IN THE SUPREME COURT OF FLORIDA

Supreme Court Case
No. 87,617

THE FLORIDA BAR,

Complainant,

vs.

ANDREW MICHAEL KASSIER,

Respondent.

The Florida Bar File
Nos. 9571,003 (11A)
9571,308 (11A)
9670,207 (11A)

CROSS REPLY BRIEF OF RESPONDENT, ANDREW MICHAEL KASSIER

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POINT ON REVIEW

MR. KASSIER SHOULD BE SUSPENDED FOR NO MORE THAN NINETY DAYS, WITH THE RESTRICTIONS RECOMMENDED BY THE REFEREE.

ARGUMENT

MR. KASSIER SHOULD BE SUSPENDED FOR NO MORE THAN NINETY DAYS, WITH THE RESTRICTIONS RECOMMENDED BY THE REFEREE.

The Florida Bar v. Block, 500 So.2d 529 (Fla. 1987), and ***The Florida Bar v. Scott,*** 566 So.2d 765 (Fla. 1990), as well as ***The Florida Bar*** v. ***Cramer, 643*** So.2d 1069 (Fla. 1994), governs.

In *Block*, the attorney represented the sellers in the sale of a condominium. He tardily deposited the $20,000.00 received from the purchasers in his trust account. The attorney's trust account check was dishonored because of insufficient funds.

The sellers filed a Bar complaint. An audit of the attorney's trust account for a two year period revealed that he was not in substantial compliance with the trust accounting requirements.

The Bar and the attorney entered into a conditional guilty plea for a consent judgment. The attorney acknowledged numerous technical and substantive trust accounting improprieties set forth in the audit. The attorney also admitted violating the rules relating to trust accounting procedures and former Disciplinary Rule 9-102(A), requiring the

preservation of the identity of funds and property of a client.

The consent judgment provided for a three year probation with safeguards. A. C.P.A. was to prepare monthly reconciliations of his trust account and trust account bank statement, The attorney had to provide the monthly reconciliations and his trust account bank statements to the Bar and the reconciliations had to be certified by the C.P.A. as to accuracy and validity. The $5,000.00 costs were to be paid on a payment schedule.

The Florida Bar v. ***Scott, 566*** So.2d 765 (Fla. 1990), also governs. In *Scott*, the attorney had been close friends with a man who had passed away. During the three years prior to the friend's death, he conveyed three parcels of real estate to the attorney to avoid creditors. The attorney knew the purpose of the conveyances and paid no consideration for the property. The attorney was to return the properties to the friend upon his request through quit claim deeds.

After the friend died, the attorney told his sons that their father had left no assets. The attorney claimed ownership in the properties. The friend's sons eventually learned the truth and sued the attorney to recover the properties. The suit was settled only when the attorney sold the properties and paid the proceeds to the sons. Additionally, the attorney was not entirely truthful in his testimony.

This dishonest, thieving, deceitful attorney was suspended for ninety one days.

The Florida Bar v. Cramer, 643 So.2d 1069 (Fla. 1994), indeed does govern, the Bar's attempt to distinguish it to the contrary notwithstanding.

Mr. Kassier is in a better position than the attorney in ***Cramer.*** ***Cramer*** does not

mention whether the attorney had a prior disciplinary record. There is no mention of character or reputation in ***Cramer.*** There is no mention of remorse in ***Cramer.***

The Bar, at pp.9-10, attempts to distinguish Mr. Kassier's lack of a prior disciplinary record. The attempt fails. The Referee correctly found:

> "Prior disciplinary record: None." (RR p.7)

None is none. The Bar cites no authority for its position.

The Bar, pp. 10 and 21-22, argues that Mr. Kassier had no personal or emotional problems, and, if he did, that did not constitute mitigation. Both arguments fail. The Referee found that:

> ". . .the respondent. . .has come upon difficult emotional stresses due to his divorce of some years ago and his inability to manage the practice of law. . . ." (RR p.7)

A Referee's findings of fact are presumed to be correct and will not be disturbed unless clearly erroneous and lacking in evidentiary support. ***The Florida Bar v. Davis, 657*** So.2d 1135, 1136 (Fla. 1995); ***The Florida Bar v. Winderman,*** 614 So.2d 484,486 (Fla. 1993).

The Bar's argument that no cause and effect relationship was presented is simply silly. What else does the Referee's finding mean?[1] Moreover, Standard 9.3(c) is simply:

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[1] The Bar's repetitious statement that Mr. Kassier left his wife is incorrect, and is a maladroit attempt to smear Mr. Kassier. Mr. Kassier and his wife ***separated.*** Mr. Kassier's generosity with his wife is set forth in detail at pp.24-25 of his Initial Brief. His testimony was uncontradicted.

The Bar's complaint that Mr. Kassier only presented his own testimony is silly. The Bar's reference to these "alleged" problems is improper. Mr. Kassier testified to these difficulties under oath and without contradiction.

"Personal or emotional problems."

The Bar's argument, at p.11, that Mr. Kassier functioned well until 1994 misses the point and ignores the evidence. Does not a splendid record and superb reputation count for something?

Mr. Kassier experienced difficulties early in private practice. In the Spring of *1992,* he went through what he thought at the time was a wonderful experience. In retrospect, it was incredibly poor judgment on his part, He tried, back to back to back, an attempted first degree murder case and two first degree murder cases. The State sought the death penalty in the two murder cases. It waived the death penalty in the second case only after jury selection (T.91).

In the first case, the defendant was charged with robbery in a home and attempted murder of a county court judge. The trial lasted approximately a week and a half. The defendants were convicted of attempted first degree murder, armed robbery, and armed burglary (T.93).

The defendant in the first first degree murder case was charged with killing a six year old child (T.91-92). The trial lasted about two and a half weeks (T.92). The defendant was convicted and sentenced to death (T.92).

In the second first degree murder case, Mr. Kassier began jury selection the ***day*** that the jury began deliberations in the penalty phase in the first first degree murder case (T.92). The second first degree murder case lasted approximately one week (T.93). The jury convicted the defendant of manslaughter (T.93).

During that time he had a conversation with Jeffrey Wiener (T.93). Mr. Wiener is a criminal defense attorney and is the past President of the National Association of Criminal Defense Attorneys (T.93). He spoke to Mr. Wiener in the clerk's office of the criminal court building (T.94). Mr. Wiener smiled and said "You've been very busy." He thought it was a compliment and said "Thank you", Mr. Wiener said "I didn't mean it as a compliment. I'm giving you advice from one who's been there. Be careful. You are going to burn out." Mr. Wiener was correct. He did burn out (T.94).

The Bar's reliance upon ***The Floridu Bar*** v. ***Shuminer,*** 567 So.2d 430 (Fla. 1990), at p. 11, is misplaced and its analysis of ***Shuminer*** is incorrect. Specifically this Court stated that the attorney: ". . .continued to work effectively during the period in issue, and he used a significant portion of the stolen funds not to support or conceal his addictions ***but rather to purchase a luxury automobile, . . .*** " 567 So.2d at 432 (Emphasis Added). Mr. Kassier had difficulties early on in private practice, as set forth fully in his Initial Brief and Answer Brief, and he did not use any client's money for personal gratification. That the Bar omits even mentioning the purchase of the luxury car is telling.

The Bar's repeated attempted application of ***The Florida Bar v.*** *Shanzer*, ***572*** So.2d 1382 (Fla. 1991), at pp. 11-12 and 21-23 fails. In *Shanzer*, this Court found that the referee did ***not*** abuse his discretion in failing to find emotional and mental problems. Here, in direct contrast, the Referee found that: ". . . the respondent. . .has come upon difficult emotional stresses due to his divorce of some years ago and his inability to manage the practice of law. . . ." (RR p.7). A referee's findings of fact are presumed correct and will not be disturbed

unless clearly erroneous and lacking in evidentiary support. *The* **Floridu** *Bar* **v. Davis, 657** So.2d 1135, 1136 (Fla, 1995); *The Florida* **Bar v.** *Winderman*, 614 So. 2d 484,486 (Fla. 1 ***993).*** In ***Shanzer,*** the Referee's finding was upheld. Here, the Referee's finding must be upheld.

Moreover, in ***Shanzer,*** the attorney had made some restitution but still owed $3,643.76. The opinion does not say when the attorney commenced making restitution. Here, restitution was completed long ***prior*** not only to the Bar's investigation, but before anyone knew it was missing, In ***Shnnzer,*** there was no evidence of character or reputation. Here, there was overwhelming evidence of good character and good reputation.

The Bar correctly cites ***The Florida Bar*** v. *Pahules*, 233 So.2d 130, 132 (Fla. 1970), at pp. 12 and 28-30, as setting forth the three purposes of discipline. The Bar then misapplies *Pahules*.

First, the judgment must be fair to society. It must protect the public from unethical conduct and at the same time not deny the public the services of a qualified lawyer because of undue harshness in imposing discipline. The Referee asked ***the*** question:

> "How is society served by disbarring an otherwise bright lawyer who obviously might cause damage to people out there as it stands. But if there is going to be some rehabilitation under a series of probation, why not do that, I guess?" (T.243)

The Bar responded:

> ***"That all makes a lot*** *of* ***sense*** and its all very unfortunate that its a bright person that does it. , . ." ***(Ibid)*** (Emphasis Added)

The Bar's answer has not improved, It persists in its unfair, inflexible, unimaginative

and unrealistic position.

The Referee stated:

> ***"I don't think*** he ***is*** a ***bad person,*** but I don't think that he understands or knows how an objective person looks at the situation he's created.
>
> * * *
>
> I think if you get him on to a side track and a sufficient period of time goes by and he's ready to demonstrate that he's ready to practice law, ***I think that he probably would make a great contribution,*** but if I let him go the way he's going now, ***even though he doesn't mean it and would probably never go out and intentionally hurt somebody,*** he's going to hurt somebody worse than he already did. Certainly, it's got to happen. No question it's got to happen." (T.292;294) (Emphasis Added)

An attorney who is not a bad person, who would make a great contribution, and who would never intentionally hurt someone does not deserve or require disbarment. ***The Florida Bar*** v. ***Scott,*** 566 So.2d 765 (Fla. 1990); ***The Florida Bar v. Cramer, 643*** So.2d 1069 (Fla. 1994), ***The Florida Bar v. Block,*** 500 So.2d 529 (Fla. 1987).

Second, the discipline must be fair to the attorney. It must be sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. A ninety day suspension of a active litigator is devastating. However, given Mr. Kassier's excellent record and the superb character testimony, it is quite clear that a ninety day suspension is sufficient to encourage rehabilitation and reformation.

Third, the discipline must deter others. Respectfully, there are very few attorneys whose situations are similar to Mr. Kassier's. Mr. Kassier repeats: A ninety day suspension of a litigator is devastating, The Bar's argument, at p.12, concerning Dade County's

payment schedule for Court-appointed counsel, is both silly and misleading. The difficulty was *not* the payment schedule, The difficulty was Dade County's recalcitrance in refusing to pay within any type of reasonable period, The attorneys on the appointment wheel are well aware of Dade County's abdication of its fiscal responsibility. The Bar's hyperbolic argument, at p.30, has no basis in reality.

We must always remember that:

> ". . .Disbarment is the extreme and ultimate penalty in disciplinary proceedings. It occupies the same wrong of the latter in these proceedings as the death penalty in criminal proceedings, It is reserved, as the rule provides, for those who should not be permitted to associate with the honorable members of a great profession. But, in disciplinary proceedings, as in criminal proceedings, the purpose of the law is not only to punish but to reclaim those who violate the rules of the profession or the laws of the Society of which they are a part." ***(The Florida Bar v. Hirsch,*** 342 So.2d 970, 971 (Fla. 1977))

Indeed, *Pahules* itself held that:

> "'[D]isbarment is the extreme measure of discipline and should be resorted to only in cases where the lawyer demonstrates an attitude or course of conduct wholly inconsistent with approved professional standards, It must be clear that he is one who should ***never*** be at the bar, otherwise suspension is preferable. For isolated acts, censure, public or private, is more appropriate. Only for such single offenses as embezzlement, bribery of a juror or court official and the like should suspension or disbarment be imposed, and even as to these the lawyer should be given ***the benefit of every doubt, particularly where he has a professional reputation and record free from offenses like that charged against him.'"*** (233 So.2d at 131-132) (Emphasis Added)

The Bar's argument on restitution is most misleading, The Bar's statement, at p.14, that Mr. Kassier failed to return $500.00 to Mr. Thomas simply is not so and the Bar knows that it is not so, Mr. Kassier pointed this out, at p.28, n.2, of his Initial Brief. The Bar persists, even though it knows what occurred, Mr. Kassier did some unusual legal work for

the Thomases concerning their house (T.145). He took care of the razing of their house, which Dade County ordered. Hurricane Andrew had greatly damaged the house. Everyone agreed that Mr. Kassier was entitled to compensation for his work. By ***agreement,*** Mr. Kassier has held $500.00 which will be spent for further expenses on the home. Mr. Thomas has received all of his money (T. 145-148).

The Bar's constant drum beat that restitution was not made to Lillie Harris and Leticia Potts is wrong (App.#1). Mr. Kassier's attorney sent them both reimbursement on September 24, 1996 for the retainers they paid to Mr. Kassier. The Cashier's Checks were sent by Certified Mail and both women signed receipts (App. #2). Additionally, Mr. Kassier's attorney sent a Cashier's Check to Lourdes Julia for the money owed to her (App. #3).[2]

Significantly, the Bar omits any mention of Ms. Thomas's testimony. Ms. Thomas twice offered to loan Mr. Kassier the money he held in trust for her (T.65). She learned that Mr. Kassier borrowed the money only after she had received all the money held in trust for her (T.65). Ms. Thomas has no complaint whatsoever against Mr. Kassier." Rather, she is very grateful to him because he helped her obtain some additional money, $3,500 (T.67).

The Bar's attempt to distinguish ***The Florida Bar v.*** *McShirley*, 573 So.2d 807 (Fla. 1991), at pp.15 and 30-32, fails. The attorney in *McShirley*: ". . knowingly converted client funds for his ***personal use*** over a period of ***several years.*** This was not an isolated instance

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[2] Copies of all the letters were mailed to the Bar.

[3] Nor does *Mr. Thomas.*

of misappropriation but instead a repeated 'dipping into' *the trust account, , , .*" *573* So.2d at 808 (Emphasis Added). *McShirley* wisely held that:

> ". . .To disbar **McShirley** without considering the mitigating factors involved, however, would be tantamount to adopting a rule of automatic disbarment when an attorney misappropriates client funds. Such a rule would ignore the threefold purpose of attorney discipline set forth in ***Pahules***, fail to take into account any mitigating factors, and do little to further an attorney's incentive to make restitution," (573 So.2d at SOS-SOS)

This Court found:

> ". . .of particular importance and significant mitigation that *McShirley* replaced the converted funds before the Bar initiated any action against him. . . ." *(573* So.2d at 809)

Here, there was an isolated instance of removing money from the trust account, not a repeated "dipping into" the trust account. In *McShirley*, as here, of particular importance and significant mitigation is Mr. Kassier's replacement of the money before the Bar initiated any action against him.

The Bar's argument that the Referee rejected the mitigation presented by Mr. Kassier, particularly the testimony of the very impressive character witnesses, is untenable. The Bar properly concedes, at p.16, that Mr. Kassier presented impressive character witnesses. However, the Bar's muddied speculation, at p.17, and pp.22-23, about the Referee's reason for not mentioning them in his report is sheer fantasy, The character witnesses were three experienced Circuit Judges, one of whom is now a District Judge, the Chief of Staff to the Attorney General of the United States, and a Senior, long time Assistant Public Defender. Their testimony was unrebutted. It is fundamental that a fact-finder cannot arbitrarily ignore

unrebutted testimony. ***The Florida Bar v. Clement*, 662** So.2d 690, 697 (Fla. 1995); ***Wiederhold v. Wiederhold*, 696** So.2d 923 924 (Fla. 4th DCA 1997); ***In Re: Estate of Hannon***, 447 So.2d 1027, 1028-1029 (Fla. 4th DCA 1984); ***Republic National Bank of Miami v. Roca***, 534 So.2d 736 (Fla. 3d DCA 1988), put it very well:

> ". . .Where the testimony adduced is not 'essentially illegal, contrary to natural laws, inherently improbable or unreasonable, opposed to common knowledge, or inconsistent with other circumstances in evidence'. . .it should not be disregarded ***but accepted as proof of the issue. . .*** " ***(Id.,*** at 738) (Emphasis Added)

The Bar's argument, at pp.15-16, that Mr. Kassier has vast experience in the practice of law overlooks his very limited experience in private practice and with money matters. He had no experience in the business aspect of the practice of law until 1991. Edith Georgi, a senior attorney in the Dade County Public Defender's Office, testified that assistant public defenders have nothing to do with the business aspect of the Public Defender's Office (T.54). They do not keep time records, or pay costs, or receive fees (T.54-55). They do not have trust accounts and most of them, including her, do not know what a trust account is. She has been a practicing attorney since 1981 (T.49). Mr. Kassier had no outside practice when he was an assistant public defender (T.55-56). Mr. Kassier testified that he obtained no business experience in the Public Defender's Office (T.81). He had had no experience in running or managing a business prior to entering private practice (T.81-82). All this was uncontradicted.

The Bar complains, at pp.17-20, that Mr. Kassier's remorse does not meet its newly created standard, which is found nowhere except in its Answer and Reply Brief. Standard

9.3 of the Standards for Imposing Lawyer Sanctions, Remorse, does contain gradations or comparisons.

Even worse, the Bar's argument is contrary to the facts. Mr. Kassier's remorse is set forth fully at T.166-170 and p. 10 of the Bar's Brief, Mr. Kassier testified that his plight is result of things that ***he*** did and ***he*** must suffer for them, What hurts the most is that he has let down a lot of very good people. He is sure that it was not easy for the Judges, or John Hogan, or Edith Georgi to come in and testify for him (T.167). This not only is remorse, this is a man who recognizes the error of his ways and accepts responsibility.

The Florida Bar v. *Farbstein*, 570 So.2d 933 (Fla. 1990), does not support the Bar's position. *Farbstein* approved the Referee's finding that the attorney had demonstrated honest and significant remorse and the desire to continue his rehabilitation. So has Mr. Kassier. The ***Furbstein*** Referee heard testimony from others about the attorney's activity in drug and alcohol addition programs. Mr. Kassier cannot be punished for having no such difficulties. Nor does ***The Florida Bar v.*** *Pahules*, 233 So.2d 130 (Fla. 1970), support the Bar's position. There, the attorney argued that he had presented an attitude of repentance. So has Mr. Kassier. Identically, ***The*** *Florida* ***Bar v.*** *Ruskin*, 126 So.2d 142 (Fla. 1961), involved an attorney who expressed repentance which suggested that his offenses would not reoccur, That is the situation here. Mr. Kassier expressed repentance. Here, the *Referee* found such promise. The Referee asked, rhetorically:

> "How is society served by disbarring an otherwise bright lawyer who obviously might cause damage to people out there as it stands. But if there is going to be some rehabilitation under a series of probation, why not do that,

I guess?" (T.243) (Emphasis Added)

The Referee found that:

> "*I don't think he is a bud person,* but I don't think that he understands or knows how an objective person looks at the situation he's created.
>
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>
> I think if you get him on to a side track and a sufficient period of time goes by and he's ready to demonstrate that he's ready to practice law, ***I think he probably would make a great contribution,*** . , ." (T.292; 294) (Emphasis Added)

The Bar erroneously continues to rely upon ***The Florida Bar v. McIver***, 606 So.2d 1159 (Fla. 1992). The Bar refuses to understand the distinction Mr. Kassier pointed out in his Initial Brief. Mr. Kassier repeats: In *McIver*, mitigation was slight. In addition to the trust account violations, the attorney flagrantly used estate and client funds intentionally and in a clearly unauthorized manner. At times he used clients' funds for his own purposes.

Mr. Kassier does ***not*** argue that it was permissible for him to pay Ms. Thomas out of money he held in trust for Mr. Thomas. Rather, his point is that all the money was replaced before anyone knew that it was missing. And, the money went to a client, not to line Mr. Kassier's pockets.

The Bar continues to rely upon ***The Florida Bar v. Schiller, 537*** So.2d 992 (Fla. 1989), and continues to ignore the obvious distinctions between ***Schiller*** and this matter. The attorney in ***Schiller*** made no attempt at restitution ***until a grievance*** had been filed against him. Mr. Kassier made full restitution of the money he removed from his trust account before anyone knew that the money had been removed. In ***Schiller,*** there is no

evidence of personal or emotional problems. Here, the Referee specifically found such problems (RR p.7). In *Schiller* there is no evidence of character and reputation. Here, there was overwhelming evidence of good character and reputation.

The Bar's reliance upon other citations in its Answer and Reply Brief is of no avail. Mr. Kassier distinguished the cases in his Initial Brief and Answer Brief. However, Mr. Kassier is constrained to point out the Bar's lack of comfort with and attempt to withdraw its reliance upon *The Florida Bar v. Rightmeyer*, 616 So.2d *953* (1993), at p.36.

CONCLUSION

This Court should suspend Mr. Kassier for no more than ninety days, with the restrictions recommended by the Referee.

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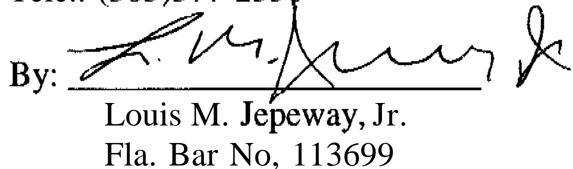

By: ______________________
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CERTIFICATE OF SERVICE

1 HEREBY CERTIFY that the original of the foregoing **Cross-Reply Brief of Respondent, Andrew Michael Kassier** was mailed to **RXCKEY GREENSPAN,** Bar Counsel, The Florida Bar, Suite M-100, Rivergate Plaza, 444 Brickell Avenue, Miami, Florida 33 13 1 this **5th** day of December, 1997.

By: Louis M. Jepeway, Jr.