IN THE
SUPREME COURT OF FLORIDA

CASE NOS. 80,236 and 80,714

TFB File Nos. 87-21613-04C
and 90-00370-04C

THE FLORIDA BAR,

Complainant,

vs.

DEITRA R. H. MICKS,

Respondent.

ANSWER BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

In this brief Deitra R.H. Micks will be referred to as "respondent" or "Ms. Micks." The Florida Bar will be referred to as "the Bar" or "petitioner." References to the transcript of the hearing before the referee will be designated as "(T.)." References to the referee's report will be designated as "(RR.)."* References to exhibits submitted at the final hearing or the Bar's supplemental motion will be designated as "(Ex)."

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* The referee below will be referred to as "referee" or "Judge Nichols."

STATEMENT OF THE CASE

The Florida Bar filed a complaint in Case No. 80,236 on July 30, 1992 (T. 9) and in Case No. 80,714 on November 3, 1992. (T.9, 12). Subsequently, the Bar filed a Motion to Deem Matters Admitted and Motion for Summary Judgment on December 22, 1992. On March 3, 1993, respondent filed a Motion to Dismiss in each case. (T. 4). The Honorable Arthur W. Nichols, III, referee, heard both cases on March 12, 1993 and issued a Report of the Referee on April 7, 1993. (RR. 1-28). Judge Nichols also granted the Bar's Motion for Summary Judgment on April 7, 1993. (_____).

On June 11, 1993, the Bar filed its Petition for Review, requesting that this Court reject the referee's recommended sanction of eighteen months suspension from the practice of law. The Bar filed its Initial Brief on July 12, 1993. This Answer Brief follows.

STATEMENT OF THE FACTS

Respondent was licensed to practice in Florida in 1972 and has since continuously resided in Jacksonville. (T. 71). Respondent's legal career began at the Duval County Legal Aid Association under a Reginald Herber Smith Fellowship from the Office of Economic Opportunity. (T. 69-70). Since 1982, respondent has been a solo practitioner, concentrating her practice primarily in the areas of poverty law, employment discrimination and civil rights. (T. 70-71). In 1986, respondent was elected to the Jacksonville City Council and served through 1991. (T. 70-71).

These proceedings involve two complaints: 80,714, concerning respondent's representation of Phyllis Brown and 80,236, regarding a real estate transaction with Lillian Bush. Respondent admitted to the factual basis asserted by the Bar in both cases. (T. 4). Following a consolidated hearing on these complaints, the referee, the Honorable Arthur W. Nichols, III, made extensive findings of fact which are not contested by respondent. Judge Nichols further made findings in aggravation and mitigation of discipline and recommended that respondent be suspended from the practice of law for eighteen months. (RR. 25).

CASE NO. 80,714

Ms. Phyllis Brown contacted respondent in 1983 regarding Ms. Brown's employment application to the Jacksonville Sheriff's Office. Ms. Brown alleged the agility tests used as a

prerequisite to employment were discriminatory. (RR. 15). Respondent filed a §1983 action in federal court and an administrative complaint with the Equal Employment Opportunity Commission, a prerequisite to filing a Title VII claim. (RR. 16).

On June 8, 1984, respondent received a "right to sue" notice from the Equal Employment Opportunity Commission. Respondent moved on June 12, 1984 to amend the complaint to include a Title VII count. On the same day respondent moved for a continuance of trial and a reinstitution of discovery. (RR. 18). Trial was set for June 19, 1984, and on June 18, 1984 respondent informed Judge John Moore that she was not prepared for trial. Judge Moore denied respondent's motions on June 18, 1984 and set commencement of trial for June 19, 1984. (RR. 18-19).

Respondent filed a new complaint pursuant to Title VII on June 18, 1984. The complaint filed in 1983 was involuntarily dismissed pursuant to defendant's motion on June 19, 1984. Attorney's fees in the amount of $7,680.00 were subsequently assessed against respondent and Ms. Brown. (RR. 19). Judge Moore made the finding in the Order on Attorney's Fees that the §1983 action was frivolous and prosecuted in bad faith. (RR. 20).

Ms. Brown appealed the dismissal and award of fees and costs. At the hearing before Judge Nichols, Ms. Brown stated that at the time (1984), she wanted to appeal Judge Moore's ruling. (T. 53). Ms. Brown then took out a second mortgage on her home to cover the costs associated with the appeal. Respondent introduced Ms. Brown to the broker who assisted Ms.

Brown in obtaining the mortgage. (RR. 20). Although the Eleventh Circuit affirmed Judge Moore's order on July 20, 1985, it did not make a finding that the appeal itself was frivolous. (RR. 21).

The fees and costs were paid by Ms. Brown. At the hearing, Ms. Brown stated that she never had any discussion with respondent about the debt. (T. 64). Indeed, Ms. Brown stated, "I felt like I had, you know, the obligation to take care of it." (T. 57).

CASE NO. 80,236

In February 1985, Ms. Lillian Bush contacted respondent about a foreclosure action pending against her property. Both the property's first and second mortgages were in foreclosure. (RR. 2). Absent funding from respondent, Ms. Bush would have lost her home years earlier.

Respondent used personal funds to clear Ms. Bush's outstanding debts and bring the mortgages current. (RR. 5-6). In return, Ms. Bush conveyed the property to respondent through a purchase and sale agreement. On April 30, 1985, respondent and Ms. Bush entered into an Agreement for Deed conveying the property back to Ms. Bush. (RR. 7). This Agreement was not recorded. (RR. 9). Respondent subsequently used the property as collateral for several loans. (RR. 9-10).

A condition of the Agreement for Deed was that Ms. Bush make a monthly payment to respondent. These payments began May 1, 1985, and continued through April 1986, when respondent increased

the payment. When Ms. Bush failed to make the payment, respondent initiated eviction proceedings. (RR. 12).

At the hearing before Judge Nichols, respondent candidly admitted that the combined rigors of solo practice and the City Council overwhelmed her during the mid-1980s. (T. 72). Respondent stated:

> You know, the biggest mistake I probably have ever made in my life, Judge, was thinking that public office, when you are elected to public office was a part time position, like they said. I said it was part time. And I did investigation prior to assuming the office. But it turned out to be a full time, more than full time duty and responsibility. I was completely overwhelmed. My district was 48,000 people.

(T. 72). Respondent stated that her district completely lacked basic services such as sewer and water, that respondent "... couldn't do it all [herself] and continue to practice law as a sole practitioner." (T. 73). Respondent's overwhelming responsibilities were further compounded by the difficulties of raising her child as a single parent. (T. 73-74).

In 1991, respondent became very ill and opted not to run again for elected office. (T. 82). That same year respondent also voluntarily terminated her practice and has since taken no new cases. Respondent described her life since 1991 as follows:

> My time on the city council expired in July of 1991. I got very sick in January. I caught pneumonia. And I was told to take it easy. My doctor told me to rest and relax and recuperate and do not catch pneumonia again.
>
> So I could not run again for elective office. My law practice has been phasing out since 1985 when I got on the city counsel.

> So I have been resting and trying to get my strength back and trying to you know, see what I could do a little bit around here and around there. And just trying to keep myself going. I go to the library. I research, trying to keep up with the law and see what is going on and keep up with things in the community. Because I am interested in things, the practice of law.

(T. 82-83).

Respondent admitted that being a sole practitioner greatly contributed to her problems because she did not have the benefit of a peer or advisor. (T. 83-84). In accordance with this acknowledgment respondent vowed she would never engage in a solo practice again. (R. 83). In addition, Ms. Bush brought a civil law suit against respondent, which judgment respondent has paid. (T. 130).

Respondent candidly admitted the factual basis of the Bush and Brown complaints and her violation of her ethical obligations as an attorney. (T. 74, 79). She did not dispute or quibble as to the factual matters asserted by the Bar but offered the matters set forth above in explanation and mitigation.

SUMMARY OF THE ARGUMENT

The referee in this case, the Honorable Arthur W. Nichols, III, erred in failing to grant respondent's Motion to Dismiss. In her Motion to Dismiss, respondent argued that both complaints in this case should be barred by the Doctrine of Laches. The factual matters in this case occurred no more recently than 1985 and 1986, the Bar did not inform respondent of its investigations until 1990 and did not file complaints until 1992, and the delay prejudiced the respondent's ability to either defend herself on the merits or present matters in mitigation. Accordingly, the referee erred in failing to grant respondent's Motion to Dismiss, and this Court should bar the complaints in this case.

The factual basis for the referee's disciplinary recommendation is not contested by the respondent and must be upheld because it is neither clearly erroneous nor devoid of record support. The referee's findings as to aggravating and mitigating factors resulted in recommended discipline that comports with previous decisions of this Court, particularly in view of the respondent's candor, overwhelming personal problems, inexperience as a sole practitioner and remorse for the consequences of her actions giving rise to these proceedings. Accordingly, this Court should uphold the discipline recommended by the referee.

The discipline recommended by the referee appropriately weighs the aggravating and mitigating circumstances and the respondent's lack of repeated prior discipline by the Bar.

Respondent has devoted her professional career to the under represented, has accepted responsibility for her wrongdoing, has voluntarily withdrawn from practice for the past two years and has suffered from overwhelming personal and professional difficulties resulting in part from her devotion to public service. Accordingly, the referee's disciplinary recommendation should be upheld.

The referee's findings in mitigation that respondent's misconduct stemmed at least in part from personal or emotional problems, that respondent made full and free disclosure to the disciplinary board and that the Bar delays unreasonably in instituting disciplinary proceedings are clearly supported in the record. In fact, the record is utterly devoid of any evidence contrary to the first two findings in mitigation. Additionally, the Bar must bear responsibility for the delay in instituting these proceedings, the record clearly supports the referee's finding that the delay was unreasonable and the respondent's conduct since 1986 shows that discipline more severe than that recommended by the referee is not warranted for the protection of either the public or the Bar. Accordingly, this Court should uphold the discipline recommended by the referee in this case.

ARGUMENT

I.

THE REFEREE ERRED IN FAILING TO GRANT RESPONDENT'S MOTION TO DISMISS

Respondent filed Motions to Dismiss on March 9, 1993, which were effectively denied when Judge Nichols granted the Bar's Motion for Summary Judgment on April 7, 1993. (RR.).

In the Motions to Dismiss, respondent argued that both complaints should be barred by laches. Laches is comprised by the following elements:

> i. Conduct on the part of the defendant giving rise to the situation of which the complaint is made.
>
> ii. The plaintiff, having knowledge or notice of defendant's conduct, and having been afforded the opportunity to bring suit, is guilty of not asserting his rights by suit.
>
> iii. The defendant lacks knowledge that plaintiff will assert the right on which he bases his suit.
>
> iv. Injury or prejudice to the defendant in the event relief is accorded to the plaintiff.

Van Meter v. Kelsey, 91 So.2d 327, 330-31 (Fla. 1956). Newman v. Newman, 573 So.2d 1001, 1003 (Fla. 1st DCA 1991); Wing v. Wing, 464 So.2d 1342, 1344 (Fla. 1st DCA 1985); Devine v. Dept. of Professional Regulation, Board of Dentistry, 451 So.2d 994, 996 (Fla. 1st DCA 1984).

The requisite elements of laches are clearly present under the allegations of both complaints, in that:

i. Respondent handled the Brown matter between 1983 and 1985. (RR. 15-21). The Bush transaction occurred in 1985 and 1986. (RR. 2-14).

ii. The Bar did not file a complaint in the Brown matter until November 3, 1992. (T. 9). A complaint in the Bush matter was not filed until July 30, 1992. (T. 9).

iii. Respondent was not informed of a Bar investigation into the Brown or Bush matter until 1990. (T. 25, 34).

iv. The delay in prosecution severely prejudiced respondent. She testified that she could no longer recall many aspects about the cases, (T. 95), and accordingly her ability to challenge the charges and aggravating circumstances, and to present mitigating factors, was severely impaired.

Disciplinary actions are brought principally to preserve the public's confidence in the Bar and protect the Bar's integrity. The Florida Bar v. Welch, 272 So.2d 139, 141 (Fla. 1972); See DeBock v. State, 512 So.2d 164, 166 (Fla. 1987) ("[B]ar disciplinary proceedings are remedial, and are designed for the protection of the public and the integrity of the Courts."). Any benefit to the public or the Bar by disciplining respondent has been nullified by the long lapse between respondent's conduct and imposition of discipline. See Welch, supra at 141. As this Court stated in The Florida Bar v. Randolph, 238 So.2d 635, 638 (Fla. 1970), "We have repeatedly announced that disciplinary

proceedings should be handled with dispatch." This Court also stated that "inordinate delays are indeed unfair and even unjust to the one accused." Id. In part, such delays "undermine the public confidence in the bar's announced determination to keep its own house in order." Id. Additionally, in The Florida Bar v. Papy, 358 So.2d 4, 6 (Fla. 1978), citing, The Florida Bar v. King, 174 So.2d 398 (Fla. 1965), this Court stated that it was "committed to the proposition that disciplinary proceedings should be handled with dispatch, without any undue delay." Furthermore, in In re Phillips, 510 F.2d 126 (2d Cir. 1975), the Second Circuit declined to proceed with suspension or disbarment charges against the attorney because six years had passed between the conduct giving rise to the complaint and the complaint itself.

Respondent has clearly been prejudiced by an excessive delay that was caused by the Bar. Diligence in prosecution rests solely with the Bar. Randolph, supra, at 639. Accordingly, respondent should not be disciplined for the Bar's dilatory action, which has already caused prejudice. Judge Nichols erred in declining to grant respondent's Motion to Dismiss.

II.

THE REFEREE'S RECOMMENDED DISCIPLINE OF 18 MONTHS SUSPENSION IS APPROPRIATE BASED UPON THE ADMITTED FACTUAL BASIS OF RESPONDENT'S CONDUCT

After making extensive findings of fact, the referee found both aggravating and mitigating factors, which he found on balance merited a suspension of eighteen months. (RR. 25). These findings and the recommendation are presumed correct and must be upheld unless clearly erroneous or devoid of record support. The Florida Bar v. Rosen, 608 So.2d 794 (Fla. 1992); The Florida Bar v. Miele, 605 So.2d 866 (Fla. 1992); The Florida Bar v. Poplack, 599 So.2d 116 (Fla. 1992).

Respondent has accepted the factual basis of the Bar's complaints and does not contest Judge Nichols' findings. Case law demonstrates that Judge Nichols' recommended discipline of 18 months suspension comports with prior disciplinary actions by this Court involving fact patterns similar to the Bush and Brown complaints.

In The Florida Bar v. Welch, 272 So.2d 139 (Fla. 1972), an attorney was placed on three years probation after persuading a client to deed property to the attorney's wife in return for inadequate consideration. The attorney had been previously disbarred in 1958 for misappropriation of clients' trust funds. Id. at 141, n.2. The three-year probation was based in large part on a six year lapse between the transaction and discipline, as well as the attorney's rehabilitation during the interim. In reaching its result, this Court specifically held:

> However, we are convinced that the overall lapse of time involved in these proceedings of four years has largely nullified any benefit to the public and the Bar to be achieved by disbarment or suspension of respondent. In the 6 years that have lapsed since the execution of the deed by the complaining witness herein, respondent has, judging from the witnesses presented, conducted his practice of law in a reputable manner. Disciplinary proceedings are instituted primarily in the public interest and to preserve the purity of the Bar. Those interests will not be served at this late date by respondent's suspension.

Id. at 141 (citation omitted).

The Florida Bar v. Israel, 327 So.2d 12 (Fla. 1975), was factually similar to this case but resulted in a far less severe sanction than sought by the Bar against this respondent. Israel involved a real estate transaction essentially identical to the Bush transaction in this case. The Court publicly reprimanded Israel after he admitted to the wrongful nature of the transaction. Id. Accordingly, Israel provides guidance as to the appropriate sanction in this case. Id. at 13.

In the case at bar, respondent admitted to the factual basis of the Bush complaint and does not contest Judge Nichols' findings of fact. She candidly discussed all aspects of the transaction during the disciplinary hearing, fully admitting that she lacked knowledge and experience in the area of real estate law and that she provided Ms. Bush with inappropriate counsel. (RR. 85). Indeed, Judge Nichols made a specific finding in mitigation of discipline that respondent had made a "full and free disclosure to disciplinary board." (RR. 25).

As this Court noted in Welch, a substantial lapse between the wrongful conduct and the imposition of discipline is a factor in mitigation of discipline. More than seven years have elapsed since the Bush transaction. (RR. 2-13). Respondent has not only fully admitted her wrongdoing but has voluntarily withdrawn from the practice of law until the conclusion of these proceedings. (T. 82-83). Respondent also has vowed that she will not again engage in solo practice. (T. 83). Accordingly, the cases of Welch and Israel compel this Court uphold Judge Nichols' recommended discipline of 18 months suspension from the practice of law.

In The Florida Bar v. Barley, 541 So.2d 606 (Fla. 1989), an attorney drafted a trust, named himself sole trustee, persuaded the client to make an unsecured loan of $47,500 to him from the trust and withdrew both hourly fees and a contingent fee from the trust without the consent of the client. The Court imposed a 60-day suspension for the misconduct.

The misconduct in Barley substantially exceeds respondent's misconduct in the Bush matter. In both cases, the attorney failed to inform clients they needed outside counsel. Both attorneys made inappropriate financial gains from clients. Both unilaterally took unagreed to fees from the clients. If a 60-day suspension was appropriate in Barley, it cannot seriously be contended that the 18 month suspension recommended by the referee is an inadequate discipline in this case.

A disciplinary action brought after an attorney failed to inform a client that there was no basis for the client's claim parallels the Brown complaint in this case. Under those circumstances, the Court in The Florida Bar v. Bazley, 597 So.2d 796 (Fla. 1992), imposed a suspension of eight months. The attorney in Bazley, like respondent, admitted to suffering from severe personal problems during the period of wrongful conduct; worked as a sole practitioner and thus lacked the benefit of a supervising attorney or associate; had received a prior reprimand; and expressed remorse for the episode. See id. at 797. As a result, Bazley demonstrates that the referee's recommendation should not be upset.

The cases cited by the Bar are not persuasive because they are clearly distinguishable. The Florida Bar v. Fitzgerald, 541 So.2d 602 (Fla. 1989), concerned an attorney disbarred after misappropriating trust fund monies from a client who was also a business partner. This Court reasoned that the combined misconduct of misappropriation and betrayal of the client/partner compelled disbarment. Id. at 606. In contrast, respondent never engaged in a partnership with either Ms. Bush or Ms. Brown. Moreover, the attorney in Fitzgerald argued that the referee erred in finding him guilty in three of the five counts of misconduct, whereas respondent has fully admitted her misconduct.

Furthermore, a significant lapse of time between the offending conduct and the imposition of discipline could not inure to Fitzgerald because it was due to his own actions to

conceal his misconduct from the Bar. Id. at 605. However, respondent has not attempted to conceal any misconduct, but rather has been forthright.

The Florida Bar v. Neely, 587 So.2d 465 (Fla. 1991), also cited by the Bar, is inapposite, because the attorney had been disciplined on five prior occasions before disbarment was ordered. The attorney faced three counts of misconduct, one involving the transfer of a home to a corporation owned by the attorney, who failed to inform the client what was being signed or to advise her to seek independent counsel. The cumulative impact of the attorney's "significant disciplinary history" combined with subsequent misconduct resulted in disbarment. Id. at 464. The attorney had demonstrated that he was completely unamenable to rehabilitation.

Disbarment was similarly ordered in the egregious case of The Florida Bar v. Della-Donna, 583 So.2d 307 (Fla. 1989). In Della-Donna, an attorney brought Nova University to the brink of financial ruin after embezzling a trust to which the University was a principle beneficiary. The attorney also ruined several other trusts, yet absolutely refused to acknowledge the misconduct. Id. at 309. In contrast, the Bar has made no showing in this case that respondent's misconduct resulted in the financial ruin of either Ms. Brown or Ms. Bush. Moreover, respondent has fully acknowledged her misconduct, unlike the unrepentant attorney in Della-Donna.

Additionally, the attorney in The Florida Bar v. Holmes, 503 So.2d 1244 (Fla. 1987), was disbarred for engaging in numerous instances of misconduct. Holmes committed a series of fraudulent real estate transactions, misappropriated funds from four clients, neglected a legal matter, entered a business relationship with a client though a conflict of interest existed and intentionally harmed clients. Id. at 1247. Respondent's misconduct was not nearly so egregious as the conduct in Holmes and does not demonstrate the continuing, calculated pattern of fraud and deceit present in Holmes.

Judge Nichols' recommendation of eighteen months suspension is supported by the facts of both the Brown and Bush cases. Welch and Israel in particular are identical to the Bush matter and resulted in reprimands. The cases relied upon by the Bar are greatly dissimilar to the facts of this case. Accordingly, the recommended suspension of eighteen months should be upheld.

III.

THE RECOMMENDED DISCIPLINE IS AN APPROPRIATE REFLECTION OF BOTH THE AGGRAVATING AND MITIGATING CIRCUMSTANCES

The Bar argues that the referee's findings in aggravation, coupled with respondent's misconduct mandate that this Court reject the referee's recommendation of an 18 month suspension and impose the disciplinary sanction of disbarment. The Bar cites to The Florida Bar v. Neely, in support of this assertion. Neely involved an attorney guilty of misconduct in three unrelated incidents who also had an extensive history of five prior disciplinary actions. Disbarment was ordered specifically to protect the public. Clearly, in Neely the attorney had been accorded multiple opportunities for rehabilitation yet nonetheless continued to violate his oath.

The Bar also alleges respondent's "cumulative misconduct." Respondent was privately reprimanded in 1989. (T. 115). One reprimand does not constitute cumulative misconduct. Certainly one private reprimand is not the egregious history of misconduct such as that of the attorney in Neely, supra. Nor does one private reprimand amount to the repeated discipline of the attorney in The Florida Bar v. Bern, 425 So.2d 526 (Fla. 1983), who was reprimanded on three separate occasions before being suspended for three (3) months after entering into a partnership with a client and failing to turn over funds due to the client. As this Court observed, "The Court deals more harshly with

cumulative misconduct than it does with isolated misconduct. Additionally, cumulative misconduct of a similar nature should warrant an even more severe discipline than might dissimilar conduct." Id. at 528. See also, The Florida Bar v. Vernell, 374 So.2d 473 (Fla. 1979) (two prior reprimands in the face of a proceeding for misdemeanor convictions warranted six months suspension).

In The Florida Bar v. Holland, 520 So.2d 283 (Fla. 1988), an attorney was suspended for six months. In that case, the attorney had twice previously been reprimanded for misconduct and was charged with dishonesty, fraud, taking advantage of a client's confusion, and overcharging fees. Indeed, the attorney took a mortgage on the client's residence, thus clouding the client's title. Id. at 284. The facts in Holland are not dissimilar to the facts acknowledged in the Bush matter and respondent's discipline of an eighteen-month suspension would accord with the six months suspension ordered in Holland.

Respondent's conduct in both the Brown and Bush matters does not amount to a pattern of fraud and dishonesty which would warrant a more severe sanction than recommended by the referee. The Brown complaint centered on civil rights litigation; the Bush matter involved a real estate transaction. The complaints are completely dissimilar and reveal isolated incidents in a career spanning 20 years of legal and civil service.

The referee's findings in mitigation and recommendation of eighteen months suspension in the instant proceeding recognize the policies and goals of attorney discipline. These purposes

were articulated in The Florida Bar v. Barley, 541 So.2d 606 (Fla. 1989):

> First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty. Second, the judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations. Id. at 607-608, quoting **The Florida Bar v. Pahules**, 233 So.2d 130, 132 (Fla. 1970).

In the case at bar, the referee heard testimony that respondent's entire professional career has been devoted to Jacksonville's under-represented poor and minority communities. (T. 70). Secondly, respondent has accepted full responsibility for her wrongdoing and has proven herself fully amenable to rehabilitation. She voluntarily withdrew from practice at the onset of the Bar's investigation and has stated that she does not intend to engage in the solo practice of law. (T. 86). Respondent has expressed her desire to continue serving her traditional client base through an association with a firm. Third, an eighteen month suspension, on the heels of respondent's personal and professional difficulties and voluntary withdrawal from practice for the last two years, will surely inform both the Bar and the public that such conduct will not be tolerated.

Because the Bar has failed to demonstrate that respondent's prior single private reprimand constitutes cumulative misconduct and has also failed to demonstrate that Judge Nichols' findings in aggravation and mitigation are clearly erroneous, these findings must not be disturbed. Accordingly, this Court should uphold Judge Nichols' findings of mitigating and aggravating circumstances and impose the recommended discipline of eighteen months suspension.

IV.

THE REFEREE'S FINDINGS IN MITIGATION ARE SUPPORTED BY THE RECORD AND SUPPORT THE REFEREE'S RECOMMENDED DISCIPLINE

Judge Nichols made three findings in mitigation:

(1) personal or emotional problems;
(2) full and free disclosure to disciplinary board; and
(3) unreasonable delay in disciplinary proceeding.

(RR-25) These findings are presumed correct and must be upheld unless clearly erroneous or devoid of record support. The Florida Bar v. Rosen, 608 So.2d 794 (Fla. 1992); The Florida Bar v. Miele, 605 So.2d 866 (Fla. 1992); The Florida Bar v. Fields, 482 So.2d 1354 (Fla. 1986); The Florida Bar v. Poplack, 599 So.2d 116 (Fla. 1992).

The disciplinary hearing is replete with testimony that respondent experienced a personal crisis during the period of her representation of Ms. Brown and Ms. Bush. Respondent testified that she was overwhelmed by the rigors of managing her legal practice and representing constituents as an elected official. (T. 72). She also admitted that practicing law as a solo practitioner was simply too much for her, and she voluntarily abandoned her practice in 1991. (T. 72-73). The record is devoid of any conflicting or contradictory evidence and, as such, the referee's finding in mitigation that respondent was suffering from "personal or emotional problems" must be upheld. (RR. 25).

The record further supports the finding in mitigation that respondent made a "full and free disclosure to [the] disciplinary board." (RR. 25). Respondent admitted to the factual basis of the Bar's complaints, and further, at the hearing, acknowledged her wrongdoing. Respondent candidly answered all questions regarding her handling of the Bush and Brown matters. There is no evidence in the record that respondent was not completely candid and forthcoming in her disclosure to the Bar. Accordingly, this finding in mitigation must be upheld. The Florida Bar v. Coklough, 561 So.2d 1147 (Fla. 1990).

The referee made a third finding in mitigation, that there was an "unreasonable delay in [the] disciplinary proceeding." (RR. 25). The record demonstrates that the Bush matter occurred in 1985 and 1986 (RR. 2-12), while the Brown matter began in November 1983 and concluded in 1985. (RR. 15-21). On its face, the Bar's delay in this case was unreasonable.

In The Florida Bar v. Welch, 272 So.2d 139 (Fla. 1972), a lapse of six years between the misconduct and imposition of discipline provided a strong mitigating consideration because the lapse "largely nullified any benefit to the public and the Bar to be achieved by disbarment or suspension of respondent." Id. at 141. Thus, the need to protect the public was not demonstrated because the attorney had proven himself rehabilitated in the interim. As this Court observed, "Disciplinary proceedings are instituted primarily in the public interest and to preserve the purity of the Bar." Id. Notably, the Bar has made no showing in

this case that respondent's membership in the Bar will harm either the public or the Bar.

Similarly, "excessive delay" in concluding a disciplinary matter was deemed a mitigating circumstance in determining the appropriate discipline in The Florida Bar v. Guard, 453 So.2d 392 (Fla. 1984). Further, in The Florida Bar v. Randolph, 238 So.2d 635 (Fla. 1970), this Court held:

> We have repeatedly announced that disciplinary proceedings should be handled with dispatch. In cases of flagrant delays ... we have held that years of exposure to public scrutiny and criticism supplemented by clear evidence of rehabilitation, justify a terminal penalty that otherwise would be considered inadequate. (citations omitted) During this unduly long period of investigation and prosecution, the accused lawyer is left dwelling through the fields of limbo where dwelt what Dante called "the praiseless and the blameless dead." (citation omitted)
>
> We have pointedly held that the responsibility for exercising diligence in the prosecution rests with the Bar. When it fails in this regard the penalizing incidents which the accused lawyer suffers from unjust delays, might well supplant more formal judgments as a form of discipline. This is so even though the record shows that the conduct of the lawyer merits discipline. (citation omitted)

Id. at 638-639 (emphasis added). Accordingly, the Bar bears responsibility for the excessive delay in this case.

The Bar cannot now blame respondent for the prejudicial delay accruing between the conclusion of the Bush and Brown matters and imposition of discipline. The Bush incident occurred during 1985 and 1986, seven years ago, while the Brown matter

occurred during 1983 and 1985, eight years ago. The decision whether and when to prosecute lies only with the Bar. The span of years in this case surely warrants a finding of mitigation under Randolph, particularly in light of respondent's acknowledgement of her actions and amenability to rehabilitation. Thus, the finding by Judge Nichols that the delay in discipline prejudiced respondent should be upheld.

CONCLUSION

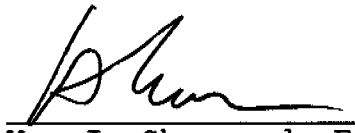
The Bar's prejudicial, unreasonable delay in prosecuting the instant matters should have caused the referee to grant respondent's Motion to Dismiss on the basis of laches. To that extent, this Court should reject the recommendation of the referee and decline to discipline respondent.

In the alternative, Judge Nichols' findings and recommendation are supported by the record and thus should not be reversed. The recommended discipline of a suspension of eighteen months is fully supported by the record, findings in aggravation and mitigation, and this Court's own caselaw.

Accordingly, this Court should uphold the Referee's Report of Findings and recommendation of discipline.

Respectfully submitted,

SHEPPARD AND WHITE, P.A.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing has been furnished to Alisa M. Smith, Esquire, Bar Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, by United States Mail, this 5th day of August, 1993.

ATTORNEY

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