IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

EDWARD J. SALNIK,

Respondent.

_____/

SUPREME COURT
CASE NO. 75,932

REPLY BRIEF IN SUPPORT OF CROSS-PETITION FOR REVIEW

JEPEWAY AND JEPEWAY, P.A.
407 Biscayne Building
19 West Flagler Street
Miami, Florida 33130
Tele.: (305)377-2356
Fla. Bar No. 113699

TABLE OF CONTENTS

TABLE OF CASES

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.

ARGUMENT

I

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

The Bar concedes that family problems cause stress and stress can aggravate a pre-existing heart condition. It asserts that there is a dispute as to whether stress caused or substantially contributed to Mr. Salnik's misconduct. The Bar is wrong. The Bar has attempted to create an artificial dispute. Of course there was a direct connection between the stress and the misconduct. Why does it think all the testimony concerning the emotional stress was brought out? Why did the Referee rule as he did? The Referee found, *inter alia*, as mitigation:

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

Why does the Bar have its Standard 3.0(b), which provides that in imposing a sanction a court should consider, *inter alia*, the lawyer's mental state? Why does it have its Standards 9.32(c) and 9.32(h), which provide that mitigating factors include, *inter alia*, personal or emotional problems and physical or mental disability or impairment?

The Bar complains, at p.1, that no expert testimony was presented. None is required. There was no expert testimony, for example, in *The Florida Bar v. Brooks*, 504 So.2d 1227 (Fla. 1987), or in *The Florida Bar v. Wishart*, 545 So.2d 1250 (Fla. 1989). Only common sense is needed to comprehend the stress Mr. Salnik experienced, its devastating effect, and the connection between the stress and the misconduct.

The Bar asserts, at p.1-2, that Mr. Salnik did not present any testimony or offer any argument suggesting that stress caused or was in any way related to the misconduct. Again, why does the Bar think all this testimony was brought out and the Referee ruled the way he did? Why does the Bar have its Standards 3.0(b), 9.32(c), and 9.32(h)? Beyond that, the assertion is disingenuous and erroneous.

It is disingenuous because the Bar knows that Mr. Salnik was precluded from making any admissions because of the pending investigation by the State Attorney's Office in Miami (T.6-7). Mr. Salnik's position at the final hearing was that of someone who had conceded guilt (T.7). However, because of the pending investigation, he was unable to make any admission (T.7). He filed nothing in opposition to the Bar's Motion for Summary Judgment. The Referee referred to himself as a criminal lawyer and stated that he was sympathetic to Mr. Salnik's position (T.12-13).

During Mr. Salnik's testimony, his attorney was about to ask him whether or not the hearing would have been necessary but for his experience with his parents and his heart condition, *i.e.*, he was about to ask him to explain explicitly the connection between his mental state and his actions (T.111-112). That, of course, would have required an admission

from Mr. Salnik's lips that he committed the misconduct. The Referee cautioned Mr. Salnik's counsel. In closing argument, Mr. Salnik's counsel referred to that:

> "Despite Ms. Etkin's assertion to the contrary, the Supreme Court very squarely has held that the emotional distress that an attorney had undergone during the relevant time period is a factor to be taken into consideration, and we cited the Brooks case.
>
> The argument that there is no connection fails and falls of its own weight.
>
> *I was about to ask Mr. Salnik would we be here but for the experience that he had with his parents and the matter with his heart condition, and Your Honor warned me and I thank you for that, because it may have opened the door. I know that very well and I want to avoid that because of the pendency of the State Attorney's investigation.*" (T.133-134)(Emphasis Added)

Thus, Mr. Salnik was prevented from testifying specifically to the connection between the stress and his misconduct because of the pendency of the State Attorney's investigation. The Bar knows that. Yet it still insists on making the specious argument that there was no connection between the stress and the misconduct.

The Bar is erroneous because the connection was argued during both the opening (T.21-23) and closing (T.133-135).

The Bar asserts, at p.2, that Mr. Salnik's eating habits and his lifestyle were consistent with that of a workaholic and thus did not provide a sufficient basis to conclude that he was mentally incapacitated. He has not asserted that he was mentally incapacitated. He used his work as an *escape* from the stress and emotional turmoil. 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 (T.109). Mr. Salnik was hardly reveling in the work. Mr. Bengochea testified that in October of 1989, he would sometimes cover for Mr. Salnik (T.48). He

sometimes spoke to Mr. 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).

The Bar states, at p.2, that Mr. Salnik managed to function as a competent attorney notwithstanding the stress. This is but an ill-disguised complaint that the situation was not even more devastating to Mr. Salnik than it was. It overlooks that he buried himself in his work as an escape. It overlooks Mr. De Palma's testimony that Mr. Salnik's experience with his parents' break up was the worst that he has seen him since he has known him and he has known him since 1983 (T.69). It overlooks Ms. Capo's testimony that Mr. Salnik was depressed during this time (T.79). He told her so at different times (T.79). 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). Frankly, it ignores all the testimony brought out at the hearing.

The Bar's attempt to distinguish the decisions cited by Mr. Salnik fails.

In *The Florida Bar v. Patarini*, 548 So.2d 1110 (Fla. 1989), the attorney sought the help of a "muscle man" to inflict physical harm on his ex-wife's counsel. Notwithstanding the egregiousness of that misconduct, the attorney's emotional stress was found to be a mitigating circumstance such as to preclude disbarment. The stress there was caused by the

attorney's marriage dissolution and post-dissolution proceedings. Here, the stress was caused by the break up of the long term marriage of Mr. Salnik's parents, which shattered a very close family. How is that any less stressful, particularly given Mr. Salnik's position as counselor to both parents? The Bar points out that there was expert witness testimony in *Patarini*. Again, there is no requirement that there be expert testimony.

Referring to *The Florida Bar v. Wishart*, 545 So.2d 1250 (Fla. 1989), the Bar argues that there is a logical relationship between an attorney's close personal and emotional involvement in custody proceedings involving his granddaughter and misconduct of failing to obey court orders involving custody. Referring to *The Florida Bar v. Brooks*, 504 So.2d 1227 (Fla. 1987), the Bar states that it "certainly" can be argued that there is some logical relationship between emotional stress experienced by an attorney and misconduct such as neglect. It states that this may lead to further misconduct, such as misrepresentation concerning the status of a client's case. The Bar overlooks the obvious reality: stress results in different types of behavior in different people. Mitigation is not limited to the *Wishart* and *Brooks* factual situation.

The Bar states that *The Florida Bar v. Price*, 348 So.2d 887 (Fla. 1977), involved a consent judgment. That is true. However, the real distinction is that the Bar was reasonable and compassionate in *Price*. Here, it is neither.

Interestingly, in *The Florida Bar v. Brooks*, 504 So.2d 1227 (Fla. 1987), *The Florida Bar v. Price*, 348 So.2d 887 (Fla. 1977), and *The Florida Bar v. Wishart*, 543 So.2d 1250 (Fla. 1989), there was no finding of a specific connection between the stress and the misconduct. It was obvious, as it is here.

The Bar asserts, at p.4, that there was no relationship between the mitigating factors (*i.e.*, stress and heart condition) and Mr. Salnik's actions. Respectfully, as set forth *supra*, that borders on the absurd.

The Bar's statement, at p.5, that the Referee's Report merely acknowledges the existence of personal or emotional problems and that there is no finding that Mr. Salnik's judgment was impaired so as to diminish culpability is astounding. Why does the Bar think that the Referee found these mitigating circumstances and why does it think he mentioned them in such detail? The Referee, a Circuit Judge of almost fourteen years' experience and a member of the Bar for well over thirty years, clearly saw the relationship between the stress and the heart condition and Mr. Salnik's actions.

Of course, the Bar does not even mention the additional mitigating factors: (1) good character and reputation (RR 6) (Standard 9.3(g)); (2) the absence of a prior disciplinary record (RR 5) (Standard 9.32(a)); (3) the absence of a dishonest motive (RR 5) (Standard 9.32(b)); (4) inexperience in the practice of law (RR 5) (Standard 9.32(f)); and (5) remorse (RR 6)(Standard 9.32(1)). Mr. Salnik was twenty-nine at the time of the hearing (RR 3), and only twenty-eight at the time (T.90-91).

The Bar states, at p.6, that Mr. Salnik did not argue causation in his brief. That is a fundamentally erroneous reading of Mr. Salnik's brief.

In sum, the Bar's hyper-technical position is unsupportable. It is unrealistic, cold-blooded, and stone-hearted.

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.

The Bar cites the Referee's characterizations of Mr. Salnik's actions as deserving of harsh punishment. Respectfully, to suggest that a ninety-one day suspension is not harsh punishment is to belie a palpable ignorance of real life.

The Bar insists in relying upon *The Florida Bar v. Pedrero*, 538 So.2d 842 (Fla. 1989). Once again, the Bar's reliance is misplaced. The *Pedrero* attorney engaged in a lengthy pattern of criminal activity. He was involved in multiple acts of importing heroin. He engaged in numerous forgeries, thefts, and frauds over an extended period of time. Instead of testifying at his final hearing he submitted an affidavit which the referee found to be incredible in almost every relevant detail and which was replete with intentional falsehoods calculated to mislead, if not to deceive, the referee. The referee specifically found that the affidavit was not the product of a clouded mind but one intent on deception. The *Pedrero* attorney's misconduct was perhaps the worst this Court has seen.

There is no "principle" to be gleaned from *Pedrero*. If there were, mitigation would almost always be irrelevant, because most acts of misconduct are clearly wrong even to a: "...layperson of even less than average intelligence and sophistication...." 538 So.2d at 846. *The Florida Bar v. Musleh*, 453 So.2d 794 (Fla. 1984), discussed at length in Mr. Salnik's original brief, certainly would have been decided differently, if the Bar's position were correct.

The Bar refers to *The Florida Bar v. Herzog*, 521 So.2d 1118 (Fla. 1988), and attempts to distinguish it by simply saying that factually it is different. Then it says that "some" of the other cases cited by Mr. Salnik involved misconduct of a similar general nature but that he has cited no case which mirrors his unethical conduct in its fullest sense and in its full chronological context. This is but a whine that there is not a case totally factually identical. That is a common circumstance. Indeed, the Bar has not cited a case that is totally factually identical. The Bar thus refuses to confront *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. Sax*, 530 So.2d 284 (Fla. 1988); *The Florida Bar v. Murrell*, 411 So.2d 178 (Fla. 1982); *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); and *The Florida Bar v. Nuckolls*, 521 So.2d 1118 (Fla. 1988).

The Bar also conveniently ignores the fact that in most of these decisions there was no mitigation. Nonetheless, the discipline was a suspension for ninety days or less. Here, of course, there is enormous mitigation.

Mr. Salnik points out that the "forged final judgment" the Bar refers to was a conformed copy of a purported final judgment, not something entered of record and asserted to be an original.

The Bar states that Mr. Salnik's conduct was reprehensible. All attorney misconduct is reprehensible. It does not all merit disbarment.

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,

JEPEWAY AND JEPEWAY, P.A.
407 Biscayne Building
19 West Flagler Street
Miami, Florida 33130
Tele.: (305)377-2356
Fla. Bar No. 113699

By: _____
Louis M. Jepeway, Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **Reply Brief in Support of Cross-Petition for Review** 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 15th day of October, 1991.

By: _____
Louis M. Jepeway, Jr.