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 Reply Brief

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

Respondent devotes a substantial portion of his argument to two unreported matters, The Florida Bar v. Kirsch, Case SC00-2610, order entered February 1, 2001 and The Florida Bar v. Michelle Ann Konig, Case SC00-759, order entered June 7, 2001. The Kirsch case, it should be noted, was concluded on the basis of a consent judgment. (Exh. A). Likewise the Konig case is also the product of an uncontested proceeding since the Bar did not challenge either the Referee's findings or the recommended discipline. (Exh. B).

In neither case was the discipline recommendation contested. The Kirsch and Konig case references are, therefore, of dubious precedential value since no court "decision is authority on **any** question not raised and considered, although it may be involved in the facts of the case". (emphasis added) See State v. Dubose, 99 Fla. 812, at 816, 128 So.4, at 6 (Fla. 1930); see also City of Miami v. Stegemann, 158 So.2d 583 (Fla. 3rd DCA 1964).

Assuming *arguendo* that the foregoing cases could serve as authority, some important distinctions exist. In Konig, the Respondent was suffering from severe depression during the time period of her undisputed transgressions. She also

suffered from having had a toe amputated. (Exh. C, p. 19). The referee's determination of discipline in Konig was tempered by the fact that the respondent had previously been suspended and admonished for similar misconduct during the same time period, while she suffered from the same problems. (Exh. C, p. 20). In the instant case, Respondent's actions are separate in both time and manner from his earlier suspension.

The Kirsch case is also dissimilar to the instant case since in Kirsch there was no intentional act by respondent to conceal her whereabouts. Respondent in this case stipulated to the fact that he made intentional efforts to conceal his location, obviously reflecting that he was aware that what he was doing was wrong. That element of serious intentional misconduct is missing in Kirsch. Therefore the standards and cases (including Kirsch) which Respondent/Cimbler has emphasized, namely those dealing with mere negligent conduct, do not apply since there were findings of intentional misconduct regarding the concealment of his whereabouts.

In his brief the Respondent also fails to take issue with several cases relied upon the Bar. Rather, these cases are casually dismissed as being among examples of conduct that is willful.

The Bar would submit that those cases cannot be dismissed since

Respondent's conduct included conduct that was willful, and that without that conduct and the communication it prevented, Respondent could not have continued to so easily neglect his clients. In other words, the cover-up, making himself unavailable, which the Referee found to be intentional, must be given great weight. Respondent's reliance on The Florida Bar v. Morse, 784 So.2d 414 (Fla. 2001) is inapplicable because it deals with only one violation. In this case there are multiple violations, both intentional and negligent. Likewise, reliance upon The Florida Bar v. Brakefield, 679 So.2d 766 (Fla. 1996) is also not viable since, unlike the instant case, Brakefield advanced no mitigating factors and only one aggravating factor.

Perhaps most telling is the fact that the Bar has cited to authority in its initial Brief which Respondent has failed to refute or even address. For example, the Respondent has ignored the reasoning and precedential value of The Florida Bar v. Vining, 761 So.2d 1044 (Fla. 2000). In Vining, this Court followed the rationale found in two of its earlier cases when it held that cumulative misconduct of a similar nature requires "more severe discipline ...".

What is more, the identical discipline, a three year suspension, was also imposed for similar misconduct in The Florida Bar v. King, 664 So.2d 925 (Fla. 1995) and The Florida Bar v. Schneiderman, 285 So.2d 392 (Fla. 1973) and The

Florida Bar v. Elster, 770 So.2d 118 (Fla. 2000) and finally The Florida Bar v. Provost, 323 So.2d 578 (Fla. 1975).

This obvious great weight of authority indicates that a ninety-day suspension is indeed, an aberration. While mitigation should be given some weight, it should not ever be the main focus of the disciplinary process.

Respondent's emphasis upon "omnibus ... safeguards" is also misplaced. Safeguards may or may not be fruitful in the future. However, no authority indicates that they are a substitute for discipline indicated by case law as appropriate for similar misconduct.

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 Reply Brief was forwarded 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 March, 2002.

_____

Randolph Max Brombacher
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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.

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Randolph Max Brombacher
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APPENDIX

A. Supreme Court order dated February 1, 2001.

B. Supreme Court order dated June 7, 2001.

C. Report of Referee dated April 5, 2001.