therefore

violated Rule 4-1.16(a)(2) (Withdrawal from representation when physical or mental condition so requires).

In the analysis as to an appropriate and just punishment, the Referee found that there were three aggravating factors: 9.22(a) (prior disciplinary offenses); 9.22(d) (multiple offenses); and 9.22(j) (indifference in making restitution). In counterbalance to the above aggravating factors, the Referee found, and commented at length upon, the following mitigating factors: 9.32(d) (timely good faith effort to make restitution or rectify consequence of misconduct); 9.32(e) (full and free disclosure to disciplinary board or cooperative attitude toward proceedings); 9.32(g) (character or reputation); 9.32(h) (physical or mental disability or impairment); 9.32(j) (interim rehabilitation); and 9.32(1) (remorse) as follows:

> I find that the following mitigating factors justify the discipline recommended.
>
> -9.32 (d) (timely good faith effort to make restitution or to rectify consequence of misconduct).
>
> Respondent has made efforts at restitution and remedy of the various claims in mitigation of the damages suffered by his clients.
> In the Crabtree matter, the final trust account disbursements were made by Respondent to complete the post closing accounting as to the warranty deed in question. In the Dominquez case, Respondent attempted, albeit twice unsuccessfully, to set aside the order of judgment on the pleadings entered against his client by the Honorable Richard Payne, 16th Judicial Circuit, Marathon, Florida, based upon an incomplete real estate sales contract addendum filed by opposing counsel in support of the original motion for judgment on the pleadings which order was potentially entered in error. (Record testimony Saul Cimbler).
>
> In the Narson case, it was revealed during the testimony of Todd Narson that many of the initial facts predicating the filing of the breach of commercial lease (commercial) contract action were not revealed to Respondent prior to filing suit, thereby rendering the case and contentions of the Narsons against their landlord without merit. (Record testimony of Todd Narsons). Todd Narson also testified that he did not have the money to pay the outstanding rent ($43,300.00) for the 16 months he remained in

the premises, yet never notified Respondent to dismiss the meritless suit. Although Respondent did not actively move the case to trial, there was sufficient evidence to support a finding that the Narsons misled Mr. Cimbler initially regarding the facts of the case as to questionable zoning issues, which they had knowledge of, and sought to hold the landlord at bay with by maintaining a wrongful breach of
contract action. Occasional verbal communications with the Narson's regarding case status occurred however not in writing. (Record testimony of Todd Narson).

It is clear that Mr. Cimbler acted in good faith with respect to his handling of this case, yet failed to advise of potential losses, such as the ever mounting rent payments, which ultimately were awarded by default in favor of the landlord, after the Narson's failed to attend court ordered depositions (Order of Judge Thomas Wilson). The Florida Bar contends Respondent willfully failed to advise his clients of the depositions, however it is disputed as to whether the notification was timely received by the Respondent. Based upon a fair interpretation of the facts presented I find that Respondent acted in good faith with respect to his involvement with the Narson case, although failed communication did result in unattended hearings.

-9.32 (e) (full and free disclosure to disciplinary board or cooperative attitude toward proceedings).

This mitigating factor is undisputed by the referee herein or the Florida Bar. Respondent at all times fully cooperated with the investigation and proceedings.

-9.32 (g) (character or reputation)

At the hearing of this matter numerous character witnesses testified on behalf of Respondent, Saul Cimbler. Each witness commented on his reputation and character as a trial attorney, especially in the area of criminal defense. Indeed eight 11th Judicial Circuit Judges appeared during the hearing and attested to the character of Respondent as being diligent, prepared, courteous, and generally very proficient in his handling of criminal court

matters. However, it should be noted that the conduct subject of this case occurred exclusively in the civil arena. Yet, I was impressed by the caliber of the character witnesses. It was apparent that Respondent maintains a good reputation among his legal peers, and the judges, which he currently appears before.

-9.32 (h) (physical or mental disability or impairment)

It is the opinion of both Dr. Kahn (psychiatrist) and Dr. Raskin (cardiologist) and the executive director of the Florida Bar Legal Assistance Program, Myer Cohen, Esq., that Respondent Saul Cimbler suffers from poor physical health, emotional and depressive syndrome impairments, and over an extended period of time, has been plagued by avoidance personality syndrome, especially during the time relevant to the negligent conduct alleged and supported by the evidence in the record. The experts opined that the illness is not an excuse, but merely an explanation for the conduct itself. I find that Mr. Cimbler was indeed incapacitated in his daily legal activities to a degree that his combined illnesses caused the aforementioned failure to appropriately handle his client's business with diligence and reasonable competence. However, expert testimony also reveals his marked improvement within the last 24 months including stabilization of weight, cardiology symptoms, and lack of mental depression. (Record testimony of Dr. Kahn). (Record testimony of Dr. Raskin). This recovery is due in part to the overall positive outlook and stress free environment Respondent is currently maintaining. It should be noted that Respondent is limiting his legal practice to criminal defense only with approximately 50 active files. He no longer wishes to engage in civil litigation from a career standpoint, which has helped make his law office practice more manageable. (Record testimony of Saul Cimbler). Therefore I find that the Respondent's personal and emotional problems which reached crisis proportions in October 1996 through September 1997 were a contributing cause of the admitted conduct, deemed herein to be a mitigating factor. Saul Cimbler's medical crisis may have passed and the future is bright, but not totally stable to any medical certainty.

-9.32 (j) (interim rehabilitation)

I find that Respondent has continuously participated in the Florida Bar's Legal Assistance Program for the past five (5) years. He has made efforts to improve his office management and organizational efficiency by contacting LOMAS and by seeking their advice, with a recently scheduled evaluation as of (8/2001). Lastly, Respondent has attended both private and group mental health therapy sessions on a routine basis attempting to control his mental depression impairment.

-9.3 2 (1) (remorse)

Respondent has expressed true remorse throughout these proceedings. He regrets having neglected his client's business matters resulting in loss. He has accepted his responsibility fully, and appears quite willing to rationally see his mistakes as having caused real harm and/or potential loss to his clients. Respondent has verbally apologized on more than one occasion to the referee and Florida Bar counsel for the necessity of this inquest and disciplinary review. *Report of Referee – Pages 17-22*

As neither party to this proceeding has appealed the factual findings of the Referee, the only issue before this Court is whether the recommended suspension together with the other imposed sanctions has a reasonable basis in law and fact.

SUMMARY OF ARGUMENT

The Florida Bar suggests that the sole issue before this Court is whether the Referee's recommendation of a ninety (90) day suspension is appropriate. What the Florida Bar fails to mention in its brief is that the Referee went to great lengths both to fashion a suitable sanction under existing case authority and to safeguard the community against a future relapse and imposed sanctions far more restrictive than the 90 day suspension to which the Florida bar objects.

The Respondent suggests that issue before this Court is whether the omnibus sanctions and safeguards for the community imposed by the Referee are adequate under existing Supreme Court authority. The Respondent submits that the discipline imposed by the Referee: a.) That Respondent is suspended for a period of ninety (90) days, b.) That Respondent be placed on five (5) years of probation to follow the suspension, c.) That Respondent, at his sole cost and expense, shall be monitored by the Florida Lawyers Assistance Program and shall conform to the terms and conditions of any contract applicable by and between himself and the Florida Lawyers Assistance Program, d.) That Respondent shall attend regular psychotherapy sessions with a licensed mental health physician acceptable to the director of the Florida Bar's Legal Assistance Program, e.) That Respondent shall deliver monthly reports to the Florida Bar regarding the physician's evaluation and confirmation of Respondent's continued ability to engage in the active practice of law, f.) That Respondent shall submit annually to an independent psychiatric evaluation (Multiaxial Examination) at Respondent's expense, performed by a license psychiatrist of the Florida Bar's selection, and forward the evaluation report to the director of the Florida Legal Assistance Program for review as to mental impairment, current health conditions, improvement, competency, etc., and g.) That the Respondent shall be directed to cooperate fully with any such evaluation otherwise requested by the Florida Bar or it's authorized program directors, in light of the significant mitigating factors set forth by the Referee, both safeguards the community and is legally adequate given the factual circumstances of the instant case.

The Respondent acknowledges that the law in Florida is clear that the ultimate responsibility for determining discipline rests with this Court, however, as determined by the Referee at the conclusion of all the evidence, the above stated sanctions in addition to a 90-day suspension is well supported by caselaw and is fair to society, fair to the attorney, and will sufficiently deter others from similar misconduct.

ARGUMENT

THE DISCIPLINE RECOMMENDED BY THE REFEREE IS SUPPORTED BY CASELAW AND IS FAIR TO SOCIETY, FAIR TO THE RESPONDENT AND WILL SUFFICIENTLY DETER OTHERS FROM SIMILAR MISCONDUCT.

After four days of hearings and the painstaking review of voluminous documents and evidence, the Referee made findings of fact, conclusions of law and recommendations to this Court that are based soundly on existing caselaw and are fair to society, fair to the attorney, and will sufficiently deter others from similar misconduct. Although the Respondent recognizes that this Court has the ultimate responsibility to determine the appropriateness of a recommended sanction, *The Florida Bar v. Niles*, 664 So.2d 504 (Fla. 1999), a referee's findings of fact come to the court with a presumption of correctness and will be upheld unless clearly erroneous or lacking in evidentiary support. *The Fla. Bar v. Stalnaker,* 485 So.2d 815 (Fla. 1986), *The Florida Bar v. MacMillan* 600 So.2d 457 (Fla. 1992). If findings of the referee are supported by competent, substantial evidence, this Court is precluded from reweighing the evidence and substituting its judgment for that of the referee. *The Fla. Bar v. Hooper,* 509 So.2d 289 (Fla.1987); ("We will typically not disapprove a referee's recommendation as long as the referees recommendation has a reasonable basis in existing caselaw. See *Florida Bar v. Lecznar*, 690 So.2d 1284, 1288 (Fla. 1997)", *The Florida Bar v. Cox*, 794 So.2d 1278, 1281 (Fla. 2001).

The Florida Bar has taken the position, both at the hearing before the Referee and in its brief to this Court, that a three-year suspension is the appropriate sanction for the acts of the Respondent. In support of this position the Bar cites a line of cases that, unlike the instant case, center around attorneys who were found to have willfully committed violations of the Rules the Florida Bar. Further, in the majority of the cases cited by the Bar, those Respondents could not present even minimal mitigation. Here the record is clear that the Respondent presented both substantial and substantive mitigation that was found by the Referee to outweigh the aggravating factors.

In the instant case the Referee made substantial and detailed findings of fact regarding not only mitigation, but the lack of any willful or intentional conduct by the Respondent. The Referee specifically found that "the evidence introduced at the hearing of the matter did not establish in certain instances a clear and convincing standard of willful, intentional conduct by Respondent" *Report of Referee – Page 15*, and that the Respondent's "negligent handling of the three (3) matters in question either occurred due to simple communication lapses, errors in calendaring legal

hearings, or possibly failures to attend hearings which were duly noticed, yet not communicated to Respondent by staff or opposing counsel" *Report of Referee – Page 15*. The Referee went on to note that it was the Respondent's symptoms of mental depression that accounted for the lapses and stated that "Whether by pure neglect or psychological complications related to the stress, coupled with avoidance personality syndrome, Respondent closed his practice and retained only a few active case files, which unfortunately resulted in the grievances currently pending with the Florida Bar" *Report of Referee – Page 16*, and that "several facts point to a complex set of procedural mistakes which were not totally put in motion by Respondent. The key issue is the mental state of Respondent. This helps explain much, if not all of his "leave of absence" from the daily practice." *Report of Referee – Page 16*.

An objective review of the testimony and documentary evidence leads to the conclusion, as found by the Referee, that the Respondent was not the irresponsible, impaired and callous attorney the Bar sought out to portray him in their complaint, but rather that his judgment was clearly diminished by illness, both physical and mental, during the relevant time periods set forth in the Complaint. The evidence establishes that, in hindsight, while trying to close down his practice (when he recognized the seriousness of those illness) the Respondent failed to take steps to adequately protect his clients. And, as found by the Referee, one of whom, the Narson's "buried their heads in the sand" to avoid the consequence of the economic decisions that they, not the Respondent, made. *See Report of Referee – Page 17*.

As caselaw support for the sanction recommendation, the Referee cited *The Florida Bar vs. Brakefield,* 679 So.2d 766 (Fla. 1996) as the case most similar to the facts of the instant case. *Brakefield* is similar in that it involves multi-count allegations of negligence, competence and failure to communicate with clients. As with this Respondent, in *Brakefield* the Bar alleged egregious and flagrant ethical violations. In *Brakefield* the Bar prevailed on their complaint and all of the allegations were proven to the court found by clear and convincing evidence. Although *Brakefield* sets forth a considerably more extreme factual violation, there the Respondent could not offer any mitigation whatsoever, and this Court ordered a 91-day suspension accompanied by three years of probation.

Additional support for the affirmation of the Referee's findings is found in *The Florida Bar vs. Michelle Ann Konig* (Referee Case - Case no. SC00-759 - decided June 7, 2001; not reported). The result on *Konig* offers the most recent application of relevant criteria by the Courts regarding similar mental and physical impairment, as well as mitigating and aggravating factors, to establish the threshold criteria regarding

whether the Respondent knowingly or negligently committed the underlying actions.

In *Konig,* the case which factually is the most similar to the instant case, an appellate lawyer was accused of neglecting four distinct appeals for four different clients, by as applicable, failing to pay filing fees, failing to obtain orders declaring his clients' indigent, failing to file appeals, and ultimately allowing those appeals to be dismissed. The client harm is patently evident in each case. At the time, *Konig* was under suspension for other ethical violations but failed to notify her clients as is mandated by applicable Florida Bar rules.

In aggravation, the Referee found that, as with the respondent in this action, *Konig* had been the subject of a prior suspension and one admonishment. As here, the Referee found *Konig's* mitigating factors to be compelling. The Referee found that at the time of the alleged violations, *Konig* was suffering from severe depression, was the victim in an abusive relationship, suffered from an eating disorder for which she was receiving therapy and had entered into a contract with Florida Lawyers Assistance, inc. (FLA"). The referee recommended that *Konig* be placed on three-year probation; that her practiced be monitored by a practicing attorney; that she file bi-monthly status reports regarding her cases and that she obtain mental health therapy.

In *The Florida Bar vs. Morse*, 784 So.2d 414 (Fla. 2001), this Court clarified that the issue of suspension (as is sought by the Bar) as opposed to public reprimand (as was sought by the Respondent along with the "safety net") are controlled by the *Florida Standards Imposing Lawyer Sanctions*, *The Florida Bar Journal*, September, 2000 at page 764. Those standards, as promulgated by this Court, establish that negligent failure to diligently handle client legal matters presumes a pubic reprimand under Section 4.43, while a knowing neglect presumes a suspension under Section 4.42. Here, no legally sustainable evidence was adduced at trial that the Respondent's actions were knowing. Accordingly, the presumption is that a public reprimand was warranted and not even the recommended suspension.

In *The Florida Bar vs. Maier*, 784 So.2d 411 (Fla. 2001) the respondent failed to complete a Labor certification for an immigration client, failed to respond to the grievance committee and failed to keep a good address with the Bar. *Maier* had been the subject of a prior disciplinary suspension and two admonishments. The Referee recommended a ninety-one (91) day suspension, three-year probation, and enrollment in LOMAS and enrollment in FLA. *Maier* argued that as to the suspension, public reprimand was appropriate. The Florida Supreme Court found that, as in the instant case, the passage of time from the prior violation mitigated against the recommended suspension. But, because the court found that violations she was charged with, in the

case then before them, were the same as in her three previous disciplines, the Supreme Court ordered that a suspension of sixty days was warranted. In *Maier*, the court eluded to the existence of mitigation arising from her mental problems.

In *The Florida Bar vs. Eileen Marie Kirsch,* (Referee Case - Case no. SC00-2610 - decided February 2001; not reported) the Respondent was an in-house lawyer for a cruise line. Due to overwhelming emotional and personal problems, *Kirsh* admitted to neglecting substantial legal matters, including failing to register international copyright/trademark applications and neglecting a matter which resulted in the entry of judgment in the excess of $70,000. In that case, the Bar agreed to a term of probation with mental health supervision.

At the trial of this case, it became clear that the Respondent did not commit the egregious conduct found by the Referee to have knowingly been committed in *Brakefield*. To the contrary, the evidence was "clear and convincing", some even elicited from complainants and Bar witnesses, that the Respondent was a good and competent lawyer and that the Respondent transgressions were not knowing but rather attributable to his physical and mental impairments during the time frames relevant to the particular complaints. Unlike, *Koenig*, *Kirsh* and *Maier*, the Respondent clearly established interim rehabilitation, and even closed his practice when he realized he could not function with the level of responsibility required of a Florida lawyer. Furthermore, unlike *Koenig*, *Kirsh* and *Maier*, the record is clear that long before the trial of this action, and in some instances, the filing of bar complaints, the Respondent voluntarily sought the assistance of FLA and followed their advice, including participation of group therapy, which the testimony established was the turning point in his continued recovery. As with *Koenig*, Respondent suffers from an eating disorder and during time of the complaints filed by the Narson's was in an abusive relationship involving extreme custody issues.

Further, it is important to note, that unlike *Koening, Kirsh* and *Maier*, the Respondent did not wait until a referee ordered him into therapy or into FLA. While in his prior disciplinary case, the Respondent could be deemed to be "avoidant", here the facts are clear that when the Respondent realized he was impaired, both because of a heart attack, diabetes and as a result of his subsequent slide back into depression, he closed his active practice, went to work for a title company in a non-lawyer capacity, sought out the help of FLA and followed their recommendations. Also unlike *Maier*, the transgressions in the instant case the Respondent were <u>not</u> the same as those alleged in his prior disciplines. Even more so than in *Koenig*, the facts of this case establish extreme mitigating factors and aggravating factors that are no worse.

The record is clear that the Respondent was not a bad lawyer or knowingly negligent, but rather that he was hit by a succession of tidal waves which almost drowned him. Fortunately, he latched on to the life preserver that FLA offered him and he was able to get back to land.

CONCLUSION

It is respectfully suggested that the Referee's recommendation was well founded in caselaw and that the omnibus sanctions recommended are fair to society, fair to the attorney, and sufficient to deter others from similar misconduct, *Florida Bar v. Poplack*, 599 So.2d 116, 118 (Fla. 1992), and that the Respondent be given the benefit of the experienced analysis by the Referee, of both the evidence presented and the character of the Respondent, when he concluded:

> "It is fair to recommend an opportunity for rehabilitation of Respondent as he has sought to stabilize his depressive behavior and has made strident efforts to turn the corner in his legal career regarding the necessity to be ever vigilant to protect his client's interestsÿ. Although it can be argued that Respondent Saul Cimbler is a danger to himself and others if allowed to continue practicing law, there appears to be no clear and convincing evidence for this supposition. A properly placed safety net of therapy and monitoring would provide the public with sufficient protection to both allow Respondent to continue to serve our legal community, and place reasonable checks and balances for a requisite period of time to fairly stabilize and prohibit the potential for future negligence.
>
> I find Mr. Cimbler perceives and recognizes the future consequences if he fails to conduct himself with professionalism to practice in the future, and knows that indeed this may truly be his last opportunity. He is willing to prove to the public at large that he is a fine trial lawyer of integrity, and not a candidate for disbarment. It is respectfully submitted that consideration of

recommendation of leniency or suspension based upon the mitigating factors is warranted under the circumstance presented." *Report of Referee – Pages 23-24*

Respectfully Submitted,

____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this pleading was sent via U.S. mail to Randolph Brombacher, Bar Counsel, The Florida Bar, 444 Brickell Avenue, Suite M-100, Miami, FL 33131, and to Kathi Kilpatrick, Assistant Director of Lawyer Regulation, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 on this 3rd day of March, 2002.

____

Richard Baron, Esq.
BARON AND CLIFF

CERTIFICATE OF TYPE, SIZE AND STYLE AND ANTI-VIRUS SCAN

I HEREBY CERTIFY that the brief of Respondent is submitted in 14 point proportionately spaced Times New Roman font and that the computer disk on which this brief is submitted has been scanned to free of viruses, by Norton Anti Virus for Windows.

____

Richard Baron, Esq.
BARON AND CLIFF