IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR, Complainant, v. ELIZABETH AILEEN BROOME, Respondent. _____/	Case Nos.: SC03-84, SC03-1205, SC03-1206, SC03-1931, SC04-448 and SC04-1375 (Consolidated) TFB File Nos. 2001-01,274(1A), 2003-00,301(1A), 2002-00,811(1A), 2003-00,493(1A), 2002-00,752(1A), 2001-01,091(1A), 2004-00,174(1A), 2004-00,357(1A) and 2004-00,410(1A) (Consolidated)

THE FLORIDA BAR'S INITIAL BRIEF

Olivia Paiva Klein, Bar Counsel
The Florida Bar
651 E. Jefferson Street
Tallahassee, FL 32399-2300
(850) 561-5845
Florida Bar No. 0970247

John Anthony Boggs, Staff Counsel
The Florida Bar
651 E. Jefferson Street
Tallahassee, Florida 32399-2300
(850) 561-5600
Florida Bar No. 253847

John F. Harkness, Jr., Executive Director
The Florida Bar
651 E. Jefferson Street
Tallahassee, Florida 32399-2300
(850) 561-5600
Florida Bar No. 123390

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PRELIMINARY STATEMENT

Complainant, THE FLORIDA BAR, will be referred to as "The Florida Bar" throughout the Initial Brief.

Respondent, ELIZABETH AILEEN BROOME, will be referred to as "Respondent".

References to SC Case No. SC03-84, TFB File No. 2001-01,274(1A) shall be designated as the “Samuel complaint.”

References to SC Case No. SC03-1205, TFB File No. 2003-00,301(1A) shall be designated as the “First DCA complaint.”

References to SC Case No. SC03-1206, TFB File No. 2002-00,811(1A) shall be designated as the “Brown complaint.”

References to SC Case No. SC03-1931, TFB File No. 2003-00,493(1A) shall be designated as the “Sapp complaint.”

References to SC Case No. SC03-1931, TFB File No. 2002-00,752(1A) shall be designated as the “Schmal complaint.”

References to SC Case No. SC03-1931, TFB File No. 2001-01,091(1A) shall be designated as the “Phifer complaint.”

References to SC Case No. SC04-448, TFB File No. 2004-00,174(1A) shall be designated as the “Smith complaint.”

References to SC Case No. SC04-1375, TFB File No. 2004-00,357(1A) shall be designated as the "Spooner complaint."

References to SC Case No. SC04-1375, TFB File No. 2004-00,410(1A) shall be designated as the "Mailloux complaint."

References to the Transcript for the Summary Judgment Hearing on May 7, 2004, shall be designated as "TSJ" with the appropriate page number, i.e.,"TSJ-4."

References to the Transcript for the Penalty Hearing on November 19, 2004, on the first six complaints, shall be designated as "TPH1" with the appropriate page number, i.e., "TPH1-45."

References to the Transcript for the Final Hearing on January 26, 2005, in the Smith complaint shall be designated as "TSmith" with the appropriate page number, i.e., "TSmith-10."

References to the Transcript for the Final Hearing on February 3, 2005, in the Spooner complaint and Mailloux complaint shall be designated as "TSM" with the appropriate page number, i.e., "TSM-5."

References to the Transcript for the Second Penalty Hearing on May 10, 2005, on all the Bar complaints, shall be designated as "TPH2" with the appropriate page number, i.e., "TPH2-15."

References to the Rules Regulating The Florida Bar shall be designated as "Rules"

with the appropriate number, i.e., “Rule 4-1.3” or as "Rules.”

References to the “Report of Referee" dated June 29, 2005, shall be designated as "ROR" followed by the appropriate number, i.e., "ROR-12."

References to the Florida Bar’s Exhibits shall be designated as "TFB Exhibit” followed by the appropriate number, i.e., "TFB Exhibit-12."

References to Joint Exhibits shall be designated as "JT Exhibit” followed by the appropriate number, i.e., "JT Exhibit-14."

References to Respondent’s Exhibits shall be designated as "R Exhibit” followed by the appropriate number, i.e., "R Exhibit-12."

References to all other pleadings and documents will be designated by their appropriate title in the record, i.e., Complaint, Motion for Summary Judgment, etc.

STATEMENT OF THE CASE

The first six complaints (Samuel, First DCA, Brown, Sapp, Schmal. and Phifer) were consolidated by the Florida Supreme Court and resolved via summary judgment before the referee. Respondent failed to respond to The Florida Bar's Complaint and Request for Admissions in the First DCA, Brown, Sapp, Schmal, and Phifer complaints, and on May 7, 2004, the referee granted summary judgment to The Florida Bar in all five complaints on all the factual allegations and rule violations. In the Samuel complaint, Respondent stipulated to the entry of summary judgment in favor of The Florida Bar which was granted by the referee on October 12, 2004 on all factual allegations and rule violations.

Three additional disciplinary complaints, the Smith, Spooner and Mailloux complaints, were filed against Respondent on March 16, 2004, and July 7, 2004. Respondent's counsel filed a Notice of Appearance on May 6, 2004, and moved for a continuance of the summary judgment proceedings, as well as an extension of time to file responsive pleadings. The referee denied the motion for continuance, but granted an extension of time until June 6, 2004, for Respondent to file responsive pleadings in the Smith complaint.

At the November 19, 2004, penalty hearing, the referee confirmed that he would not issue a recommended discipline in the first six complaints until the three subsequent

disciplinary cases could be heard. TPH1-113, 117. The Smith complaint was set for hearing on January 26, 2005, and the Spooner and Mailloux complaints were scheduled for February 7, 2005. A final penalty hearing was held on May 10, 2005.

The referee issued his final Report of Referee for all nine disciplinary complaints on June 29, 2005, recommending a public reprimand and three-years probation for Respondent. The conditions of probation included continuation of Respondent's Florida Lawyer Assistance ("FLA") contract, dated November 18, 2004, obtaining a mentoring attorney to supervise her legal practice, with quarterly reports to The Florida Bar, a Law Office Management Assistance Service (LOMAS) evaluation, and attendance at Ethics School.

The Florida Bar petitioned for review on the referee's recommended discipline, the lack of restitution on the Sapp complaint, and for the court to consider additional aggravating factors based on the referee's findings of fact and on the face of the record. The Florida Bar submitted its Initial Brief on October 26, 2005.

STATEMENT OF THE FACTS

The Florida Bar does not dispute the referee's findings of fact and rule violations in his final report of referee. Set forth below is a brief synopsis of the factual allegations and rule violations in the final report of referee pertaining to the nine underlying disciplinary complaints that are the focus of this petition for review. The referee granted summary judgment to The Florida Bar on the findings of fact and rule violations in the following complaints as set forth in his report of referee:

Samuel Complaint ---Respondent failed to diligently represent Brian Samuel from June 28, 1999, up through June 23, 2000, on two felony drug charges, and failed to properly communicate with him. As a result, Samuel turned down an offer of probation by the State, decided to go to trial, and ended up with incarceration. During the criminal proceedings, Respondent requested and obtained numerous continuances from the Court from June 1999 through May 2000. At least three times, Respondent specifically represented to the court that she needed to continue the trial date to take depositions of the State's witnesses.

Respondent's sworn testimony at an evidentiary hearing on Samuel's motion for a new trial on December 21, 2000, provided the grounds for ethical charges by the Bar. She testified that Samuel repeatedly requested her to take depositions of the State's witnesses which she failed to do. She also testified that if she had taken the depositions,

and Samuel had read over the witnesses' testimony, then he might have taken the state's plea offer more seriously rather than risk a jury trial where he was convicted.

Respondent admitted that she had failed to sit down and discuss Samuel's options and the evidence against her client before trial so that he could make informed decisions about his criminal trial. Respondent failed to respond to the grievance committee's investigating member even after a letter was sent to her requesting that she contact him to discuss the complaint. Respondent admitted to all the allegations in the Bar's complaint and stipulated to summary judgment on October 12, 2004. The referee found that Respondent violated the following Rules: 4-1.3 (Diligence), 4-1.4 (Communication), and 4-8.4(g)(2) (Failure to respond to Grievance Committee).

First DCA Complaint -- Respondent represented Terrance Beasley at his criminal trial in August 1999. Beasley was found guilty and sentenced on February 2, 2000. At least two times, Beasley advised Respondent that he wanted her to file an appeal. Two weeks after the appeal deadline, Respondent filed the notice of appeal, statement of judicial acts to be reviewed, designation to the reporter, a motion to withdraw and a motion to extend time to appeal with the circuit court. The court inadvertently signed the order to extend the appeal date and it was submitted to the First DCA along with the other appellate paperwork.

The First DCA returned the appellate pleadings because the circuit court could not extend the appeal time, and at a hearing on April 6, 2000, Respondent withdrew her motion. On the record, Respondent represented to the court that she would file a motion for belated appeal for Beasley and the court reappointed her to Beasley's case for that sole purpose. Respondent again failed to file the motion for belated appeal, and the public defender's office intervened on Beasley's behalf on June 24, 2000.

On August 25, 2000, the First DCA ordered Respondent to reply as to whether Beasley had timely requested her to file an appeal, but she ignored the Order. On December 22, 2000, the First DCA issued an Order to Show Cause as to why the matter should not be referred to The Florida Bar, but Respondent failed to reply. On August 30, 2002, the First DCA issued a second Order to Show Cause that Respondent also ignored. On September 24, 2002, the First DCA issued an Order referring Respondent's lack of compliance with its prior orders to the Florida Bar for further investigation.

Respondent failed to reply to The Florida Bar and to the grievance committee. Respondent also failed to reply to The Florida Bar's Complaint or Request for Admissions. The referee found that Respondent violated the following Rules: 4-1.2 (Scope of Representation), 4-1.3 (Diligence), 4-3.2 (Expediting Litigation), 4-3.4(c) (Failure to Obey Order of Tribunal), 4-8.4(a) (Violation of Bar Rules), 4-8.4(d) (Conduct

Prejudicial to Administration of Justice); and 4-8.4(g)(1)(2) (Failure to Respond to Bar or Grievance Committee).

Brown Complaint --On October 7, 1998, William Brown, Respondent's former client, filed a small claims action against her to recover $5,000 in legal fees previously paid to Respondent. The court referred the matter to mediation and on November 19, 1998, Respondent signed a mediation agreement in which she stipulated 1) to pay Brown $2100, 2) forward his case file to his new attorney, and 3) if she did not comply with the mediation agreement, the court could enter a final judgment for $5,114.50, including court costs. Respondent failed to abide by the terms of the agreement and on March 1, 1999, a final judgment was entered.

Despite her written consent to the imposition of the final judgment, Respondent filed a Motion to Set Aside the Final Judgment that was denied by the court. Brown wrote numerous letters to Respondent to resolve the debt, but she ignored him. On May 31, 2001, Brown initiated garnishment proceedings against Respondent. After Brown filed a Bar complaint, Respondent misrepresented in her reply to the Bar that she was trying to pay Brown. When the Bar complaint was referred to the grievance committee, Respondent misrepresented to them that she had offered to pay $2000 to Brown and the balance in 30 days, but he had refused her offer.

The court required Respondent to appear at a hearing and provide a Fact Information Sheet to start a payment plan. She appeared on October 29, 2002, and again represented to the court that she would pay off the judgment by December 2, 2002, but failed to provide the FI Sheet to the court. The court ordered Respondent to either pay the judgment or provide a FI Sheet by December 2, 2002, but she failed to comply with the court order.

On January 29, 2003, Respondent wrote Brown a letter and copied it to the grievance committee offering to pay him $500 a week beginning within one week. Brown later advised the grievance committee that he never received any payments. For over three years, Respondent misrepresented to Brown, the court, and the Bar that she would pay the debt she owed him, but always reneged on her promises.

Respondent failed to reply to The Florida Bar's Complaint or Request for Admissions. The referee found that Respondent violated the following Rules: 3-4.3 (Misconduct), 4-3.1 (Meritorious Claims and Contentions), 4-3.3 (Candor Towards Tribunal), 4-3.3(c) (Fairness to Opposing Party and Counsel), 4-8.4(c) (Misrepresentation), and 4-8.4(d) (Conduct Prejudicial to the Administration of Justice).

Sapp Complaint --Respondent was hired to represent Ricky Sapp for $6,700 in fees, but failed to communicate with him or to contact him from June 13, 2002, through November 22, 2002. She performed no legal work on his two criminal cases, and refused

to refund his fees. Respondent waived Sapp's speedy trial rights without his consent, after he had indicated he wanted a speedy trial. She failed to provide Sapp's case file to his new counsel. Respondent failed to reply to The Florida Bar or to the grievance committee. Respondent also failed to reply to The Florida Bar's Complaint or Request for Admissions. The referee found that Respondent violated the following Rules: 4-1.3 (Diligence), 4-1.4 (Communication), 4-1.5 (Excessive Fees), 4-1.5(e) (Duty to Communicate Basis of Fees), 4-1.16(d) (Protection of Client's Interests), 4-8.4(g)(1) (Failure to respond to Bar), and 4-8.4(g)(2) (Failure to Respond to the Grievance Committee).

Schmal Complaint -- The sole issue was failure to respond to the Bar. Respondent also failed to reply to The Florida Bar's Complaint or Request for Admissions. The referee found Respondent violated Rule 4-8.4(g)(1)(Failure to Respond to the Bar).

Phifer Complaint -- Respondent was hired to file a post conviction relief motion in March 1997 for Angelo Phifer, but failed to file it until February 1, 1999. The court denied the motion on February 25, 1999, finding that Phifer's original sentence was imposed on September 11, 1996, and with a two-year statute of limitations, the motion was time barred. Respondent failed to reply to two Bar inquiry letters sent to 2 different addresses. Respondent failed to reply to The Florida Bar's Complaint or Request for

Admissions. The referee found Respondent violated Rules 4-1.1 (Competence), 4-1.3 (Diligence), and 4-8.4(g)(1) (Failure to respond to Bar).

A disciplinary hearing was held on January 26, 2005, and the referee made the following findings of fact:

Smith Complaint -- Respondent was hired to represent Eugene Smith on a charge of Driving While License Suspended (DWLS)-Third Conviction. ROR-18. The referee found that the fee of $3900 for 5 criminal cases was reasonable, and it was not necessary for the fee agreement to be in writing. ROR-19 The referee found that Respondent communicated on numerous occasions with Smith and adequately represented him. ROR-20. The referee did not make any determination as to whether Smith had a valid driver's license at the time of his arrest. ROR-20. Respondent could not produce a retainer agreement, billing records or client case file to support her testimony. TSmith-16-17. Most of the information obtained by the Florida Bar came from Mr. Smith's criminal file at the courthouse, or other public records. See TSmith, JT Exhibits 1-15, 17-23. TFB Exhibits 1-4. It was not until the day of the disciplinary hearing that Respondent produced a driver's license record for her client. See TSmith, R Exhibit 1. The referee found that if Respondent had timely responded to The Florida Bar regarding Mr. Smith, it might not have been necessary to hold a disciplinary hearing. ROR-21. The referee did find that Respondent failed to reply to The Florida Bar, and failed to

respond to the grievance committee violating Rules 4-8.4(g)(1) (Failure to respond to Bar), and 4-8.4(g)(2) (Failure to respond to the Grievance Committee). ROR-35-36.

A disciplinary hearing was held on February 7, 2005, and the referee made the following findings of fact:

Spooner Complaint -- Tracy Spooner's parents paid Respondent $10,000 to file a motion for post conviction relief and, if denied, to file an appeal of the denial. TSM-19, 116-117. Respondent entered into a written fee agreement with Spooner's parents. TSM-19, TFB Exhibit-3. The Florida Bar alleged lack of diligence, lack of communication, and excessive fees because Respondent never filed any appeal of the post conviction motion for her client, and failed to return the unearned fees. See The Florida Bar's Complaint. The referee found, however, that, because the Spooners elected not to allow Respondent to continue with the appeal, there was no clearly excessive fee. ROR-31 The referee found that Respondent had reasonably communicated with her client, and had adequately represented him in his criminal appeal. ROR-29-30 The referee found that Respondent failed to respond to The Florida Bar and violated Rule 4-8.4(g)(1) (Failure to respond to Bar).

Mailloux Complaint -- Respondent was hired by Richard Mailloux on February 7, 2003, to represent him on a Motion for Modification or Reduction of Sentence, and/or a Motion to Withdraw his plea and was paid $1,000. TSM, TFB Exhibit-25. Respondent

advised her client to wait until the present judge rotated out of the division and then she would pursue his post conviction motion. TSM-231 Respondent spoke with Mailloux in April 2003, and promised her client that as soon as the judges rotated assignments, she would file his motion for post conviction relief. TSM-231 Respondent had a plan to get the matter before a new judge, but then decided her strategy would be unethical because it involved encouraging Mailloux to file a frivolous pleading. TSM-229-232. The referee found that Respondent failed to advise Mailloux that she was not going to pursue his case, and should have returned his fees. ROR- Respondent conceded at the final hearing that she should return Mailloux's money because she was unable to accomplish for him what she had originally intended to do. TSM-231. Respondent admitted that she failed to respond to The Florida Bar. The referee found that Respondent violated Rules 4-1.4 (Communication), and 4-8.4(g)(1) (Failure to respond to the Bar).

The referee found the following mitigating factors under Standard 9.32: (a) absence of prior disciplinary record, (c) personal or emotional problems, (h) physical or mental disability or impairment, and (j) interim rehabilitation.

The referee also found the following aggravating factors under Standard 9.22: (c) pattern of misconduct, and (d) multiple offenses. Finally, the referee recommended a disciplinary sanction of a public reprimand for all nine complaints with three-years probation, and granted taxable costs to The Florida Bar.

SUMMARY OF ARGUMENT

The Florida Bar contends that (1) the appropriate disciplinary sanction under the Florida Standards for Imposing Lawyer Sanctions and the relevant case law is a one-year suspension, not the public reprimand recommended by the referee; 2) based on the referee's specific findings of fact and of Rule violation 4-1.5(a)(1), the referee erred when he did not order restitution in the Sapp complaint on the sole basis that Mr. Sapp had a civil suit pending; 3) based on the referee's findings of fact and the face of the record, the court should consider additional aggravating factors in this case under Standards 9.22(e), (i), and (j).

ARGUMENT

ISSUE I

THE COURT SHOULD IMPOSE A ONE-YEAR SUSPENSION AS AN APPROPRIATE DISCIPLINE UNDER THE FLORIDA LAWYER STANDARDS AND RELEVANT CASE LAW.

The Florida Bar contends that the referee's recommendation of a public reprimand is not reasonable under the Florida Standards for Imposing Lawyer Sanctions and the relevant case law. The Florida Bar v. Temmer, 753 So.2d 555, 558 (Fla. 1999). The imposition of a public reprimand by the referee is too lenient for nine disciplinary cases at issue and the multitude of rule violations found by the referee. ROR- 34-36. The referee also found as aggravating factors that there was a pattern of misconduct over a long period of time and multiple offenses. ROR-42. This Court should impose a one-year suspension as an appropriate discipline because it serves the three-fold purposes of discipline, and comports with the Florida Standards for Imposing Lawyer Sanctions as well as the relevant case law. In addition, it is a lesser discipline than has been imposed in similar cases, and takes into account the mitigating factors of no prior disciplinary history as well as Respondent's mental and personal problems considered by the referee. ROR-40-42.

It is a well established maxim that a disciplinary sanction 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 as a result of undue harshness in imposing the 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. The Florida Bar v. Brake, 767 So.2d 1163, 1169 (Fla. 2000). See also, The Florida Bar v. Lord, 433 So.2d 983, 986 (Fla. 1983); The Florida Bar v. Pahules, 233 So.2d 130, 132 (Fla. 1970).

The referee's recommendation of a public reprimand is not fair to society, is not sufficient to punish the breach of ethics for all of the disciplinary complaints, and would not serve to deter others from being involved in similar misconduct. On the other hand, a one-year suspension does meet the threefold purposes of a disciplinary sanction. First, it would protect the public and is not unduly harsh under the facts and circumstances of these nine disciplinary complaints. Second, it is fair to the respondent because it punishes the breach of ethics while encouraging rehabilitation. Lastly, a one-year suspension is severe enough to deter others from similar violations of the ethical rules.

The Court's scope of review as to the referee's recommended discipline is broader than that afforded to the referee's findings of fact because it is the final arbiter of the appropriate disciplinary sanction. See The Florida Bar v. Miller, 863 So. 2d 231, 234 (Fla. 2003). Generally, the Court will not second-guess a referee's recommended discipline as long as there is a reasonable basis in the case law and it comports with the

Florida Standards for Imposing Lawyer Sanctions. The Florida Bar v. Shoureas, 892 So.2d 1002, 1005-1006 (Fla. 2004).

A review of the Florida Standards for Imposing Lawyer Sanctions, however, indicates that the applicable Standards are 4.42 and 6.22 requiring a suspension, not a public reprimand, under the facts and rule violations found in these nine disciplinary complaints. There were multiple counts, inter alia, of failure to respond to The Florida Bar, failure to diligently pursue clients' cases, failure to communicate with clients, and failure to obey court orders. Respondent knowingly failed to perform services for clients in five of the above complaints and caused them substantial injury. Her pervasive neglect of client matters shows a pattern of neglect that seriously jeopardized her clients' legal rights. In fact, the referee found that there was a pattern of misconduct and multiple offenses as two aggravating factors. ROR-42.

For example, under the facts found in the Samuel complaint, Respondent's client refused probation and ended up with incarceration because she admittedly failed to explain the State's discovery to him prior to trial. ROR-6. In the Brown complaint, Respondent knowingly failed to obey the court's final orders, and misrepresented to the court, The Florida Bar, and her client that she would repay the unearned fees. ROR-10-13. In the First DCA complaint, Respondent failed to file a timely appeal on behalf of her client, and failed to respond to the First DCA's orders to show cause for over two years.

ROR-7. In the Sapp complaint, Respondent failed to communicate with her client for over five months during which she repeatedly continued his trial date, and waived his rights to a speedy trial without his consent. ROR-15. In the Phifer complaint, Respondent failed to timely file a motion for post conviction relief although she was hired by the client 15 months before the statute of limitations expired. ROR-18. In the Mailloux complaint, Respondent failed to communicate to her client that she was not going to pursue his case, and failed to return his fees. ROR-34.

Respondent knew, or should have known, that her failure to diligently pursue her clients' criminal cases would result in irreparable legal injury to them. As an experienced criminal attorney for almost 17 years, she was aware of the attendant circumstances of missing statutory deadlines, waiving speedy trial rights, failing to timely file an appellate brief, and not adequately communicating the state's discovery to a criminal defendant before trial. Her misconduct was not just an aberration or a minor mistake in judgment in one or two cases that occurred in a short space of time. Respondent's neglect of client legal matters occurred in seven cases over a span of over six years. The failure to respond to the court in the Brown complaint occurred over a period of more than five years of stonewalling both her former client and the court. The failure to respond to the First District Court of Appeal's Orders to Show Cause covered over two years until September 24, 2002, when the court issued an Order referring Respondent's lack of

compliance with its prior orders to the Florida Bar for further investigation. This Court has disbarred attorneys for less in prior cases. See The Florida Bar v. Springer, 873 So.2d 317, (Fla. 2004) ("As the uncontested facts demonstrate, Springer violated a multitude of rules governing the legal profession numerous times over many years, and the ill effects of his misconduct seriously injured not one, but multiple clients." Id. at 324).

Even given the mitigating evidence of mental depression set forth in the referee's report, the case law still supports The Florida Bar's recommendation of a one-year suspension rather than a public reprimand. In the recent case of The Florida Bar v. Shoureas, 2005 WL 2509271 (Fla.)("Shoureas II"), this Court imposed a three-year suspension on an attorney who provided similar evidence of mental depression as a mitigating factor where the rule violations concerned two cases of client neglect and two instances of failure to respond to The Florida Bar. In Shoureas, the Court found that the three-year suspension had a reasonable basis in the case law considering the attorney's three prior instances of client neglect for which she had received a 91-day suspension and a prior three-year suspension. See The Florida Bar v. Shoureas, 892 So.2d 1002 (Fla. 2004)("Shoureas I"). Further, the Court found that the three-year suspension, rather than disbarment, was authorized by the Florida Standards for Imposing Lawyer Sanctions under Standard 4.42. See Shoureas, 2005 WL 2509271 (Fla.).

In reaching its decision in Shoureas II, the court weighed the aggravating and mitigating factors. In aggravation, the attorney had been previously disciplined twice for similar neglect of client matters. In mitigation, the court considered the evidence of depression, personal or emotional problems and interim rehabilitation, as well as the attorney's inexperience in the practice of law and that she had no dishonest or selfish motive. Despite the uncontroverted evidence of depression, the Court imposed a three-year suspension.

In the present disciplinary complaints, the facts and circumstances are even more egregious, the rule violations go beyond just neglect of client in two legal matters, and there is a pervasive failure to respond to The Florida Bar as well as to co-operate in the disciplinary proceedings. The referee found seven instances of failure to respond to The Florida Bar, and three instances of failure to respond to the grievance committee. See ROR-34-35. The record also reflects that Respondent failed to file responsive pleadings to The Florida Bar's Complaint and Request for Admissions pertaining to five disciplinary complaints. See ROR-2. The referee found numerous other violations of misconduct for Respondent's failure to comply with court orders. See ROR-34-35. Given the broad spectrum of rule violations and the similarity of the mitigating evidence in the recent case of Shoureas, The Florida Bar's recommendation of a one-year suspension is reasonable under the prevailing case law. See The Florida Bar v. Shoureas, 892 So.2d 1002, 1009

(Fla. 2004) ("A review of our precedent reveals that the sanction of a long-term suspension, not disbarment, is authorized under the Standards for Imposing Lawyer Sanctions and has a reasonable basis in existing case law." Citations omitted. Id. at 1009).

Although the prevailing case law would indicate a recommendation of a long-term suspension, The Florida Bar weighed the mitigating factors presented in this case including the lack of a prior disciplinary history, and the evidence pertaining to Respondent's personal, emotional, and mental problems before recommending a one-year suspension with probation. The relevant case law indicated a one-year suspension was a reasonable and appropriate discipline. See The Florida Bar v. Centurion, 801 So.2d 858 (Fla. 2000)(one-year suspension for multiple counts of neglect of client matters where attorney had no prior disciplinary history and court held that "Centurion's conduct resulted in prejudice to his clients' rights and was an intolerable breach of trust." Id. at 862-863); The Florida Bar v. Cimbler, 840 So.2d 955(Fla. 2002)(a one-year suspension for multiple counts of neglect of client matters where attorney had history of severe depression. Id. at 957-958.).

Further, if the Florida Bar had pursued these disciplinary complaints on an individual basis, and if the referee had not granted Respondent's ore tenus motion for a consolidation of the last three disciplinary complaints at the penalty hearing on November

19, 2004, Respondent would be facing a prior disciplinary history that would have clearly resulted in a long-term suspension. This Court has previously disbarred an attorney for similar conduct in a six-count complaint where there was no evidence of mental health issues:

> Springer's position fails to accommodate the repeated and prolonged nature of his conduct. Surely, had Springer been subject to disciplinary proceedings for each of his offenses as they occurred, this Court would not have continued to prescribe short-term suspensions. At some point we would have said "enough is enough," and rescinded Springer's license to practice law. He deserves no more lenient punishment because his numerous transgressions were

> lumped into one disciplinary proceeding. See Springer, 873 So.2d at 325.

The referee's reliance on the cases of The Florida Bar v. Grigsby, 641 So. 2d 1341(Fla. 1994), and The Florida Bar v. Moran, 273 So. 2d 379 (Fla. 1973) to recommend a public reprimand is misplaced. These cases are clearly distinguishable from the facts and circumstances of the present disciplinary complaints. In Grigsby, the attorney was charged solely with one instance of failure to respond to The Florida Bar's initial inquiry letter. While the attorney did not respond to the grievance committee's initial requests, he did appear at the grievance committee hearing, and the underlying client complaint was dismissed. Nevertheless, the referee imposed a public reprimand because the "referee found that Grigsby suffers from clinical depression for which he has voluntarily sought treatment, and although Grigsby's illness explained his conduct, it did not excuse it." Grigsby, 641 So.2d at 1342. Emphasis added.

In Grigsby, the Court held that suspension was not the appropriate discipline citing to Standard 8.2, and not Standard 4.42. Taking into account that the attorney's one failure to respond to The Florida Bar "was likely caused by this mental disability," the Court upheld the referee's recommended discipline. Id. at 1343. Similarly, the facts of Moran do not rise to the level of the factual allegations and numerous rule violations found in Respondent's disciplinary complaints.

In Grigsby and Moran, there was ample evidence that the attorneys had voluntarily sought medical treatment before the disciplinary proceeding, and in both cases could show rehabilitation by the time of the referee hearing. In these disciplinary complaints, however, The Florida Bar began investigating complaints against Respondent in 2001, filed its first formal complaint in January 2003, and proceeded to summary judgment on five complaints in May 2004. It was not until after the referee granted summary judgment to The Florida Bar in five disciplinary complaints that Respondent retained a psychiatrist and began to raise mental depression as an excuse for her misconduct.

At the penalty hearing in November 2004, the psychiatrist testified that she first consulted with Respondent on May 21, 2004, after the summary judgment hearing in the Florida Bar's cases. TPH1-33. She also testified that she made recommendations as to treatment on August 2, 2004, and did not begin regular office visits with Respondent until October 6, 2005. TPH1-14, See R Exhibit -2. Respondent had treated with her psychiatrist only six or eight times before the first penalty hearing. TPH1-34, 48.At the May 10, 2005, the psychiatrist testified that Respondent was improving, but Respondent admitted that she had still not complied with her psychiatrist's recommendation of a physical examination as of the date of the second penalty hearing. TPH2-9, 13. Although the psychiatrist's testimony tracks the same findings as in Moran, in that case it was a physical problem for which the attorney had obtained successful medical treatment,

and could prove he was diligently handling current cases. Here, Respondent's rehabilitation is still difficult to evaluate in light of the short period she has been treated by her psychiatrist. TPH2-45. Respondent knew she had these problems for many years, and took no positive action to correct her mental health problems. She continued to represent anywhere from 25 to 40 clients, take fees, and continued a very active criminal defense practice. TSmith-11.

In addition to his reliance on Grigsby and Moran, the referee recommended a public reprimand based on the mitigating factors in Standards 9.32(c) personal and emotional problems, 9.32(h) physical and mental disability or impairment, and 9.32(j) interim rehabilitation. The referee's findings on these Standards, however, are inconsistent with his findings of fact in the Smith, Spooner, and Mailloux complaints. ROR-40. On one hand, based on the testimony of Respondent's psychiatrist, Dr. Roberta Schaffner, the referee found that Respondent "suffered from severe clinical depression for well over a decade" during which her depression got worse for about five-six of those years, she had "serious health problems," and her clinical depression "caused" her ethical misconduct. See ROR-41. On the other hand, the referee found, that within the same timeframe of this "severe clinical depression," Respondent "communicated on numerous occasions with Mr. Smith" and "adequately represented Mr. Smith" in five criminal cases, filing motions, appearing at hearings, and negotiating a

plea agreement for her client from February 2003 through July 2003. ROR-20. Similarly, in the Spooner complaint, during this same timeframe of "severe clinical depression," the referee found that Respondent from May 2000 through July 2003, diligently represented her client and communicated on numerous occasions with the client and his parents regarding a motion for post conviction relief. ROR-27-29.

During this timeframe of "severe clinical depression," in which Respondent was unable to put pen to paper once to respond to The Florida Bar, the grievance committee, the First DCA, or to The Florida Bar's Complaints and Requests for Admissions in five cases, nevertheless, the referee found that:

> She met with Mr. Spooner twice to discuss the issues, did legal research, reviewed all the transcripts and the records generated by previous counsel, and attempted to locate the witnesses who allegedly could provide beneficial testimony, including tracking down the witnesses who had moved out of state. Respondent prepared and filed a 7-page Motion for Post Conviction Relief and a 19-page Memorandum of Law in support thereof….When the court granted an evidentiary hearing, Respondent promptly followed through with the court's order to set a hearing. ROR-29.

Again in the Mailloux complaint, the referee held that Respondent diligently represented her client from February 2003 through September 2003. It appears that Respondent's "severe clinical depression" did not prevent her from accepting fees and continuing to represent numerous criminal defendants. It appears her "other actions and

omissions" relating to the Florida Bar, the courts, and other clients were the only ones "caused by Respondent's medical condition of clinical depression." See TPH1-30-31. As the referee correctly points out, there was no mention of any mental health issues until after Respondent hired legal counsel in May 2004, and then consulted a psychiatrist. ROR-41. Respondent did not enter into the Florida Lawyer's Assistance ("FLA.") contract until November 18, 2004. TPH1, R Exhibit-1.

Even if these mitigating factors were present, it should not be considered an excuse for her ethical misconduct during the same timeframe as she was representing other clients. See Grisby, 641 So. 2d at 1342 (…. "Grigsby's illness explained his conduct, it did not excuse it." Id.). See also The Florida Bar v. Horowitz, 697 So.2d 78 (Fla.1997) ("….evidence of Horowitz' clinical depression helps to explain but not to excuse his pattern of neglect of his clients and his failure to respond to communications from the Bar." Id. at 84, citing to The Florida Bar v. Setien, 530 So.2d 298, 300 (Fla. 1988)).

Respondent's claim that "severe mental depression" is the "cause" of her misconduct is contradicted by the oral and documentary evidence presented by Respondent at the hearings before the referee. Respondent has failed to show that this mitigator impaired her ability to practice law to such an extent that it outweighs the misconduct. See The Florida Bar v. Heptner, 887 So.2d 1036, 1043 (Fla. 2004).

Respondent testified that she continued to represent clients, make daily court appearances at trials, hearings, and docket days, as well as draft and file trial and appellate pleadings on behalf of at least 25-30 clients at any given time. TSmith-11. Yet, during this same period of time, she relies on "severe mental depression" for failure to respond to the Florida Bar at the staff, grievance or referee level, the First District Court of Appeal, and to communicate with the eight clients who filed complaints against her.

ISSUE II

THE COURT SHOULD REQUIRE RESTITUTION BASED ON THE REFEREE'S FINDINGS OF FACT

Rule 3-5.1 states that a judgment may be entered for one or more types of discipline including restitution. Specifically, Rule 3-5.1(i) states that Respondent may be ordered to pay restitution to a complainant "if the disciplinary order finds that the respondent has received a clearly excessive fee…" In the Sapp complaint, the referee granted to The Florida Bar summary judgment on all of its allegations in its complaint. The referee found that "Mr. Sapp paid Respondent $6,700 in attorney fees to represent him in his two criminal cases." ROR-15. Further, the referee found "Respondent charged Mr. Sapp a clearly excessive fee because no legal work worth that amount of money was completed in either criminal case during the five months that she represented him." ROR-15. The referee also found that Respondent violated Rule 4-1.5(a)(1) which provides that

> A fee or cost is clearly excessive when (a) if after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee or the costs exceeds a reasonable fee or costs for services provided to such a degree as to constitute clear overreaching or an unconscionable demand by the attorney.

Despite these clear findings of fact, the referee declined to order restitution in the Sapp case because he determined that Mr. Sapp had civil litigation pending which would resolve the matter. ROR-46.

In this case, however, the referee made specific findings that Respondent charged a "clearly excessive fee" in light of the fact that she performed no legal services for the client, and found Respondent in violation of the appropriate ethical rule. Rule 3-5.1(i) approves restitution in only two narrow instances: when an attorney charges an excessive fee or when an attorney converts client funds.

Whether the client instituted a civil action that is pending should not be relevant as to whether he is entitled to restitution under the Bar Rules. Even if the former client is successful in his civil suit, it would be unfair to the client to be required to enforce a civil judgment against Respondent who may be judgment proof, and thereby the excessive fees remain uncollectible. If restitution is ordered by the Court as a condition of Respondent's reinstatement or payment must be made as part of a final disciplinary judgment, then Respondent will be required to pay the restitution to comply with the Court's order. After pursuing a complaint through The Florida Bar because an attorney failed to diligently represent him in two criminal cases and after The Florida Bar prevailed on the issue of excessive fees, it would be unfair to allow Respondent to waive

responsibility for repayment of the excessive fees except through an civil action for enforcement by her former client.

Further, restitution ordered by The Florida Bar and a judgment for damages in a civil suit are not equivalent remedies. Even if Mr. Sapp were to prevail on a civil action for attorney's fees against Respondent, he would need to execute on the judgment. If restitution is ordered by the Florida Supreme Court, however, then Respondent would be required to refund him the excessive fees within the prescribed timeframe or before reinstatement.

ISSUE III

THE COURT SHOULD CONSIDER ADDITIONAL AGGRAVATING FACTORS BASED ON THE REFEREE'S FINDINGS AND A REVIEW ON THE FACE OF THE RECORD.

The referee failed to find that Respondent had substantial experience in the practice of law as one of the aggravating factors in his final report of referee. Yet, under "Personal History of Respondent", the referee noted that Respondent was admitted to The Florida Bar on April 22, 1988. ROR-40. He also specifically found under "Mitigating Factors" that she had been a member of The Florida Bar for over 17 years. In light of the referee's specific findings, the Court should add Standard 9.22(i) to the list of aggravating factors to be considered before imposing an appropriate discipline on Respondent.

In addition, the Court should also consider Standard 9.22(e), bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with the rules or orders of the disciplinary agency, and Standard 9.22(j), indifference to making restitution based on the face of the record before this court. Respondent failed to reply to The Florida Bar and the referee made seven specific findings of violations of Rule 4-8.4(g)(1). Further, the referee made three specific findings of violations of Rule 4-8.4(g)(2) for failure to reply to the grievance committee or its members. Respondent failed to reply to five of The Florida Bar's Complaints as required by Rule 3-7.6(h)(2). The above actions clearly

reflect an obstruction of the disciplinary process. Respondent's failure to comply with the Rules required The Florida Bar to rely on complainants, and third party sources for information to investigate and prosecute its disciplinary complaints against Respondent. Even during the disciplinary hearings, Respondent failed to provide any client case files to support her testimony. TSmith-21, TSM-15-16. The referee also found that had respondent cooperated with The Florida Bar, and not waited until the day of hearing to respond to the allegations, the Smith hearing may not have been necessary. ROR-21.

Standard 9.22(j) is also applicable as an aggravating factor. As reflected on the face of the record on review, Respondent made no attempt to pay any refund of fees in the Brown complaint and delayed the process in small claims court for over three years. Similarly in the Sapp complaint, Respondent made no attempt to refund any fees to her former client either before or after the Bar filed its complaint. Further, in the Spooner case, Respondent took $10,000 to file a motion for post conviction relief and an appeal if the motion was denied. Despite failing to do any appeal, Respondent has made no attempt to refund any monies to the Spooners. In the Mailloux complaint, Respondent admitted that she should have returned her client's money because she did not perform the legal services for which she was retained. As of the hearing date of February 7, 2005, however, Respondent had made no effort to return any money to Mr. Mailloux. The referee specifically found that "When Respondent determined that her plan to assist Mr.

Mailloux would not work, she immediately should have contacted Mr. Mailloux and returned his money. ROR-34.

CONCLUSION

For the foregoing reasons, The Florida Bar would respectfully request that the Court reject the referee's disciplinary recommendation of a public reprimand, and impose a one-year suspension, grant restitution of $6,700 to Ricky Sapp to be paid before reinstatement, and find that the referee should have found additional aggravating factors based on the face of the record and the referee's findings of fact.

Respectfully submitted,

OLIVIA PAIVA KLEIN
Bar Counsel, The Florida Bar
651 East Jefferson Street
Tallahassee, FL 32399-2300
(850) 561-5845
(850) 561-5829 (Fax)
Fla. Bar No. 970247

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing The Florida Bar's Initial Brief regarding Supreme Court Case Nos. SC03-84, SC03-1205, SC03-1206, SC03-1931, SC04-448, SC04-1375, has been furnished by regular U.S. Mail to Lois B. Lepp, Respondent's Counsel, at her record Bar address of 1127 North Palafox Street, Pensacola, FL 32501, on this _____ day of October, 2005.

_____

Olivia Paiva Klein, Bar Counsel
The Florida Bar
651 E. Jefferson Street
Tallahassee, FL 32399-2300
(850) 561-5845
Florida Bar No. 0970247

Copy provided to:
John Anthony Boggs, Staff Counsel

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

Undersigned counsel does hereby certify that the Initial Brief is submitted in 14 point proportionately spaced Times New Roman font, and that the brief has been filed by e-mail in accord with the Court's order of October 1, 2004. Undersigned counsel does hereby further certify that the electronically filed version of this brief has been scanned and found to be free of viruses, by Norton AntiVirus for Windows.

_____

Olivia Paiva Klein, Bar Counsel