

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

SUPREME COURT
CASE NO. 75,932

vs.

EDWARD J. SALINIK,

Respondent.

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**BRIEF IN SUPPORT OF CROSS-PETITION FOR REVIEW AND
ANSWER BRIEF**

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INTRODUCTION

The Florida Bar was the Complainant. It will be referred to as the Bar. Mr. Salnik was the Respondent. He will be referred to by his surname.

The symbol "T." will be used to designate the transcript of the hearing before the Referee. The symbol "RR" will be used to designate the Report of Referee.

STATEMENT OF THE CASE AND OF THE FACTS

The Bar's Statement of the Case is correct.

The Bar's Statement of the Facts on Pages 3-5, which tracks the Complaint, is correct.

Mr. Salnik emphatically *rejects* the remainder of the Bar's Statement of the Facts. It is woefully incomplete, unfairly slanted, and unduly argumentative.

The following is correct:

Just prior to the commencement of the final hearing, counsel for Mr. Salnik stated that the State Attorney's Office in Miami had had the matter under investigation (T.6). One of the pleadings filed in the matter contained as an exhibit a copy of a letter from the assistant state attorney to Mr. Salnik notifying him that they were in fact investigating the situation (T.6-7). For that reason, Mr. Salnik was unable to admit the charges contained in the Complaint (T.7). Mr. Salnik's position at the final hearing was that of someone who has conceded guilt with regard to the matter of discipline, but, because of the pending investigation was unable to make any admissions (T. 7).

Judge Cindy Lederman testified. Mr. Salnik had a continuing objection to her testimony (T.25), on the ground that it was superfluous on the question of discipline (T.12), the Bar having filed an unopposed motion for summary judgment, which was entered by the Referee (T.13), thus rendering her testimony redundant and superfluous (T.14). A relevancy objection was also raised (T.15).

The Referee sustained objections to questions asking Judge Lederman's opinion concerning her ethical concerns and view of Mr. Salnik (T.32).

On cross-examination she testified that the clerk's office does not issue a writ of possession until the original final judgment is presented to it (T.34).

On recross-examination, when asked whether or not a statement in the letter Mr. Salnik sent was a mistake or a misrepresentation she answered that she did not know, and then proceeded to give her views concerning the case (T.37).

Andres Bengochea testified. He is an attorney (T.38). He has been an attorney for approximately three and one-half years (T.38). He has a general practice in Miami (T.39).

He first knew about Mr. Salnik when he was an undergraduate at the University of Miami during the 1981-1982 school year (T.39). He met Mr. Salnik in his senior year, and came to know him very well in law school (T.39). They were in the same study group (T.39). The study group remained in existence throughout all of law school (T.39). The members developed a very close friendship which has continued (T.39).

During law school he saw Mr. Salnik on a daily basis (T.40). They have maintained their friendship since graduation (T.40). Mr. Salnik permitted him to use his office to practice law in mid to late 1988 (T.40). He opened his own office in July, 1990, in the same building with Mr. Salnik (T.41).

When he first started using Mr. Salnik's office, he would be there two or three times a week (T.42). By mid 1989, he was there on a daily basis, so he would see Mr. Salnik from that time on almost on a daily basis (T.42).

He knows Mr. Salnik very well, better than he knows his own brothers (T.42). Mr. Salnik is a very honest individual, diligent, generous to a fault, hard working, conscientious, and has all the best qualities that one can imagine (T.42). He is a person of high moral character (T.42). He is a person of integrity (T.42-43). Mr. Bengochea had read the Complaint in this matter (T.43). Assuming that Mr. Salnik was guilty, that does not fit in

with what he knows of Mr. Salnik (T.43). It was totally out of character for him (T.43). It would be a radical departure from the norm (T.43).

He knows Mr. Salnik's family (T.43). His family consists of his father, his mother, a brother, a sister, and now, technically, a stepmother (T.43). Mr. Salnik is the oldest of the three children (T.43-44). It was a very close family (T.44). He got to know them when his parents were still married and they were all in law school (T.44).

In 1988 the father left the house (T.44). That had a very big effect on Mr. Salnik (T.44). He spoke to Mr. Salnik about it a lot (T.44). Even when Mr. Salnik did not want to talk about it, he dragged it out of him (T.44). The family was very close (T.44). When the father moved out of the house he caught everyone, including Mr. Salnik, by surprise (T.44). It created a very difficult situation for Mr. Salnik (T.45). He had been very close to both parents (T.45). Seeing the split up was very painful (T.45). The parents had been married a very long time (T.45-46).

When he would get home every day his mother would really only open up and discuss her feelings with him (T.45). The only outlet the mother had was to talk it over with Mr. Salnik, which she did continuously (T.45). Mr. Salnik was living at home (T.45).

The split up badly affected Mr. Salnik (T.46). He was under a lot of stress and bothered by this (T.46). There were tiring days at the office, at the end of which he would say that he wanted to go home and go to sleep, just relax (T.46). However that was not really what he wanted to do, because going home was worse than the situation at work (T.46).

He did not have an outlet for relaxation (T.46). He was introverted (T.46). He was keeping it inside (T.46). He knows Mr. Salnik well enough that he can tell if something is troubling or bothering him just by looking at his expression or complexion (T.46). He could

tell that it was bothering Mr. Salnik (T.46). This mood and demeanor existed pretty much throughout this time (T.47). It was bad when his father left the house in 1988 and it became progressively worse until late September, 1989, when his father announced his intention to divorce his mother as opposed to just being separated (T.47).

Mr. Salnik was hopeful that his parents would get back together (T.47). In fact, usually when there was some type of family gathering, he would arrange it in such a way that the mother might join them, or that the father might join the family, so that it would be a complete family unit (T.47). This was the first year that the family did not go together on a cruise, as they had done for the last three or four years, which was a jarring experience (T.47).

He would talk to Mr. Salnik about the situation primarily when he could see that it was really bothering him (T.47-48). That was maybe once a week or sometimes twice a week in a bad week (T.48). Sometimes he did not speak about it at all, even though he knew that it was bothering Mr. Salnik (T.48). He knew enough about it to know that keeping Mr. Salnik busy or trying to keep his mind off it was all he could do (T.48).

In October of 1989, he would sometimes cover for Mr. Salnik (T.48). He sometimes spoke to Salnik about perhaps taking over Mr. Salnik's entire practice (T.48). Mr. Salnik was stressed out (T.49). Mr. Salnik would tell him that he was not in the mood for some of the cases (T.49). Half in jest, but definitely seriously, he would say: "Do you want to come in on this case and this case, because, quite frankly, I can't really handle it right now. I can't really put concentration into it. It's a nice way for you to make some extra money...Why not?" (T.49).

Prior to the break-up of his parents' marriage, Mr. Salnik was an outgoing person (T.52-53). He would be one of the ones to suggest that they go do something (T.53). He

was usually the impetus for them to go somewhere (T.53). During this period, in terms of sociability, Mr. Salnik was "out of it" (T.50). He might participate in a lot of things, but it was necessary to drag him and force him to go to things (T.50). It no longer was "would you like to go to the movies," it became "We are expecting you to be in such and such a theater by such and such a time" (T.50-51). One had to sometimes work at getting Mr. Salnik into a mood to participate and actually begin to have a good time (T.51).

At the end of the day he had conversations with Mr. Salnik about what he was going to do for the rest of the day or night (T.51). This became a ritual, especially near the end of the week (T.51). He would ask Mr. Salnik what he was going to do that night (T.51). A typical response was: "I don't know" (T.51). He would ask Mr. Salnik what he was in the mood for and they would go through this process and narrow it down to eating a certain type of food or going somewhere to have dinner and just try to wind down (T.51-52). Mr. Salnik would not be in the mood to go home (T.52). Once he saw that look on Mr. Salnik's face, he knew that that was what it meant (T.52). He was not in the mood to go home because it would just mean, after a hard day, going home and hearing the complaints or worries from his mother (T.52).

During the time period that his parents were breaking up, Mr. Salnik worked long hours (T.54). Usually at 9:00 A.M. he had either a calendar report, a motion, or something in some court (T.54). He would then arrive at the office (T.54). If Mr. Bengochea was there for lunch, they would usually have a quick lunch at the pizza shop two buildings away (T.54-55). He would leave the office at 5:30 or at 6:00 P.M. and Mr. Salnik would still be there (T.55). That was on a day that they did not go out or go eat, or do things like that (T.55). Mr. Salnik kept long hours (T.55).

His mental, emotional, and psychological condition during this time of his parents' break-up was the worst he has ever seen (T.53). He had never seen Mr. Salnik as stressed and emotionally distraught as he was during this time (T.57).

His parents' divorce was finalized in February, 1990 (T.53). Since it was terminated, Mr. Salnik has gotten better (T.53). The Bar proceedings have also had an effect on him, but not as major an effect as the break-up did (T.53). Mentally and in terms of doing things he is better than he was around that period of his parents' break-up (T.54).

Mr. Salnik has health difficulties (T.49-50). In late 1989, he noticed a little vial of pills in Mr. Salnik's briefcase and asked him what it was (T.50). Mr. Salnik told him that he was getting some palpitations, which he knew about from two or three different occasions, and the doctor had prescribed these for him to take if he ever got into a bad situation (T.50). Mr. Bengochea said: "That sounds to me like a heart attack." (T.50). Mr. Salnik said: "Well, it's not quite a heart attack, but somewhat similar to it and these pills are to calm me down" (T.50).

Robert De Palma testified. He is an attorney (T.58). He is admitted to the Florida, New York, and New Jersey Bars (T.58). He lives in Staten Island, New York (T.58). He has been an attorney since 1987 (T.58). He graduated from the University of Miami Law School (T.58).

He was an Assistant District Attorney for four years (T.59). He started at the misdemeanor level (T.59). In October, 1989, he became a felony assistant (T.59). He was assigned to the Special Investigations Bureau and his duties involved white collar crime and credit card fraud (T.60). He eventually left the District Attorneys' Office and for the past three weeks has been in private practice, in Staten Island (T.60).

He paid his own way from New York to Ft. Lauderdale (T.60). He came down here for the sole purpose of testifying as a character witness in Mr. Salnik's matter (T.60-61).

He has known Mr. Salnik since 1983, when they started law school (T.61). He had known of Mr. Salnik before 1983 when Mr. Salnik was treasurer of the Pre-Legal Society (T.61). He joined the Pre-Legal Society his senior year, when Mr. Salnik was president (T.61).

Their relationship became close in law school (T.61). They were in the same study group (T.61). The study group existed throughout law school (T.61). Mr. Salnik was the leader (T.61-62). Mr. Salnik was the person who always took charge (T.62). Mr. Salnik was the man who got them all together (T.62).

During law school, he saw Mr. Salnik on a daily basis and got to know him very well (T.62). When he moved to New York in February, 1987, he stayed in contact with Mr. Salnik (T.62). They would speak by phone once a month and would see each other when he came down to Florida for a vacation, once or twice a year (T.62-63). They correspond (T.63). They have remained good friends (T.63).

Mr. Salnik has the highest morals (T.63). He has the highest integrity (T.63). Mr. Salnik's character is impeccable (T.63). He envies Mr. Salnik's moral character and integrity (T.63). Throughout law school Mr. Salnik was their leader (T.63). He took care of them (T.63). When he graduated and was ready to go to New York, it was very difficult for him to leave Mr. Salnik (T.63).

In terms of friendship, Mr. Salnik is the best (T.64). He has had some troubles in his life, for example when his father died (T.64). Mr. Salnik was there for support throughout the ordeal (T.64). Mr. Salnik was an excellent friend throughout law school and he remains an excellent friend (T.64).

He had read the Complaint against Mr. Salnik (T.64). Presuming that Mr. Salnik was guilty, it does not fit in with what he knows of Mr. Salnik (T.64). He knows Mr. Salnik would not do such a thing (T.64). It is very uncharacteristic of Mr. Salnik (T.64).

He knows Mr. Salnik's family (T.64). He has a younger brother and sister (T.64). He learned of Mr. Salnik's parents' marital difficulties in the summer of 1988, when he was visiting here on vacation (T.65). Mr. Salnik's father was no longer living in the house (T.65). Prior to that time it was a very closely knit family (T.65).

The break-up had an adverse effect on Mr. Salnik (T.65). He was just not his usual self (T.65). During law school and for the entire period of time that he has known Mr. Salnik, he was always an extroverted individual (T.65). Mr. Salnik would make the plans and most of them would just follow along (T.65-66). During this time when they sat down and spoke Mr. Salnik became introverted (T.66). He was withdrawn (T.66). He was holding things in (T.66).

When he would call Mr. Salnik he would reach his mother (T.66). Mr. Salnik was almost always at work (T.66). He called once at 10:00 P.M. and Mr. Salnik was still working in the office (T.66). He told Mr. Salnik to slow down and not to work so hard, to take it easy, because he knew the emotional stress that the divorce proceedings were inflicting upon him (T.66). The divorce was taking its toll on Mr. Salnik (T.66). He became the mediator between his mother and father and hoped that they would be together again (T.66). The stress caused Mr. Salnik to dive deeper into his job (T.66). Mr. Salnik would tell him at times that he had not slept (T.67).

He recommended to Mr. Salnik that he get away and go to New York and visit him (T.67). His door is always open to Mr. Salnik (T.67). He suggested that numerous times (T.67). Mr. Salnik was never able to take him up on it (T.67).

Mr. Salnik's parents' divorce was finalized in February, 1990 (T.67). His father immediately remarried (T.67-68). After the matter was resolved Mr. Salnik understood that it was time for him to get on with his life and to try to take care of his mother the best that he could (T.68). Progressively, things got a little bit better, but not one hundred percent better (T.68).

The Bar proceedings have had an adverse effect on Mr. Salnik (T.68). He could see, just by the tone of Mr. Salnik's voice when he told him about these proceedings, that it was bothering him (T.69). He had been down for a few days and he could see the stress that Mr. Salnik was going through as a result of the situation that he is in now (T.69).

Mr. Salnik's experience with his parents' break-up was the worst that he has seen in him since he has known him (T.69), and he has known him since 1983 (T.69). It was much worse than when he flunked the Bar exam the first time (T.69).

On cross-examination, he testified that, assuming Mr. Salnik was guilty, that would not change his opinion of him (T.71).

Maria Capo testified. She is an attorney and has been since April, 1987 (T.73). She is employed by the U.S. Customs Service as an assistant regional counsel (T.73-74). She has been with Customs for two years (T.74). Prior to that, just after law school, she worked with the Immigration and Naturalization Service (T.74).

She has known Mr. Salnik since early 1983 (T.75). She met him in the Pre-Legal Society, of which he was president, when they were undergraduates at the University of Miami (T.75). In law school she and Mr. Salnik were in the same study group (T.75).

They had a very close relationship in law school (T.75). They spent a lot of time together, especially in the first and the last years (T.75). They socialized after school (T.75). They spent most of their week together (T.75). In the last year of law school they

participated in the Trial Advocacy Program (T.75). She and Mr. Salnik were partners for six months and three or four mock hearings (T.75-76). Mr. Salnik is like a brother (T.76).

She came to know Mr. Salnik very well (T.76). After law school she was in Louisiana and Texas for a couple of years (T.76). She and Mr. Salnik kept in contact (T.76). They spoke by phone and wrote (T.76). She would come to Miami often to see her family and she would visit with Mr. Salnik and spend time with him (T.76). When she returned to Miami they remained friends (T.76-77). They are in contact once a week now (T.77). They go to lunch and dinner (T.77). They talk on the phone often (T.77). She still socializes with him (T.77).

Mr. Salnik is a very hard working person (T.77). He is a very honest person (T.77). He is reliable (T.77). She has always expected the highest of him (T.77). He is a person of good moral character (T.77). He is a person that respects his family (T.77).

Mr. Salnik is a wonderful friend (T.77). He has always helped her in everything about which she requested assistance (T.77). He has never said no to any of her requests (T.77). If he could help her, he would (T.77).

She knows Mr. Salnik's family (T.78). He has a very close relationship with his family (T.78). He is the first born (T.78). His family counts on him a lot (T.78). He is the person his parents rely on most in the family (T.78).

She had read the Complaint (T.78). It is very hard to believe that Mr. Salnik would be capable of doing that which the Bar has charged (T.78). It is totally out of character for the person she has known for eight years (T.78).

She knew about Mr. Salnik's parents' situation (T.78-79). Mr. Salnik was the family member that kept everything going at that time (T.79). He was trying to mediate between his parents to try to resolve the situation as best as possible (T.79).

Mr. Salnik was depressed during this period (T.79). He told her so at different times (T.79). She heard him say that after seeing his parents together for twenty-nine years, it was something that he never would have believed could happen (T.79). His father was an honest and good person all his life and he was unable to cope with his father leaving the family (T.79-80).

Mr. Salnik's relationship with his mother is very close (T.80). During this period he was baby-sitting for his mother (T.80). He was the person that his mother would go to in times of distress and he was the one upon whom she would rely (T.80). Mr. Salnik mentioned to her many times that he wanted to move out of the house but could not because his mother was so upset (T.80). He was the only one upon whom she could count for support (T.80). This occurred during 1988, 1989, and part of 1990 (T.80).

Mr. Salnik was the most optimistic of their study group (T.81-82). He always took everything on (T.82). He never doubted that he would be able to cope with either law school or a particular course (T.82). He was the one that gave them most of their support in getting through their courses (T.82). During the time of his parents' difficulties, he felt helpless (T.82). He felt that there was no way he could convince his father to resolve the situation (T.82). At the same time, he loved his father (T.82). It was really a task for him to cope with that (T.82).

After his parents' situation was resolved, Mr. Salnik's condition improved (T.82). It was a relief in that his parents were not at war, that the situation was resolved peacefully, and the family assets were protected (T.82-83). The Bar matter, of course, has bothered him (T.83).

She is aware of Mr. Salnik's health difficulties (T.80). Once, in 1989, when they went to lunch, Mr. Salnik was wearing some type of apparatus (T.80). Mr. Salnik told her that

the doctors said that he had an irregular heartbeat and that they were monitoring him for that (T.81).

Robin Bengochea testified. She is an attorney and has been since November, 1979 (T.84). She has been an Assistant Public Defender in Dade since 1979 (T.85). She is married to Andres Bengochea (T.85).

She knows Mr. Salnik (T.85). She was not in law school with him (T.85). She met Mr. Salnik when he interned at the Public Defender's Office in 1985 (T.86). She became friends with him a year and one-half to two years later, through her husband (T.86). Since then she has seen Mr. Salnik weekly, if not more often (T.86). She has gotten to know him very well (T.86). During the period of Mr. Salnik's parents' difficulties, Mr. Bengochea spent a lot time alone with Mr. Salnik (T.86).

Mr. Salnik is the kind of person that quite literally, if one were needy, would give one the shirt off his back (T.86). He is generous beyond anyone's belief (T.86-87). He is very honest and a true friend (T.87). He is a man of integrity (T.87). He is a man of good moral character (T.87).

She has read the Complaint (T.87). Assuming that Mr. Salnik is guilty it is really almost beyond her ability to perceive (T.87). It is totally unlike the Edward Salnik that she knows (T.87). It is very unlike Mr. Salnik. (T.87).

During the time that Mr. Bengochea was spending a lot of time alone with Mr. Salnik, Mr. Salnik appeared very unlike his normal self (T.87-88). Normally, Mr. Salnik likes to have fun (T.88). He enjoys going out, going places, doing things (T.88). He enjoys his work (T.88). But, work has a place and there is the rest of his life (T.88). During that time, one had to pull Mr. Salnik to get him to do anything other than work (T.88). He did not want to go out (T.88). He was preoccupied (T.88). She knew that the situation

obviously was weighing very heavily on Mr. Salnik's mind (T.88). He really seemed overwhelmed by it (T.88).

After the divorce was finalized, although Mr. Salnik was not happy about it, he no longer seemed as preoccupied or as down and depressed (T.88-89).

After that was resolved, Mr. Salnik represented her in a couple of matters (T.89). He drew up her will (T.89). He represented her in the sale of her town house (T.89). He represented her in the purchase of the home where she and her husband now live (T.89). He represented her on a traffic ticket (T.89). His work was excellent (T.89). He did not charge her a fee (T.89). She tried to pay him, but he would not take anything (T.89).

Mr. Salnik testified. He is twenty-nine (T.90). In December, 1989, he was twenty-eight (T.90-91). He is single and has never been married (T.91). He is presently living with his mother in Broward County (T.91).

His family consists of his mother, his father, and a younger brother and sister (T.91). Now, just his mother and he live in the house (T.91). He went to undergraduate and law school at the University of Miami (T.91). He was active in the Pre-Legal Society of the University of Miami (T.91). He was on the Dean's list in law school (T.91-92). He has been an attorney since October, 1987 (T.92). He is in private practice, with the firm of Adolfo A. Aguila-Rojas P.A. (T.92). He has a general practice, primarily civil and criminal litigation (T.93).

Prior to his parents' break-up, his family was an inseparable unit (T.93). His parents' divorce confused them tremendously (T.93). His father left first and then his sister and brother left the house (T.93). He attributes it to the confusion, just the unexplainable nature of the whole thing (T.93).

They always did things as a family (T.93). Every year they took a vacation together (T.93). The last time they did that was in 1987 (T.93-94). Since then, the family unit has deteriorated (T.94). The family closeness was a major part of his life (T.94). It is not there now (T.94).

His family has a food processing business called Don Carlos Foods (T.94). It started about 1975 (T.94). They started the business literally in their house (T.94). They were a very close family and they all helped out in producing the product and distributing it (T.94). It has grown since that time (T.94).

He has worked in the business since 1975 (T.95). At the time they started his father was still trying to make ends meet (T.95). When they expanded the business out of the house to Miami, he would head straight for the business when he finished school (T.95). He was thirteen or fourteen when he started working in the business (T.96). When they moved to Hialeah and expanded further, he was involved continuously (T.95).

When he went to law school, it was traumatic, because in the first year, because of scheduling, he could not spend time at the business (T.95). Unfortunately, his father had become dependent on him because he had always been there (T.95). When he had free time he tried to stay involved as much as possible (T.96). His mother also worked in the business (T.96).

His father left the house in the Summer of 1988 (T.96). This was particularly upsetting to everyone (T.96). His father left because of the situation (T.96). There was a female friend of the family that his father came to know through the business (T.96). The pressure was building up (T.97). His father could not continue that way so he left (T.97). He did not want to live a charade (T.97).

It was confusing to Mr. Salnik (T.97). He is very close to his parents (T.97). He is extremely close to his father (T.97). His father is also his friend (T.97). Before college and law school, when he did not have close friends, his father was always there and he is still there to talk to (T.97). Mr. Salnik had a very hard time dealing with this situation, which came out of the blue (T.97). He was at a loss because he could not rationalize what happened or see it coming (T.97). It was very devastating (T.97).

He thought that this potentially could end in a divorce, even though his father did not tell him that at the time (T.98). He tried to do whatever he could to mend the situation, being the oldest child and the one that has to be the mediator (T.98).

His parents' break-up had the most devastating effect on his mother that he has ever seen (T.98). When they separated they had been married for twenty-eight years (T.98). By the time they divorced, it was almost thirty years (T.98). His mother was totally devastated (T.98). Ever since the family moved to South Florida in 1973, she never really made the friends that she could rely upon, or keep herself occupied, because she was fully devoted to the family, specifically his father (T.98-99). When his father left, she was totally lost and did not know what to do (T.99). She could not explain it (T.99). She knew how close Mr. Salnik was to his father and a lot of times she would come to him and ask why (T.99). He could not tell her why (T.99).

This had a devastating effect on his mother's mental state (T.99). It was daily torment for her, trying to figure out why, trying to rationalize the situation (T.99). She would go to his brother and sister (T.99). A lot of times they would give her advice (T.99). So he made it a point from the very beginning to listen to her and to try to ease the situation, because he did not want to see her going through this agony (T.99-100). His mother came to rely upon him and told him that she could talk only to him because his

brother and sister just told her what to do (T.100). His mother was very, very lost and needed a lot of guidance (T.100). He was her counselor (T.100). He would discuss the situation with her on a daily basis, maybe a few times a day (T.102). She would call him at work (T.102). Of course, when he came home there were always discussions (T.102).

His mother went through stages (T.102). Before his father said he was actually going to file for divorce his mother always had the hope that maybe his father would see the light (T.102). When divorce became certain she became even more distressed and confused because now she could see the writing on the wall (T.103).

Prior to this, he was thinking of moving out (T.100). He did not because, just at that time, he sensed these problems (T.100). He knew that something was wrong (T.100-101). If he moved out, it would be more difficult, so he stayed put (T.101). Shortly after this whole thing broke his sister left (T.101). The family was breaking apart (T.101). Then his brother left (T.101). His brother could not deal with the situation (T.101). Every time they came home from work their mother was there (T.101). She was dependent upon them to listen to her (T.101). If they did not, in her eyes they were wrong (T.101). Given that type of pressure, his brother moved out (T.101). So, suddenly, Mr. Salnik was the only one there (T.101).

His father moved out of the house right before the July 4th weekend in 1988 (T.103). He made it clear that he was going to get a divorce in October, 1989 (T.103). That was close to his birthday (T.103). He asked his father if he could wait until after his birthday before there were further discussions (T.103). It was not dealt with until the beginning of November, 1989 (T.103). The divorce was finalized in February, 1990 (T.103-104). His father married the other woman shortly thereafter (T.104).

He is closer to his father than to his mother (T.104).

His father is a very, very sensitive individual (T.104). He had always cared about the three children (T.104). He had always cared about his mother and still does (T.104). That is the weirdest thing of the whole situation (T.104). It was not a typical divorce (T.104). He would swear that he still loves her the way he did when they were married, but you know that is not true (T.104).

It was ironic (T.105). He would ask his father why this had happened (T.105). Most of the time his father did not give him a reason (T.105). His father would break down (T.105). That was not an answer, but it told him that there was some type of psychological or emotional weakness and Mr. Salnik tried to put his finger on it (T.105). It was devastating for Mr. Salnik's father even though he had initiated the situation (T.105).

Mr. Salnik was placed in the same situation with his father as with his mother, that is as his counsel (T.105-106). He probably assumed the position also because he would speak to his father a lot during the day, and even during the evening, and would go over to see him (T.106). He spoke to his father during the day every day during this period (T.106).

Mr. Salnik was confused (T.106). He was not able to explain things (T.106). He has always tried to be on top of things (T.106). He was totally confused, perplexed and dumbfounded (T.106). This was something that he had never expected to happen with his father (T.106).

Since Mr. Salnik was the oldest, he was trying not to take sides with either his father or his mother (T.106). He mediated between them, trying to keep things as calm as possible (T.106-107). He always had the hope that maybe he could hit on something that would solve things and get them back together (T.107). His mother confided in him and his father confided in him (T.107). He kept things as calm as he could under the circumstances (T.107). He was trying to coordinate everything (T.107).

This whole situation was very emotionally draining on him, because this was something that he had every day whether he wanted it or not (T.107). A lot of times, whether he was right or wrong, he tried to avoid it by not going home, or by being incognito, and not calling his father as much or his mother, because he just could not deal with it (T.107).

It was extremely difficult starting off the day with a full head (T.107). One always tries to have a clear head to get through the day (T.107). He would leave his mother upset or crying over something that had happened the night before and that carried over (T.107-108). So he always started the day with major problems (T.108). What would normally take a half hour would take him an hour because he would have to clear his head and get himself into the right frame of mind (T.108).

During this time he was attempting as much as he could to keep his parents' marriage together (T.108). Psychologically and emotionally, this bothered him tremendously, because no matter what effort he put forth or what he did, he could see that it was not working and ultimately, when it ended in divorce, he really felt lost because he had tried everything and it just did not work out (T.108-109). It was a very lost, confusing feeling, because situations such as this simply do not arise when there is such a close family (T.109). Not only did this break up his parents, it had quite an impact on the family (T.109). His family was everything (T.109). To lose his family was like losing a part of his life (T.109). It was very difficult to deal with (T.109).

His eating was greatly affected (T.109). Since he tried to bury himself in his work, because it was the easiest way to forget about the problems, or at least put them in the background, he rarely ate breakfast (T.109). He would eat lunch only when someone else would suggest it (T.109). He tried to avoid going home for dinner and dealing with the

daily problems that his mother had (T.109). So he would eat fast food or nothing at all (T.109). He had a very erratic eating schedule (T.109).

He would get home late, be overtired, and then would wake up early either to be in court or down at one of the jails or something (T.110). The situation really wrecked havoc with his eating and sleeping (T.110).

This had an adverse effect on his social life (T.110). He really did not have too much of a social life (T.110). When he was not spending time with his father or his mother he was working (T.110). Just dealing with the whole situation left him very exhausted most of the time (T.110). Even though his friends tried to get him to be with them a lot of times he was not good company because of everything that was on his mind, so he would come up with excuses to avoid it (T.110). Most of the time he was in the office and he would then eventually go home (T.110).

This was an extremely depressing experience (T.110). The situation looked endless, like it would never be resolved (T.111). From July, 1988, when his father moved out of the house, until October, 1989, when he decided to get a divorce, Mr. Salnik thought that either the thing would go on indefinitely or maybe Mr. Salnik would be lucky enough for something to happen and they would get back together (T.111). Even after his father filed for divorce it still looked as though the situation could go on because the papers were not served right away (T.111). There was still a lot of tenderness (T.111).

The end of 1989 was the worst of the whole time (T.112). That was when it became clear that his parents were not going to get back together (T.112). This was the worst time of his life (T.112;121). It was one of the only times that he was unable fully to deal with a situation and understand it (T.112). It was very hard for him to comprehend and deal with not being in control (T.112).

The last vacation he took was in 1987, when the whole family was together (T.112). He did not take a vacation in 1988, 1989, or 1990 (T.112). They were not in any mental state to enjoy themselves on a vacation (T.113).

He did not seek any mental health help during this time because there have been a couple of situations which he has seen in which he was not too impressed with the results (T.113). He has a distrust of counseling or psychological treatment (T.113). Specifically, his brother had much difficulty dealing with his girlfriend's death a few years ago (T.113). He saw a psychologist (T.113). His brother had always been a very caring and understanding individual (T.113). As a result of therapy his whole attitude changed and he became a very self-centered and egotistical person (T.113). It really turned Mr. Salnik off (T.113). He relied upon his friends (T.114). He was fortunate enough to have friends who would sit and listen (T.114). Mr. Bengochea undertook the greatest burden (T.114). Mr. Bengochea, Mr. De Palma, and Mr. Salnik had become so close that they could see if something was wrong with one of them, without anything being said (T.114). They were always there for each other (T.114). Fortunately, Mr. Bengochea was there, so he did not have any need or desire to seek professional help (T.114).

Since his parents' divorce was finalized, he has tried to get on with his life (T.120). Socially, he has tried to be a little more active (T.120). The emotional and psychological stress has decreased (T.120). The constant aggravation is not there (T.120). There is still a little bit of aggravation, but the fact that it is final means that there is really no need for his trying to get them back together again (T.120). It has decreased his emphasis on trying to clear things up (T.120). He has had the opportunity to get back and care a little more about himself (T.121). His emotional and psychological outlook has improved (T.121). This Bar proceeding has taken a toll on him but, overall, his outlook has improved (T.121).

Mr. Salnik has a health difficulty (T.114). It is a heart condition (T.114). It is called Mitral Valve Prolapse (T.114-115). It is a defective heart valve that can create irregular heartbeats on various occasions (T.115). When it was first diagnosed, there was no remedy (T.115). He has since learned that there may be an operation that can repair the valve, but it is a problematical or iffy operation (T.115). Basically, the only thing that can be done is preventive medicine (T.115). He must be aware of his condition and try to regulate his conduct and try to keep things calm (T.115). He has been aware of the condition for about four to five years (T.115).

When the condition gets bad he has heart palpitations (T.115-116). His heart starts beating at an irregular, fast pace (T.116). He has to lie down immediately because he can not move (T.116). He has been told that if it continues on for too long a time, ultimately it can result in a heart attack and he could die (T.116). It is abnormal for the heart to operate at that pace (T.116). He usually deals with it by lying down and trying to become as calm as possible (T.116). Eventually, his heartbeat will slow down (T.116). That usually makes it go away (T.116). He is totally washed out afterward and extremely tired (T.116). His activities for the remainder of that day and sometimes for the next day are affected because it takes a major toll on his system (T.116).

Stress is a major contributor to the situation (T.116). His doctor has told him on many occasions that he has to restrict the stress (T.116). Mr. Salnik told the doctor that with his parents' situation, plus his job, that was an impossibility (T.116).

The heart condition became extremely bad at the end of 1989 (T.116-117). Usually, he would have fast palpitations only occasionally (T.117). Towards the end of 1989, he was having them on a frequent basis, several times a week (T.117). He did not inform his parents of this because of everything that was going on (T.117). He never wanted to use

their situation as an excuse (T.117). He was supposed to go for his annual check-up in September, 1989 (T.117). But, being so involved in work and his parents' situation, he put it off (T.117). In November, with the irregular and frequent occurrences of the palpitations, his father pretty much ordered him to see the doctor to find out if there was something additionally wrong (T.117).

He went to a cardiologist (T.117). He told the doctor what was going on (T.117). The doctor said: "It sounds like you are a major candidate for extreme stress. However, from what you have told me in the past and what you tell me now, I don't think my telling you that you should alleviate stress would be a possibility." (T.117-118).

The doctor gave him some medication called inderal (T.118). It is a beta-blocker (T.118). The doctor told him to take one of the pills if he had an occurrence of the palpitations (T.118). It would eventually or almost immediately slow down his heartbeat to avoid any ill effects afterward (T.118). The doctor told him to use it as needed (T.118).

The doctor told him that the frequency of the heart palpitations could directly occur because of the situation with his parents (T.118). The doctor told him: "I don't know what I can tell you to stop it, but if you keep it up at this pace with the condition you have, you could kill yourself" (T.118). Mr. Salnik explained the family situation to him and that it was really up to him to try to do whatever was necessary and that the stress was not going to go away until everything was resolved (T.118-119).

The doctor gave him a full battery of tests (T.119). One was a Cardiogram (T.119). One was a Holter Cardiogram (T.119). They strapped that device onto him and it is worn for twenty-four hours (T.119). That gives the doctor a more accurate reading of any irregularity (T.119). Mr. Salnik was put through a stress test, a treadmill test (T.119).

The knowledge of his heart condition made him more aware of his health (T.119). Whenever he would get into a stressful situation, where things were getting tense, whether at work or with his parents, he became frightfully aware that "God, I have to try to calm this down, or the palpitations are going to come on" (T.120). The doctor was very blunt in telling him what could happen (T.120). So, in addition to worrying about everything that was going on, he was worried about the heart condition that he had (T.120). So by trying to avoid stress he probably created more stress (T.120). It made him very tense, because every time he would get into a very tense situation, he would tighten up and try to convince himself to calm down (T.120). It would incapacitate him every time he would get these occurrences and he did not want that (T.120).

Since his parents' divorce was finalized, he has not had as many heart palpitations (T.121-122). His heart condition has improved (T.121-122). The medication has helped (T.122). He is afraid of becoming addicted to the pill and therefore, he now has another problem to worry about (T.122). So the occurrences of the heart palpitations have decreased (T.122).

He voluntarily submitted to a handwriting test at the request of the Bar (T.122). He voluntarily turned over to the Bar a purported conformed copy of the Final Judgment of Stel Holdings v. Cortez, (T.122).

He assured the referee and this Court that he will, in the future, conduct himself in an exemplary, high minded, and professional manner (T.122).

As a result of having gone through this experience with his parents and having had this heart condition and dealing with it, he is in a better position to handle whatever stress and pressure may arise in the future than he was prior to these difficulties (T.122-123).

The Referee recommended that Mr. Salnik be found guilty as to violations of the rules as alleged in the Complaint (RR 3).

As to discipline, the Referee found the following aggravating circumstances:

1. A dishonest motive "The Respondent did commit an extremely egregious act and deserves harsh punishment." (RR 4).

The Referee found the following mitigating circumstances:

1. An absence of prior disciplinary record (RR 5).
2. The absence of a selfish motive (RR 5).
3. Personal or emotional problems. The Referee found that:

"...The respondent was the firstborn of a marriage of some thirty years, having a younger brother and sister. This family was extremely close knit and the harmony was shattered when the father moved out of the home and subsequently divorced the Respondent's mother and remarried. The brother and sister also left the home, leaving the Respondent to deal with a devastated mother. This was an extremely stressful time in his life for the Respondent and apparently had serious effects upon his emotional state." (RR 5)
4. Physical disability and impairment. The Referee found that: "...due to the stress in his life, [Respondent] developed a heart problem for which he was treated by a cardiologist" (RR 5).
5. Inexperience in the practice of law. The Referee found that: "At the time he had practiced law only for a relatively short period of time" (RR 5).
6. Remorse. The Referee found that: "He expressed deep remorse for his conduct in this episode" (RR 5-6).
7. Good character and reputation. The Referee found that:

"...the Referee heard the testimony of witnesses Andres Bengochea; Robert De Palma; Maria Capo and Robin Bengochea. The first three were classmates of the Respondent and each testified in glowing terms regarding the Respondent's integrity and general reputation, and were shocked at the

allegations contained in the Bar's Complaint. It was, as they testified, completely contrary to the makeup of the respondent's personality.

In the words of Mr. Jepeway [Respondent's counsel] this act was an 'aberration' in the professional and personal life of this young lawyer." (RR 6)

The Referee found that Standard 6.22 of the Standards for Imposing Lawyer Sanctions was appropriate (RR 6).

The Referee recommended that Mr. Salnik be suspended from the practice of law for ninety-one days and that he be required to take and pass the Ethics portion of the Bar exam (RR 6-7).

The Bar and Mr. Salnik both sought review.

POINTS ON APPEAL

I

THIS COURT AND THE BAR'S OWN STANDARDS RECOGNIZE EMOTIONAL STRESS, OTHER MENTAL FACTORS, GOOD CHARACTER EVIDENCE, AND OTHER MATTERS IN MITIGATION OF DISCIPLINE.

II

THIS COURT HAS IMPOSED DISCIPLINE OF A NINETY DAY SUSPENSION OR LESS, IN SITUATIONS SIMILAR TO MR. SALNIK'S, EVEN IN THE ABSENCE OF MITIGATING CIRCUMSTANCES, OR WHEN ONLY SLIGHT MITIGATING CIRCUMSTANCES WERE PRESENT.

SUMMARY OF ARGUMENT

I

The Referee properly found mitigating circumstances of emotional stress, medical difficulties, good character, the absence of a prior disciplinary record, the absence of a dishonest motive, inexperience in the practice of law, and remorse. His findings are amply supported by competent and substantial evidence.

Mr. Salnik's ordeal is behind him and his emotional health has been restored. Any discipline beyond a suspension of ninety days would be pointless.

II

This Court many times has imposed discipline of a ninety day suspension or less in situations similar to Mr. Salnik's, even in the absence of mitigating circumstances, or were only slight mitigating circumstances were present.

The Bar's assertion that Mr. Salnik has a fundamentally dishonest character is totally contrary to the testimony of the four close personal friends who testified as character witnesses, without any support, and totally contrary to the specific finding of the Referee that he is a person of good character.

ARGUMENT

I

THIS COURT AND THE BAR'S OWN STANDARDS RECOGNIZE EMOTIONAL STRESS, OTHER MENTAL FACTORS, GOOD CHARACTER EVIDENCE, AND OTHER MATTERS IN MITIGATION OF DISCIPLINE.

This Court has often recognized that the emotional stress that an attorney experiences during the period when misconduct occurs is a factor in mitigation. *The Florida Bar v. Brooks*, 504 So.2d 1227, 1228 (Fla.1987); *The Florida Bar v. Patarini*, 548 So.2d 1110, 1111 (Fla. 1989); *The Florida Bar v. Diamond*, 548 So.2d 1107, 1108 (Fla. 1989); *The Florida Bar v. Wishart*, 543 So.2d 1250, 1252-1253 (Fla. 1989); *The Florida Bar v. Milin*, 517 So.2d 20, 21 (Fla. 1987); *The Florida Bar v. Price*, 348 So.2d 887, 888 (Fla. 1977).

This is accord with Standard 3.0(b) of the Bar's Standards for Imposing Lawyer Sanctions, which provides, *inter alia*, that:

"In imposing a sanction...a court should consider the following factors:

* * * * *

(b)the lawyer's mental state...."

It is also in accord with Standard 9.3, which provides, *inter alia*, that:

"9.3 Mitigation

9.31 Definition. Mitigation or mitigating circumstances are any considerations or factors that may justify a reduction in the degree of discipline to be imposed.

9.32...Mitigating factors include:

...(c)personal or emotional problems...."

The Referee found that:

"c) Personal or emotional problems. Yes. The respondent was the firstborn of a marriage of some thirty years, having a younger brother and

sister. This family was extremely close knit and the harmony was shattered when the father moved out of the home and subsequently divorced the Respondent's mother and remarried. The brother and sister also left the home, leaving the Respondent to deal with a devastated mother. This was an extremely stressful time in his life for the Respondent and apparently had serious effects upon his emotional state...." (RR 5)

This was set forth fully in the Statement of the Case and of the Facts *supra*.

This Court has also recognized mental illness and drug and alcohol abuse as mitigating factors. *The Florida Bar v. Musleh*, 453 So.2d 794 (Fla. 1984) (mental illness); *The Florida Bar v. Farbstein*, 570 So.2d 933 (Fla. 1990) (poly-substance abuse); *The Florida Bar v. Tunsil*, 503 So.2d 1230 (Fla. 1986) (alcoholism); *The Florida Bar v. Seidel*, 510 So.2d 871 (Fla. 1987) (alcoholism); *The Florida Bar v. Parsons*, 238 So.2d 644 (Fla. 1970) (mental illness).

These decisions are also in accord with Standards 3.0(b) and 9.32(c).

They also are in accord with Standard 9.32(h), which provides that physical or mental disability or impairment are mitigating circumstances.

The Referee found that:

"At the time...due to the stress in his life, [he] developed a heart problem for which he was treated by a cardiologist." (RR 5)(Brackets Added)

This was set forth fully in the Statement of the Case and of the Facts *supra*.

This Court has also recognized that evidence of good character is a mitigating factor. *The Florida Bar v. Diamond*, 548 So.2d 1107, 1108 (Fla. 1989); *The Florida Bar v. Musleh*, 453 So.2d 794, 796-797 (Fla. 1984).

This is in accord with Standard 9.3(g), which provides that character and reputation are mitigating circumstances.

The Referee found that:

"As to the character and reputation of the Respondent, the Referee heard the testimony of witnesses Andres Bengochea; Robert De Palma; Maria Capo and Robin Bengochea. The first three were classmates of the Respondent and each testified in glowing terms regarding the Respondent's integrity and general reputation, and were shocked at the allegations contained in the Bar's Complaint. It was, as they testified, completely contrary to the makeup of the respondent's personality.

In the words of Mr. Jepeway [Mr. Salnik's counsel] this act was an 'aberration' in the professional and personal life of this young lawyer...." (RR 6)(Brackets Added)

This was set forth fully in the Statement of the Case and of the Facts *supra*.

There are additional mitigating circumstances which the Referee found: (1)the absence of a prior disciplinary record (RR 5) (Standard 9.32(a)); (2)the absence of a dishonest motive (RR 5) (Standard 9.32 (b)); (3)inexperience in the practice of law (RR 5) (Standard 9.32(f)); (4)remorse (RR 6) (Standard 9.32(l)). He was twenty-nine at the time of the hearing (RR 3), and twenty-eight at the time of the misconduct (T.90-91).

These decisions, principles, and Standards are well illustrated in *The Florida Bar v. Musleh*, 453 So.2d 794 (Fla. 1984). There, the attorney had been indicted by a federal grand jury for conspiring to receive, to transport in interstate commerce, and to sell stolen securities. He was found not guilty by reason of insanity. He had been restored to health by the time of his trial.

The Bar sought disbarment. This Court disagreed:

"...we are mindful of the three purposes of Bar discipline -- punishment of the offender, deterrence of those who might be tempted to emulate the wrongdoer, and protection of the public. *The Florida Bar v. Pahules*, 233 So.2d 130 (Fla. 1970). While we recognize the gravity of respondent's misconduct, we consider in mitigation his severely limited ability to control his activity. *We cannot see how greater deterrence or protection of the public will be achieved by a lengthy suspension of one who, until this episode, had an unblemished record and who has now, with the help of ongoing medical assistance, returned to his former level of conduct and practice.* We, therefore, suspend respondent from the practice of law for ninety days...." (453 So.2d at 797)(Emphasis Added)

Identically, here, Mr. Salnik's ordeal is behind him and his emotional health has been restored. Mr. Bengochea testified that since the finalization of Mr. Salnik's parents' divorce in February, 1990 (T.53), Mr. Salnik has gotten better (T.53). Ms. Capo testified that after Mr. Salnik's parents' situation was resolved, Mr. Salnik's condition improved (T.82). Mr. Salnik testified that since his parents' divorce was finalized the emotional and psychological stress has decreased (T.120). His emotional and psychological outlook has improved (T.121). His heart condition has improved (T.121-122). He assured the Referee and this Court that in the future he will conduct himself in an exemplary, high minded, and professional manner (T.121). As a result of having gone through these experiences, he is in a better position to deal with whatever stress and pressure may arise in the future than he was prior to these difficulties (T.122-123).

These decisions, principles, and Standards adopt the truth that:

"Mercy is above this scep-
tred sway,
It is enthroned in the hearts of kings,
It is an attribute of God himself;
And earthly power doth then show
likest God's
When mercy seasons justice."

Merchant of Venice 4.1.193

The Bar's silence concerning these decisions, principles, and its own Standards is deafening.

The Bar's reliance upon *The Florida Bar v. Shuminer*, 567 So.2d 430 (Fla. 1990), is misplaced. *Shuminer* involved misappropriation of trust funds by the attorney. "In 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 Florida Bar v. Tunsil*, 503 So.2d 1230, 1231 (Fla. 1986). Disbarment is presumed to be the appropriate punishment in the instance of misuse

of client funds. *The Florida Bar v. Farbstein*, 570 So.2d 933 (Fla. 1990); *The Florida Bar v. Newman*, 513 So.2d 656 (Fla. 1987). Of course the mitigation in *Shuminer* did not outweigh the seriousness of the offense. Moreover, the attorney used a significant portion of the stolen funds not to support or conceal his convictions but rather to purchase a luxury automobile. These factors are not present here.

Similarly, in *The Florida Bar v. Knowles*, 500 So.2d 140 (Fla. 1986), the attorney converted to his own use almost \$198,000.00 from the trust fund accounts of several of his clients. He was suspended by this Court. He was charged with eight counts of grand theft to which he pleaded no contest. The adjudication of guilt was withheld, and he was sentenced to two years probation, three hundred hours of community service, and a \$1,400.00 fine.

What this Court actually said was:

"...Although we recognize that alcoholism was the underlying cause of respondent's misconduct, it cannot constitute a mitigating factor sufficient to reverse the referee's recommendation to disbar *under the facts of this case*. These misappropriations occurred continuously over a period of approximately four years. During this time, respondent continued to work regularly. His income did not diminish discernably as a result of his alcoholism. We note further that the clients from whom he stole were elderly individuals who trusted him and for whom he held powers of attorney. *Under these circumstances, we believe respondent should be disbarred regardless of his defense of alcoholism.*" (500 So.2d at 142)(Emphasis Added)

Even given these aggravating circumstances, this Court ruled that this *experienced* attorney's disbarment would run concurrently, *nunc pro tunc*, with the suspension which it had ordered more than three years earlier. *Id.* The attorney could reapply for admission at the end of his criminal probation *Id.*

Identically, *The Florida Bar v. Shanzer*, 572 So.2d 1382 (Fla. 1991), involved misappropriation of funds and shortages in the attorney's trust account. The referee found

a dishonest or selfish motive, a pattern of misconduct, the defalcations occurred over a period of nine months, and multiple offenses. Again, the Bar quotes selectively from this Court's opinion. This Court's entire holding was:

"...These problems, unfortunately, are visited on a great number of lawyers. *Clearly, we cannot excuse an attorney for dipping into his trust funds as a means of solving personal problems.* We recognize that mental problems as well as alcohol and drug problems may impair judgment so as to diminish culpability. *However, we do not find that the referee abused his discretion in not finding this to be one of those cases.*" (572 So.2d at 1383-1384)(Emphasis Added)

Here, of course, the Referee found that Mr. Salnik's emotional stress diminished his culpability.

The Bar's position, at p.12 of its brief, that it was inappropriate for the Referee to consider Mr. Salnik's "family problems" as mitigation is clearly wrong.

The Bar attempts to argue, apparently, at p.13, that the emotional stress caused by Mr. Salnik's parents situation should not be considered because the misconduct occurred in December, 1989, seventeen months after Mr. Salnik's parents separated and two months after his father announced his intention to divorce his mother. That is contrary to common sense. The Bar conveniently overlooks Mr. Salnik's uncontradicted testimony that the end of 1989 was the worst of the whole time concerning his parents' situation (T.112). That was when it became clear that his parents were not going to get back together (T.112). That was the worst time of his life (T.112). It was one of the only times that he was unable fully to deal with a situation and understand it (T.112). It was very hard for him to comprehend and deal with not being in control (T.112). Moreover, his heart condition became extremely bad at the end of 1989 (T.116-117). Usually, he would have fast palpitations only occasionally (T.117). Towards the end of 1989 he was having them on a frequent basis, several times a week (T.117). He did not inform his parents of this because of everything

that was going on (T.117). He never wanted to use their situation as an excuse (T.117). He was supposed to go for his annual check up in September, 1989 (T.117). But, being so involved in work and his parents' situation, he put it off (T.117). In November, with the irregular and frequent occurrences of the palpitations, his father pretty much ordered him to see the doctor to find out if there was something additionally wrong (T.117).

The Bar also overlooks the principle that this Court does not review a referee's findings *de novo*. The responsibility for finding facts and resolving conflicts is the referee's. *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 presumption of correctness of the judgment of a trier of fact in a civil proceeding prohibits a reviewing court from reweighing the evidence and substituting its judgment for that of the trier of fact. *Shaw v. Shaw*, 334 So.2d 13 (Fla. 1976); *Westerman v. Shell's City, Inc.*, 265 So.2d 43 (Fla. 1972). A finding must be sustained if it is "supported by competent and substantial evidence." *The Florida Bar v. Hirsch*, 359 So.2d 856, 857 (Fla. 1978). The rule that the trier of fact's conclusions should be sustained if supported by "legally sufficient evidence" is applicable to Bar discipline proceedings. *The Florida Bar v. Abramson*, 199 So.2d 457, 460 (Fla. 1967); Rule 3-7.6(k)(1), Rules regulating The Florida Bar.

The Bar has not and cannot show that the Referee's findings were clearly erroneous. They were clearly correct.

The Bar states, at p.13, that Mr. Salnik never sought any counseling or professional help. That is irrelevant. Moreover, he did not seek any mental health help during this time because there were a couple of situations he had seen in which he was not too impressed

with the results (T.113). He has a distrust of counseling or psychological treatment (T.113). Specifically, his brother had much difficulty dealing with his girlfriend's death a few years ago (T.113). He saw a psychologist (T.113). His brother had always been a very caring and understanding individual (T.113). As a result of therapy his whole attitude changed and he became a very self-centered and egotistical person (T.113). It really turned Mr. Salnik off (T.113). He relied upon his friends (T.114). He was fortunate enough to have friends who would sit and listen (T.114). Mr. Bengochea undertook the greatest burden (T.114). His friends were always there for each other (T.114). Fortunately, Mr. Bengochea was there, so he did not have any need or desire to seek professional help (T.114).

The Bar states, at p.13, that there was no testimony that Mr. Salnik's stress had any impact on his ability to function as an attorney. That is not the question. The question is, what effect did the stress have on his behavior?

The Bar asserts, at p.14, that Mr. Salnik's heart condition predated his parents' separation and therefore, was not the result of the stress. The Bar misses the point. The stress aggravated his heart condition severely. The heart condition became extremely bad at the end of 1989 (T.116-120).

The Bar makes a jury argument, at p.14, that Mr. Salnik's misconduct caused the aggravation of his heart condition. That argument should have been addressed to the Referee. It is also contrary to the uncontroverted testimony. In *November*, 1989 with the irregular and frequent occurrences of the palpitations, Mr. Salnik's father pretty much ordered him to see the doctor to find out if there was something additionally wrong (T.117). That predates the misconduct by several weeks, if not a month.

The Bar erroneously argues, at p.15, through its quoted portion of the testimony, that since Mr. Salnik's heart condition and the stress from his parents' divorce did not affect his

ability to understand right from wrong, they cannot be considered in mitigation. The Bar is flatly wrong. In *The Florida Bar v. Musleh*, 453 So.2d 794 (Fla. 1984), the attorney had been indicted by a federal grand jury for conspiring to receive, to transport in interstate commerce, and to sell stolen securities. He was tried and found not guilty by reason of insanity. The Bar then proceeded against him. This Court noted the difference between the test for insanity applied in federal court and that applied in the courts of this state. 453 So.2d at 796-797. The federal test defines insanity as a lack of substantial capacity to appreciate the criminality of one's conduct or to conform one's conduct to the requirement of law. 453 So.2d at 796. This Court affirmed the referee's finding that the attorney could appreciate the nature of his acts. However, it also affirmed the referee's finding that the attorney's mental illness should be considered as a mitigating factor: "...the referee correctly considered respondent's mental illness in mitigation of his wrongful actions. This has been the course adopted in past disciplinary proceedings...." 453 So.2d at 797.

The Florida Bar v. Pedrero, 538 So.2d 842 (Fla. 1989) provides no support for the Bar. The attorney's misconduct there was perhaps the worst this Court has seen. He engaged in numerous forgeries and thefts over an extended period of time. He trafficked in heroin. Instead of testifying at his final hearing he submitted an affidavit which the Referee found to be the product of a mind intent on deception.

There is no "principle" to be gleaned from *Pedrero*. If there were, there could almost never be mitigation, because most acts of misconduct are clearly wrong. *Musleh* because certainly would have been decided differently.

The Referee's findings concerning mitigation were correct.

II

THIS COURT HAS IMPOSED DISCIPLINE OF A NINETY DAY SUSPENSION OR LESS, IN SITUATIONS SIMILAR TO MR. SALNIK'S, EVEN IN THE ABSENCE OF MITIGATING CIRCUMSTANCES, OR WHEN ONLY SLIGHT MITIGATING CIRCUMSTANCES WERE PRESENT.

In many situations similar to Mr. Salnik's, this Court has imposed discipline of a ninety day suspension or less. *The Florida Bar v. Betts*, 530 So.2d 928 (Fla. 1988); *The Florida Bar v. Story*, 529 So.2d 1114 (Fla 1988); *The Florida Bar v. Adler*, 505 So.2d 1334 (Fla. 1987); *The Florida Bar v. Sox*, 530 So.2d 284 (Fla. 1988); *The Florida Bar v. Murrell*, 411 So.2d 178 (Fla. 1982); *The Florida Bar v. Herzog*, 521 So.2d 1118 (Fla. 1988); *The Florida Bar v. Anderson*, 538 So.2d 852 (Fla. 1989); *The Florida Bar v. Babbitt*, 475 So.2d 242 (Fla. 1985); *The Florida Bar v. Oxner*, 431 So.2d 983 (Fla. 1983); *The Florida Bar v. Shapiro*, 456 So.2d 452 (Fla. 1984); *The Florida Bar v. Nuckolls*, 521 So.2d 1118 (Fla. 1988).

In *Betts*, the attorney prepared a client's will. Subsequently, two codicils were prepared when the client was in a rapidly deteriorating physical and mental state. In the first codicil, the client removed his daughter and son-in-law as beneficiaries. The attorney spoke with the client on several occasions in an effort to persuade him to reinstate his daughter.

Thereafter, the attorney prepared the second codicil which reinstated the client's daughter and son-in-law. When the codicil was presented to the client, he was in a comatose state. The second codicil was not read to the client, he made no verbal response when the attorney presented the codicil to him, and the codicil was executed by an X that the attorney marked on the document with a pen he placed and guided in the client's hand.

The referee recommended that the attorney be given a private reprimand and that he be placed on probation for one year.

In this Court the *Bar* sought only a public reprimand. This Court agreed:

"We agree with the Bar that the recommendation of the referee is inappropriate. Improperly coercing an apparently incompetent client into executing a codicil raises serious questions both of ethical and legal impropriety, and could potentially result in damage to the client or third parties. It is undisputed that respondent did not benefit by his action and was merely acting out of his belief that the client's family should not be disinherited. Nevertheless, a lawyer's responsibility is to execute his client's wishes, not his own." (530 So.2d at 929)

In *Story*, the attorney prepared a client's will. When the client executed it, the signatures of the witnesses purporting to attest to the client's execution had already been obtained. Additionally, the notarized statement that the witnesses had signed in the presence of the client had been executed prior to the client's execution of the will.

The referee recommended that the attorney be suspended for thirty days. This Court approved the recommendation.

In *Adler*, the attorney invested over \$4,000.00 in a joint venture involving a coal mining tax shelter. He prepared several documents for the group of investors including a joint venture agreement. The joint venture agreement and a nonrecourse note were executed in late December, 1976. However, with the knowledge of the attorney, the documents were backdated to October 27, 1976, to take advantage of a tax deduction that ceased after that month.

On his 1976 tax return the attorney claimed a deduction of \$125,000.00. This deduction was later disallowed after discovery of the fraudulent backdating. The attorney pled guilty to wilfully delivering and disclosing a document known to be fraudulent as to a material fact. He was sentenced to three years probation and fined \$10,000.00.

The referee recommended that the attorney be disciplined by public reprimand and payment of costs. The Bar argued that the discipline was insufficient for the misconduct involved. This Court agreed:

"At the time of the misconduct Mr. Adler was an able tax practitioner, well versed in the intricacies of IRS regulations. His acquiescence in fraudulently backdating the instruments directly involved his professional responsibilities and reflected upon his fitness to practice law.

In recommending public reprimand, the referee observed that Adler's motive in backdating the documents was not pecuniary gain. We find, however, that despite the minimal amount of the tax assessment, Adler's actions were directly related to making money. He testified that he joined the joint venture because he thought it was a good investment and participated in the backdating because otherwise he would not have been permitted to join the joint venture. The fact that Adler's misconduct did not injure his client should not be considered in mitigation where a fraud is being perpetrated upon the government." (505 So.2d at 1335)

This Court suspended the attorney from practice for ninety days.

In *The Florida Bar v. Sax*, 530 So.2d 284 (Fla. 1988), the attorney submitted a notarized pleading to a court when he knew or should have known that the pleading contained a factual averment that was not true, and that the document presented as having been notarized was signed by the attorney outside the presence of the notary and subsequent to the affixing of the jurat by the notary.

This Court approved the referee's recommendation of a public reprimand.

In *The Florida Bar v. Murrell*, 411 So.2d 178 (Fla. 1982), this Court approved a public reprimand for an attorney who backdated a quitclaim deed.

In *The Florida Bar v. Herzog*, 521 So.2d 1118 (Fla. 1988), the attorney was found guilty of deceptive billing practices but the referee could not determine whether this had deprived his firm of any attorney's fees or costs. There was no mitigation.

The referee recommended a private reprimand. The Bar sought a one year suspension. This Court disagreed with both:

"...The referee found that respondent 'adjusted' his bills to Harrigan and Sorensen so that these clients would not be privy to the exorbitant costs incurred relative to fees. Once a bill was paid, respondent 'readjusted' it so that the advanced costs would be covered. Respondent admitted that he did this and did so because he did not think the clients would authorize the expenditures.

The falsification in any manner of bills to clients is unethical and reprehensible. Billing practices, like every other aspect of client dealing, should be conducted in a scrupulously honest manner.

We conclude therefore that suspension is appropriate. In view of the fact that respondent has no history of prior disciplinary actions, we believe the appropriate measure of discipline is a ten-day suspension...." (521 So.2d at 1120)

In *Anderson*, the attorneys had been sanctioned by a District Court for uncorrected misrepresentations to it. Despite the exposure of their misrepresentations, they did not acknowledge them, maintaining instead that the opposing party was attempting to obfuscate and deceive the court. They finally acknowledged the misleading nature of their representations when personally confronted and closely questioned by the District Court at a hearing on a motion for sanctions.

The referee recommended that McClung receive a public reprimand and that Anderson receive a private reprimand. The Bar argued for more stringent discipline. This Court agreed:

"...We agree, in part, with the Bar's recommendations of discipline. We are concerned that respondents not only misrepresented the facts to the district court but failed to correct the misrepresentations even when they were brought to their attention. By their actions, respondents violated their responsibilities as officers of the court. We agree with the Bar that private and public reprimands for respondents Anderson and McClung, respectively, are inadequate. Accordingly, we order that respondent McClung be suspended for a period of thirty days and that respondent Anderson be publicly reprimanded through publication of this opinion." (538 So.2d at 854)

In *Babbitt*, the attorney prepared and used a forged use and occupancy permit in connection with a real estate closing. There was no mitigation. The referee recommended a suspension of sixty days.

This Court approved.

In *Oxner*, the attorney deliberately lied to a judge, both in court and by telephone, in order to obtain a continuance. The referee found that the attorney failed to recognize the seriousness of his conduct in making "bold faced lies" to the judge.

This Court approved a sixty day suspension for the attorney.

In *Shapiro*, the attorney represented a defendant in a criminal case. She filed a sworn motion to dismiss the charges, which contained false statements and a forged client signature.

This Court ordered the attorney suspended for ninety days, placed her on probation for two years afterwards, and required that she take and pass the ethics portion of the Bar examination.

In *Nuckolls*, the attorney represented a real estate partnership which was selling town house units. He knew that purchasers of seven units paid only \$36,000.00 per unit. However, he prepared contracts and closing documents which reflected that the units would be sold for \$45,000.00 each, with a down payment of \$9,000.00. Lenders advanced mortgage loans on the seven units based at least partly on the attorney's written representation that purchasers had made or would make the down payments and \$36,000.00 reflected 80% of the purchase price, rather than 100%. Subsequently, one of the partners wrote a \$36,000.00 check to cover four of the down payments, but the attorney never cashed the check and the purchasers never paid the down payment. The attorney sent copies of checks to the lenders as proof that the down payments had been received, knowing that they had not.

Also, while acting as a land trustee for the purchaser, he closed a real estate transaction for the benefit of the sellers, who were both his partners and clients. He did so under his authority as trustee for the purchaser, although he failed even to consult the purchaser about terms and conditions of the sale. As a result of the transaction the attorney freed his partnership, the sellers, of numerous mortgages that then became liens against the property of the purchaser, his principal and *cestui que* trust. As a consequence, the purchaser was forced to sue the partnership.

This Court held that:

"...we cannot view respondent's conduct as anything less than a serious ethical breach. We cannot characterize as 'bad judgment' a deliberate attempt to perpetrate a fraud on lenders who, based on respondent's misrepresentations, thought they were making an 80% loan. Nor do we share respondent's view of his conduct as to count three. To be sure, respondent did not consult his principal. The referee's findings, however, reveal an active breach of trust, not merely a failure to communicate." (521 So.2d at 1121-1122)

The attorney pointed to his seventeen years of service in The Florida Bar without prior incident and his ten years of service in The Florida House of Representatives.

This Court concluded:

"...although we find merit in petitioner's argument for mitigation and proportionality to the extent of reducing the suspension to ninety days, we cannot agree that only a public reprimand is appropriate.

Accordingly, we adopt the referee's findings of fact and suspend respondent from the practice of law for a period of ninety days...." (521 So.2d at 1122)

In *The Florida Bar v. Cohen*, 534 So.2d 392 (Fla. 1988), the attorney had his client, the sole shareholder of a corporation, execute a note and mortgage from the corporation to both the client and the attorney. Later, they foreclosed on the mortgage and the attorney

filed an affidavit of indebtedness claiming that the corporation owed the client and him \$60,000.00 on the note plus \$3,000.00 interest.

The referee found that the entire transaction was established to prevent paying high liability insurance premiums and damages to possible claimants against the corporation. The referee also found that no indebtedness even existed.

The attorney had a history of disciplinary difficulties. He had been publicly reprimanded for misconduct. Additionally, a circuit judge had found, in an unrelated matter, that he had transferred real property fraudulently and ordered the conveyances set aside. There was no mitigation.

Even with the attorney's history, and even though this Court deals more severely with cumulative misconduct than with isolated misconduct, *The Florida Bar v. Greene*, 515 So.2d 1280, 1283 (Fla. 1987); *The Florida Bar v. Vernell*, 374 So.2d 473, 476 (Fla. 1979), this Court approved the referee's recommendation of only a ninety-one day suspension.

The Bar's silence concerning these decisions speaks volumes.

The Bar's statement, at p.18, that Mr. Salnik has a fundamentally dishonest character, which was not readily apparent to the four close personal friends-character witnesses, but was evident to the judge whose signature stamp was misused, borders on the ridiculous. The Referee properly found, as to the character witnesses, that:

"...each testified in glowing terms regarding the Respondent's integrity and general reputation, and were shocked at the allegations contained in the Bar's Complaint. *It was, as they testified, completely contrary to the make-up of the respondent's personality.*

In the words of Mr. Jepeway this act was an 'aberration' in the professional and personal life of this young lawyer." (RR 6)(Emphasis Added)

The Bar's reliance upon *The Florida Bar v. Kickliter*, 559 So.2d 1123 (Fla. 1990), is misplaced. In *Kickliter*, there was a forged will that was presented to the probate court which would have deprived certain beneficiaries of that to which they were rightfully entitled. Here, the purported copy of a purported final judgment was a nullity as far as obtaining an eviction. Judge Lederman herself testified that the Clerk's office does not issue a writ of possession until the original final judgment is presented to it (T.34). In *Kickliter*, there was no emotional stress. Here, such evidence is overwhelming. In *Kickliter*, the attorney did not have any medical difficulty. Here, Mr. Salnik has a very serious medical difficulty. In *Kickliter*, the attorney involved two employees in his misconduct. Here, Mr. Salnik acted alone. In *Kickliter*, the attorney submitted a forgery to the court. Here, Mr. Salnik submitted nothing to the Court. In *Kickliter*, the attorney committed fraud on the court and beneficiaries potentially could have been deprived of that to which they were entitled. Here, there was no fraud on the Court.

Similarly, the Bar's reliance upon *The Florida Bar v. Roman*, 526 So.2d 60 (Fla. 1988), is misplaced. There, the attorney created a beneficiary to an estate, forged the beneficiary's signature on an affidavit portraying him as a relative of the decedent, filed the forged and false affidavit along with the supporting documents with the probate court with the intent of deceiving the court, was successful, and thereafter took possession of assets of the estate in the name of the created beneficiary and converted them to his own use. As set forth *supra*, under Point I, theft of funds is among the more egregious types of misconduct.

The Bar argues that its Standard 6.11 of the Florida Standards for Imposing Lawyer Sanctions should apply and that the Referee erred in applying Standard 6.22. Even

presuming *arguendo* that the Bar is correct, it ignores its own prefatory Standard 6.1 which provides that:

"6.1 False Statements, Fraud, and Misrepresentation

Absent aggravating or mitigating circumstances, and upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving conduct that is prejudicial to the administration of justice or that involves dishonesty, fraud, deceit, or misrepresentation to a court...."(Emphasis Added)

Thus, even by the Bar's own standards, disbarment is not warranted in this cause.

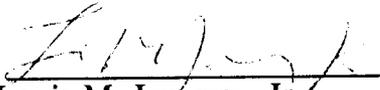
The most severe discipline which can be imposed upon Mr. Salnik is a ninety day suspension.

CONCLUSION

This Court must modify the recommended discipline of the Referee to provide for a suspension of no more than ninety days. This Court must also reject the Petition for Review of The Florida Bar.

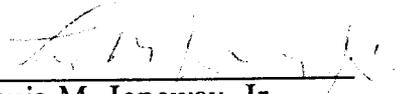
Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **Brief in Support of Cross-Petition for Review and Answer Brief** was mailed to **PATRICIA S. ETKIN**, Bar Counsel, The Florida Bar, Suite M-100, Rivergate Plaza, 444 Brickell Avenue, Miami, Florida 33131, **JOHN T. BERRY**, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, and to **JOHN F. HARKNESS, JR.**, Executive Director, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 this 17th day of September, 1991.

By: 
Louis M. Jepeway, Jr.