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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,
v.

Supreme Court
Case No. 75,932

EDWARD J. SALNIK,

Respondent.
_____ /

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

ANSWER BRIEF and REPLY BRIEF OF COMPLAINANT

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ARGUMENT

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

The Florida Bar fully accepts the principle that mitigating factors may exist to reduce discipline. However, whether a particular factor is legally sufficient so as to justify mitigation is a question for this Court to decide. In reviewing a referee's recommendation of discipline this Court utilizes a broader scope of review than that afforded to findings of fact. The Florida Bar v. Anderson, 538 So.2d 852 (Fla. 1989).

The Florida Bar maintains that the mitigating factors which are the subject of this review should be rejected by this Court as legally insufficient. Respondent's brief focuses extensively on Respondent's testimony and corroborative testimony of his four friends who appeared as character witnesses. This testimony establishes that Respondent was experiencing stress because of his parent's separation. However, the fact that family problems may cause stress is not in dispute. Nor is it disputed that stress can aggravate a preexisting heart condition and cause palpitations. What is in dispute is whether stress caused or substantially contributed to Respondent's misconduct.

Respondent did not present any expert witness testimony to establish that the stress caused insanity, diminished capacity or impaired judgment. Respondent did not present any testimony or

offer any argument suggesting that stress caused or was in any way related to the misconduct. In fact, the testimony of Respondent and all of his witnesses at trial establish only the one undisputed fact: that Respondent was extremely upset beginning in 1988 when his parents separated and continuing until 1990 when their divorce was final. His distress was readily apparent to his close personal friends (and character witnesses) who noted its effect: that Respondent was not his usual (extroverted) self (De Palma, Tr. 65); that stress "was making him dive deeper into his job" (De Palma, Tr. 66); that he was working long hours (A. Bengochea, Tr. 54); "you had to pull [Respondent] to get him to do anything other than work . . . he was preoccupied" (R. Bengochea, Tr. 88). Respondent himself admits that he buried himself in his work (Salnik, Tr. 109). He rarely ate breakfast, ate lunch when someone would say "Let's go to lunch" and ate fast food for dinner, if at all (Salnik, Tr. 109). Respondent's eating habits, however, as well as his lifestyle is consistent with that of a workaholic and not a sufficient basis to conclude that he was mentally incapacitated.

Moreover, notwithstanding stress Respondent managed to function as a competent attorney. A. Bengochea, who knows Respondent very well, in fact "better than his own brothers" (Tr. 42), acknowledged that Respondent never missed court hearings, his clients didn't complain, he didn't neglect cases, he always acted in a responsible professional manner and his clients never suffered

(Tr. 56). Another close personal friend, De Palma, confirmed that Respondent was and is a hard worker, gave attention to his clients' legal matters and that his problems had no adverse impact on his handling of legal matters (Tr. 71-72). Even Capo testified that Respondent seemed to be enjoying the work during this stressful period (Tr. 83).

The Florida Bar acknowledges that in some instances periods of extreme emotional stress may be competent and sufficient evidence to warrant mitigation of discipline. For example, in The Florida Bar v. Patarini, 548 So.2d 1110 (Fla. 1989), which is cited by Respondent, the respondent's actions of seeking a "muscle man" to inflict physical harm on his ex-wife's counsel whom he apparently blamed for his problems was found to be the result of the intense emotional upheaval precipitated by the respondent's marriage dissolution and post-dissolution proceedings. In this case the relationship between the emotional upheaval and the misconduct was supported by the uncontroverted testimony of a clinical psychologist.

Moreover, it certainly can be argued that there is a logical relationship between a respondent's close personal and emotional involvement in custody proceedings involving the respondent's granddaughter and misconduct of failing to obey court orders involving custody, as is present in The Florida Bar v. Wishart, 545 So.2d 1250 (Fla. 1989), which is cited by Respondent.

Further, it certainly can be argued that there is some logical relationship between emotional stress experienced by a respondent and misconduct such as neglect which may be the result of an inability to focus attention because of stress. This may, arguably, lead to further misconduct associated with the consequences of neglect, such as misrepresentation concerning status of a client's case, as is present in The Florida Bar v. Brooks, 504 So.2d 1227 (Fla. 1987), which is cited by Respondent.¹

There is, however, simply no relationship between the mitigating factors in this case (i.e., stress and a heart condition) and Respondent's actions of misappropriating a judge's stamp to create forged, fictitious final judgments and sending these fictitious judgments to an opposing party.

The Florida Bar does not dispute Respondent's argument that

¹In addition Respondent cites The Florida Bar v. Diamond, 548 So.2d 1187 (Fla. 1989) which involves a respondent who was convicted of a felony and subsequently suspended. As a result, the respondent suffered loss of position, professional esteem and acute personal embarrassment. The mitigating factors in Diamond, do not involve emotional stress occurring at the time of the misconduct and does not support Respondent's argument. Another case cited by Respondent, The Florida Bar v. Milin, 517 So.2d 20 (Fla. 1987), does not even mention emotional stress or mitigation. Finally, The Florida Bar v. Price, 348 So.2d 887 (Fla. 1977), specifically involves a consent judgment wherein The Florida Bar agreed that personal problems, including a failing practice and marriage, poor health and the death of a child for which the respondent sought psychiatric help, would mitigate misconduct involving neglect of a legal matter and entering a false satisfaction of judgment. The instant case does not involve a consent judgment wherein The Florida Bar agrees to mitigation.

this Court recognizes mental illness and drug and alcohol abuses as mitigating factors. The Florida Bar v. Musleh, 453 So.2d 794 (Fla. 1984), cited by Respondent, supports this principle as it applies to mental illness. None of these mitigating factors, however, are present in the instant case.

This case deals with a claim of stress rather than a properly supported finding of disease. There is no finding or even argument presented that Respondent suffered from mental illness, alcohol or substance abuse and there was no testimony or evidence presented upon which such a finding could properly be based. Respondent's assertion, therefore, at p. 34 of its brief that the Referee found that Respondent's emotional stress diminished his culpability is inaccurate in that no such finding was made by the Referee nor is culpability even mentioned in the Referee's report. The referee's report merely acknowledges the existence of personal or emotional problems (RR. 5). There is no finding that Respondent's judgment was impaired so as to diminish culpability.

In reviewing cases involving mitigation based upon alcoholism, this Court has recognized the importance of causation:

This Court has responsibility to assure that the public is fully protected from attorney misconduct. In those cases where alcoholism is the underlying cause of professional misconduct and the individual attorney is willing to cooperate in seeking alcoholism rehabilitation, we should take these circumstances into account in determining the appropriate discipline.

* * *

It is clear from the facts of this case, as perceptively found by the referee, that Mr. Larkin's professional misconduct stems totally from the effects of alcohol abuse. (Emphasis added)

The Florida Bar v. Larkin, 420 So.2d 1080 (Fla. 1982).

There has been no argument even offered by Respondent in his Brief addressing the issue of causation. Respondent's silence is deafening. The Florida Bar maintains that the mere existence of stress caused by the marital problems of Respondent's parents should be rejected by this Court as legally insufficient to justify mitigation of discipline.

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

The Florida Bar has cited The Florida Bar v. Shanzer, 572 So.2d 1382 (Fla. 1991), The Florida Bar v. Shuminer, 567 So.2d 430 (Fla. 1990) and The Florida Bar v. Knowles, 500 So.2d 140 (Fla. 1986) in support of its position that this Court will reject a referee's findings of mitigation where the mitigating factor or level of impairment does not outweigh the seriousness of the offense. Respondent suggests that these cases are inapplicable to the case subjudice because they involve misappropriation of trust funds which, he asserts, is more serious than Respondent's unethical conduct.

The Florida Bar takes issue with this position. The Referee

characterized Respondent's actions as dishonest, extremely egregious and deserving of harsh punishment (RR at 4). Respondent's conduct is, at a minimum, criminal and in its truest sense is shocking and manifests a nature which is so fundamentally dishonest that in the absence of substantial and compelling mitigation clearly warrants disbarment.

Although there is a difference in the nature of the criminal conduct, this case like The Florida Bar v. Pedrero, 538 So.2d 842 (Fla. 1989), involves criminal conduct which "any layperson of even less than average intelligence and sophistication would know" was illegal. Id. at 846. The principle mitigating factor present in Pedrero involved a severe mental problem (borderline schizophrenia) which is certainly more compelling than Respondent's claim of stress. Nevertheless, this Court rejected the discipline recommended by the referee and noted that absent a finding of incompetency, disbarment can be the only sanction. Pedrero supports the Bar's position that this Court will reject mitigation found by a referee and disbar a respondent where the lawlessness of the conduct is clear and the conduct is reprehensible.

In support for his recommendation for a suspension of 90-days or less, Respondent cites cases such as The Florida Bar v. Herzog, 521 So.2d 1118 (Fla. 1988) involving deceptive billing practices which clearly does not apply to the facts in this case. Some of the other cases cited by Respondent involve misconduct of a similar

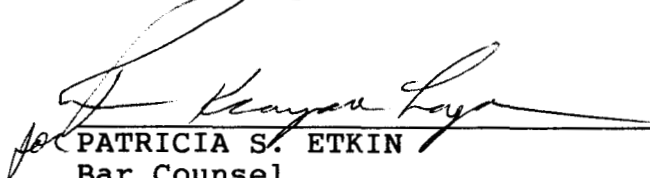
general nature to the misconduct which is the subject of the case subjudice, to wit: forgery. However, Respondent has cited no case which mirrors Respondent's unethical conduct in its fullest sense and in its full chronological context, to wit: that on December 8, 1989, while a judge was on vacation, Respondent used the judge's signature stamp to create a forged final judgment; that several days later, on December 11, 1989, he mailed the fictitious final judgment to the opposing party and, in addition, sent a letter to the party which contained misrepresentations of law concerning the procedure for eviction and the effect the (fictitious) judgment will have on the renewal of their driver licenses; that several days later, on December 13, 1989, Respondent lied to the judge by stating that he had received a conformed copy of the final judgment in the mail which he then photocopied and mailed to the opposing party; and that one month later he provided a handwriting exemplar in which he attempted to disguise his writing. How is Respondent's conduct anything less than reprehensible?

CONCLUSION

The Florida Bar maintains that the Referee's finding of personal or emotional problems is an insufficient basis to support mitigation of discipline. Moreover, the mitigating factors cited by the Referee (no prior discipline, absence of selfish motive, personal or emotional problems) even if properly considered do not outweigh the seriousness of Respondent's misconduct. The Florida

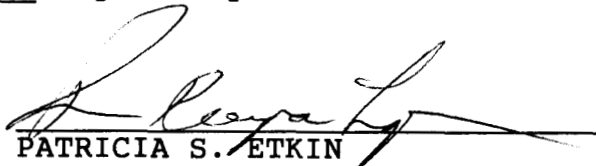
Bar requests that this Court exercise its broad scope of review and impose discipline in accordance with Standard 6.11 of Florida's Standards for Imposing Lawyer Sanctions: disbarment.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the Answer Brief and Reply Brief of Complainant was sent by Airborne 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 Louis Jepeway, Jr., Attorney for Respondent, Biscayne Building, Suite 407, 19 West Flagler Street, Miami, Florida 33130 this 27th day of September 1991.


PATRICIA S. ETKIN
Bar Counsel