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JUL 12 1991

CLERK, SUPREME COURT

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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,  
  
Complainant,  
v.  
  
EDWARD J. SALNIK,  
  
Respondent.

Supreme Court  
Case No. 75,932

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On Petition for Review of  
the Referee's Report in a  
Disciplinary Proceeding.

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INITIAL BRIEF OF COMPLAINANT

PATRICIA S. ETKIN  
Bar Counsel  
The Florida Bar No. 290742  
The Florida Bar  
Suite M-100, Rivergate Plaza  
444 Brickell Avenue  
Miami, Florida 33131  
(305) 377-4445

JOHN F. HARKNESS, JR.  
Executive Director  
The Florida Bar No. 123390  
The Florida Bar  
650 Apalachee Parkway  
Tallahassee, FL 32399-2300  
(904) 222-5286

JOHN T. BERRY  
Staff Counsel  
The Florida Bar No. 217395  
The Florida Bar  
650 Apalachee Parkway  
Tallahassee, FL 32399-2300  
(904) 222-5286

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## INTRODUCTION

In this brief, The Florida Bar is referred to as either "THE FLORIDA BAR", "THE BAR", or "Complainant"; EDWARD J. SALNIK will be referred to as the "Respondent" or "Salnik"; CINDY S. LEDERMAN, County Court Judge, will be referred to as "judge"; MARTA CORTEZ will be referred to as "Marta Cortez" or "Mrs. Cortez"; LINDA HART will be referred to as "Document Examiner" and other witnesses will be referred to by their respective names or surnames for clarity.

Abbreviations utilized in this brief are as follows:

"TR" refers to the Transcript of Proceedings before the Referee held February 27, 1991.

"RR" refers to the Report of Referee.

"GC TR" refers to the Transcript of Proceedings before the Eleventh Judicial Circuit Grievance Committee "F" held February 20, 1990.

"GC EX" refers to the Exhibits introduced in the proceedings before the Eleventh Judicial Grievance Committee "F" held February 20, 1990.

"EX." refers to Complainant's Exhibits attached to the Complaint.

"APP" refers to Appendix to Initial Brief of Complainant, attached hereto.

### STATEMENT OF THE CASE

This disciplinary proceeding commenced on April 30, 1990 with the filing of a Complaint against Respondent alleging violations of Rules 4-8.4(b) (commission of a criminal act that reflects adversely on the lawyer's honesty, trust worthiness or fitness as a lawyer), 4-8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) and 4-8.4(d) (conduct that is prejudicial to the administration of justice) of the Rules of Professional Conduct and Rule 3-4.3 of the Rules of Discipline (commission of an act which is unlawful or contrary to honesty and justice) for misconduct involving forgery.

The final hearing before the Referee was held on February 27, 1991. Prior to the final hearing, The Florida Bar filed a Motion for Summary Judgment based upon the representation of Respondent's counsel that Respondent did not intend to offer testimony or evidence at final hearing to refute the Bar's allegations and would not contest a Motion for Summary Judgment. In support of summary judgment, The Florida Bar submitted to the Referee the transcript of the grievance committee hearing held February 20, 1990, together with the exhibits.

On February 26, 1991, the Referee granted The Florida Bar's Motion for Summary Judgment and ordered that the factual allegations and disciplinary rule violations set forth in the Bar's complaint shall be taken as true and that no further proof shall be necessary in support thereof. Accordingly, the issue at the final hearing was limited to testimony and argument as it pertained to discipline.

The Referee filed a Report of Referee dated March 27, 1991 which recommended that Respondent be suspended from the practice of law for ninety-one (91) days, prove rehabilitation, and take the Ethics portion of the Bar exam (RR 7).

The Report of Referee was considered by the Board of Governors of The Florida Bar at its meeting held May 1991. The Florida Bar recommends rejection of the Referee's recommendation of discipline and in lieu thereof seeks entry of an order of disbarment.

### STATEMENT OF THE FACTS

The Complaint filed by The Florida Bar against Respondent alleges that Respondent committed forgery to create fictitious final judgments and further, that Respondent engaged in uttering a forged instrument by transmitting the fictitious final judgments to an opposing party and The Florida Bar, knowing that such judgments were forgeries.

As alleged in the Complaint, Respondent engaged in the misconduct during the course of his representation of a client/lessor in eviction proceedings. On behalf of his client, Respondent filed a complaint for eviction against Rodolfo and Marta Cortez. He thereafter filed a Motion for Default against Rodolfo Cortez for failure to answer the Complaint. A default against Rodolfo Cortez was entered by the Clerk. Thereafter, Respondent forwarded a proposed Final Judgment for Removal of Tenant ("final judgment"). The judge, however, refused to sign the proposed final judgment because the court file did not reflect that Marta Cortez had been served with the Complaint.

Respondent was contacted by the judge's secretary and advised of the judge's position with regard to his proposed final judgment. On December 8, 1989, Respondent went to the judge's office in an effort to resolve the issue of service. Neither the judge nor her secretary were present and Respondent left a note that he had

stopped by.

On December 11, 1989, Respondent sent a letter to Rodolfo and Marta Cortez advising them that they were subject to a forceful eviction by the Sheriff. (EX. A, APP. A). On that same day, Respondent mailed to Rodolfo and Marta Cortez a document which purported to be a conformed copy of the final judgment (EX. C, APP. B). This document, subsequently designated "Final Judgment Q1", became the subject of further inquiry by both The Florida Bar and the judge.

Respondent advised the judge that he had received a conformed copy of the final judgment in the mail which he photocopied and mailed to the Defendants in the lawsuit (Rodolfo and Marta Cortez). Respondent produced to the Bar the actual conformed copy of the final judgment which he claims he received in the mail. This document was subsequently designated "Final Judgment Q2" (EX. B, APP. C). Both judgments, Q1 and Q2, were forgeries in that a final judgment had not been entered in the lawsuit and conformed copies of a final judgment had not been issued.

Through document examination it was established that the handwritten entries inserting the costs, location and date made on each judgment was the writing of Respondent. In addition, the Document Examiner was able to determine the method employed by Respondent to create the judgments; to wit: the judge's rubber



stamp was affixed to Final Judgment Q1 before any handwritten entries were made. This document was then photocopied to create Final Judgment Q2, and the handwritten entries were thereafter made by Respondent on Final Judgment Q2.

The Florida Bar alleges that Respondent's actions constitute forgery and further that by transmitting the forged final judgments to Marta and Rodolfo Cortez (Final Judgment Q1) and to The Florida Bar (Final Judgment Q2), Respondent engaged in uttering a forged instrument. Respondent's actions are violative of Rule 4-8.4(b) (a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer), Rule 4-8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) and 4-8.4(d) (conduct that is the prejudicial to the administration of justice) of the Rules of Professional Conduct and Rule 3-4.3 of the Rules of Discipline (commission of an act which is unlawful or contrary to honesty and justice).

Because The Florida Bar's Motion for Summary Judgment was granted, The Florida Bar did not offer any testimony or evidence to the Referee at final hearing for the purpose of establishing Respondent's guilt of the facts and disciplinary rule violations alleged in the Complaint. As an evidentiary basis to support summary judgment, however, The Florida Bar presented to the Referee the transcript of proceedings before the Eleventh Judicial Circuit

Grievance Committee "F" held February 20, 1990, with exhibits. This transcript, which is part of the record of these proceedings, includes the grievance committee testimony of the judge, the judge's secretary, Marta Cortez and the Document Examiner.

At final hearing, the referee considered testimony and argument relevant to discipline. The Florida Bar recommended disbarment based upon the serious nature of the misconduct which involves the misuse of a judge's signature stamp to commit forgery and fraud on the Court. The Florida Bar further argued that consideration should be given to Respondent's subsequent communication with the judge as well as his correspondence sent to Marta Cortez. The Florida Bar argued that Respondent's actions, taken in its entirety, manifest a fundamentally dishonest character.

As further support for disbarment, the judge whose signature stamp was misused testified as to her direct communication with Respondent (TR. 27-29) and specifically, Respondent's representation to her that he had received a conformed copy of a final judgment in the mail (TR. 28). The judge further testified as to her concern with Respondent's character and his ability to be a member of the legal profession because of the letter he sent to Marta Cortez (APP. A; TR. 33, 37) which includes a misrepresentation of the law as it relates to eviction by the

Sheriff (TR. 35) and the effect of a judgment on driver license renewal (TR. 36).

At final hearing, Respondent's counsel "conceded guilt with regard to the matter of discipline" but explained that Respondent was unable to make any admissions because of the investigation by the State Attorney's Office (TR. 7). Respondent's counsel recommended a ninety-day suspension as the most severe discipline (TR. 24) In mitigation, Respondent focused on the stress caused by his parents' separation (TR. 22) as well as his irregular heartbeat which was aggravated because of the stress (TR. 23). The Florida Bar stipulated that Respondent had no history of prior discipline.

At final hearing, four of Respondent's friends and law school classmates testified on Respondent's behalf as to Respondent's character and his reaction to his parent's separation: Andres Bengochea, Respondent's friend from college and law school (TR. 38-55); Robin Bengochea, wife of Andres Bengochea and Respondent's friend (TR. 84-90); Robert De Palma, Respondent's friend from law school (TR. 58-73); Maria Capo, Respondent's friend from college and law school (TR. 73-83).

In addition to Respondent's friends, Respondent testified on his own behalf at final hearing as to his background, his parents' marital problems and his heart condition (TR. 90-126). There was no expert testimony from any physician or psychologist and other

than the testimony of Respondent and his friends, there was no other testimony presented to establish mitigation.

The Referee issued a Report of Referee which confirmed that by failing to respond to the Bar's Motion for Summary Judgment, Respondent is deemed to have admitted the allegations in the Complaint (RR 3). In finding Respondent guilty of the violations alleged in the Complaint, the Referee recommended that Respondent receive a ninety-one day suspension, with proof of rehabilitation and that he take the Ethics portion of the Bar examination (RR 6-7).

### SUMMARY OF THE ARGUMENT

Respondent engaged in misconduct involving the misuse of a judge's stamp to create a forged, fictitious final judgment and thereafter transmitted the forged, fictitious final judgment to an opposing party. In determining disciplinary sanctions, however, consideration should be given to Respondent's actions in the full context in which the misconduct occurred. For example, when inquiry was made by the judge whose stamp was misused to create the forged, fictitious final judgment, Respondent attempted to mislead the judge by explaining that he had received a conformed copy in the mail which he had photocopied and mailed to the opposing party. In addition, Respondent sent a letter to the opposing party which misrepresented the law as it pertained to eviction by the Sheriff and the effect of a judgment on a driver's license renewal. Further, when giving a handwriting exemplar to the Document Examiner, Respondent attempted to disguise his handwriting.

The Florida Bar urges the Court to reject the mitigating factors suggested by the referee, including the marital problems of Respondent's parents as well as Respondent's heart condition purportedly caused by stress. These factors preceded the misconduct by a substantial period of time and are therefore not chronologically related to the misconduct. Moreover, there is no reasonable basis to conclude that the mitigating factors are

causally related to the misconduct. Stress and palpitations simply cannot cause a respondent to engage in the course of conduct which the referee found to be "extremely egregious" and which The Florida Bar maintains manifests a fundamentally dishonest character. Disbarment is clearly warranted in this case.

## ARGUMENT

### I. STRESS CAUSED BY THE MARITAL PROBLEMS OF A RESPONDENT'S PARENTS SHOULD NOT BE CONSIDERED BY A REFEREE TO MITIGATE DISCIPLINE.

Respondent presented testimony to the Referee at final hearing which focused on his emotional response to his parents' marital problems. The Referee's report reflects acceptance of the stress caused by his parents separation and subsequent divorce as a mitigating factor (RR 5). It is the position of The Florida Bar that the marital problems of a respondent's parents should not be considered by a referee to mitigate discipline.

The Florida Bar maintains that mitigation should only be considered where there is a sufficient evidentiary basis to conclude that the mitigating factor caused or substantially contributed to the misconduct. This position is supported by cases involving drug or alcohol addiction.

In The Florida Bar v. Marshall, 531 So.2d 336 (Fla. 1988), the Supreme Court approved a disciplinary recommendation which provided for an eighteen-month suspension where the referee found that the Respondent's judgment was impaired by alcoholism. Marshall at 337. In The Florida Bar v. Shuminer, 567 So.2d 430 (Fla. 1990), however, the Supreme Court rejected a respondent's addiction as mitigation and disbarred the respondent where the respondent failed to establish that his "addictions rose to a sufficient level of

impairment to outweigh the seriousness of his offenses". (Shuminer at 432). In rejecting mitigation the Court compared the Shuminer case with The Florida Bar v. Knowles, 500 So.2d 140 (Fla. 1980), wherein "during the period when the misconduct occurred, [the respondent] had continued to work regularly and his income did not diminish discernibly as a result of his alcoholism". Shuminer at 432.

Moreover, in The Florida Bar v. Shanzer, 572 So.2d 1382 (Fla. 1991), this Court rejected a respondent's argument that his depression over his marital and economic problems caused him to engage in the misconduct. In so ruling the Court held:

These problems, unfortunately, are visited upon a great number of lawyers . . . . We recognize that mental problems as well as alcohol and drug problems may impair judgment so as to diminish culpability. (Emphasis added)

Shanzer at 1384.

The inappropriateness of consideration of Respondent's family problems as mitigation in this case is apparent when considering both the time frame and the complete lack of evidence that these problems impaired Respondent's judgment or ability to practice law at the time he engaged in the misconduct.

Respondent testified that in July of 1988, his father moved out of his home (TR. 103). Respondent was living at home at the time (TR. 100). Shortly thereafter his sister and brother left the



house (TR. 101) leaving Respondent with his mother. Much of the proceedings before the Referee was devoted to Respondent's repeated assertions of the emotional effect the separation had upon Respondent's mother and Respondent (TR. 97). This emotional effect is confirmed by each of Respondent's character witnesses. However, there is no attempt to reconcile the fact that the misconduct occurred in December 1989, a full seventeen months after Respondent's parents separated and two months after Respondent's father announced his intention to divorce his mother (TR. 103).

Moreover, although Respondent was suffering from stress for a period in excess of seventeen months, he never sought any counseling or professional help (TR. 113) and was able to function by relying on his friends who would listen to his problems (TR. 114).

Further, it is significant that notwithstanding stress, there is a complete lack of testimony that the stress had any impact on his ability to function as an attorney. On the contrary, it appears that Respondent threw himself into his work apparently as a diversion from problems (TR. 107, 109; Bengochea TR. 109; De Palma TR. 68). In fact, Respondent's close friend, Andres Bengochea, who eventually moved his office to Respondent's office building (TR. 91), testified that to his knowledge, Respondent never missed any court hearings, has never had clients complain or

neglected client cases and that his clients have never suffered because of Respondent's emotional distress (TR. 56). Mr. Bengochea further testified that, notwithstanding Respondent's personal problems, Respondent has always acted in a responsible, professional manner (TR. 56). This is echoed by Respondent's other witnesses who testified that Respondent is a hard worker and gave attention to his client's legal matter (De Palma, TR. 71,72) and that Respondent enjoyed his work (Capo, TR. 83).

Moreover, the Referee's report suggests that due to the stress in his life, Respondent developed a heart problem for which he was treated by a cardiologist (RR 5). This is contrary to Respondent's testimony wherein he indicated that he went to a cardiologist for his problem about four or five years ago (TR. 115). Accordingly, Respondent's heart condition predated even his parent's separation and was not, therefore, the result of the stress.

In addition, Respondent testified that his palpitations worsened at the end of 1989 (TR. 116-117). This is at or about the time that Respondent either engaged in the misconduct or his unethical actions were discovered. Accordingly, it can be argued that Respondent's palpitations may be the result of the guilty knowledge that he had concerning his involvement in the forgery or the false information he furnished to the judge and was not, therefore, the result of the stress from his parents' separation.

subsequent actions manifest a fundamentally dishonest character and fully justify disbarment. Neither Respondent's palpitations nor his parents' marital problems can reasonably be found to have any causal relationship to the misconduct so as to mitigate discipline. Any factor which is appropriate for consideration as mitigation should be causally related to the misconduct. In this instance, there is no mitigating factor which caused Respondent to abandon all ethical principles and engage in forgery. Perhaps the most revealing testimony in support of the Bar's position comes from Respondent:

[Bar Counsel]: Are you saying, Mr. Salnik, that your heart condition or your parents' divorce affected your ability to understand right from wrong?

[Respondent]: That was not my testimony or my understanding.

There was a lot of stress on me at the time. However, I was into my work fully, as a result of what was going on and I was being very careful in what I did. I did not believe it was affecting my ability to determine between right and wrong.

TR. 126.

In The Florida Bar v. Pedrero, 538 So.2d 842 (Fla. 1989) this Court rejected as mitigation a referee's finding of "severe mental problems" which was substantiated by two doctors reports. Although the Court acknowledged the respondent's depression and found that it tended to cloud his judgment, the Court held:

[T]his is not a case where the lawlessness of the conduct

is subject to subtle shadings and picayune interpretations of technical rules. Any layperson of even less than average intelligence and sophistication would know that what [respondent] did was illegal. The public and the legal profession cannot tolerate the type of conduct engaged in by [respondent]. Absent a finding of incompetency, [respondent's] actions were so reprehensible that disbarment can be the only sanction. [Emphasis added].

Pedrero at 845-846.

Applying the Pedrero principle to the instant case, any layperson would know that the use of a judge's stamp to create a fictitious final judgment is illegal. Accordingly, Respondent's actions are so reprehensible that stress should not mitigate discipline and in the absence of a finding of incompetency, he should be disbarred.

**II. DISBARMENT IS THE APPROPRIATE DISCIPLINARY SANCTION FOR MISCONDUCT OF A CRIMINAL NATURE WHICH MANIFESTS A FUNDAMENTALLY DISHONEST AND IS FOUND BY THE REFEREE TO BE "EXTREMELY EGREGIOUS".**

In recommending discipline the referee found in aggravation a dishonest motive and specifically that "Respondent did commit an extremely egregious act and deserves harsh punishment" (RR 4). In mitigation the referee found the absence of prior disciplinary record, the absence of a selfish motive, and personal or emotional problems (RR 5).

The Florida Bar's maintains first, as previously discussed, that Respondent's personal or emotional problems should not

mitigate discipline. Alternately even if personal or emotional problems were properly considered by the referee, the conduct of Respondent is so "extremely egregious" (RR 4) so as to outweigh a any mitigating effect.

In support of its recommendation for disbarment, The Florida Bar maintains that consideration be given to: serious nature of the misconduct (criminal conduct involving forgery and uttering a forged instrument); Respondent's misrepresentation to the judge that he had received the judgment in mail (TR. 28) in an attempt to suggest that he was merely a conduit for transmittal of the judgment (Final Judgment Q1) to the opposing party; and Respondent's letter to Rodolfo and Marta Cortez which contains misrepresentations of law as to the procedure followed by the Sheriff for eviction and the effect the judgment will have on the renewal of both of their driver's licenses (EX A, APP. A).

In addition, consideration should be given to the fact that Respondent's misconduct involved a series of unethical actions which occurred over a period of time beginning December 8, 1989, the date the judge was on vacation and the date the forged final judgment received by Mrs. Cortez was signed (TR. 28-29), followed by: December 11, 1989, the date Respondent mailed his letter containing misrepresentations to Rodolfo and Marta Cortez (EX A, APP. A) and the forged final judgment; December 13, 1989, the date

the judge contacted Respondent who confirmed that he had received a conformed copy of the final judgment in the mail which he photocopied and mailed to Rodolfo and Marta Cortez (TR. 28); and January 12, 1990 when Respondent provided the Document Examiner with handwriting exemplars in which he attempted to disguise his writing (GC EX. 8 at 3, APP. D; Linda Hart, GC TR. at 98, 101-102, APP. E).

When considering Respondent's actions in its full chronological context it is apparent that Respondent has a fundamentally dishonest character which, although not readily apparent to the four close personal friends who testified on his behalf, was certainly evident to the judge whose signature stamp was misused to create the forged fictitious final judgments:

[Respondent's Counsel]: You don't actually know if that statement in the letter about the notice is a mistake or a misrepresentation, do you, never having spoken to Mr. Salnik?

[Judge]: No, but I can't imagine anyone getting through law school and practicing law for any period of time making that mistake, in addition to the significant other intentional misrepresentations of the law and the nature of that letter, which wa [sic] to harass the people.

\* \* \* \*

In answer to your question, Mr. Jepeway, after reading the letter and after dealing with Mr. Salnik relating to the problem with the final judgment, there is no doubt in my mind that Mr. Salnik has attempted to use that letter to harass and misrepresent the law, to abuse

his power as a lawyer and to unlawfully coerce Mrs. Cortez and her husband to get out of those premises in violation of every right that they have.

TR. 36-37.

In further support for its recommendation for disbarment, The Florida Bar relies on The Florida Bar v. Kickletter, 559 So.2d 1123 (Fla. 1990) wherein this Court rejected the referee's recommendation of suspension and disbarred a respondent for misconduct involving forging a client's signature on a will, notarizing the will and submitting it for probate. Like the instant case, Kickletter involved misconduct which included forgery and uttering a forged instrument. In addition, like Kickletter, Respondent compounded his misconduct by failing to correct it as well as undertaking a series of unethical actions including fraud on the Court which in this instance is manifested by Respondent's misrepresentation to the judge. Moreover, the referee in Kickletter found substantial mitigation which included the absence of a dishonest motive (which is contrary to the instant case wherein the Referee has made a specific finding reflecting dishonesty), the absence of a selfish motive, a cooperative attitude, good character, remorse and the imposition of criminal penalties (Kickletter at 1124). While recognizing the referee's finding of substantial mitigation, this Court held that "we cannot, however, overlook the magnitude of Kickletter's misconduct and his

failure to correct it" (Kickletter at 1124). In disbarring Kickletter this Court reaffirmed the "general rule of strict discipline against attorneys who deliberately and knowingly perpetrate a fraud on the Court". Kickletter at 1124. See also The Florida Bar v. Roman, 526 So.2d 60 (Fla. 1988), wherein this Court rejected the mitigating factors found by the referee and disbarred a respondent for theft of funds through fraud on the Court. In so ruling this Court stated that fraud on the Court "strikes at the very heart of a lawyer's ethical responsibility". Roman at 62.

There are no facts present in the instant case to warrant an exception from the general rule and a deviation from Kickletter. Clearly the Respondent engaged in fraud by appropriating a judge's signature stamp to create a forged, fictitious final judgment and compounded his fraud by furnishing the judge with false information in response to the judge's inquiry.

Finally, in recommending discipline, The Florida Bar cites Standard 6.11 of Florida's Standards for Imposing Lawyer Sanctions which states:

6.11 Disbarment is appropriate when a lawyer: (a) with the intent to deceive the court, knowingly, makes a false statement or submits a false document; or (b) improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.



The referee rejected this Standard and found Standard 6.22 as more appropriate to the facts of this case (RR 6). Standard 6.22, however, deals with abuse of the legal process and specifically, violation of a court order which is neither directly nor collaterally involved as an issue in this case. This case involves the crime of forgery and the crime of uttering forged instruments and as such specifically involves dishonesty, fraud, deceit or misrepresentation. Accordingly, The Florida Bar maintains that Standard 6.11 is the appropriate sanction standard in this case.

CONCLUSION

Neither the marital problems of Respondent's parents nor Respondent's heart problem is either chronologically or casually related to the misconduct and should therefore be rejected as mitigating factors. Moreover, even if these claims should properly be considered, Respondent's actions manifest a fundamentally dishonest character and are so "extremely egregious" so as to warrant disbarment as the appropriate disciplinary sanction.

Respectfully submitted,



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PATRICIA S. ETKIN  
Bar Counsel  
Attorney No. 290742  
The Florida Bar  
Suite M-100, Rivergate Plaza  
444 Brickell Avenue  
Miami, FL 33131  
(305) 377-4445

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the Initial Brief of Complainant was sent by Federal Express to Sid J. White, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida, 32399-1927, and that a true and correct copy was mailed to Louis Jepeway, Jr., Attorney for Respondent, Biscayne Building, Suite 407, 19 West Flagler Street, Miami, Florida 33130 this 11<sup>th</sup> day of July 1991.



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PATRICIA S. ETKIN  
Bar Counsel

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,  
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v.

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No.

EDWARD J. SALNIK,  
Respondent.

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APPENDIX TO COMPLAINANT'S INITIAL BRIEF

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Salnik's letter to Rodolfo and Marta  
Cortez dated December 11, 1989 (EX "A") . . . . . A

Conformed copy of final judgment  
Salnik sent to Rodolfo and Marta  
Cortez ("Final Judgment Q1") (EX "C").  
The handwritten entries made by Salnik  
are highlighted in blue. . . . . B

Conformed copy of final judgment  
Salnik claims he received in the  
mail (Final Judgment Q2") (EX "B").  
The handwritten entries made by  
Salnik are highlighted in yellow . . . . . C

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