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IN THE SUPREME COURT OF FLORIDA

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THE FLORIDA BAR,

Complainant,

v.

ANDREW MICHAEL ICASSIER,

Respondent.
_____/

Supreme Court Case
No. 87,617

The Florida Bar Case
No. 95-71,003(11A)
95-71,308(11A)
96-70,207(11A)

ANSWER BRIEF AND REPLY BRIEF OF THE FLORIDA BAR

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SYMBOLS AND REFERENCES

For the purposes of this brief, The Florida Bar will be referred to as "The Florida Bar" or "the Bar". Andrew Michael Kassier will be referred to as "the Respondent" or "Mr. Kassier" or "Respondent Kassier".

Abbreviations utilized in this brief are as follows: "TR" will be used to refer to the transcript of the final hearing held on September 18, 1996 and on September 24, 1996.

STATEMENT OF THE CASE AND OF THE FACTS

The Florida Bar reiterates its Statement of the Case and of the Facts as set forth in its Initial Brief. Additional facts necessary to address the Respondent's position will be set forth in the argument portion of this brief.

SUMMARY OF ARGUMENT

The Referee did not err by recommending **at least** a one year suspension and three year probation for Respondent Kassier. The Referee found, and the record supports, that the Respondent misappropriated client funds, passed several worthless checks (including trust account checks), only made partial reimbursement for the checks he issued and the trust monies he used, neglected the cases of two clients, was uncooperative with the Bar investigation, and testified to having reimbursed clients and returned client evidence when, in truth and in fact, that had not been done.

The Respondent claims several mitigating factors to which he is not entitled. A highly experienced criminal trial attorney, who had been in private practice for over four years, he desires mitigation because he was inexperienced in the business of law. He desires credit for having made restitution prior to the Bar proceedings, although full restitution had not been made at the time of the final hearing. He desires mitigation for having personal problems. (The woman from whom he has been separated since 1991 was unhappy with the amount of money he made and the tips he left at dinner; Dade County did not pay him for his court appointed cases quickly enough.) He desires mitigation for

not having a prior disciplinary record, although the Referee found that his misconduct is continuing. He desires mitigation for a cooperative attitude toward the proceedings although the Referee found that he had failed to cooperate with the Bar in its initial proceedings and did not admit any wrongdoing until days before the final hearing. He further desires mitigation for having a good character and reputation although the Referee, who heard the testimony on this issue, declined to find mitigation on this factor (after hearing the cross-examinations and testimony and seeing evidence which indicated otherwise). Finally, he claims mitigation for remorse when the regrets he emphasizes are what he has done to himself and his future - not what he has done to his clients and the legal profession.

This is a case which cries out for disbarment. Respondent Kassier does not qualify for any of the mitigating factors which he seeks to soften the severity of disbarment, which is the presumed punishment for the misuse of client funds. This presumption is bolstered by the many other charges for which the Respondent has been found guilty. He misappropriated client money. He bounced trust account checks. He bounced other business checks. He neglected clients. He failed to communicate with clients. He failed to make complete restitution. He failed

to reimburse the neglected clients. He failed to cooperate with the Bar. He has shown no remorse, only self-pity. He has started no path of reform or rehabilitation. He has stopped the therapy for the problems he seeks to use to excuse his misconduct,

There is no justification and no reasoning which would warrant a lessened penalty for this highly experienced attorney. The Referee found him to be a **runaway freight** train who is on a course of conduct which has got to harm the people he comes in contact with on a professional basis. This course of conduct continues. The Florida Bar seeks disbarment to protect the public from Respondent Kassier.

ARGUMENT

I. THE REFEREE DID NOT ERR BY RECOMMENDING A DISCIPLINE GREATER THAN A NINETY DAY SUSPENSION (The Bar's Answer)

Although the Respondent would like The Florida Bar v. Cramer, 643 So.2d 1069 (Fla. 1994) to control, it does not. He fails to demonstrate its similarity to the situation at Bar. The Respondent in Cramer had a compelling situation; the Court found that he demonstrated substantial mitigating factors. The most significant factor the Court cited was his serious heart problems, which necessitated open heart surgery, put him out of work for five months and then only allowed him to return to work on a restricted basis. The Court found that Cramer's heart condition and related medical problems led to many of the problems in his law practice and affected his conduct. In contrast, the Respondent at Bar has made no showing of any medical condition at all. He merely tried to show that his marital problems with a woman who he left and from whom he has been separated since 1991 led to his conduct in 1994 and 1995. Interestingly, although he testified that he had been in counseling once a week for problems stemming from his marital problems because he and his wife had a running battle about the

tips he left when they went out to dinner and his wife thought that he was a failure because he did not make enough money, he decreased his counseling in 1995 and saw the counselor infrequently (if at all[1]) by the time of the final hearing. If these rather common marital quarrels were the cause for Respondent's misconduct, the Bar wonders why Mr. Kassier's therapist was not called to testify on this point.

While both Cramer and Respondent Kassier developed financial problems which resulted in trust accounting irregularities and the issuance of worthless checks, Cramer did not compound those problems by incurring multiple complainants, failing to communicate with clients and keep them informed about the progress of their cases, or neglecting client matters. Respondent Kassier has admitted failing to keep his clients informed and neglecting two client matters. (A-4 p. 4-5). Therefore, while none of Cramer's clients suffered any injury because of his conduct, at the time of the final hearing two of Respondent Kassier's clients were still complaining that their legal matters

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[1]The **Respondent testified at the final hearing that beginning in 1995 he would cancel appointments with his counselor's agreement and then "eventually the period of time between the sessions lengthened to the point where by 1996, I was going every other week and at this point, I was dealing with her [presumably, his therapist] on an infrequent basis." [emphasis added]** (TR **87**).

had been neglected and their retainers were not returned[2]. Additionally, one of the clients, Mrs. Lili Harris, testified that she still had not received the photos and receipts which she had given the Respondent at the start of her case.[3]

Finally, in Cramer, the Respondent cooperated fully with The Florida Bar investigation. Unfortunately, Respondent Kassier did not. The original Bar complaint by Mrs. Lillie M. Harris was closed August 10, 1994, based upon representations by Respondent Kassier that he would take the necessary steps to resolve her complaint. On January 20,1995, Mrs. Harris wrote to inform the Bar that the Respondent still had not taken any steps to resolve the matter. The Bar wrote to the Respondent on February 9, 1995, requesting a response to Mrs. Harris' allegations. The Respondent failed to respond to the February 9, 1995 letter. The

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[2]Although Respondent quotes as facts his client's assertions that Mrs. Harris had received her money and file back and that Mrs. Potts had received her money back (see p.30, 32 of Respondent's Initial Brief and Answer Brief), the recitation of these assertions as facts is disingenuous. The final hearing before the Referee in this matter was postponed specifically for the purpose of taking testimony on this issue. When the hearing resumed, Respondent's counsel offered to stipulate that these clients did not receive their money back. (TR259). Then Mrs. Harris (TR 262) and Mrs. Potts (TR 266) testified that the monies still had not been returned. The Referee concluded that, "in truth and in fact, they had not been paid". Even the Respondent finally mentions (much later in his brief) that he offered to make the aforementioned stipulation. (Respondent's Initial Brief and Reply Brief p. 37)

[3]Despite Respondent's claim to the contrary (see p.37 of Respondent's Initial Brief and Answer Brief), Mrs. Harris testified "I have not received the monies, nor have I received my photos and my receipts that I gave him [Respondent Kassier] when he started the case". (TR 262).

Florida Bar wrote to the Respondent again on March 3, 1995, requesting a response. Mr. Kassier also failed to respond to the second letter. The Florida Bar wrote a third time on March 20, 1995 requesting a response. (A-2 p. 5-6). The Florida Bar also sent Mr. Kassier letters on August 16, 1995 and September 7, 1995 requesting a response to the Bar complaint by Mrs. Letitia Potts. (A-2 p. 77). Mr. Kassier also failed to respond to these inquiries. Additionally, on August 30, 1996 the Referee granted The Florida Bar's Motion for Sanctions for Respondent Kassier's failure to respond to interrogatories and requests to produce subsequent to the filing and granting of a motion to compel, On September 9, 1996, the Respondent withdrew his previously filed responses to The Florida Bar's Requests for Admissions (which mirrored the complaint), thereby admitting the facts and rule violations set forth therein. Finally, although the final hearing started with Mr. Kassier's admission of the allegations of the Complaint and Request for Admissions, making the sole issue the evidence of mitigation, Respondent's counsel still objected to a lack of evidence on allegations in the Complaint

which had been admitted[4]. That is why, contrary to the findings in Cramer, the Referee found aggravation in the Respondent's failure to cooperate with the Bar's preliminary investigation and his failure to acknowledge any wrongdoing until days before the hearing. In fact, even in the final hearing, that acknowledgment was in doubt.

The Respondent claims that several factors listed in Standard 9.3 of the Florida Standards for Imposing Lawyer Sanctions apply to his case and justify a reduction in the degree of discipline to be imposed.

First, he claims a right to mitigation based on absence of a prior disciplinary record, Standard 9.32(a), Florida Standards for Imposing Lawyer Sanctions. While it may be true that Respondent Kassier had no disciplinary record prior to the case (and multiple complaints at Bar), it should be noted that the Referee found that the Respondent continued even to the time of the final hearing to write checks on accounts in which there were insufficient funds and that the Respondent had testified to

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[4]On the issue of funds which were still not accounted for (TR 42); on the issue of whether the two NSF checks made to the clerk of the Court were ever made good (TR l.53); on the issue of returning the retainer to Mrs. Potts (TR 158-159); justifying his misconduct in the guise of mitigation (TR 149, 154); blaming a secretary he fired (one of the parties complaining about receiving worthless checks) without any proof that she had and/or failed to mail the checks in question (TR 259).

having made restitution to clients who, in truth and in fact, had not been paid at that time. (A-4 p. 6). This factor, which was intended to provide a lesser penalty for isolated instances of misconduct, should not be used as a shield to protect a respondent engaged in a continuing course of misconduct, such as the case at Bar.

Secondly, Respondent Kassier claims a right to mitigation based on his personal or emotional problems, Standard 9.32(c), Florida Standards for Imposing Lawyer Sanctions. The Respondent claims he is entitled him to this mitigation factor because he had marital problems and he had financial problems because he was not paid quickly enough by Dade County for the work he performed in court appointed cases.

Although Mr. Kassier testified that his wife argued with him about the amount of tips he left in restaurants, thought he did not make enough money, and felt all the sins of the world fell on his shoulders, (TR 109) he failed to present any expert testimony proving the cause and effect relationship between these rather common marital squabbles with a woman he had left in 1991 and his behavior which began in 1994 and continued through the time of

the hearing in 1996, a full five years later.[5] The Respondent only presented his own testimony as evidence of these alleged problems and their connection to his misdeeds.

Although the Respondent had had similar problems with his wife since his marriage in 1982 and court payments since he entered private practice in 1990, he was able to function well without dipping into his client funds until 1994. He continued to perform well in capital cases during the time the misconduct in question occurred. (TR 14-15). The Court rejected a claim for mitigation for personal problems in The Florida Bar v. Shuminer, 567 So.2d 430 (Fla. 1990). The Court emphasized that Shuminer continued to work regularly and effectively during the period in issue; His ability to function at work belied his claim of impairment of judgment during the time that the misappropriations took place.

As the Court stated in The Florida Bar v. Shanzer, 572 So.2d 1382 (Fla. 1991) another case where the Court noted that the Respondent only provided his own unsubstantiated testimony that his marital and financial problems made him misuse client funds:

> Respondent argues that his depression, primarily over his marital and economic

[5]See discussion on this point **under analysis of Cramer, Page 6.**

> problems, led him to use his trust account for personal purposes. These problems, unfortunately, are visited upon a great number of lawyers. Clearly, we cannot excuse an attorney for dipping into his trust funds as a means of solving personal problems. Shanzer at 1383-1384.

Further, the Court has long explained that, in discipline cases, three purposes must be kept in mind in reaching decisions on the discipline to be imposed:

> First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty. Second, the judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations.
> The Florida Bar v. Pahules, 233 So.2d 130,132 (Fla. 1970).

If Respondent Kassier is allowed use the payment schedule of court appointed special defenders in Dade County as an excuse in mitigation of his misconduct, it will send the wrong message to the other attorneys on the Dade County appointments wheel.

Respondent Kassier also claims a right to mitigation based on his alleged timely good faith effort to make restitution or to rectify consequences of misconduct, Standard 9.32(d), Florida Standards for Imposing Lawyer Sanctions. As previously stated, at the time of the final hearing two of Respondent Kassier's clients were still complaining that their legal matters had been neglected and their retainers had not been returned. Although Respondent quotes as facts his assertions that Mrs. Harris had received her money and file back and that Mrs. Potts had received her money back (see p.30, 32 of Respondent's Initial Brief and Answer Brief), the recitation of these assertions as facts is disingenuous.[6] The final hearing before the Referee in this matter **was** postponed specifically for the purpose of taking testimony on this issue. During the original hearing, while the Referee still believed that the Respondent had returned the original complainant's money, the Referee stated "obviously you paid it back because of the proceeding, not because you felt -- it was a year since the Bar tried to contact you on it".

When the hearing resumed, Respondent's counsel offered to stipulate that these clients did not receive their money back but

[6] Even the Respondent finally mentions once (much later in his brief) that he offered to stipulate that these clients did not receive their money back. (Respondent's Initial Brief and Reply Brief p. 37).

blamed the Respondent's former secretary (TR 259). Then the clients, Mrs. Harris (TR 262) and Mrs. Potts (TR 266), testified that their monies still had not been returned. Mrs. Harris also testified that she still had not received the photos and receipts which she had given the Respondent at the start of her case.[7] It should be noted that, while Respondent testified that he discovered files, follow-up work to be done, phone calls that needed returning, copies of documents to be sent, and matters that needed to be calendared after firing the secretary, (TR 276) he did not produce the checks he supposedly gave the secretary to mail. Curiously, the Respondent was still in possession of the photos and receipts that he had also supposedly returned to Mrs. Harris. During the same hearing, his counsel offered to mail them back to her. (TR 282). The Referee concluded that, "in truth and in fact, they [the clients] had not been paid". (A-4 p.6).

Mr. Kassier also failed to return $500.00 to Mr. Thomas, another client, which he excused as being funds which he was holding for further work to the client's property. (TR 148). However, Respondent Kassier did not acknowledge that those

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[7]Despite Respondent's claim to the contrary (see p.37 of Respondent's Initial Brief and Answer Brief), Mrs. Harris testified "I have not received the monies, nor have I received my photos and my receipts that I gave him [Respondent Kassier] when he started the case". (TR 262). Mrs. Potts also testified that her money had not been returned. (TR 266).

funds, which he was supposedly holding for the benefit of a client, were not in his trust account. The Respondent also continued to owe two former employees money for worthless checks written for their salaries. (TR 209-213). The Referee found that the Respondent also continued to write checks drawn on accounts in which there were insufficient funds at the time of the final hearing.

This pattern of misusing funds and making half-hearted partial restitution immediately prior to and/or in the middle of disciplinary proceedings is not the type of mitigation contemplated by The Florida Bar v. McShirley, 573 So.2d 807 (Fla. 1991). In McShirley, the Court found of particular importance that the Respondent replaced the converted funds before the Bar initiated any action against him, reasoning that this mitigating factor would further the Respondent's incentive to make restitution. Respondent Kassier was not so motivated and, therefore, should not receive the benefit therefrom.

Respondent Kassier further claims a right to mitigation based on his alleged inexperience in the practice of law, Standard 9.32(f), Florida Standards for Imposing Lawyer Sanctions. However, Respondent is really attempting to fashion a new mitigation standard for very experienced attorneys who only

have four (4) to six (6) years experience in the business aspect of the private practice of law. Mr. Kassier has been a practicing attorney since 1981. (TR 74-75). He was the Second Executive Assistant Public Defender in charge of all the Executive Assistant Public Defender's responsibilities when he was out of the office, including having responsibilities for planning and operation of an office of (TR 77-78) 120 felony assistants. He has also taught in law schools since 1987. (TR 79-80). He has even been in private practice since 1990. (TR 80).

Respondent's claim to this factor is spurious. His claim to this factor cannot compare to that of Shuminer, where the Referee found many mitigating factors, including only one (1) year of experience in the practice of law (and Shuminer was still disbarred for misusing client funds). The Florida Bar v. Shuminer, 567 So.2d 430 (Fla. 1990).

Respondent Kassier further claims a right to mitigation based on his character and reputation, Standard 9.32(g), Florida Standards for Imposing Lawyer Sanctions. Although Respondent presented impressive witnesses as to his character and reputation, the Referee, after considering the testimony involved, declined to make any findings as to this factor, except

that the Respondent is an intelligent person with a commitment to the practice of law. (A-4 p.7). The Florida Bar presumes that the Referee's decision in this respect was based on the facts brought out on cross-examination: that most of the character witnesses were not fully informed of all the charges against the Respondent, including his failure to respond to the Bar; some of the witnesses had very little contact with Mr. Kassier and/or the relevant legal community during recent years; most of the witnesses were led to believe that the Respondent had made full restitution; and the witnesses were familiar with the Respondent's abilities in court-appointed criminal cases, rather than in the private practice of civil law, where these complaints arose. (TR 26, 33, 39-40, 40-45, 57-58, 164-165). The Referee also had the opportunity to observe the Respondent, assess his credibility, and consider other evidence which was indicative of Respondent's true character.

Finally, Respondent Kassier claims a right to mitigation based on his alleged remorse, Standard 9.32(l), Florida Standards for Imposing Lawyer Sanctions. Webster defines remorse as a gnawing distress arising from a sense of guilt for past wrongs:

SELF-REPROACH . . . syn PENITENCE".[8] The American Heritage Dictionary further defines remorse as 'Moral anguish arising from repentance for past misdeeds; bitter regret".[9]

Nothing that Respondent Kassier has said or done demonstrates that he has remorse and is truly sorry for the wrongs which he has done to others. On the contrary, the only real regret he expresses is for what he has done to himself and his future. He says he regrets what he did. His "most profound regret" is about what he has "done to myself". He regrets that he will never be a judge now. He is humiliated. He states that:

> [I]t hurts almost as much that as a result of what's happened to me and what may happen to me that it's not only the practice of law - -my practice of law--that's being affected, but my ability to teach. . . . [U]ltimately I am paying a very high price for my poor judgment," (TR 166-169)

That is not remorse - it is self-pity.

Unlike the Respondent in The Florida Bar v. Farbstein, 570 So.2d 933 (Fla. 1990), who received a three year suspension after he "demonstrated honest and significant remorse in a desire to continue his rehabilitation" from substance abuse caused by low

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[8]Webster's New Collegiate Dictionary, G. & C. Merriam Co., Springfield, Massachusetts, U.S.A. 1981

[9]The American Heritage Dictionary of the English Language, New College Edition, Houghton Mifflin Company, Boston Massachusetts, 1980

self-esteem from a disfiguring childhood injury, or the Respondent in Pahules[10] who showed an "attitude of repentance", [11] Respondent Kassier did not demonstrate honest and significant remorse. The Referee merely noted his failure to acknowledge any wrongdoing until days before the hearing. Mr. Kassier did not rehabilitate. He saw his counselor infrequently (if at all)[12] by the time of the final hearing and he continued to issue checks from accounts in which there were insufficient funds during that same time period.

In The Florida Bar v. Ruskin, 126 So.2d 142 (Fla. 1961), the Court noted a demonstration of remorse which merited the commendation of the court. Ruskin appeared before them 'in a spirit of repentance seldom evidenced in cases of this kind. His frankness and candor in discussing his predicament and his apparent sincerity in the assurances which he gave regarding his future conduct". The Court noted that Ruskin gave "every possible indication of repentance which suggests that his

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[10] The Florida Bar v. Pahules, 233 So.2d 130 (Fla. 1970)

[11] Pahules, supra.

[12] The Respondent testified at the final hearing that, beginning in 1995, he would cancel appointments with his counselor's agreement and then "eventually the period of time between the sessions lengthened to the point where by 1996, I was going every other week and at this point, I was dealing with her [presumably, his therapist] on an infrequent basis." [emphasis added1

offenses will not likely happen again". Respondent Kassier has failed to either demonstrate a spirit of repentance or give the Referee any assurances regarding his future conduct. Ruskin also made efforts to regain his self-respect and make amends for his wrongdoings. In contrast, Respondent Kassier continues to justify and blame others for his actions: his demanding, over-reaching wife; Dade County; the bank officer who was not always around to approve his overdrafts; and his negligent former secretary,

Therefore, the case at bar is not controlled by The Florida Bar v. Cramer, 643 So.2d 1069 (Fla. 1994) and Respondent Kassier is not entitled to any of the numerous mitigation factors cited in the Respondent's appeal, which were rejected by the Referee.

II. THE REFEREE ERRED BY RECOMMENDING A ONE YEAR SUSPENSION RATHER THAN DISBARMENT. (The Bar's Reply)

The Respondent claims that The Florida Bar v. Shanzer, 572 So.2d 1382 (Fla. 1991), another trust funds misappropriation case, does not apply because, although Shanzer made some restitution, he still owed some money. Then he claims again that the Respondent made full restitution "long prior to the Bar's investigation". This assertion conflicts with the facts in evidence. First of all, the testimony clearly reflects a $500.00 shortage remaining in the Respondent's trust account. These money was supposedly retained for the benefit of a client to pay for the completion of a demolition and cleanup of the client's property. At the time of the final hearing, Respondent also still owed two clients refunds and two ex-employees restitution for worthless checks which he had given them.

The Respondent also distinguishes Shanzer because Shanzer retained interest from his trust account for his personal use. However, this begs the question whether the Respondent would have kept his trust account interest if his account had a positive balance on which to earn the interest.

The Respondent also asserts that the Court found that the Referee in Shanzer did not abuse his discretion in finding that

Shanzer's mental problems did not impair his judgment so as to diminish culpability. Then he quotes from the Referee's Report that the Respondent had "come upon difficult emotional stresses due to his divorce of some years ago and his inability to manage the practice of law". Respondent infers that this statement is the equivalent of a finding that his emotional stresses and inability to manage the practice of law equate to a finding that they impaired his judgment and diminished his culpability; It is not. The Referee heard no testimony at all as to Respondent's impaired judgment, received no expert testimony demonstrating a cause and effect relationship between Respondent's misconduct and the stresses found, and made no findings as to Respondent having either impaired judgment or diminished culpability.

Respondent also argues a distinction between the case at bar and Shanzer because Shanzer had no character or reputation evidence and Respondent Kassier did. Although Respondent calls evidence of his own character and reputation "superb" and "overwhelming", the Referee did not seem to agree. The Referee declined to make findings of fact as to Respondent's character. In fact, the only character traits noted in the Referee's Report are that the Respondent is "an intelligent person" and has a 'commitment to the practice of law". As the finder of fact, the

Referee heard testimony on cross-examination that: most of the character witnesses were not fully informed of all the charges against the Respondent, including his failure to respond to the Bar; some of the witnesses had very little contact with Mr. Kassier and/or the relevant legal community during recent years; most of the witnesses were led to believe that the Respondent had made full restitution; and the witnesses were familiar with the Respondent's abilities in court-appointed criminal cases, rather than in the private practice of civil law, where these complaints arose. The Referee also had an opportunity to view the Respondent's demeanor and observe how he conducted himself during the proceeding and in relation to the complaints. Obviously, the Referee is not impressed with the Respondent's character.

The Respondent is correct that The Florida Rar v. McIver, 606 So.2d 1159 (Fla. 1992) is not this case; but it is very similar. McIver also was found in violation of Rule 5-1.1 of The Rules Regulating The Florida Bar (trust account). He also had shortages in his trust accounts. He also used client funds for purposes for which they were not intended. Respondent's claimed distinction seems to imply that his use of client funds was not clearly unauthorized.

Respondent's contention throughout this action that his borrowing of client funds was authorized defies logic. He testified that he created a shortage in his trust account when, after borrowing money (supposedly with prior permission), which he was holding in trust for one of his clients, he gave this client more than the amount she had remaining in the trust account. (TR 176). Respondent ignores the point that he was then borrowing the trust funds of other clients, who definitely had not authorized their use. He also forgets that he has still not repaid $500.00 of that money. (TR 141).

Respondent seems oblivious to the fact that there can be no conceivable explanation for bouncing a check which was issued to replace a stale check, which had been written over six months before. He explains that he tried to contact the client to pay his fees, expecting to have funds available to cover it before reissuing the check. (TR 150-151). He does not explain why those funds had not been subtracted from his available balance six months earlier (and therefore, remained there for over six months untouched).

In The Florida Bar v. Schiller, **537** So.2d 992 (Fla. 1989), the Referee recommended a two year suspension followed by a one-year probation for misappropriating client funds. Schiller **was**

much more honest and forthright with The Florida Bar. He disclosed a deficit of approximately $10,000 when he was notified that a grievance had been filed against him. Then, prior to meeting with the Bar, he deposited $9,000 of his own funds towards that deficit. Eventually, an audit of his trust account showed a gradually increasing deficit which exceeded $29,000. Following that determination, Schiller borrowed the money and covered the entire shortage. He admitted that he knowingly wrote checks on his trust account without authorization and used the funds for his own purposes. However, by the time of final hearing, Schiller had replaced all the funds he had misappropriated from his trust account, there was no indication that any of his clients had been directly damaged, and he had paid the doctors who were entitled to trust money. The Referee found that Schiller was genuinely remorseful and appeared to be a good candidate for rehabilitation.

Therefore, the Court found the presumption of disbarment to be an inappropriate punishment for Schiller stating:

> Upon a finding of misuse or misappropriation, there is a presumption that disbarment is the appropriate punishment. This presumption, however, can be rebutted by various acts of mitigation, such as cooperation and restitution. The Florida Bar v. Schiller, 537

So.2d 999,993 (Fla. 1989) citing The Florida Bar v. Pincket, 398 So.2d 802 (Fla. 1981)[13]

While the Court in Schiller found the misappropriated funds had been replaced, no clients had been damaged, and that Schiller seemed to be genuinely remorseful and a good candidate for rehabilitation, such is not the case with Respondent Kassier. Mr. Kassier has not replaced all the misappropriated funds. He does not even acknowledge that the $500.00, which he admits keeping for the benefit of Mr. Thomas, should be in his trust account. He still has not reimbursed others from his office who have been damaged by receiving worthless checks from him. The Respondent, at the time of the final hearing, still had two clients waiting for refunds of their retainers (for cases he neglected). One of these clients was also awaiting the return of the evidence she gave him to pursue her case, Despite these facts, the Respondent repeatedly asserts throughout his brief that he made full restitution before anyone knew that any money had been taken.

[13]Referred to in Respondent's Initial Brief and Answer Brief as Bar counsel's "mantra that removal of trust funds mandates disbarment in all cases, regardless of mitigation or other factors" (P. 39), which is a misquote of (TR 244).

The Referee in the case at Bar did not make a finding that Mr. Kassier was genuinely remorseful. He is not.[14] The Referee below also did not make a finding that the Respondent is a good candidate for rehabilitation. The Respondent was, at the time of the final hearing, seeing his therapist infrequently, if at all. He presented no other evidence that he was attempting to rehabilitate. Further, since the Referee found that the Respondent continued to write checks for accounts in which there were insufficient funds, he could not have found any evidence of the Respondent being a good candidate for rehabilitation.

Again, Respondent distinguishes Schiller because Schiller does not discuss evidence of character and reputation. He again ignores the fact that the Referee, the trier of fact below, declined to make a finding of fact as to this factor, despite the Respondent's witnesses on the subject.[15]

Respondent Kassier's misconduct was as egregious as that of Schiller. But he does not qualify for any of the mitigating

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[14]See the discussion of this point under the section on mitigation factors in the Bar's answer, p.18 .

[15]See the discussions of this point above in the answer Brief section analyzing the inapplicability of mitigating factors, p. 17, 23.

factors for which Schiller received a reprieve from disbarment. Andrew Kassier should be disbarred.

The Respondent also quotes the three-fold purpose of attorney discipline stated in The Florida Bar v. Pahules, 233 So.2d 130, 132 (1970). The first purpose of discipline is to "be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty". The Referee characterized the Respondent as "a runaway freight train". (TR 293). The Referee also stated:

> If I let him go the way he's going now, ... he's going to hurt somebody worse than he already did. Certainly, it's got to happen. No question it's got to happen. . . . I don't think he's a bad person, but I don't think that he understands or knows how an objective person looks at the situation he's created. . . . The pressure is no different now really than they were when he was going through this problem with his wife. So there's no reason to suspect he would be any different tomorrow or next week. It's still ongoing, obviously. . . It's all part of the same pattern of being out of control. (TR 293-297).

The Referee's Report states:

> If not suspended from the practice of law for some meaningful period of time, the respondent will continue to be overwhelmed by the responsibilities he has undertaken and will cause damage to his clients and to those whom he comes into contact professionally. (A-4)

The Referee's findings and reasoning make it perfectly clear that there is a compelling need to protect the public from Mr. Kassier's unethical conduct, That may deny the public from the services of an attorney who may be qualified in some areas of the law but, unfortunately, Mr. Kassier made the decision not to limit himself to the areas in which he was qualified because of his own ego and desire to earn a larger income than he did as the third highest person in the Public Defenders office. (TR (TR 215).

Second, the discipline " must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation". Respondent Kassier misappropriated trust funds, passed worthless checks, ignored two clients matters, and failed to make restitution to two clients and two former employees by the time of the final hearing. He has failed to acknowledge that he still has funds in his possession that belong in a trust fund for the benefit of a client. He seems not to understand why his explanations of how and why his checks bounced indicate impropriety. He continues to exhibit the same misconduct charged. Even the proceedings against him did not stop the behavior, even temporarily. Obviously, he is not motivated to reform. He also has shown no

effort to cure any of his personal problems and seek rehabilitation. If, at this point in the process of discipline the Respondent has not exhibited this motivation, it is senseless to modify the presumption of disbarment in the hope that he will be motivated to reform and rehabilitate sometime in the future.

Third, the discipline 'must be severe enough to deter others who might be prone or tempted to become involved in like violations". Unfortunately, Mr. Kassier has been held out as a role model to hundreds of young lawyers and lawyers-in-training as a result of his teaching in **law** schools and supervising and training in the Public Defenders office. The severity of the allegations and other misconduct admitted will be of special interest to those young attorneys. The claim of mitigation due to the financial problems allegedly caused by the Dade County system for paying court-appointed attorneys will be of great interest to hundreds more. If Mr. Kassier is not punished to the extent of the applicable standards, the goal of the judgment deterring others will be lost; these attorneys will not believe the warning of Schiller.

It is true that the Court, in The Florida Bar v. McShirley, 573 So.2d 807 (Fla. 1991), rejected the adoption of automatic disbarment for attorneys who have misappropriated client funds.

However, the Court's reasoning reveals that it found 'of particular importance and significant mitigation" that McShirley replaced the funds he had converted before the Bar initiated any action against him. The Court expressed concern that such an automatic rule would not further an attorney's incentive to make restitution. Although McShirley's repeated dipping into his trust account for his personal benefit was considered an aggravating factor, the Referee found McShirley's good character and reputation, remorse, restitution prior to the initiation of disciplinary proceedings, cooperative attitude toward the disciplinary proceedings, and the facts that no client was harmed and the Respondent had no prior disciplinary proceedings mitigating. [16]

Although the Respondent would take advantage of McShirley's rejection of an automatic disbarment rule, he does not have a referee's finding entitling him to the mitigating factors which the Court found in deciding that disbarment was inappropriate and unduly harsh in McShirley. Respondent Kassier's misappropriations were discovered when The Florida Bar received multiple complaints against him. He had not made complete

[16]The misappropriation was discovered when McShirley declared bankruptcy, not as a result of a complaint to the Bar.

restitution to his trust account, his neglected clients, or others to whom he had written worthless checks prior to the initiation of an action by the Bar. On the contrary, the Referee found that Respondent Kassier had not accomplished these things by the time of the final hearing. Obviously, this mitigating factor was not a sufficient incentive to Mr. Kassier. The Referee also declined to find that Mr. Kassier had a good character or reputation, remorse, or that no client was harmed. To the contrary, the Referee refused to make those findings despite Respondent's argument for these mitigating factors. The Referee specifically found that the Respondent failed to cooperate with The Florida Bar in its preliminary investigation.

The Respondent also attempts to distinguish The Florida Bar v. Davis, 361 So.2d 159 (Fla. 1978), again claiming (inexplicably) that he made full restitution.[17] The Respondent claims that the check, which was returned for insufficient funds to the Gainesville attorney, was returned under very unusual circumstances. The Florida Bar agrees. It is very unusual to issue a replacement check for a check which is stale and not have sufficient funds in the account to cover it; in the usual

[17]See the many discussions referencing the testimony in opposition to this point beginning with the mitigation section of the Answer Brief above.

circumstance the sufficient funds would have been in the account for over six months in anticipation of the original check being presented before it became stale.

The Respondent also argues that the two checks to the Clerk of the Court which he bounced involved "negligence, at the worst". The undersigned fails to understand how writing checks in advance of receiving funds to cover them is merely negligent. Further, although the Respondent states as fact that these checks were made good, the Referee found that the Respondent had admitted that there was some question whether they were ever repaid. (A-4 p.3).

The Respondent also seeks to distinguish The Florida Bar v. Mayo, 439 So.2d 888 (Fla. 1983). In Mayo, the attorney issued a worthless check and did not make restitution after giving assurances that he would pay. The Respondent is correct. His case is distinguishable from Mayo; the Respondent did not issue one worthless check, he issued several from various accounts. Instead of merely promising payment which never came like Mayo, Respondent Kassier gave worthless checks to Jenny Jeria, Lordes Julia, and Leslie Lundstrom (TR 123-127) and replaced the worthless checks with other worthless checks. By the time of the

final hearing, he had only made partial restitution to the two women.

The Bar concedes, however, that Respondent was comparatively more cooperative in the disciplinary proceedings than Mayo, who did not file responsive pleadings, appear at the final hearing, or respond to the Bar's Request for Admissions. But the Respondent, unlike Mayo, was also proven to have misappropriated trust funds, failed to communicate with clients, and neglected client matters. Therefore, even though three Justices believed a one-year suspension was too severe a punishment for the one worthless check which Mr. Mayo wrote, it should not be true for the number or severity of the charges upon which the Respondent has been found guilty.

Although the Respondent cites The Florida Bar v. Jones, 543 So.2d 751 (Fla. 1989) as a case of multiple instances of neglect warranting suspension, that is not the case. The attorney in Jones was suspended for multiple rule violations for the neglect of a single client matter,

The Respondent contends that The Florida Bar's argument that Mr. Kassier did not tell the truth about making restitution to Lillie Harris and Letitia Potts is incorrect and untenable. He notes that the Referee did not make a finding that Respondent

Kassier had not told the truth. This is misleading. The Referee did not make a finding that Respondent Kassier lied. The Referee also did not make a finding that the Respondent told the truth. Instead, the Referee noted that he had continued the hearing to take testimony on that specific issue[18] and that, upon further hearing, the Respondent was unable to produce evidence to prove his prior testimony. The Referee found that the information which the Respondent testified to was not, in fact, true. Then, instead of making a finding that the Respondent gave the money to his secretary and that the secretary failed to mail it (which would have indicated that the Referee believed this testimony), he merely noted that the Respondent testified that this was because of an error by his secretary. This excuse, which is similar to an affirmative defense, cast the burden of proof on this issue upon the Respondent[19]. Obviously, since the Referee noted the testimony instead of making a finding of fact on the issue, the Respondent did not meet his burden of proof; the

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[18] **Despite the fact that, as noted above, the hearing commenced on the issue of mitigation only, since the Respondent had withdrawn his response to The Florida Bar's Request for Admissions which mirrored the allegations of the complaint, thereby admitting to these allegations in the complaint**

[19] **The Respondent argues that this was the only finding the Referee could make because the complainants were not capable of testifying that he did not attempt to mail them their money and evidence.**

Referee did not find that Mr. Kassier's failure to make the restitution was because of Mr. Kassier's secretary failing to mail out the checks.

The Florida Bar does not attempt to analogize The Florida Bar v. Riahtmever, 616 So.2d 953 (1993) to the situation at Bar. The Rightmeyer Court pronounced its concern about attorneys lying under oath. It is the Court's place to decide how significant it considers the Referee's finding of fact (or lack thereof) on this point and how it wishes to apply that pronouncement in the instant case.

The Referee sustained the Respondent's objection to the Bar's argument in aggravation that the Respondent employed a felon convicted of fraud to sign trust account checks. However, since steps taken to ensure restitution to clients constitute mitigation, steps taken to jeopardize clients funds should constitute aggravation and/or a counterbalance to evidence in mitigation. The Respondent used assurances concerning this person's background[20] to convince The Florida Bar to close an investigation into his trust accounting procedures, without disclosing his criminal record and name change. This is

[20] See A-3 in The Florida Bar's Initial Brief.

additional evidence concerning the Respondent's character, forthrightness and veracity it is very relevant in a proceeding in which the Respondent's testimony is the only evidence on a critical issue and he seeks to claim an advantage by testimony as to his character and reputation for honesty.

The Referee's findings of fact in disciplinary proceedings are presumed correct and will not be disturbed unless clearly erroneous or without support in the record. Further, the party challenging a Referee's findings of fact carries the burden of demonstrating that they are clearly erroneous or unsupported by the record. The Florida Bar v. Cramer, 678 So.2d 1278 (Fla. 1996). The Respondent acknowledges that the Referee did not mention the character testimony. Then, once again, he characterizes the aforementioned testimony as "splendid". The Referee had the opportunity to observe Respondent Kassier in the hearing and observe his conduct. The Referee listened to the testimony on character . The Referee heard the cross-examination concerning the witness' knowledge of the Respondent's reputation, his actions over the last several years, and their relevance to the types of law in which the complaints arose. The Referee saw evidence and heard testimony which reflects on the Respondent's character. Therefore, the Referee's refusal to make a finding of

fact in favor of mitigation based on testimony on Respondent's character and reputation is entitled to the presumption of correctness. Respondents's assertion that the testimony was "splendid" does not rise to the level of demonstrating that the finding (or rather the refusal to make the finding) is either clearly erroneous or unsupported by the record.

Finally, the Respondent claims that the Referee recognized that the Respondent did not willfully steal, but rather was merely sloppy and negligent. This assertion is not supported by the record. The Referee did not make a finding that the Respondent did not willfully steal. To the contrary, the Referee found Respondent Kassier in violation of Rule 4-8.4(c) of The Rules Regulating The Florida Bar. (A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.) This finding implies willful conduct.

This is a case of an experienced attorney out of control. The Referee described him as a "runaway freight train" who will damage clients and those with whom he comes in contact professionally, if he is not taken out of the practice of law for a meaningful period of time. It is the case of a Respondent who the Referee found has no understanding of how an objective person views the situation he created. It is the case of someone who

continues to deny and/or excuse his wrongful behavior. It is a case of a bright person who should have known better-but still does not. It is a case of someone who has shown no effort to reform or rehabilitate. It is a case which warrants the presumption of disbarment. There are no mitigating factors which could, or should, modify the severity of the punishment earned.

CONCLUSION

Based upon the foregoing reasons and citations of authority, The Florida Bar respectfully requests that this Honorable Tribunal not follow the referee's recommendation to suspend the respondent for one year and find instead that the respondent should be disbarred.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of The Florida Bar's Answer Brief and Reply Brief was forwarded via Airborne Express to **Sid J. White,** Clerk, Supreme Court of Florida, 500 So. Duval Street, Tallahassee, Florida 32399, and a true and correct copy was mailed to **Louis Jepeway, Jr.,** Attorney for Respondent, 19 West Flagler Street, Suite 407, Miami, Florida 33130 this 29 day of August, 1997.

for J. K. Olsen
DEWAYNE K. TERRY