047 **FILED**

SID J. WHITE
NOV 28 1994 12/12
CLERK, SUPREME COURT
By ____________
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR, :

Complainant, :

v. :

LAWRENCE J. SMITH, :

Respondent. :

Supreme Court Case No. 82,255

TFB File No. 94-50,126 (17E)

ANSWER BRIEF OF RESPONDENT LAWRENCE J. SMITH

NEAL R. SONNETT, # 105986
Neal R. Sonnett, P.A.
Attorneys for Respondent
One Biscayne Tower, Suite 2600
Two South Biscayne Boulevard
Miami, Florida 33131-1802
Telephone: (305) 358-2000

TABLE OF CONTENTS

TABLES OF CASES AND CITATIONS iii

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE AND FACTS 2

SUMMARY OF ARGUMENT 3

ARGUMENT

POINT I

THE REFEREE'S RECOMMENDATION REGARDING DISCIPLINE WAS APPROPRIATE AND SHOULD BE AFFIRMED 4

A. Introduction 4

B. The Standard of Review 5

C. Disbarment Is Not Mandated For Felony Convictions 7

D. The Referee Correctly Concluded That Disbarment Was Not Required By The Aggravating Circumstances Urged By The Bar In This Case 8

1. Pattern of Misconduct 8

2. Dishonest or Selfish Motive 10

3. Multiple Offenses 12

4. Vulnerability of Victim 14

5. Prior Disciplinary Offenses 14

6. Substantial Experience in the Practice of Law 15

E. Substantial Mitigating Factors Justify A Suspension Rather Than Disbarment In This Case 15

1. Character or Reputation 16

2. Remorse 17

3. Timely Good Faith Effort To Make Restitution or Rectify the Consequences of his Actions 18

4. Full and Free Disclosure to Disciplinary Board or Cooperative Attitude Toward Proceedings 19

5. Absence of a Dishonest or Selfish Motive 19

6. Personal or Emotional Problems 19

7. 9.32(k): imposition of other penalties or sanctions 20

8. No Violation of Duty Owed To Clients 21

9. Factors Raised By The Testimony of Witnesses for the Respondent 23

F. Conclusion 27

CERTIFICATE OF SERVICE 28

TABLE OF CASES AND CITATIONS

CASES

Gould v. State,
9 Fla. 662, 127 So. 309 (Fla. 1930) 25

The Fla. Bar v. Tunsil,
503 So. 2d 1230 (Fla. 1986) 22

The Florida Bar In re: Efronson,
403 So. 2d 1305 (Fla. 1980) 16

The Florida Bar v. Adler,
505 So. 2d 1334 (Fla. 1987) 21

The Florida Bar v. Anderson,
538 So. 2d 852 (Fla. 1989) 6

The Florida Bar v. Anderson,
594 So. 2d 302 (Fla. 1992) 21

The Florida Bar v. Blessing,
440 So. 2d 1275 (Fla. 1983) 26

The Florida Bar v. Calvo,
630 So. 2d 548 (Fla. 1993) 14

The Florida Bar v. Carbonaro,
464 So. 2d 549 (Fla. 1985) 8, 23

The Florida Bar v. Chosid,
500 So. 2d 150 (Fla. 1987) 8, 11, 23

The Florida Bar v. Clark,
582 So. 2d 620 (Fla. 1991) 15, 20

The Florida Bar v. Corbin,
540 So. 2d 105 (Fla. 1989) 23

The Florida Bar v. Davis,
361 So. 2d 159 (Fla. 1978) 8

The Florida Bar v. Diamond,
548 So. 2d 1107 (Fla. 1989) 21, 24, 26

The Florida Bar v. Dubbeld,
594 So. 2d 735 (Fla. 1992) 4, 21

The Florida Bar v. Graham,
605 So. 2d 53 (Fla. 1993) 6

The Florida Bar v. Helinger,
620 So. 2d 993 (Fla. 1993) 22

The Florida Bar v. Hoffer,
383 So. 2d 639 (Fla. 1980) 5

The Florida Bar v. Jahn,
509 So. 2d 285 (Fla. 1987) 7, 23

The Florida Bar v. Keane,
536 So. 2d 990 (Fla. 1989) 21

The Florida Bar v. Lipman,
497 So. 2d 1165 (Fla. 1986) 6, 27

The Florida Bar v. MacMillan,
600 So. 2d 457 (Fla. 1992) 6

The Florida Bar v. Marcus,
616 So. 2d 975 (Fla. 1993) 7

The Florida Bar v. McNamara,
634 So. 2d 166 (Fla. 1994) 7

The Florida Bar v. McShirley,
573 So. 2d 807 (Fla. 1991) 7

The Florida Bar v. Meldon,
459 So. 2d 314 (Fla. 1984) 16

The Florida Bar v. Mims,
532 So. 2d 671 (Fla. 1988) 14

The Florida Bar v. Moody,
577 So. 2d 1317 (Fla. 1991) 22

The Florida Bar v. Nedick,
603 So. 2d 502 (Fla. 1992) 10, 11, 27

The Florida Bar v. Neely,
502 So. 2d 1237 (Fla. 1987) 5

The Florida Bar v. Niles, 19 Fla. L. Weekly S554
(Fla. October 27, 1994) 5, 6

The Florida Bar v. Pahules,
233 So. 2d 130 (Fla. 1970) 7

The Florida Bar v. Pavlick,
504 So. 2d 1231 (Fla. 1987) 7, 23

The Florida Bar v. Pearce,
631 So. 2d 1092 (Fla. 1994) 4, 6

The Florida Bar v. Poplack,
599 So. 2d 116 (Fla. 1992) 6, 27

The Florida Bar v. Prior,
330 So. 2d 697 (Fla. 1976) 17

The Florida Bar v. Rosen,
495 So. 2d 180 (Fla. 1986) 7

The Florida Bar v. Saphirstein,
376 So. 2d 7 (Fla. 1979) 4

The Florida Bar v. Scott,
238 So. 2d 634 (Fla. 1970) 16

The Florida Bar v. Seldin,
526 So. 2d 41 (Fla. 1988) 6

The Florida Bar v. Simring,
612 So. 2d 561 (Fla. 1993) 4, 6

The Florida Bar v. Thomson,
271 So. 2d 758 (Fla. 1972) 25

The Florida Bar v. Wagner,
212 So. 2d 770 (Fla. 1968) 5

The Florida Bar v. Wells,
602 So. 2d 1236 (Fla. 1992) 20

The Florida Bar v. Whitney,
237 So. 2d 745 (Fla. 1970) 16

FEDERAL STATUTES AND SENTENCING GUIDELINES

18 U.S.C. §1001 13

Title 2, U.S.C. §437g(a)(5)(B) 13

Title 2, U.S.C. §437g(d)(1)(A) 13

United States Sentencing Guidelines, §2T4.1 9

RULES

R. Regulating Fla.Bar 3-7.7(c)(5) 5, 27

FLORIDA STANDARDS FOR IMPOSING LAWYER SANCTIONS

Standard 9.22(b) 10, 19

Standard 9.22(c) 9

Standard 9.22(d) 12

Standard 9.32(a) 19

Standard 9.32(c) 19

Standard 9.32(d) 18

Standard 9.32(e) 19

Standard 9.32(g) 16

Standard 9.32(k) 20

Standard 9.32(l) 17, 18

PRELIMINARY STATEMENT

Lawrence J. Smith, the Respondent-Appellee in this case, will be referred to as "Mr. Smith. The Florida Bar, the Complainant-Appellant, will be referred to as "the Bar." The symbol "RR" will be used to designate the Report of Referee. The symbol "TT" will be used to designate the transcript of the hearing before the Referee on April 11, 1994, and the symbol "CT" will be used to designate the transcript of the closing argument before the Referee on May 23, 1994. The Bar's exhibits will be referred to as "TFB____" Mr. Smith's exhibits will be referred to as "Resp._____".[1/]

1/ These designations are utilized in order to be consistent with the designations in the Initial Brief of The Florida Bar.

STATEMENT OF THE CASE AND FACTS

Pursuant to Rule 9.210(c), Fla.R.App.P., we do not herein set forth a full statement of the case and the facts. While we have some minor disagreements with the Statement of the Case and Facts in the Initial Brief of The Florida Bar, those areas of disagreement will be dealt with at the relevant points of our argument.

We also note that The Bar stipulated and agreed to the submission of Lawrence Jack Smith's Sentencing Memorandum With Incorporated Memorandum Of Law for substantive, evidentiary consideration by the Referee in these proceedings, and that Memorandum, at pp. 4-16, contains a complete factual background of the charges on which Mr. Smith was convicted.

SUMMARY OF ARGUMENT

Under the Rules Regulating The Florida Bar, the burden is upon the party seeking review to demonstrate that a report of a referee is erroneous, unlawful, or unjustified, and the Referee's findings, including recommendation on discipline, are afforded a presumption of correctness unless the recommendation is clearly erroneous or not supported by the evidence. In the case at bar, the Referee's factual findings were supported by competent, substantial evidence and that, based upon his findings and a fair balancing of the mitigating and aggravating circumstances, he arrived at the appropriate disciplinary recommendation.

The Florida Supreme Court has made it clear that disbarment is far from automatic, and that the appropriate discipline must be based upon a fair consideration of all of the facts and circumstances of the individual case, one that is fair to society and sufficient to protect it from unethical conduct while not denying the public the services of a qualified lawyer by an unduly harsh discipline, fair to the Respondent by punishing him for his misconduct while at the same time encouraging rehabilitation, and severe enough to deter others from similar misconduct.

The Referee correctly concluded that, under all of the circumstances surrounding the offenses of conviction, the aggravating factors present in this case were less substantial than urged by the Bar and did not warrant disbarment. On the other hand, the Referee properly found that the mitigating factors substantially outweighed the aggravating factors and justified suspension, rather than disbarment, for Mr. Smith. His recommendation should therefore be affirmed.

ARGUMENT

POINT I

THE REFEREE'S RECOMMENDATION REGARDING DISCIPLINE WAS APPROPRIATE AND SHOULD BE AFFIRMED

A. Introduction.

The Florida Bar appeals the Report of the Referee, contending that his recommended sanction is unjustified and that disbarment is the only appropriate result.

In the case at bar, the Referee recognized that he undertaken a "solemn responsibility" to:

> . . . weigh all of the facts and circumstances of the case and the relevant aggravating and mitigating factors, and make a recommendation regarding an appropriate sanction -- one that is fair to society and sufficient to protect it from unethical conduct while not denying the public the services of a qualified lawyer by an unduly harsh discipline, fair to the Respondent by punishing him for his misconduct while at the same time encouraging rehabilitation, and severe enough to deter others from similar misconduct.

RR, p. 3-4.[2/] In a carefully reasoned, thorough and erudite Report, the Referee concluded:

[2/] In The Florida Bar v. Niles, 19 Fla. L. Weekly S554, 555 (October 27, 1994), the Court reiterated its prior holdings that:

> . . . bar disciplinary proceedings must serve three purposes: 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; 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; and third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations.

See also The Florida Bar v. Pearce, 631 So.2d 1092 (Fla. 1994); The Florida Bar v. Simring, 612 So.2d 561, 570 (Fla.1993); The Florida Bar v. Dubbeld, 594 So. 2d 735, 736 (Fla. 1992); The Florida Bar v. Saphirstein, 376 So.2d 7 (Fla. 1979); The Florida Bar v. Pahules, 233 So.2d 130 (Fla.1970).

> In this case, there are substantial and strong mitigating factors which, on balance, outweigh the aggravating factors and, notwithstanding the seriousness of the offenses, tip the scales in favor of a degree of discipline less than disbarment. Having carefully considered all of the facts and the law, I am satisfied that the stigma of disbarment is not necessary to encourage reformation or rehabilitation of the Respondent and would not result in any greater protection of the public, than would a term of suspension.

RR, p. 13-14 (footnote omitted). The Referee therefore recommended that Mr. Smith be suspended for a period of Two Years, nunc pro tunc to September 24, 1993, the effective date of the felony suspension. Id.

We maintain that the Referee's factual findings were supported by competent, substantial evidence and that, based upon his findings and a fair balancing of the mitigating and aggravating circumstances, he arrived at the appropriate disciplinary recommendation. This Honorable Court should therefore uphold and approve the Referee's findings and recommendations.

B. The Standard of Review.

R. Regulating Fla.Bar 3-7.7(c)(5) provides that, upon review, "the burden shall be upon the party seeking review to demonstrate that a report of a referee sought to be reviewed is erroneous, unlawful, or unjustified." Moreover, in "a referee trial of a prosecution for professional misconduct, the Bar has the burden of proving its accusations by clear and convincing evidence." The Florida Bar v. Niles, 19 Fla. L. Weekly S554 (Fla. October 27, 1994). In Niles, this Honorable Court discussed the weight to be given to the factual findings of a Referee:

> However, this court's review of a referee's findings of fact is not in the nature of a trial de novo. The responsibility for finding facts and resolving conflicts in the evidence is placed with the referee. The Florida Bar v. Hoffer, 383 So.2d 639 (Fla.1980). The referee's findings "should not be overturned unless clearly erroneous or lacking in evidentiary support." The Florida Bar v. Wagner, 212 So.2d 770, 772 (Fla.1968); The Florida Bar v. Neely,

> 502 So.2d 1237 (Fla.1987). Further, rule 3-7.6(k)(1)(A) of the Rules Regulating The Florida Bar provides that the referee's findings of fact as to items of misconduct charged "shall enjoy the same presumption of correctness as the judgment of the trier of fact in a civil proceeding." See The Florida Bar v. Hooper, 509 So.2d 289 (Fla.1987).

See also The Florida Bar v. Simring, 612 So.2d 561, 565 (Fla.1993)("factual finding is presumed correct and will not be overturned unless the Court finds that it is clearly erroneous or lacking in evidentiary support."); The Florida Bar v. MacMillan, 600 So.2d 457, 459 (Fla. 1992) (If findings of referee are supported by competent, substantial evidence, Court is precluded from reweighing the evidence and substituting its judgment for that of the referee.); The Florida Bar v. Graham, 605 So.2d 53, 55 (Fla. 1993); The Florida Bar v. Seldin, 526 So.2d 41 (Fla.1988); The Fla. Bar v. Hooper, 509 So.2d 289 (Fla.1987).

The presumption of correctness with which a Referee's recommendation comes to the Court also pertains to recommendations of discipline: However, in The Florida Bar v. Niles, supra at S555, the Court observed:

> In reviewing a referee's recommendations for discipline, our scope of review is broader than that afforded to findings of fact because it is our responsibility to order the appropriate punishment. The Florida Bar v. Anderson, 538 So.2d 852, 854 (Fla.1989). However, a referee's recommendation on discipline is afforded a presumption of correctness unless the recommendation is clearly erroneous or not supported by the evidence. See The Florida Bar v. Lipman, 497 So.2d 1165, 1168 (Fla.1986); The Florida Bar v. Poplack, 599 So.2d 116 (Fla.1992).

See also The Florida Bar v. Pearce, 631 So.2d 1092, 1093 (Fla.1994); The Fla. Bar v. Anderson, 538 So.2d 852, 854 (Fla.1989).

C. **Disbarment Is Not Mandated For Felony Convictions.**

Contrary to the argument advanced by the Bar's brief, it is not "axiomatic that attorneys are disbarred for the commission of a serious felony."[3/] As the Referee correctly stated:

> The Florida Standards for Imposing Lawyer Sanctions do not mandate that the respondent be disbarred. On the contrary, while the language of Standard 5.11 provides that disbarment is "appropriate" when a lawyer is convicted of a felony, the Florida Supreme Court has made it clear that disbarment is far from automatic, and that the appropriate discipline must be based upon a fair consideration of all of the facts and circumstances of the individual case. In The Florida Bar v. Jahn, 509 So. 2d 285, 286-87 (Fla. 1987), the Supreme Court rejected "automatic disbarment rule" for felony convictions, stating that it would "continue to view each case solely on the merits presented therein."

RR, p. 3 (footnote omitted). As the Referee also noted, this Honorable Court affirmed those principles most recently in The Florida Bar v. McNamara, 634 So.2d 166, 167-168 (Fla. 1994):

> As we said in The Florida Bar v. McShirley, 573 So.2d 807, 808-09 (Fla.1991): To disbar McShirley without considering the mitigating factors involved, however, would be tantamount to adopting a rule of automatic disbarment when an attorney misappropriates client funds. Such a rule would ignore the threefold purpose of attorney discipline set forth in Pahules [233 So. 2d 130 (Fla.1970)], fail to take into account any mitigating factors, and do little to further an attorney's incentive to make restitution.

See also The Florida Bar v. Marcus, 616 So. 2d 975, 977 (Fla. 1993)("Court has rejected an automatic disbarment rule for attorneys who are convicted of a felony" and "continues to view each case solely on the merits presented."); The Florida Bar v. Pavlick, 504 So. 2d 1231 (Fla. 1987)("neither the Integration Rule nor case law mandates disbarment for all attorneys who are convicted of a felony."); The Florida Bar v. Rosen, 495 So.2d 180,182 (Fla. 1986)(extreme

---

[3/] See Initial Brief of the Florida Bar, p. 5.

sanction of disbarment is to be imposed only "in those rare cases where rehabilitation is highly improbable."); The Florida Bar v. Davis, 361 So.2d 159, 162 (Fla. 1978)(same); The Florida Bar v. Chosid, 500 So.2d 150 (Fla.1987); The Florida Bar v. Carbonaro, 464 So.2d 549 (Fla.1985).

A full and fair consideration of all of the facts of this case demonstrates that the Referee was eminently correct in concluding that the extreme sanction of disbarment is not warranted, and that a lengthy suspension is in the best interest of society

D. The Referee Correctly Concluded That Disbarment Was Not Required By The Aggravating Circumstances Urged By The Bar In This Case.

At the hearing below, the Bar urged the Referee to consider six separate "aggravating factors" pursuant to Standard 9.22 of the Florida Standards For Imposing Lawyer Sanctions.[4] The Referee did find that five of the six factors were present, but he correctly concluded that, under all of the circumstances surrounding the offenses of conviction, those aggravating factors were less substantial than urged by the Bar and did not warrant disbarment. Since the Bar argues on appeal that "the referee did not attribute the proper weight to the substantial aggravation present in this case"[5] we discuss each of those factors.

1. Pattern of Misconduct.

In Count I of the Information, Mr. Smith was charged with tax evasion for the calendar year 1988. The Bar argued that because, as part of the plea agreement, Mr. Smith admitted to underreporting income for additional years, he had engaged in a pattern of misconduct which was

---

[4] The aggravating factors urged by the Bar included prior disciplinary offenses, dishonest or selfish motive, pattern of misconduct, multiple offenses, vulnerability of victim, and substantial experience in the practice of law. See Brief of The Florida Bar, p. 13; The Florida Bar's Memorandum of Law on Discipline, p. 9.

[5] See Initial Brief of The Florida Bar, p. 13, fn. 7.

aggravating conduct.[6]

However, as we noted at page 7 of our Memorandum Of Fact And Law On Discipline, Mr. Smith's stipulation to the numbers utilized by the government for the years 1987 to 1990 was entered into solely in order to reach an amount certain for "relevant conduct" under the under the Federal Sentencing Guidelines, which determines the correct "offense level" by the amount of the tax loss.[7] That stipulation, for plea purposes, was not an admission of guilt as to those years, nor was it an agreement that Mr. Smith **intentionally** sought to evade those amounts of taxable income.[8]

Those true facts regarding the circumstances of the tax offense and Mr. Smith's plea of guilty were supported by substantial competent evidence[9] and were uncontroverted by The Florida Bar.

Thus, the Referee properly took these facts into account in determining that the "pattern of misconduct" factor was not a strong one:

> The Florida Bar asserts that the additional years and amounts demonstrate a pattern of misconduct, but the Respondent argues that the stipulation regarding application of the sentencing guidelines was not an admission that he intentionally sought to

[6] See Standard 9.22(c), Florida Standards For Imposing Lawyer Sanctions.

[7] See United States Sentencing Guidelines, §2T4.1.

[8] As we specifically observed in our Sentencing Memorandum, counsel believed that there might have been legal defenses available to Mr. Smith. For purposes of plea negotiations with the government, he agreed not to pursue them they would have made no difference in the sentencing guideline calculations. See Lawrence Jack Smith's Sentencing Memorandum With Incorporated Memorandum Of Law, p. 12, n.8.

[9] As noted above, The Florida Bar stipulated and agreed that the Sentencing Memorandum submitted to the United States District Court could be given substantive consideration by the Referee. See Lawrence J. Smith's Memorandum Of Fact And Law On Discipline, p. 2.

> evade those amounts of taxable income for those years. Under these circumstances, while I find that this aggravating factor is relevant, I do not assign it great weight. (footnote omitted).

See RR, p. 6.

2. Dishonest or Selfish Motive.

The Bar also argued that the offenses of conviction constituted dishonest or selfish motive,[10] citing The Florida Bar v. Nedick, 603 So.2d 502 (Fla. 1992). As the Referee determined, however, Nedick's actions were far more egregious and scheming than the actions of Mr. Smith. In discussing the aggravating factor of "dishonest or selfish motive," the Referee reasoned:

> Because the Respondent acted consciously to violate the law, there is no doubt that he committed dishonest acts. I am far less convinced, however, that he committed those acts solely because of dishonest or selfish motives.
>
> Indeed, because The Florida Bar relies so heavily on Nedick, however, it must be noted that the conduct in this case differs significantly from Nedick. Nedick conspired with his partners to hide cash fees, and his "only motive was pecuniary gain." Id. at p. 503. In contrast, the great bulk of the income at issue in the instant case represented properly deposited checks, not hidden cash receipts, and the failure to report the income resulted from financial pressures and inability to pay, not from a purely selfish desire for pecuniary gain. On balance, any such aggravating factor here is far less egregious than that in Nedick, and the mitigating factors, as discussed below, are far more substantial and meaningful than those present in Nedick.

See RR, p. 5. In a footnote, the Referee noted that while "the lack of a selfish motive does not excuse the Respondent's actions, the circumstances are relevant to the weight to be accorded this factor." Id.

---

[10] See Standard 9.22(b), Florida Standards For Imposing Lawyer Sanctions.

The evidence established that the underreporting of income derived primarily from two referral fees from old cases and several honoraria from speeches, and that there was no attempt to "hide" those funds, which were all checks openly deposited in Mr. Smith's bank accounts. They were not properly included on Mr. Smith's tax returns for the years in question only because the strain of financial pressures left Mr. Smith unable to pay the required taxes. Moreover, the unreported honoraria payments were not discovered by the government, but were voluntarily disclosed by Mr. Smith.[11/]

Thus, the Referee was correct in determining that the circumstances in this case are very different from those in The Florida Bar v. Nedick, 603 So.2d 502 (Fla. 1992), so heavily relied upon by Bar Counsel. Nedick planned and conspired with his partners to receive and hide cash fees received by partnerships evidently formed for that purpose, was guilty of "repeatedly joining with others in making and subscribing to false income tax returns," and his "only motive was pecuniary gain." Id. at p. 503. The fact that the statutory violation may have been the same does not thereby mean that the discipline should be the same as well. See The Florida Bar v. Chosid, 500 So. 2d 150 (Fla. 1987),(Court approved three-year suspension, notwithstanding the Bar's contention that disbarment was warranted, for felony conviction of making and subscribing a false income tax return related to importing and distributing of marijuana).[12/]

[11/] See Lawrence Jack Smith's Sentencing Memorandum With Incorporated Memorandum Of Law, p. 12.

[12/] As we discuss further below, while the Referee "was not convinced by the argument of Bar Counsel that 'dishonest or selfish motive' should be viewed as an aggravating factor," he was equally unconvinced by our argument that the absence of such a motive was a mitigating factor that would justify a reduction in the degree of discipline to be imposed. He concluded that "[a]t best, the issue of motive represents a neutral factor that is neither aggravating nor mitigating." RR, p. 10.

3. Multiple Offenses.

Mr. Smith also pled guilty to an offense of causing a false statement to be made to the Federal Election Commission regarding the September 10, 1990 check on the Larry Smith For Congress Committee account, and The Florida Bar argued that the second count constituted the aggravating factor of "multiple offense."[13]

While the Bar's position is technically correct, the Referee properly examined the underlying circumstances of Count 2 in determining that this factor was not entitled to full weight:

> In addition to the tax evasion charge, The Respondent pled guilty to a separate count involving a false Federal Election Commission report, and this aggravating factor is therefore relevant and applicable. Nevertheless, I find that the weight of this factor is somewhat diminished by the unrefuted representations of Respondent's counsel that similar violations of the federal election laws have almost always been handled administratively by the Federal Election Commission through conciliation agreements, and that Congress has determined to treat such conduct, when prosecutable, as a misdemeanor. (Footnote omitted).

See RR, p. 6.

The record clearly reflects that Mr. Smith acknowledged the wrongfulness of his conduct with regard to the reporting of the check on his quarterly campaign report.[14] However, it was never Mr. Smith's intent to permanently misuse or steal campaign funds. When he entered into the agreement with Brian Berman in September 1990, he fully expected that Berman would do the work for which he was being retained, and that there would be no misuse, but only a

---

[13] See Standard 9.22(d), Florida Standards For Imposing Lawyer Sanctions.

[14] See TT, pp. 134-135; Lawrence Jack Smith's Sentencing Memorandum With Incorporated Memorandum Of Law, p. 13-15.

temporary loan, of the funds.[15]

Nevertheless, personal use of campaign funds and/or the misreporting of the disposition of campaign payments, the conduct which formed the basis of the charge against Mr. Smith, has rarely, if ever, been prosecuted criminally. Rather, such cases are almost always handled administratively by the Federal Election Commission through what are known as conciliation agreements.[16] Title 2, U.S.C. §437g(a)(5)(B) provides:

> If the Commission believes that a knowing and willful violation of this Act or of chapter 95 or chapter 96 of Title 26 has been committed, a conciliation agreement entered into by the Commission under paragraph (4)(A) may require that the person involved in such conciliation agreement shall pay a civil penally which does not exceed the great of $10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation.

Even when the Federal Election Commission determines that such violations rise to the level of criminal conduct, Congress has determined that it should more properly be treated as a misdemeanor.[17] Title 2, U.S.C. §437g(d)(1)(A) provides:

> Any person who knowingly and willfully commits a violation of any provision of this Act which involves the making, receiving, or reporting of any contribution or expenditure aggregating $2,000 or more during a calendar year shall be fined, or imprisoned for not more than one year, or both. The amount of this fine shall not exceed the greater of $25,000 or 300 percent of any contribution or expenditure involved in such violation.

---

[15] See TT, pp. 134-135.

[16] Indeed, Mr. Smith entered into such a Conciliation Agreement with the Federal Election Commission, which provided for a civil fine in the amount of $5,000.

[17] Although campaign reporting violations have been specifically designated as misdemeanors, there is legal authority for the government to charge the same conduct under 18 U.S.C. §1001, the general false statement offense, which is a felony.

Mr. Smith, as part of his course of cooperation with the government, agreed to plead guilty to the felony charge, and he acknowledged his wrongdoing. Nevertheless, it is highly relevant, and entirely appropriate for the Referee to consider, that the conduct which resulted in a second count for Mr. Smith rarely results in criminal prosecution and is statutorily defined as a misdemeanor.

4. Vulnerability of Victim.

The Referee properly rejected "vulnerability of victim" as an aggravating factor:

> I find the aggravating factor of "vulnerability of victim" to be inapplicable to the facts and circumstances of the case at bar. The Florida Bar urges that "public at large" is the vulnerable victim in this case, but this is not a case in which a large segment of the public is vulnerable to being victimized, or in which clients or other individuals were particularly vulnerable. (Footnote omitted).

RR, p. 7. See The Florida Bar v. Calvo, 630 So.2d 548, 551 (Fla. 1993), where the Court discussed the "harm to the public at large that Calvo helped create through his reckless misconduct or omissions." See, e.g., The Florida Bar v. Mims, 532 So.2d 671, 673 (Fla. 1988), in which the Court observed that "Mims' victims were extremely vulnerable, one being a poor, unhealthy woman and another being both unemployed and uneducated."

5. Prior Disciplinary Offenses.

The Referee correctly assigned only slight weight to the factor of "prior disciplinary offenses":

> While the judgment regarding the public reprimand may have pre-dated these proceedings, the subject matter of the reprimand is part and parcel of the conduct underlying the convictions in this case, since both arose out of the Respondent's relationship with Brian Berman.
>
> Thus, the reprimand represents a separate Rule violation from that

> upon which the instant proceedings are based, but it is not really "prior" in the sense that it represents unrelated acts of misconduct committed before the acts underlying the conviction. For that reason, I find that it merits only slight weight, if any.

RR, p. 4. The Referee noted that, as Bar Counsel acknowledged, The Florida Bar's inquiry initially covered **both** areas under the same Florida Bar file number, but was later bifurcated by agreement of the parties for reasons of convenience. Moreover, the facts underlying the reprimand were addressed in the Sentencing Memorandum submitted to the United States District Court, which further demonstrates the interrelationship between the two areas.

6. Substantial Experience in the Practice of Law.

The Referee found this factor to be applicable to Mr. Smith.

E. Substantial Mitigating Factors Justify A Suspension Rather Than Disbarment In This Case.

Not only was the Referee eminently correct in determining that some of the aggravating factors urged by the Bar were entitled to less weight, the Referee aptly compared the cases relied on by the Bar in support of disbarment with the mitigating factors present here to conclude that they "lack the level of mitigation present in this case." The Florida Bar v. Clark, 582 So. 2d 620, 621 (Fla. 1991). Thus, we proceed to discuss those mitigating factors.

Mr. Smith advanced seven separate mitigating factors enumerated in Standard 9.3 of the Florida Standards for Imposing Lawyer Sanctions, four of which were not contested by the Bar.[18] In addition, the facts supported a variety of other factors which were properly

---

[18] Those mitigating factors included: (1) character or reputation; (2) remorse; (3) timely good faith effort to make restitution or rectify the consequences of his actions; and (4) full and free disclosure to disciplinary board or cooperative attitude toward proceedings.

considered by the Referee.[19] While the Referee assigned greater weight to some of those factors than others, there was a compelling showing that the mitigating factors substantially outweighed the aggravating factors and justified suspension, rather than disbarment, for Mr. Smith.

1. Character or Reputation.[20]

The Bar does not contest the mitigating factor of "otherwise good character and reputation,"[21]citing to "numerous witnesses [who] have expressed confidence in respondent's character and reputation. . . [22] In addition to the witnesses who testified before the Referee, the Bar also agreed to the introduction of the character letters, attached to the Sentencing Memorandum, as substantive evidence in the proceedings before the Referee, consistent with other cases. See, e.g., The Florida Bar v. Meldon, 459 So.2d 314, 315 (Fla. 1984)("Meldon has submitted numerous letters commending him for his community service..."); The Florida Bar In re: Efronson, 403 So.2d 1305 (Fla. 1980)(In reinstatement proceeding before a Referee, the "record includes well over two hundred letters of recommendation from attorneys, former clients, community leaders, and friends."); The Florida Bar v. Scott, 238 So.2d 634, (Fla. 1970); The Florida Bar v. Whitney, 237 So.2d 745 (Fla. 1970).[23] Indeed, such letters "provide interesting

---

[19] As we argued in our Memorandum of Fact and Law on Discipline, p. 13 et. seq. and at the hearing, a Referee is not limited to consideration of only those specific factors listed in Standard 9.32.

[20] See Standard 9.32(g), Florida Standards for Imposing Lawyer Sanctions.

[21] See Standard 9.32(g), Florida Standards for Imposing Lawyer Sanctions.

[22] See Initial Brief of The Florida Bar, p. 14.

[23] Cf. The Florida Bar v. Prior, 330 So. 2d 697, 703 (Fla.1976), where the Respondent appended character letters to a brief in the Supreme Court, and two Justices opined that character letters were "not proper evidence" because the Court's "directive to file briefs is not a license to submit evidence." (Overton, C.J. and England, J., concurring specially).

and valuable assistance in the exercise of . . . discretion. . ."[24]

The witness testimony and the letters provided poignant attestation to the fact that, prior to the instant matters, Mr. Smith had dedicated his professional career and his personal life to the betterment of his profession, community, and nation, and had engaged in public service activities that improved the law, the legal system, and the legal profession.

It is apparent[25] that Mr. Smith, throughout his career, attempted to serve and help those who are unable to help themselves. His commitment to his profession, his community, and the nation, and the remarkable reputation for character and integrity which he amassed during that career, was properly considered by the Referee as a substantial mitigating factor in determining the appropriate discipline.

2. Remorse.[26]

Through his extensive course of cooperation with the United States Attorney, the Internal Revenue Service, and the Federal Election Commission, through his guilty plea, and through his testimony at the hearing before the Referee,[27] Mr. Smith demonstrated not only that he accepted full responsibility for his own actions, but that he felt a sincere and profound sense of remorse and contrition. That sense of remorse was further confirmed by many of the letters attached to

---

[24] The Florida Bar v. Prior, 330 So. 2d 697, 708 (Fla.1976)(Roberts, J., dissenting).

[25] See our discussion in Lawrence J. Smith's Memorandum of Fact and Law on Discipline, pp. 17-18.

[26] See Standard 9.32(l), Florida Standards for Imposing Lawyer Sanctions.

[27] See, e.g., TT, p. 137.

the Sentencing Memorandum,[28] and was further confirmed by the testimony of witnesses who appeared at the proceeding before the Referee.[29]

Mr. Smith recognized that he must be held accountable to society for violating the law, but the sincerity of his remorse is an important mitigating factor "that may justify a reduction in the degree of discipline to be imposed." See Florida Standards for Imposing Lawyer Sanctions, Standard 9.31, 9.32(l).

3. Timely Good Faith Effort to Make Restitution or Rectify the Consequences of his Actions.[30]

The Bar agreed, and the Referee determined, that Mr. Smith "clearly qualifies for consideration with respect to this mitigating factor." RR, p. 8.[31] The Referee noted that Mr. Smith voluntarily repaid the $10,000 to his campaign fund in April 1992, more than a year before he was charged, that he voluntarily agreed, as part of his cooperation and plea agreement, to pay all his outstanding tax liabilities, and that he entered into a conciliation agreement with the Federal Election Commission and to paid a personal civil fine in the amount of $5,000.[32]

4. Full and Free Disclosure to Disciplinary Board or Cooperative Attitude

---

[28] As noted above, the Bar agreed that the Sentencing Memorandum and the letters attached thereto would be made a part of the record and considered by the Referee as substantive exhibits.

[29] The witness testimony is discussed in greater detail below.

[30] See Standard 9.32(d), Florida Standards for Imposing Lawyer Sanctions.

[31] The Referee held that Mr. Smith's cooperation, standing alone, might not outweigh the seriousness of the offenses, but that it was "certainly a relevant factor which should be considered together with the other factors present." Id.

[32] The Referee also noted that, "[u]nlike the facts in The Florida Bar v. Nedick, supra, the Respondent's course of cooperation and his attempts to rectify the consequences of his misconduct began before he was caught." Id.

Toward Proceedings.[33/]

The Bar agreed, and the Referee determined, that Mr. Smith had been "fully cooperative" during the proceedings, and this mitigating factor was "relevant and applicable."

5. **Absence of a Dishonest or Selfish Motive;**[34/] and
6. **Personal or Emotional Problems.**[35/]

The Referee did not find these factors present "to a degree that would justify a reduction in the degree of discipline to be imposed." Because he found that the Bar had not demonstrated a dishonest or selfish motive pursuant to Standard 9.22(b), he held that "the issue of motive represents a neutral factor that is neither aggravating nor mitigating." RR, p. 10.

We believe that the facts clearly contradicted a dishonest or selfish motive, since Mr. Smith's actions resulted from serious personal financial problems. The Referee did note that the incident involving the campaign check was the only time in 14 years in public service that Mr. Smith had ever utilized campaign funds as a loan for personal purposes, despite raising campaign contributions totalling millions of dollars without any complaint or inquiry by the FEC.[36/] Moreover, the fact that Mr. Smith received a cashier's check made payable directly to a creditor demonstrates that he was not attempting to camouflage either the debt or his use of the funds for payment of it.

While the Referee evidently did not rely on these factors, this Honorable Court has approved personal problems or stress as mitigating factors in other cases. The Florida Bar v.

[33/] See Standard 9.32(e), Florida Standards for Imposing Lawyer Sanctions.

[34/] See Standard 9.32(a), Florida Standards for Imposing Lawyer Sanctions.

[35/] See Standard 9.32(c), Florida Standards for Imposing Lawyer Sanctions.

[36/] See RR, p. 9.

Wells, 602 So.2d 1236, 1239 (Fla. 1992);[37] The Florida Bar v. Clark, 582 So. 2d 620, 621 (Fla. 1991).[38]

7. 9.32(k): imposition of other penalties or sanctions.[39]

The Bar does not contest the viability of this mitigating factor based upon Mr. Smith's conviction and sentence in the federal criminal prosecution,[40] but it should be noted that the Referee also correctly considered, as other penalties or sanctions, the Federal Election Commission civil sanction, and substantial monetary penalties in connection with the payment of his outstanding civil tax liability." RR p. 10.

---

[37] In that case, the referee found, as mitigating factors: " 1) personal and emotional problems; 2) absence of dishonest or selfish motive; 3) inexperience in practice of law; 4) character and reputation; and 5) remorse."

[38] Clark had been convicted for conspiracy to import marijuana, and was sentenced to imprisonment for three years. The referee recommended a thirty-six month suspension, but the Bar argued for disbarment. The Supreme Court upheld the Referee's recommendation and noted that Clark had been under "substantial personal stress." Among other factors, cited by the Court in Clark and applicable to Mr. Smith's case, were: cooperation with law enforcement authorities; Clark was "truly remorseful for the embarrassment he has caused himself and others;" character witnesses attested to Clark's "legal ability and his reputation for honesty and integrity;" the incident "in no way adversely affected the fulfillment of Clark's legal duties;" and character witnesses "testified that Clark is hardworking, dedicated, and an asset to the community." Id.

[39] See Standard 9.32(k), Florida Standards for Imposing Lawyer Sanctions.

[40] See Initial Brief of the Florida Bar, p. 14.

The Bar does dispute that "other penalties or sanctions" may also include the enormous media attention Mr. Smith's case received because of his status as a former Member of Congress, citing The Florida Bar v. Dubbeld, 594 So. 2d 735, 736 (Fla. 1992). However, the Referee recognized that this Honorable Court has approved, as mitigating factors, "other personal hardships" which included "loss of professional esteem and acute personal embarrassment, including his understandable reluctance to accept public service positions offered to him. . ." The Florida Bar v. Diamond, 548 So. 2d 1107 (Fla. 1989). Moreover, we fully agree with the observation of the Referee that, "if the Respondent had been Mr. Smith, private citizen, instead of Mr. Smith, former Member of Congress, one wonders if the positions of both federal prosecutors and bar counsel might have been different." RR p. 11, fn. 19.

8. No Violation of Duty Owed To Clients.[41]

The Referee found that the "Respondent's offenses did not involve the practice of law or any duty owed to clients." RR, p. 11. The Referee rejected the Bar's position that this mitigating factor should not be considered, determining that the cases relied upon by the Bar[42] involved the misuse of public funds, circumstances not involved in the instant case.

Manifestly, the fact that Mr. Smith was acting in a personal capacity and not as an attorney in connection with the events which led to his conviction is a circumstance previously recognized by the Florida Supreme Court as one which may justify a lesser degree of discipline.

41/ The Referee considered this under the category of "Other Factors Which Justify a Reduction In The Degree Of Discipline." RR, p. 11.

42/ The Florida Bar v. Adler, 505 So. 2d 1334, 1335 (Fla. 1987), The Florida Bar v. Anderson, 594 So. 2d 302, 303 (Fla. 1992); The Florida Bar v. Keane, 536 So. 2d 990 (Fla. 1989).

In The Florida Bar v. Helinger, 620 So.2d 993 (Fla. 1993), the Supreme Court distinguished between cases which "occurred within the practice of law and involved the misappropriation of clients' funds" and cases which did not involve harm to clients:

> Bar discipline exists primarily to protect the public from misconduct that occurs in the course of an attorney's representation of a client. Standard 3.0 of the Florida Standards for Imposing Lawyer Sanctions states: "In imposing a sanction after a finding of lawyer misconduct, a court shall consider the following factors: (a) the duty violated; (b) the lawyer's mental state; (c) the potential or actual injury caused by the lawyer's misconduct; and (d) the existence of aggravating or mitigating factors." In light of these factors, we have repeatedly found that "[i]n the hierarchy of offenses for which lawyers may be disciplined, stealing from a client must be among those at the very top of the list." The Fla. Bar v. Tunsil, 503 So.2d 1230 (Fla.1986).
>
> This Court likewise has recognized that misconduct occurring outside the practice of law or in which the attorney violates no duty to a client may be subject to lesser discipline. In a case resulting from a criminal conviction, discipline is imposed in addition to the criminal penalty already exacted in the criminal case.

Id. at 995-996.[43/]

In The Florida Bar v. Moody, 577 So. 2d 1317 (Fla. 1991), the Respondent was convicted of DUI manslaughter. In recommending a nine-month suspension, which was upheld by the Supreme Court, the referee found, as a mitigating factor, that "the violations did not involve the practice of law and did not affect a client."[44/]

[43/] Helinger had been convicted of multiple counts of making obscene phone calls over a five year period, on occasions when he consumed alcohol and cocaine, and he had a prior arrest for similar conduct while he was a member of the Bar. The Florida Bar sought a three year suspension, but the Court suspended Helinger for two years. Id. at p.996.

[44/] The referee also found, as mitigators, "(a) absence of a prior disciplinary record; (b) absence of a dishonest or selfish motive; (c) timely good faith effort to make restitution or to
(continued...)

In The Florida Bar v. Corbin, 540 So. 2d 105 (Fla. 1989), a circuit court judge was convicted of attempted sexual activity with a child. The Court stated:

> The single issue is whether a three-year suspension is appropriate in this case. Both parties agree that the commission of a felony does not in itself mandate disbarment. The Florida Bar v. Pavlick, 504 So.2d 1231, 1235 (Fla.1987). See also The Florida Bar v. Jahn, 509 So.2d 285 (Fla.1987); The Florida Bar v. Chosid, 500 So.2d 150 (Fla.1987); The Florida Bar v. Carbonaro, 464 So.2d 549 (Fla.1985).

In rejecting the Bar's argument for disbarment, the Supreme Court placed reliance on the fact that "respondent's misconduct did not involve the practice of law nor actual breach of a professional responsibility to litigants or clients. After having heard the entire testimony, the referee concluded that respondent "has been and is being punished" and recommended suspension for three years." Id. at 107.

9. Factors Raised By The Testimony of Witnesses for the Respondent.[45]

At the hearing, eight individuals offered compelling testimony in support suspension rather than disbarment for Mr. Smith. They included three distinguished Past Presidents of The Florida Bar,[46] one distinguished Past President of both The Florida Bar and the American Bar

---

[44] (...continued)
rectify consequences of misconduct; (d) full and free disclosure to disciplinary board or cooperative attitude toward proceedings; (e) character or reputation; (f) interim rehabilitation; (g) imposition of other penalties or sanctions; and (h) remorse." Id. at 1318, n. 4. Most of those factors are also present in the case at bar.

[45] The Referee considered this under the category of "Other Factors Which Justify a Reduction In The Degree Of Discipline." RR, p. 11.

[46] James Fox Miller (TT, pp. 85-97); Ray Ferrero, Jr. (TT, pp. 98-110); and Stephen Zack, who testified via telephone (TT, pp. 110-123).

Association;[47] a Member of Congress who had served with Mr. Smith, and who had also served as President of the Palm Beach County Bar Association and Chaired a Grievance Committee in that Circuit,[48] two Florida State Senators who were close friends and colleagues of Mr. Smith for many years,[49] and an attorney who had worked for and with him in his private practice of law.[50]

The Referee found that the testimony of those witnesses "was exceptionally impressive, and the substance of their testimony was extraordinarily genuine and striking." RR, p. 12:

> All attested to his basic sense of honesty, integrity, and forthrightness. They expressed their admiration for his outstanding service to his profession, his community, state and nation. They spoke of his sincere remorse over what he did, his lack of a vile or corrupt motive, and the substantial punishment that he has already received, including being forced out of public life and the emotional trauma for him and family because of the extensive publicity surrounding him.
>
> Perhaps most important, they all strongly stated their belief that he is rehabilitatable if not already rehabilitated, in the sense that such acts will never occur again, that he can continue to be a substantial asset to the profession, and that disbarment is not warranted and represents far too serious a punishment in this case.

RR, pp. 12-13 (footnotes omitted).

The Florida Bar v. Diamond, 548 So. 2d 1107 (Fla. 1989), cited by the Referee, presented mitigating factors analogous to those in the present case. Diamond was found guilty of six counts

---

[47] Chesterfield Smith (TT, pp. 70-84).

[48] Rep. Harry Johnston of West Palm Beach (TT, pp. 33-44).

[49] State Senator Kenneth Jenne (TT, pp. 53-70); State Senator Howard Forman (TT, pp. 44-52).

[50] Patricia Rahl (TT, pp. 17-33).

of mail and wire fraud. This Honorable Court's recitation of the mitigating factors which weighed heavily in favor of suspension for Mr. Diamond, are also present in the case at bar:

> In rejecting the Bar's argument that respondent should be disbarred, the Referee found that Diamond 'has shown the ability to be rehabilitated,' and concluded that 'no further discipline to prevent his future application for readmission is or should be required.' Specifically, the referee found mitigation as follows:
>
> A. The age of Respondent, his years of service to his clients, his community, his Bar and his country.
>
> B. The testimony of leaders members of The Florida Bar and the community with respect to Respondent's integrity, trustworthiness and ability to be rehabilitated.
>
> C. The testimony of the Honorable Edward C. Davis [the judge who tried Diamond's case] that notwithstanding the verdict, he never saw Mr. Diamond as an active participant in an act of fraud, and the fact that Mr. Diamond has completed all the requirements of his incarceration and has already had his civil rights restored to him. See The Florida Bar v. Thomson, 271 So.2d 758, 761 (Fla.1972); Gould v. State, [99 Fla. 662], 127 So. 309 (Fla.1930).
>
> D. The other personal hardships incurred by Respondent, including his loss of position in his law firm, loss of professional esteem and acute personal embarrassment, including his understandable reluctance to accept public service positions offered to him in order to save the public officials or institutions the embarrassment of having a suspended attorney appointed to various types of volunteer positions.
>
> E. The Respondent's witnesses, including a past president of The Florida Bar, a past Mayor of Miami Beach, and persons who have dealt with him in business, the law, and public service, all testified in support of he Respondent's good reputation in the community, notwithstanding the charges against him as to his good character and as to their belief that he is not in need of any further discipline, and is rehabilitatable if not already rehabilitated, and that he was not motivated out of any corrupt or vile motive. See Thomson and Gould, supra.

> F. The unblemished record of Respondent, exclusive of these charges.
>
> G. That the stigma of disbarment is a burden on Respondent which is not necessary to encourage reformation or rehabilitation of Respondent and would not result in any greater protection of the public, than would a three year suspension. The Florida Bar v. Blessing, 440 So.2d 1275, 1277 (Fla.1983).
>
> H. Finally, that a review of "Florida's Standards for Imposing Lawyer Sanctions" Section 9.3, at pp. 73-74, has shown the presence of many mitigating factors, with which the referee agrees.

Id. at 1108. In Diamond, the Bar vigorously argued that disbarment was required because of his felonious conduct, but this Honorable Court upheld the Referee's recommendation for a three year suspension, The Court observed that it would agree that disbarment would be appropriate were "this conduct not extensively mitigated" and stated that it could not "ignore the abundant character testimony from prominent, sober, and reliable witnesses." Id. The Referee echoed that position:

> Just as The Florida Supreme Court, in Diamond, supra at 1108 (Fla. 1989), could not 'ignore the abundant character testimony from prominent, sober, and reliable witnesses,' I find such strong testimonials by persons who have made such major contributions to the profession, the state and the nation, to be convincing and compelling. I also find other factors set forth in Diamond to be present in this case, including '[t]he age of Respondent, his years of service to his clients, his community, his Bar and his country.' Id.

RR, pp. 12-13.[51]

---

[51] In a footnote, the Referee observed that United States District Judge Donald Graham, after imposing sentence on Mr. Smith, expressed his "great respect" for the Respondent and his belief that the Respondent would "continue to be a positive member of this community." RR, p. 13, fn. 30. See also, Transcript of Sentencing, Vol I-91.

F. Conclusion.

It is important to note that the Bar does not dispute the factual linchpins for the Referee's determinations of mitigation and aggravation, but merely disputes the weight the Referee, after careful consideration, assigned to those factors.

The real gravamen of the Bar's appeal can be found in its assertion that there is "no basis for treating this respondent differently from the respondent in Nedick, supra."[52] Quite to the contrary, Lawrence J. Smith is a very different person and this is a very different case from Nedick, and the Referee so found, in conclusions supported by competent, substantial evidence and which were not "clearly erroneous or not supported by the evidence." See The Florida Bar v. Lipman, 497 So.2d 1165, 1168 (Fla.1986); The Florida Bar v. Poplack, 599 So.2d 116 (Fla.1992); R. Regulating Fla.Bar 3-7.7(c)(5).

The Referee recognized that, under all of the circumstances involved in this case, disbarment is not a necessary, warranted or appropriate discipline. He took into account that the criminal conviction leading to this discipline was the result of a breach of the law which was aberrational in nature and was not related to Mr. Smith's status as an attorney, and he considered Mr. Smith's prior professional and personal conduct, and the other matters set forth above in mitigation of punishment.

Considered as a whole, the mitigation present in the case at bar is exceptionally substantial and meaningful. As the Referee determined, the mitigating factors substantially outweigh the aggravating factors, and fully justify discipline less than disbarment. His recommendation that suspension, rather than disbarment, is the fair and appropriate penalty in this case, should

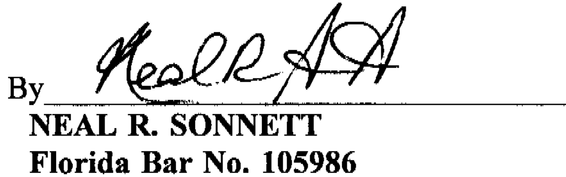
---

[52] See Initial Brief of The Florida Bar, p. 16.

therefore be affirmed.

Respectfully submitted,

NEAL R. SONNETT, P.A.
Attorneys for Respondent
One Biscayne Tower, Suite 2600
Two South Biscayne Boulevard
Miami, Florida 33131-1802
Telephone: (305) 358-2000

By 

NEAL R. SONNETT
Florida Bar No. 105986

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by Mail this ~~23rd~~ 25th day of November 1994 to Kevin P. Tynan, Esq., Bar Counsel, The Florida Bar, 5900 North Andrews Avenue, Suite 835, Ft. Lauderdale, Florida 33309; John T. Berry, Esq., Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300; John A. Boggs, Director of Lawyer Regulation, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399; and John F. Harkness, Jr., Executive Director, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399.

NEAL R. SONNETT