IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR, Complainant, v. SAUL CIMBLER, Respondent, _____/	Supreme Court Case No. SC01-116 The Florida Bar File Nos. 1999-71,000(11H), 2000-70,519(11H), and 2000-71,321(11H)

Complainant's Initial Brief

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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 is included in the Referee's Report. Additional factual findings made by the Referee are also included in the report.

Neither party to this proceeding has appealed the factual findings of the Referee. 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 a number 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 also found that the Respondent violated Rule 4-1.16(a)(2) (Withdrawal from representation when physical or mental condition so requires).

The Referee also found that there were three aggravating factors and six mitigating factors. The aggravating factors were 9.22(a) (prior disciplinary

offenses); 9.22(d) (multiple offenses); and 9.22(j) (indifference in making restitution). The mitigating factors found were 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(l) (remorse).

The stipulations and/or findings pertaining to Count I established that Respondent was retained by Jorge Ruiz Del Vizo and his wife Gladys in regard to the sale of property, but failed to carry out his post closing responsibilities in that he failed to ever record the Warranty Deed and pay the real estate taxes.

Another attorney (Ralph Crabtree, Jr. - representing the buyer) sought to locate Respondent and request his performance of his post closing responsibilities. For approximately one year, Crabtree engaged in a diligent effort to locate the Respondent; Crabtree was unsuccessful as Respondent had "made deliberate efforts to make himself unavailable" (Referee's finding No. 47). After having failed to locate the Respondent, Crabtree attended to the post closing matters himself by arranging for a recording of a second Warranty Deed, the paying of the fees and the real estate taxes which had been remitted and improperly retained by the Respondent.

The second count of the Bar's complaint concerned Respondent's representation of Antonio Dominguez. Respondent was hired to prepare a contract for the purchase of real property located in Marathon, Florida. The seller, however, did not consummate the same and Respondent, having advised Dominguez to initiate litigation, filed a suit on behalf of Dominguez for specific performance.

Opposing counsel moved to dismiss and for judgment on the pleadings and set the motions for hearing. Respondent did not appear and final judgment was entered in favor of the defendant. Post judgment motions were denied. Respondent failed to appear for a hearing on his own Motion to Set Aside the Judgment.

A judgment for attorney's fees and costs was assessed against Dominguez in the amount of $7,294.00 and a lien was subsequently placed upon Dominguez's property; the Respondent only becoming aware of this lien when his client (Dominguez) brought the lien to the attention of Respondent. Respondent made no effort to refund Dominguez's deposit money for the purchase of the property or provide restitution to Dominguez for the judgment lien, which was the direct result of Respondent's lack of diligence and deliberate efforts to make himself unavailable.

The third count of the complaint concerned Respondent's representation of Drs. Todd and Corey Narson in a suit against their landlord. Respondent failed to advise them of scheduled depositions. Paragraphs 41, 42 and 43 of the Referee's Report sum up the subsequent events in regard to the Narsons:

> 41. Respondent attended a December 18, 1997 hearing at which time the Court generated an Order also dated December 18, 1997 that required that the Narsons were to make themselves available for deposition within 30 days of said Order or suffer sanctions as a result of their failure to attend said deposition. Respondent testified that contrary to the testimony of Judge Thomas Wilson, Jr. and Mr. Eric Stein, Esq. - who both maintain Respondent was present at the December 18, 1998 hearing- Respondent did not recall being present at the hearing.
>
> 42. As a result of the Respondent's failure to produce his clients (Drs. Narson) for deposition, the Court, sometime on or about April 16, 1998, entered a Final Judgment in favor of the Defendants in which the Narsons were held accountable for $58,400.00, as well as attorney's fees of $15,391.25 and costs of $940.17, totaling approximately $74,731.41.
>
> 43. Sometime on or about August 4, 1999, the Narsons were informed by their bank that a writ of garnishment had been attached to their bank account based on the above Final Judgment for approximately $74,731.41.

The Referee noted Respondent's failure to withdraw as counsel.

The Referee also found:

> 45. The Respondent was previously under contract with FLA, Inc. and was under the Psychiatric care of Dr. Stephen Kahn, M.D. from June, 1993 through 1998; and

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).

Lastly, in 1993 Respondent had previously received a 90-day suspension, probation, and an emergency suspension for funds and trust account violations for similar conduct involving violations of 4-1.15(a), 4-1.15(b), 4-8.4(a), 5-1.1(a) and 5-1.2(b)(c) of the Rules Regulating The Florida Bar (See The Florida Bar v. Cimbler, Case 81,952, Record Ex. 40, Hon. Eli Berger's Referee Report). He was also admonished in 1999 for another, separate instance of funds and trust account violations.

SUMMARY OF ARGUMENT

The sole issue before this Court is whether the Referee's recommendation of a ninety (90) day suspension is appropriate. Neither party has challenged the factual findings.

The Referee found that the Respondent was guilty of rule violations in relation to three separate and unrelated clients concerning three separate and unrelated matters. The three different matters were encompassed in a three count complaint.

In addition, the Referee found that the Respondent was guilty of two 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 also found that the Respondent violated 4-1.16(a)(2) (Withdrawal from representation when physical or mental condition so requires).

The Referee also found that there were three aggravating factors and six mitigating factors. The aggravating factors were 9.22(a) (prior disciplinary offenses); 9.22(d) (multiple offenses); and 9.22(j) (indifference in making restitution). The mitigating factors found were 9.32(d) (timely good faith effort to

make restitution or to 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(l) (remorse).

The Bar would submit that the discipline imposed by the Referee, a ninety (90) day suspension, is clearly inadequate given the factual circumstances of the instant case and disciplinary history of the Respondent.

The law in this state is clear that the ultimate responsibility for determining discipline rests with this Court. A number of cases support the Bar's contention that cumulative misconduct of a similar and repeated nature mandate a three year suspension. This is the only appropriate discipline given that the Respondent has a prior disciplinary history such as in the instant case. Furthermore, although aggravating and mitigating factors must be given some weight, Respondent's physical and mental problems should not be given greater weight than the Respondent's numerous rule violations and disciplinary history.

ARGUMENT

THE REFEREE ERRED BY RECOMMENDING ONLY A NINETY (90) DAY SUSPENSION FOR THE RESPONDENT

The Referee's findings in this case are based upon both factual stipulations and testimony was presented at the final hearing.

The Referee found that based upon stipulations and testimony, the Respondent was guilty of violations of the Bar Rules in regard to three clients, presented in three counts of the Bar's complaint. Specifically, the Referee found that the Respondent was guilty of two 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. In regard to the Rule 1-3.3 violations, the Referee noted that the Respondent intentionally sought to prevent individuals from locating him. (ROR, p. 9) That is, those were not merely negligent violations of the Rule. The Referee also found that the Respondent violated 4-1.16(a)(2) (Withdrawal from representation when physical or mental condition so requires).

The Referee also found that there were three aggravating factors and six mitigating factors. The aggravating factors were 9.22(a) (prior disciplinary

offenses); 9.22(d) (multiple offenses); and 9.22(j) (indifference in making restitution). The mitigating factors found were 9.32(d) (timely good faith effort to make restitution or to 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(l) (remorse).

The Bar would submit that the discipline imposed by the Referee, a ninety (90) day suspension, is clearly inadequate in this case. As this Court stated in The Florida Bar v. Vining, 7 So.2d 1044, 1048 (Fla. 2000):

> The Court's scope of review of a referee's recommended discipline, however, is broader than that afforded to findings of fact because this Court has the ultimate responsibility to determine the appropriate sanction. *See Florida Bar v. Niles*, 644 So.2d 504, 506 (Fla. 1994). Yet, the Court "will not second-guess a referee's recommended discipline so long as that discipline has a reasonable basis in existing caselaw." *Florida Bar v. Lecznar*, 690 So.2d 1284, 1288 (Fla. 1997) ....
>
> In determining the appropriate discipline, this Court considers prior misconduct and cumulative misconduct, and treats more severely cumulative misconduct than isolated misconduct. *See Florida Bar v. Adler*, 589 So.2d 899 (Fla. 1991); *see also* Fla. Stds. Imposing Law. Sancs. 9.22(d) (multiple offenses are one factor that my justify an increase in degree of discipline imposed) .... *See Florida Bar v. Cox*, 718 So.2d 788, 794 (Fla. 1998).

> Additionally, cumulative misconduct of a similar nature warrants an even more severe discipline than might dissimilar conduct.

Given the rationale of Adler & Cox, the facts of this case do not support the limited discipline recommended by the Referee. This conclusion is supported by the fact that similar cases have resulted in a three year suspension.

Unlike the case upon which the Referee relied, The Florida Bar v. Maier, 784 So.2d 411 (Fla. 2001), the cases which follow properly address disciplinary proceedings in which a Respondent has violated several ethical rules in regard to several clients. Maier, pertains to only one client and three singular rule violations.

Respondent's conduct in regard to three clients must be given great consideration due to the fact that Respondent's wrongdoing had an onerous effect upon his clients. In Count I, the Del Vizos, were required to obtain a new Warranty Deed and wait more than a year to properly record the sale of their real property. In Count II, Dominguez was the subject of a $7,294.00 judgment because of Respondent's inaction and a lien was placed upon his property. In Count III, the Narsons incurred a judgment of $58,400 and attorney's fees of $15,391.25 and costs in the amount of $940.17 due to Respondent's inaction.

Given the extensive harm that Respondent was both directly and indirectly responsible for, the applicable caselaw are those comparable cases in which more

than one client was profoundly affected. For instance in The Florida Bar v. Provost, 323 So.2d 578 (Fla. 1975), this Court held that a three year suspension was proper for respondent's breach of duties in failing to properly represent and/or protect the interests of his clients. Provost failed to protect a client's secured claim in a bankruptcy matter and failed to advise the client of his inaction. In addition, he failed to complete representation in a child support matter, and failed to complete the administration of two estates. The referee determined that these actions violated the Rules of Professional Conduct and further noted that respondent had a prior disciplinary history consisting of a private reprimand and a one year suspension.

The Provost case is analogous to the present case. Provost clearly neglected cases, received an unearned fee, failed to communicate with clients, and failed to withdraw when needed. In the present case, Respondent failed to disburse funds entrusted to him, failed to record a Deed, failed to appear for a hearing on a Motion to Dismiss, and misinformed clients as to the status of their case. In each of the cases handled by Respondent, there was communication so inadequate that it caused detriment to his clients.

The same rationale is illustrated in The Florida Bar v. King, 664 So.2d 925 (Fla. 1995), in which King was suspended for three years for failure to file an

answer to a complaint by the extension date, failure to appear at a hearing on a summary judgment motion, failure to notify his clients that the opposition had scheduled depositions, failure to attend depositions, failure to initiate communications that would keep his clients informed, and failure to respond to client's requests for status reports. The referee gave substantial weight to King's prior disciplinary history which included a public reprimand for neglect, an admonishment for neglect and inadequate communication, and a 90-day suspension for numerous violations including trust account violations and neglect. This Court stated that "King has shown a pattern of neglecting clients and seriously affecting their interests." Id. at 927. King was suspended for three years.

In the present case, as stated earlier, Respondent received a 90-day suspension and probation for similar conduct in 1993, and an emergency suspension for funds and trust account violations. He was reinstated in October 1993, and admonished in 1999 for funds and trust account violations. Respondent's prior discipline seems to be more egregious than King's with two suspensions and two violations concerning funds and trust accounting. Therefore, a three year suspension is appropriate.

There are several additional cases wherein a three year suspension was imposed for similar misconduct. In The Florida Bar v. Schneiderman, 285 So.2d

392 (Fla. 1973), respondent, in three instances, failed to take any action in regard to his cases, misrepresented his activities in his clients' behalf, failed to keep them informed of the status of their cases, refused to answer phone calls and letters requesting information, refused to return files and failed to inform clients of his whereabouts. Also similar is The Florida Bar v. Elster, 770 So.2d 118 (Fla. 2000). In Elster, the respondent failed to accomplish any meaningful work on behalf of his clients, made misrepresentations to clients, and issued misleading business cards. The pattern of misconduct and collective misconduct contributed significantly to the determination that a three year suspension was appropriate.

The facts of this case warrant a long term suspension. The suspension should be regarded as not merely a punishment factor, but a rehabilitative factor. It would, given Respondent's documented and prolonged mental illness, be prudent and in keeping with previous findings by this Court to implement a long-term suspension so that his Court can be assured that Respondent is completely capable of performing his duties upon his return to practice so as to not revisit the current situation. This Court has made similar findings and conclusions when mental disorders are at issue. In The Florida Bar v. Horowitz, 697 So.2d 78 (Fla. 1977), this Court held that failing to communicate, and neglect of clients, as a result of clinical depression warranted disbarment. The case involved three consolidated

cases. In each instance Horowitz failed to perform the representation for which he was retained.

Mitigation should not be given greater weight than the rule violations. That message was clearly conveyed in The Florida Bar v. Cruz, 490 So.2d 48 (Fla. 1986). In Cruz the respondent:

> ... introduced three witnesses to testify in his behalf, two of whom participated in the federal trial proceedings. The first of these witnesses was the United States District Court judge who presided at respondent's trial and accepted respondent's guilty plea. He testified that respondent is religious, "not a criminal type," and "essentially a very good person." The judge also testified that, with respect to the offense, respondent was more of an aider or abettor really rather than a conspirator, in the strict sense of the word. He never got anything for it, but there was enough there so that a jury could have nailed him, if it had elected to do so. I don't know whether the decision to plead guilty was the right decision or not .... I wish the sentence could have been less and maybe it should have been. Respondent called as his second witness the probation officer who conducted the investigation for respondent's PSI report. The investigator testified that respondent had an "exemplary background," that he did not feel respondent had used his position as an attorney to violate any laws, and that respondent's involvement in the events surrounding the crime as the result of poor judgment rather than an attempt to further a criminal conspiracy. Respondent also called as a witness Bishop Armando Leon, who testified favorably concerning respondent's character. Respondent testified in his own behalf that his involvement in the events surrounding the bribery was

minimal, and that he was not a party to the bribe.

Despite the extraordinary mitigation, this Court approved the recommendation of disbarment, stating:

> It is apparent from this record that the referee gave credence to the mitigating testimony concerning the limited extent of respondent's participation in this offense because she recommended his disbarment be effective on August 29, 1993, the date of respondent's suspension, thereby allowing respondent to seek readmission in less than a year from the date the referee filed her report. We approve the referee's recommendation.

The cases in this state do not reflect an imbalance whereby mitigation outweighs serious and numerous and repeated violations. Rather, serious misconduct has resulted in serious discipline. The cases quoted above establish that the Referee erred and a three year suspension is the appropriate discipline for this Respondent.

CONCLUSION

Based upon the foregoing reasons and citations of authority, The Florida Bar respectfully submits that the Referee's recommendation of a ninety (90) day suspension should be rejected, and the Respondent should be suspended for three years.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of this Complainant's Answer Brief was forwarded Via Airborne Express (# 3370028325) to Honorable Thomas D. Hall, Clerk, Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1927, and a true and correct copy was mailed to Richard Baron, Attorney for Respondent, at11077 Biscayne Boulevard, Suite 307, Miami, Florida 33161, on this _____ day of January, 2002.

_____

Randolph Max Brombacher
Bar Counsel

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

I HEREBY CERTIFY that the Brief of The Florida Bar is submitted in 14 point proportionately spaced Times New Roman font, and that the computer disk filed with this brief has been scanned and found to be free of viruses, by Norton AntiVirus for Windows.

_____

Randolph Max Brombacher
Bar Counsel