IN THE SUPREME COURT OF FLORIDA

Supreme Court Case
No. 87,617

THE FLORIDA BAR,

Complainant,

The Florida Bar File
Nos. 95-7 1,003 (11A)
95-71,308 (11A)
96-70,207 (11A)

VS.

ANDREW MICHAEL KASSIER,

Respondent.
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INITIAL BRIEF AND ANSWER BRIEF OF RESPONDENT, ANDREW MICHAEL KASSIER

JEPEWAY AND JEPEWAY, P.A.
407 Biscayne Building
19 West Flagler Street
Miami, Florida 33 130
Tele.: (305)377-2356
Fla. Bar No. 113699

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STATEMENT OF THE CASE AND OF THE FACTS

The Bar's statement of the case is correct. The Respondent rejects the Bar's statement of the facts, which is incomplete and in at least one instance incorrect. The following are the facts:

Circuit Judge Rodolfo Sorondo[1] testified. He sits in the Criminal Division (T.6). He was admitted to practice in 1979. He was with the State Attorney's Office as a certified legal intern and then as an assistant state attorney. He was in private practice doing primarily criminal defense work from 1981 until 1992 when the Governor appointed him to the Circuit bench (T.7).

He has known Mr. Kassier for about ten years (T.7). Mr. Kassier has appeared before him many times. Mr. Kassier litigated many motions and similar matters before him. He tried a case before him. He knows Mr. Kassier and his reputation (T.8).

He has always been able to rely upon anything Mr. Kassier tells him. He can take to the bank what Mr. Kassier says. Mr. Kassier is not dilatory in anything that he does. When he says that there is a problem one can be sure that the problem exists. He is an honest man and an honest lawyer (T. 10). His reputation is that he is a very honest lawyer and that is recognized by Judge Sorondo's colleagues (T. 10).

Mr. Kassier is an outstanding attorney (T.10-11). His legal and professional reputation is outstanding (T. 11). He takes cases that no one else wants: the murder cases,

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[1] Now District Judge Sorondo.

the unpopular causes, the people who are very difficult to deal with, people whom other lawyers are afraid even to meet. He has done more capital litigation probably than any other lawyer in the system. The judges turn to him for these very difficult cases on a regular basis, cases which routinely are turned down by many lawyers (T. 11).

He selected Mr. Kassier for a particular case even though the wheel system was established for court appointment of attorneys. There are four wheels, one for Third Degree Felonies, one for Second Degree Felonies, one for First Degree Felonies and Life Felonies, and one that is exclusively for capital cases. The Committee sets up standards and each lawyer submits his or her credentials and the Committee determines the number of wheels an attorney can serve on and whether they can serve on the capital wheel. It is very difficult to get on the wheel. He thinks that Mr. Kassier is on all wheels. He knows him from being on the capital wheel (T, 12).

This particular case was a First Degree Murder of a North Miami Police Officer. These probably are the most difficult cases in which to obtain lawyers to represent the defendants because the attorney wins the enmity of everyone. One lawyer was thrown out of the Shomrim Society, a Jewish law enforcement fraternity or group, of which he had been a member for ten years, because he accepted an appointment to represent a defendant charged with killing a police officer (T. 12- 13).

In the particular case, an attorney was representing one of the defendants. He tried the case. The defendant was convicted of first degree murder and they moved to the second, penalty phase (T. 13). The attorney and the defendant developed irreconcilable differences

and it put Judge Sorondo in a very difficult position. There is only so long a jury can be kept out without becoming contaminated, especially in a high publicity case (T. 13-14).

The conviction was in the first week of June, 1994. He set a late September date for the penalty phase, He called Mr. Kassier because he had the experience in capital litigation which enabled him to come in after conviction, familiarize himself with the case, and fully prepare a case for mitigation within the time period, which is what he did. The selection normally would be made from the wheel. He did not make a selection from the wheel because it would give him lawyers who are qualified but some of them take too many cases, He wanted an attorney who would be true to his word, He called Mr. Kassier. He asked him about his schedule. He asked him if he could take the case and prepare it. Mr. Kassier said that he could and he kept his word. The case proceeded as scheduled (T. 14- 15). Mr. Kassier had about ninety days to prepare for the sentencing hearing. His work was outstanding (T. 15).

Most defendants convicted of killing police officers in Dade County are sentenced to death. The defendant was sentenced to death (T. 15). The jury recommendation was seven to five in favor of death. If it had been six to six it would have been, in essence, a recommendation of life imprisonment (T. 16).

When practicing, he worked with a lot of other attorneys. As a judge, he observed many attorneys. He has sat as a Referee in Bar matters (T. 17). As a Referee, he has made recommendations to the Supreme Court (T. 17). He has discussed this case with Mr. Kassier and his attorney (T, 17-18).

He proffered his view of Mr. Kassier's situation and what should be done.

He has known Mr. Kassier for ten years. He has been called as a circuit judge to testify as a character witness for many people. This is the first time that he has agreed to do so (T.22).

There were some grievous errors in judgment and he is not blind to those and he believes that Mr. Kassier must be punished for those errors in judgment (T.23).

There are two sides to the practice of law. There is the noble side, the practice, the scholarship, the advocacy, and there is the dark side, the business of law (T.23). Some are very good at the business side, but Mr. Kassier was not. As unsuccessful as he has been in managing his finances, he has been even more successful in the noble side of the practice, the representation of causes in an expert, efficient manner, advocating the best interests of his clients (T.25). He has been doing that for a long time. That should stand for something (T.25-26).

As he understands the facts of the case, although certainly there was misconduct, there are no aggrieved individuals (T.26). The most egregious violation involves a client, who, although betrayed, does not feel betrayed; who, although betrayed is not vindictive or in any way seeking punishment. He knows that the Bar and the Referee must act, but he believes that if a suspension is in order it should be one of brief duration and one that allows automatic reinstatement (T.26). That ended the proffer.

On cross-examination he testified that probably the last comment he heard about Mr. Kassier was a judge telling him that he had Mr. Kassier in a trial and that it was running

smoothly. That would have been within the last year, probably (T.27).

He does not recall a lengthy philosophical discussion about Mr. Kassier's honesty and integrity, only that another judge said that it was a pleasure to have Mr. Kassier in the courtroom, matters move along, there is no nonsense, objections are validly made, and statements such as that (T.27). He has not reviewed the Bar complaint (T.28).

On redirect he testified that he spoke to Judge Leonard Glick about a murder case Mr. Kassier tried before him. That was the time that the other judge told him that the trial was so smooth and so easy because Mr. Kassier and his co-counsel were handling the case.

Circuit Judge Fredericka Smith testified. She worked for Legal Services in Washington, DC, and moved to South Florida in 1968 and worked for Migrant Legal Services here (T.34-35). She also worked with the Legal Services program on the Navajo Reservation in Windowrock, Arizona for a year (T.35). Then she worked in private practice for about five years. She was appointed to the bench in 1980 and has been a circuit judge ever since (T.35). She has sat in all divisions of the circuit court, except probate. She has had a great deal of experience in the criminal division of the circuit court and sits in that division now (T.35).

She has know-n Mr. Kassier for about seven or eight years, professionally (T.36). He has practiced before her (T.36). She has always had the highest regard for him and for his integrity. He is a very competent, professional attorney. That also is his reputation. He has always been extremely competent. He has handled himself in court in the most professional way. He is always polite and totally professional (T.36). She has never heard any negative

comment about him (T.36).

She has sat as Referee in Bar matters at least twice (T.37). She has observed many attorneys (T.37).

She proffered that she has spoken to both Mr. Kassier and his attorney about the nature of the complaint, She talked to Mr. Kassier at length the day before the hearing. He filled her in on the details. She is aware of how this matter arose with the trust account check written with insufficient funds and the examination of the trust account in that he has acknowledged taking money out of the trust account which he wasn't entitled to take and that he put it back before the investigation started. No one was hurt by any of his actions, No one was out of any funds or otherwise injured although there was some complaint that he neglected some work (T.39).

These are serious matters and Mr. Kassier realizes that they are very serious. She knows that he has suffered a lot just contemplating these matters over the last several years (T.40).

She believes that some short suspension may be in order and some probationary period with strict controls would also be appropriate. She certainly does not think that any type of long suspension would be needed (T.40).

On cross-examination, she pointed out that Mr. Kassier has acknowledged that he committed the act and that it was wrong. As in any criminal case, she would take into account anything that was relevant in mitigation (T.42). Restitution, especially if it is done voluntarily, is a relevant factor (T.42).

Edith Georgi. testified. She is a senior attorney in the Dade County Public Defender's Office. She has been an Assistant Public Defender for about fifteen years. She is an Adjunct Professor of Law at the University of Miami Law School. She taught at the Chinese University of Hong Kong for two years, at another school in Hong Kong for a year, and at Miami-Dade Community College in the Paralegal Program, and is currently an Adjunct Professor at the University of Miami Law School where she teaches in the Litigation Skills Program and has for about four years (T.48).

She has been an attorney since 1981 and has practiced in the Public Defender's Office in Dade County since then. She has represented defendants in every sort of case from misdemeanors to capital charges and has done almost exclusively homicide and capital homicide for about the past six or seven years.

A senior trial attorney is an attorney of senior status who has a hand in the administration of the office, in training of younger lawyers, in crisis management, in advising the Public Defender, and anything else that is necessary (T.49).

She is active in civic affairs. She is a Board Member of the Theodore Gibson Memorial Fund, a unity organization founded in memory of the former Miami City Commissioner and Episcopal Priest who passed away in 1983 (T.49-50). The Gibson Memorial Fund works to bring about harmony among the black, white, and Latin communities in Miami. She has worked with youth groups through that organization (T.49-50). She has served on the Board of Legal Services of Greater Miami for three years (T.50). She was elected to the Coconut Grove Village Council and presently serves there (T.50).

She has served on a Florida Bar Grievance Committee for three years (T.50-5 1).

She has known Mr. Kassier since 1982 or 1983 (T.51). The nature of the Public Defender's Office and the positions that she and Mr. Kassier were in required that they discuss virtually all aspects of the representation of criminal defendants, which included legal, ethical, personal, psychological, and social aspects of the representation (T.52).

Mr. Kassier was an attorney assigned to a regular trial judge, a "pit" lawyer, and rose to training director for all of the felony attorneys (T.52). He also had appellate experience (T.54). He also was a Senior Attorney and was an Assistant Executive Public Defender, which was a new position (T.52). He occupied that position in his final years at the Public Defender's Office (T.52-53). He also was the link between the Public Defender's Office and the various law schools for coordinating the Intern Program (T.53).

Mr. Kassier was held in the highest regard in the Public Defender's Office. He provided the highest moral leadership and had the highest integrity (T.53). He was in charge of training forty to sixty lawyers and supervising lawyers with heavy, heavy case loads. He was placed in that position because the Public Defender, Bennett Brummer, had complete trust and confidence in him (T.53).

Mr. Kassier was held in the highest esteem throughout his years in the Public Defender's Office. His integrity was never questioned. He was held in the highest esteem in the Public Defender's Office. He was a leader. He was creative. He exemplified everything that public service required of an individual: caring, sincerity, honesty, hard work, integrity. She cannot emphasize that enough (T.54).

There were about 120 attorneys in the Public Defender's Office in 1989 and 1990 (T.54). There were about 100 or so secretaries and other support staff then (T.54).

The assistant public defenders have nothing to do with the business aspect of the Public Defender's Office (T.54). They don't keep time records, they don't consider the costs of cases (T.54-55). They do not receive fees from clients (T.55). They do not pay costs. They do not have trust accounts and most of them, including her, do not know what a trust account is. She has never had experience with a trust account (T.55). They are prohibited from doing any private practice which would interfere with their public defender work. Most lawyers are discouraged from any kind of outside practice and most do not have any time for it. Mr. Kassier had no outside practice when he was an assistant public defender (T.55-56).

On cross-examination, she testified that she has had contact with Mr. Kassier on a casual basis since he left the Public Defender's Office five years ago. She has seen him at the law school where he has held teaching positions. Sometimes they have discussed Mr. Kassier's serious cases with him (T.56).

On cross-examination, he testified that she had not read the complaint (T.57). She has not had any discussion with a lawyer or judge about Mr. Kassier's integrity since he left the Public Defender's Office (T.57). She may have had a few discussions, just very casual discussions with others (T.57).

On redirect, she testified that when she had these casual discussions the reaction of the other people was the same as hers, that this is highly out of character for Mr. Kassier and they were sad and believed that something must have gone on in is personal life because this

was not consistent with his professional reputation or standing (T.58-59).

Circuit Judge Thomas Wilson, Jr., testified by deposition.

Judith Thomas testified. She was in Ashville, North Carolina, and testified by phone (T.62). She could not attend the hearing in person because her son was very ill and she had to take him to a specialist on the day of the hearing, That was the only available time (T.63). She would have attended the hearing in person but for that (T.63). She would have paid her own travel expenses (T.63). She is employed as the office manager at Biltmore Associates in Psychiatry and Psychology in Ashville, North Carolina. She has been there for three years. She has been involved in that type work for ten years (T.63).

She knows Mr. Kassier (T.63). Mr. Kassier represented her in a domestic matter after her divorce was final (T.64).

She was satisfied with Mr. Kassier's representation (T.64). The litigation involved money (T.64). Mr. Kassier obtained for her all the money to which she was entitled (T.64).

During the course of Mr. Kassier's representation he held money in trust for her (T.64). During that time she became aware that Mr. Kassier had financial difficulties. She discussed those difficulties with him (T.64). She offered to loan money to Mr. Kassier (T.64-65). She made the offer on two separate occasions (T.65). The offer related to the money he held in trust for her (T.65). She told Mr. Kassier that if he needed the money he could borrow whatever he needed (T.65). He was free to borrow that money (T.65). Mr. Kassier declined the offer (T.65).

She subsequently learned that Mr. Kassier had borrowed the money. That was after

she had received all the money held in trust for her. She has received all the money to which she was entitled (T.65).

When she learned that Mr. Kassier had borrowed the money she told him that that was fine, that she had no problem with that (T.65-66). She reminded him on several occasions that she had offered to loan him the money (T.66). She said: "My gosh. I offered it several times. Why didn't you take it?" (T.66).

She was paid all of her money before she knew that the money had been removed (T.67). Mr. Kassier replaced the money in the trust account before she was aware that it had been removed (T.66). She did not know the money had been borrowed from the trust account. It did not affect her at all (T.66). The money was replaced in the trust account before she knew that it had been removed (T.67).

She was very shocked when Mr. Kassier spoke to her about the Bar matter (T.67). She did not think that one could get in trouble for doing something like that, especially since she offered him the money (T.67).

She has no complaint whatsoever against Mr. Kassier. Rather, she is very grateful that he helped her obtain some additional money owed to her at the time of the post-decretal matter, an additional $3,500 (T.67).

On cross-examination, she stated that she authorized Mr. Kassier to borrow whatever money in trust was hers. She could not give him authority to borrow money that was due to her ex-husband (T.68). She had about $16,000 in trust for her (T.68-69). She was not referring to the $8,200 that was paid to her husband's attorney (T.69).

On redirect she testified that she offered to loan Mr. Kassier all of the money that he held in trust for her (T.69).

John Hogan testified. He is an attorney. He is the Chief of Staff to the Attorney General of the United States (T. 162). He has been an attorney since 1977 (T. 162). He began his practice as an associate in the litigation department of Shutts & Bowen. He went to the State Attorney's Office in 1979. He became the Chief Assistant State Attorney in 1984. In 1989, he left the State Attorney's Office to become the Statewide Prosecutor (T. 162-163). He returned to the State Attorney's Office in January 1989, as Chief Assistant State Attorney for the felony division. He stayed in that position until June, 1993, when he went to work for the Department of Justice (T. 163).

He has known Mr. Kassier for about ten years, professionally (T. 163-164). He tried one case against Mr. Kassier and had dealings with him, He came to know him (T. 164). Mr. Kassier had an excellent reputation in the legal community for truthfulness, veracity, and integrity. In his dealings with Mr. Hogan he conducted himself consistently with his reputation. He always represented the best tradition of the Bar (T. 164). He has skimmed the complaint, he has not read it in detail (T. 164). He and Mr. Kassier and Mr. Kassier's attorney discussed it (T. 165).

On cross-examination he testified that he left Florida in June, 1993 and has not been a part of the Miami legal community since 1993 (T. 165).

Mr. Kassier testified. He is an attorney and an adjunct professor at the University of Miami Law School. He graduated from the University of Pennsylvania cum ***laude, in*** 1977.

He attended the University of Miami Law School and graduated in 1980 (T.73).

He went with the Public Defender's Office upon his admission to the Bar in 1981 (T.74-75). He had worked as a certified legal intern while in law school at the Public Defender's Office (T.74).

Initially, he worked in the appellate division. He was there from 1978 through 198 1. Then he went to the Juvenile Division and did trial work there to the beginning of 1983 (T.75). Then he went into the felony trial division and was there from 1983 to 1985 (T.75). In that position he handled every type of felony charge imaginable, from relatively minor felonies, third degree felonies with probationary sentences through first degree murder cases involving the death penalty. He was in that position for approximately two years (T.76).

He has participated in the University of Miami Law School's Clinical Program. When he was an Assistant Public Defender from 1985 to 1990, he was in charge of training and supervising all the clinical interns that were assigned to the Public Defender's Office. He entered private practice in 1990 and was hired as the Clinical Field Director for the University of Miami Law School's Litigation Skills Program, He had direct supervision over approximately fifty certified legal interns in all the various locations. They were in the Public Defender's Office, the State Attorney's Office, at Legal Services, and at other places.

He also became a senior training attorney in 1985 (T.76). As senior attorney he had the responsibility as training director for all the attorneys, and he was also responsible for recruiting new lawyers as part of the planning and hiring committee, which was comprised of all the senior attorneys and the Public Defender, Mr. Brummer (T.76).

He continued to try cases while a senior attorney (T.76-77). He did not carry a full case load. However, he was directly responsible for supervising the new felony assistants and that included working up their cases, sitting in on depositions and going to trial with them. To that extent, between their cases and his cases, he was carrying close to a full case load. He tried a lot of cases in that position, approximately seventy jury trials (T.77).

Then he became an Executive Assistant Public Defender. There were too many responsibilities for the first Executive Assistant Public Defender. The Public Defender decided to have a second executive assistant. He was chosen and was in charge of all the responsibilities that the first executive assistant had when he was not there. He assisted the first executive assistant as liaison with the judges, he attended criminal justice council meetings, and he had even more responsibility for the planning and operation of the entire office (T.77-78). He was the number three man in the Public Defender's Office, behind the elected Public Defender and the first Executive Assistant (T.78). There were approximately 120 felony assistant public defenders at that time (T.78). He was still trying cases. He tried 18 felony cases in 1987 (T.78). That was the most of any assistant public defender (T.79).

He had sought a judgeship. The Judicial Nominating Commission nominated him three times for the County Court in 1987, 1988, and 1989 (T.79). He sought election to the County Court in 1988, unsuccessfully (T.79).

He has taught at St. Thomas Law School, that was his first teaching position (T.79-80). That was in 1987 (T.80). He taught a seminar workshop in client interviewing and negotiation (T.80). He taught for one semester at St. Thomas (T.80).

He has taught at the University of Miami since 1989 (T.80). Initially he taught Florida Criminal Procedure. In 1990, when he went into private practice, in addition to his clinical responsibilities, he also was an adjunct professor teaching pre-trial skills in the litigation skills program (T.80). He had administrative responsibilities there. As the Clinical Field Supervisor he was responsible for all the liaison work and supervising the interns in their placements and reporting back to the professor in charge of the entire programs (T.80-81). There were between thirty-five to sixty students in the clinical program from semester to semester. He was in that position from 1990 to 1995. The law school decided that they wanted to have a full time professor in that role (T.8 1).

He obtained no business experience in the Public Defender's Office (T.81). Prior to entering private practice, he had had no experience in running or managing a business (T.8 1-82).

He entered private practice in January, 1990 and has been in private practice since then. His practice always has been predominantly criminal trial and criminal appellate work. Now, about twenty five to thirty percent of his case load is domestic work (T.82).

He was married in October, 1982 (T.84). He has encountered difficulties in his marriage. His wife is an attorney (T.84). His wife was admitted to practice the same year as he and worked in the State Attorney's Office as a prosecutor (T.84-85). That presented conflicts constantly (T.85). His wife currently is a General Master in the Eleventh Judicial Circuit in the Family Division (T.85). They own a house. They separated in September, 1991. His wife stayed in the house (T.85).

He has sought counseling and therapy (T.85). He began the counseling in the end of January or February 1990. He made several changes and decisions at the end of 1989, one of which was to go into private practice and one of which was to begin counseling (T.86). The pressures of his marriage had become almost unbearable. A lot of the pressure was from his wife, who placed a tremendous amount of pressure on him to be successful. Success to her simply equated to how much money he was making (T.86). He sought counseling solely for the purpose of dealing with the marital difficulties and trying to work through the problems and the pressures that he was feeling from the marriage (T.86). The counseling initially was once a week. It continued that way for almost five years. There was one point in 1991 when the counselor offered to do marriage counseling for him and his wife. That lasted three sessions and was a complete disaster. His wife thought that the counselor was siding totally with him (T.86).

He was no longer able to continue going to the counselor on a weekly basis for financial and other reasons. He eventually began seeing the counselor every other week and at the point of the final hearing he was seeing her on an infrequent basis (T.87).

His wife had certain expectations about how successful he should be. She saw other lawyers going into private practice while he stayed in the Public Defender's Office (T.87-88). Even though his accomplishments showed that he was successful and he was moving in a positive direction, for her there was and still is only one bottom line: how much is the check at the end of the month? That was one of the reasons why he started teaching. He loves teaching but there also was the opportunity of bringing in some extra income (T.88).

His wife at one point practically demanded that they move back to New York because he was not as successful here as she wanted him to be. Her father was an attorney, had an existing practice, and she wanted him to take over her father's practice. When he politely but firmly refused and said that he wanted to stay and make it here, the pressures became even worse because she felt that that he was an affront to her and her father (T.88).

His wife wanted a house, so they bought a house. They were living in a townhouse that they were able to handle financially, They were not able to sell the townhouse so they had to borrow money from her parents, which created a second mortgage (T.88). That increased the financial responsibilities (T.89).

Although his wife was working as an Assistant State Attorney, she made it very clear to him that he was expected to be the primary bread winner and the pressures became so great that by 1989 he was talking seriously about leaving the marriage because he just could not deal with it any more (T.89). These were tremendous blows to his ego because in her mind and from her own lips she referred to him as a failure because he was only a public defender (T.89). They separated in September, 1991 (T.89).

He was very close to his father-in-law (T.89). He was kind, gentle, and considerate (T.89). He had a running battle with his wife about tipping, which illustrates the difference between her and her father. He much preferred his father-in-law's method, which was to be kind to other people and reward them for good service. That one stupid little thing became a major focal point every time they had a meal (T.89).

Her father was the consummate lawyer, He was totally professional in the way he

handled his cases. His father-in-law was very interested in his career, If anything, there were times that her father was as proud, if not prouder, of his accomplishments than of his own daughter's (T.90).

His wife was extremely close to her father. During the last year of his life, he came to Miami to visit in the Fall of 1991, aware that he and his wife already had separated. He did not react any differently to him than he had (T.90).

He came down in the Fall, 199 1. They learned shortly after the first of the year, 1992, that he was terminally ill. He died in Miami of lung cancer. He was in Miami approximately five or six months before he passed away. He visited his father-in-law in the hospital. His father-in-law's terminal illness put enormous stress upon him and his wife. He made no progress in his divorce during that time (T.95). He decided that any finality to the divorce proceedings was going to have to wait until her father had passed (T.95-96).

His wife was still pressing him financially during that time, even more so than she had earlier (T.96).

In the Spring of 1992, he went through what he though at the time was a wonderful experience but which, in retrospect, 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 after jury selection (T.9 1).

In the first case, his defendant was charged with robbery in a home and attempted murder of a county court judge. It lasted approximately a week and a half. The defendants

were found guilty of attempted first degree murder, armed robbery, an armed burglary (T.93).

The defendant in the first first degree murder case was charged with first degree murder of a six year old child (T.9 1-92). 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, the defendant was charged with the murder of her lover and boy friend. He began jury selection in that case the day that the jury began deliberation on 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 found the defendant guilty of manslaughter (T.93).

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

He is on the wheels for appointments in criminal cases (T.82). He is on all the wheels (T.83). He is on the appellate wheel, but not for capital cases (T.83).

He has been appointed in capital cases approximately fifteen times since he has been

in private practice (T.83). He has been appointed in other serious felony cases, such as second degree murder, manslaughter, attempted murder, sexual battery, armed kidnaping, and multiple armed robbery cases (T.84). A major portion of his practice is composed of court-appointed cases (T. 84).

He encountered great difficulty in obtaining payment in court-appointed cases. Dade County pays the bills in court-appointed cases in Dade County (T.96).

When one submits bills to Dade County, one has a choice. One can either submit the short form, in which one summarizes one's hours in a single page affidavit. One is limited in the payment when the short form is used. The bills are paid from between two to four months after submission. In the more serious cases, in which an attorney puts in more hours, which include first degree murder cases, the attorney has to submit the long form. It is an itemization, such as one does with any other client, It is a billing statement of each and every quarter hour that the attorney worked on a case. The bill goes through the auditing process, which was done by the County Attorney's Office after the Trial Court had approved the bill. In those days the Trial Court had to approve the bills (T.97). Upon approval, Dade County is supposed to pay (T.98).

In the first capital case in which he was appointed after entering private practice he submitted a bill for approximately $24,000 for approximately two years of work. The hourly rate was $40.00 per hour out-of-court and $50.00 an hour in court. He submitted the bill and the judge refused to sign it (T.98). The judge said he wanted to test the system (T.98). The judge said that on paper there was an agreement that pre-trial fees would be limited to

$10,000 and his position was that if lawyers accept court appointments under those circumstances, it doesn't matter how many hours they put in. They have agreed to take $10,000, period. The judge was Circuit Judge Arthur Snyder (T.99).

He filed a petition for writ of mandamus in the Third District Court of Appeal because the County told him that unless Judge Snyder approved the bill it was not going to pay him. Before the Third District ruled, someone from the County Attorney's Office called asking him to settle for a lower amount which they though Judge Snyder would approve. He cut his bill by approximately $2,000 to $3,000 (T.99-100). The County Attorney then agreed to pay the amount and asked him to submit the bill to Judge Snyder, who did approve the lower amount (T. 100). It still took two or three months for Dade County to pay him. That was after the assistant county attorney told him that the County would pay it (T. 100).

He had difficulty getting the County to pay him in other cases (T. 100-101). The auditing process was extremely slow (T. 101). He knows from personal experience that Dade County pays bills in clumps. So even if one bill had been sitting there for three months, if they had not yet decided to release money for special assistant public defenders they would simply make the lawyer wait until enough other bills had come in from other lawyers and then they would pay them all at one time (T. 101). It was too much of an effort for them to write him a check (T. 101).

One bill in particular from another first degree murder case, in the amount of $2 1,000, which had been approved by the Court, and which the County was supposed to pay, was pending for about five or six months (T.101-102). He spoke to people in the Court

Administrator's Office who told him that they had lost the bill after they had clocked in. He had to resubmit the bill (T.102). It still took a while for the County to pay him. He eventually was paid almost a year after the bill had first been submitted (T. 103).

He had difficulties obtaining payment from Dade County in other cases (T. 103). In late 1992, Dade County went to a new system, the wheel system, which has been described earlier (T. 103-104). Promises were made to attorneys that the past difficulties with bills languishing through their audit and approval mechanism would not occur and the process would be sped up. It was not. A committee was formed composed of a representative from the Public Defender's Office, the State Attorney's Office, the County Attorney's Office, and the Court Administrator's Office with a judge as the *de facto* head of the committee. The committee normally meets once a month, sometimes every other month. Again, they meet when a significant number of bills have piled up. The bills were not paid faster, Dade County had decided how quickly it was going to pay the bills and no one could make them do otherwise (T, 104). It was also well known that Dade County paid the bills when the new budget year began (T. 104-105). If an attorney was unlucky enough to submit his bill near the end of the budget period, he simply would not be paid for a very long time (T. 105).

He decided that he would submit short forms, even if it meant eating part of the bill, because of the difficulties he had encountered in having the other bills paid. For the less serious felonies, the maximum fee is $1,500. If an attorney submits a long form, it is $3,500. He cannot count the number of times that he submitted a bill for $1,000 or $1,250 or $1,500 when he had put in far more time then he billed. He did that solely to be paid faster. No

bills could be paid until the case was over. There is no interim billing (T. 105). He submitted bills for substantial fees and Dade County dragged its feet on the two murder cases about which he has testified (T. 105-106). It took about six to seven months to receive payment on those bills, each of which was in excess of $20,000. At one point Dade County owed him in excess of $40,000 (T. 106).

Dade County's negligence placed him in a horrible financial bind. He had to take on more matters than he reasonably could handle. He could not afford the kind of support staff that was needed to manage the type and the number of cases he was doing. It forced him to take on cases in other areas of law. That took him more time to learn and prepare cases (T. 106). It forced him to reach the maximum limit on a line of credit that he had established with his bank when he entered private practice. It forced him to borrow money on several occasions from his wife. It forced him to borrow money from his parents, who could ill afford it (T. 106- 107).

Hurricane Andrew, which hit Dade County on August 24, 1992, exacerbated all the difficulties, It made matters much worse. It caused over $100,000 worth of damage to the marital home, which was rendered uninhabitable (T. 107). There were difficulties obtaining a settlement from the insurance company. His wife had to leave the marital home, which they had to sell in July, 1993. She had three temporary residences during that time. She had to bag up and box up her personal belongings on three occasions because they could not obtain payment from the insurance company so that she could rebuild the house (T. 108).

It made their personal situation much worse. His wife had expenses that he continued

to pay and they had to pay a mortgage on a house that they did not inhabit (T. 108).

The personal, emotional, psychological aspects of this were that his wife's most significant character flaw came out, which is that the sins of the world fell on his shoulders (T. 109). When she got angry at attorneys who had worked on cases against her, particularly attorneys from the Public Defender's Office, it was his fault because he did not train them properly. He continued to hear that even after he entered private practice (T. 109).

Emotionally, she became a basket case between having been separated from him in September, 199 1, losing her father in April, 1992, and then the destruction of the home by the hurricane in August, 1992. All of the pressures upon her became pressures upon him. He also had self-generated pressures because of his guilt feelings about his "contribution" to her problems by separating from her. It became almost unbearable (T. 109). He decided not to push the divorce when the hurricane hit. He did not think she could cope with it (T. 109-110).

He and his wife entered into some financial agreements in 1993. The insurance company eventually paid for the damage to the house. They are still litigating over some more money, but it eventually paid approximately $100,000 under the personal property coverage and approximately $70,000 to repair the house. The house was not repaired because by the time they received the money they no longer could afford to maintain it. They had to sell the house at a loss. He agreed to give his wife $95,000 of the $100,000 the insurance company paid for the personal property loss (T. 110). They received $72,000 for structural damage to the house from the hurricane. He gave all of it to her. She received

$167,000 from the insurance proceeds and he received $5,000 (T. 135). He agreed to pay one half of the mortgage on the home that was destroyed by the hurricane. The monthly mortgage payment was a total of $1,650. He agreed to pay his wife's auto insurance which was approximately $1,200 to $1,400 a year. He agreed to pay for her gas and other automobile expenses, which averaged about $50 to $75 a month, without extraordinary repairs. He agreed to pay her 25% of his fees for the six largest cases for which Dade County owed him money (T. 11 1). He paid her $15,000 as a result of that agreement (T. 111-112). His mother-in-law held the second mortgage on the home destroyed by Hurricane Andrew. The mortgage payment was approximately $ 115 a month. He agreed to pay that totally (T. 112).

He agreed to this generous arrangement for two reasons. First, although felt very strongly that he had to leave the marriage in order to save both of them and to give them both a chance at some happiness, he nevertheless felt very guilty that his wife was a few years older than he and was childless, and that had become a very big issue in the marriage. He was well aware that it would be easier for him, at thirty-three or thirty-four, to remarry and have children when he was in his forties or fifties. He felt very guilty about that, He felt that even if he could not give her the personal happiness that she wanted, at least he could give her the financial security that was her obsession (T. 114). It was done with the expectation of better days ahead. It was done with the expectation of a big client walking through the door, It was done in the expectation that his practice would continue to grow (T. 115).

Second, it was done in an effort to avoid conflict with her and litigation with her in

what would have been a very difficult and very public divorce, given both their positions in the legal community (T. 115). He went well beyond what even his lawyer thought was a reasonable or generous offer (T. 115). She said "it's very fair." (T. 115).

His wife was still working in the State Attorney's Office until July, 1993. Shortly after they sold the home she became a General Master (T. 112). As an assistant state attorney she earned approximately $60,000 a year plus benefits. She was eligible for a deferred compensation. She received a greatly reduced rate for her medical insurance, dental insurance, and other such matters. When she became a General Master, the deferred compensation became non-contributing. She did not have to contribute to the deferred compensation. Dade County paid it. It is extra income. That was over $7,000 a year in income (T. 113). His net income during this period was in the range of $50,000 to $75,000 annually (T. 114).

He represented Judith Thomas in proceedings to obtain money from her ex-husband that were due as a result of the marital settlement (T. 135-136). She was having difficulty obtaining the money from the ex-husband. There was past due child support and they had a marital debt to the IRS that they had agreed to split. They both would have had to pay $3,500 to the IRS. Her ex-husband did not pay his half. She paid his half to avoid difficulties with the IRS, but he never repaid her the $3,500 (T. 136).

When he entered the case, the General Master had already ruled that back child support was owed and there was order for the ex-husband to pay it. The marital debt had not been resolved because the ex-husband had raised a statute of limitations defense. The

General Master asked him and the other lawyer to submit memoranda on the issue (T. 137).

Then he received money that was being held from an insurance settlement that the Thomases' had made with their insurance company. That was the only remaining marital property that had not been distributed. He placed it in his trust account (T. 137-138).

He and his wife were having their difficulties during this time. Dade County owed him money at the time for his work in court-appointed cases. Dade County owed him between $40,000 and $50,000. He had already completed the work. He had submitted bills. He simply was waiting for Dade County to pay the bills (T. 138). These bills were submitted in connection with several cases. Some had been pending as much as six months (T. 139).

Ms. Thomas was aware of his financial difficulties and offered to help him. It was a standing blanket offer. She said: "I will loan you the money if you need the help. I don't need the money right now. You are in a bad financial situation. Please borrow it if you need it." (T. 139).

At the beginning, he held approximately $21,000 in trust for her (T. 139). She made the offer at least twice (T. 139-140). He said "No. I'll figure out some way to deal with my problems," He did not ask her to borrow the money, she simply made the offer. He refused because of pride (T. 140).

He eventually removed some money from the trust account. He did that on two occasions (T. 140). He withdrew approximately $14,000 (T. 141). He repaid all of the money (T. 141). Ms. Thomas was paid all her money (T. 142). He later informed her about what he had done. She did not understand why there was a difficulty with the Bar. She said: "I told

you that you could borrow the money." (T. 142).

Ms. Thomas never had any complaint. She was very grateful for the work that he had done for her. On several occasions she told him that she was glad that she was able to help him (T. 143-144). He obtained a total of approximately $8,300 or $8,400 additionally for her. The total amount of money paid to her was about $28,000 or $29,000 (T. 145).

He did some unusual legal work for the Thomases concerning their house (T. 145). He took care of the razing of their house, as ordered by Dade County. Hurricane Andrew had greatly damaged the house. They all agreed that he was entitled to compensation for his work. Mr. Thomas has received all his money. By agreement, Mr. Kassier has held $500 which will be spent on further expenses on the home (T. 145-148).[2]

Count I involves a charge of writing a check that was returned for insufficient funds. It was sent to an attorney, Gary Moody (T. 148-149). He represented a man who had sent a worthless check to one of Mr, Moody's clients. The man retained Mr. Kassier, and paid him money for fees and to make good on the check. He only paid half the money initially and promised to pay the rest. Relying upon his word, Mr. Kassier deposited the money in his trust account, instead of taking it for fees, and sent it to Mr. Moody (T.149). He considered Mr. Moody's end of the matter closed as full restitution had been made (T. 149-150). Mr. Moody returned the check to him, six months later, with an explanation that the check had not been cashed. It had been placed in the client's filed and when it was presented

[2] The Bar's implication, at p.7, that Mr. Kassier simply failed to repay the $500 is erroneous.

it was rejected as being stale. There was no question as to insufficient funds (T. 150).

Mr. Moody asked him to issue a replacement check, which he did (T.150). He attempted to contact his client to obtain his fee before sending the second check. He issued the check expecting that he would have the funds available to cover it. He did not and the check did not clear (T. 150-15 1).

Mr. Moody called him. For a substantial period of time he was not available. He was in a first degree murder trial. He intended, at all times, to have the money to pay the check. He had difficulty getting to the bank (T.151). He had no support staff. He was working with a part time secretary. He was in trial from 9:00 A.M. to 5:00 P.M.. He made the check good (T. 152).

There are two checks made payable to the Clerk of the Court that were returned for insufficient funds. One is for $196. The other is for $153. One matter was a divorce, one was a law suit. The clients agreed to pay the cost of filing. He prepared the suits and filed them in anticipation of receiving the money for costs. He did not (T. 152). He made those checks good and paid the bank charges also (T. 153). The clients never reimbursed him for the costs (T. 153-154).

Count II involved his representation of Lili Harris. Ms. Harris was involved in a landlord-tenant dispute. She wanted him to sue her landlord for damaging her personal property through the negligence of his maintenance crew. While he was attempting to resolve the matter, the landlord instituted suit for failure to pay rent. Mr. Kassier filed an answer and a counterclaim and the case was transferred to circuit court,

The matter became very difficult because the landlord's attorney and the landlord were dilatory. Ms. Harris complained to him several times about the length of time it was taking. He explained to her what had happened. The case became exceedingly frustrating because it reached the point where the other attorney moved to withdraw and did not even appear at the hearing nor was the file even present because he had noticed it in the wrong court.

Ms. Harris asked him to withdraw. She said she was going to turn it over to another attorney. She had paid him a retainer of $350. He returned the retainer. He gave her the file. He kept the correspondence file (T. 154-156).

He responded to the first complaint Ms. Harris filed. The case was closed (T. 156).

She made a second complaint. He did not recall if he responded at that time (T. 156). He was aware of the pending investigation concerning the trust account, He was concerned about the seriousness of the potential allegations about the trust account. The delay was caused by his concern over the consequences of the trust account matter (T. 157).

Count III concerns Letitia Potts, He represented her in the purchase and sale of a coin laundry. She paid him a retainer of $250 (T. 157). She had asked him to try to negotiate. He made some minimal efforts to contact the potential purchaser's attorney. She asked that he no longer represent her (T. 157).

He had a very thin file which consisted of xerox copies of documents that she had already made and given to him during the first meeting, She had the originals. He did not return the copies, He returned the retainer (T. 158).

Mr. Kassier regrets what he has done (T. 166). The entire time that he has been practicing, he has been in the courts. That's what he wanted to do and that's what a lawyer is.

He could not tell the Referee, during the last three years, with his financial problems and the problems with the Bar, what it was like going into the criminal court building sometimes four and five days a week and having to smile when people asked him when he would be a judge, when he was running for judge (T. 166). Knowing that the answer was never, it was difficult to smile through it and say "some day."

The humiliation that he has suffered and is going to suffer is the result of things that he did and he must suffer for them. What hurts the most is that there are a lot of very good people that he has let down. He is sure that it was not easy for the Judges or John Hogan or Edith Georgi to come in and testify for him. He is very grateful that they did because, to them, he represented everything good about being a lawyer.

The practice of law enabled him to teach. He taught at the University of Miami. He teaches every year at the University of Florida in a program established to teach just public defenders and prosecutors. Every year he obtains the highest rating of any of the teachers in the program (T. 167).

He has taught probably over five hundred students who are now lawyers in the State Attorney's Office, the Public Defender's Office, and in private practice. He feels that he has let each and every one of them down. It hurts him almost as much that as a result of what has happened to him and what may happen to him that not only will his practice be effected

but his ability to teach (T. 168).

He always wanted to believe that there was a better day coming. He always wanted to believe that all the problems in private practice were going to get better because he was naive enough to believe that somehow legal ability and respect in the legal community neatly meshed with fmancial success. He has learned in a very disastrous way that it does not (T. 168).

Other people have always said that he is a nice guy. He always did things for other people. He has related the fmancial difficulties with his wife. He was always trying to do things right for other people and as a result he suffered and it was his fault because he should have known better (T. 168-169). He never intended to hurt anybody or to defraud anybody. Ultimately, he is paying a very high price for his poor judgment (T. 169).

It was extremely difficult to speak to Judge Sorondo about this. He was difficult to speak to Judge Smith. It was difficult to speak to Judge Wilson. It was difficult to speak to Ms. Georgi (T. 169). It was difficult to speak to Mr. Hogan It was very difficult to speak to counsel (T. 170).

On cross-examination he repeated that he returned the money to Ms. Harris and Ms. Potts (T. 171-172).

He borrowed money from the trust account when Ms. Thomas had more than enough money in the trust account to cover the loan. The shortage was created as a result of his disbursing to Ms, Thomas more money in addition to the money that she had loaned (T. 175-176). He created the shortage by giving her money before he repaid the money that she had

loaned him (T. 177).

He took all the cases that came in his door, He took court-appointed cases because he knew that eventually there would be a check coming to him in a substantial amount. He hoped that in the interim, through other court-appointed cases with smaller bills and through private clients, he would be able to make it from bill to bill, that he would be able to survive (T. 184).

He issued a check to Jenny Jeria in the amount of $582.35 (T. 194). It was returned because of insufficient funds (T. 194).

He is involved in the Turner-Geller-Kassier Financial Services Group, Inc. (T. 195). He has signatory capacity on that account (T. 195). An objection was overruled (T. 199), and he answered that he remembered the check being returned for insufficient funds (T.200).

He issued a check on July 26, 1996 in the amount of $779.50 to Lourdes Julia for salary on the Turner-Geller-Kassier Financial Services Group, Inc. account. It was returned for insufficient funds (T.200-201). He issued a check to Lourdes Julia on August 9, 1996 on his operating account in the amount of $1,571, It was returned for insufficient funds (T.201-202). Ms. Julia has received partial payment (T.202).

On redirect he testified that when he agreed that his wife could have $167,000 of the $172,000 in insurance proceeds, that had an adverse financial impact upon him. When he agreed to pay $800 a month as his share of the mortgage on the house, even though he was not living in it, that had an adverse financial effect upon him. When he agreed to pay his wife's automobile insurance of about $1,200 a year, that had an adverse financial impact

upon him. When he agreed to pay and paid her gasoline and other routine car bills which amounted to $50 to $75 a month, that had an adverse financial impact upon him. When he agreed to and paid his wife $15,000 from fees he received in court-appointed cases, that had an adverse financial impact upon him. When he paid $100 a month for the second mortgage on the home, that had an adverse financial impact upon him (T.203). His wife lives in a townhouse now. The mortgage payments are approximately $800 a month and the maintenance is $100 a month, a total of $900 a month. He pays half the mortgage and all the maintenance, approximately $500 a month. He does not live in the townhouse. That has an adverse financial impact upon him (T.204). He is still paying his wife's automobile insurance. It is about the same amount. That has an adverse financial impact upon him. He still pays part of his wife's gasoline bills (T.204). It now is about $40 or $50 a month (T.205).

At the time he withdrew the money from the trust account Dade County owed him almost $50,000 in court-appointed cases. Dade County's delay in paying the money had an extremely adverse financial impact upon him (T.205).

His law firm operating account was at United National Bank (T.205-206). He had an arrangement with the bank concerning overdrafts. He always dealt with a vice-president, Terry Biddulph. He was Vice-President and Manager of the Dadeland Branch of United National (T.206).

Mr. Biddulph was aware that he was very dependent on County checks. He had the authority to allow overdrafts in accounts, provided that they eventually were covered. He

had a certain amount of money that he could allow. It was not only Mr. Kassier's account. He allowed overdrafts on all his accounts and he also had an allowance as to how many days and in for what amount the overdraft could stand (T.205-206). United National is noted for being a lawyer's bank. Most of his clients are lawyers (T.206).

When Mr. Biddulph learned of his financial problems, he agreed to allow overdrafts in the account provided that Mr. Kassier covered them and in the case of any particularly large check that might be coming through, Mr. Kassier was to notify him in advance so that he would be able to look for it and insure that it was approved as soon as it came in. In some instances, Mr. Biddulph asked him to fax or deliver copies of his court-appointed bills so that he could show his superiors that there was justification for extending the overdraft policy to him. Those were bills that had been submitted but which the County had not paid (T.207).

He proffered that Mr. Biddulph had that arrangement with other lawyers (T.208).

If the overdraft was relatively small, Mr. Biddulph would not even comment. He just would cover the check. Unfortunately, there were some occasions when he was not present when checks arrived, either because he was on vacation or was out of the office (T.208-209). Mr. Kassier learned through some very embarrassing situations that no one else would take responsibility for approving an overdraft on his account. On several occasions when a check was returned for non-sufficient funds, Mr. Biddulph told him to tell the payee to redeposit the check or he himself phoned the payee and told him to redeposit the check. The checks were paid (T.209).

In the instances when the check came back and an overdraft had not been approved,

he made his best effort to make good on the checks (T.209), as evidenced by Mr. Lundstrom's testimony (T.209). Mr. Lundstrom has been paid all his money (T.209).

The check to Jenny Jeria was paid with the anticipation that United National Bank would cover the overdraft as it had previously with payroll checks issued to his employees (T.210). Check number 2, Bar Exhibit #2, has not been paid (T.210).

He anticipated that United National would cover the check to Lourdes Julia, as it had done in the past. Partial payment has been made to her in the amount of approximately $400 or $450 (T.210).

He does not know if the check to the dry cleaner has been paid (T.210). He did not sign the check. He was aware that the check was being written. He did not watch the check being written but he was aware that the check had been written. He was not aware that there were insufficient funds to cover the check (T.211).

He did not know that at the time he signed the check to Lourdes Julia from Turner-Geller-Kassier that there were insufficient funds in the account (T.212). When that check was returned, a new check was issued to Ms. Julia (T.213). At that time they had established with bank officer at Continental National Bank a similar overdraft policy for the business, although it was a lot more restrictive that the one that Mr. Biddulph had allowed (T.213). Apparently this is not an uncommon practice for banks to allow for commercial customers. When the second check was issued to Ms. Julia, it was their understanding that Continental National would cover the check if there was overdraft. When the check was not covered the only funds that he had available to make good on the check was approximately $450 which

he gave Ms. Julia in the office (T.213).

The Bar presented evidence in aggravation over objection (T. 12 1-122).

Leslie Lundstrom testified. He has a check cashing financial services. He has been in the business for twenty years. He knows Mr. Kassier. He filed a complaint against Mr. Kassier with the Bar (T. 123). The complaint was about a worthless check he had received from Mr. Kassier's operating account in the amount of $2,806.50 (T. 124). The check was dated July 9, 1996 (T, 124). He received reimbursement approximately five weeks later (T. 124-125). That was subsequent to the filing of the Bar complaint (T. 125). The check he received was a replacement for four other worthless checks (T. 127).

On cross-examination, Mr. Lundstrom testified that Mr. Kassier made all the checks good (T. 128). He attempted to withdraw his Bar complaint (T. 128). He informed the Bar that he was satisfied and that the Bar complaint should be dropped (T. 129). He received no response from the Bar when he told them that he wanted to drop the complaint (T. 129). He had no desire to proceed with the complaint (T. 129). The Bar subpoenaed him to testify (T. 129).

The Respondent offered to stipulate that Lillie Harris and Letitia Potts did not receive the checks. However, Mr. Kassier wrote the checks and gave them to his former secretary, who was fired because of her incompetence (T.259-260).

They testified over objection (T.261).

Lillie Harris testified that she filed the complaint against Mr. Kassier with the Florida Bar, She paid him $350. She has not received the money in return and she had received her

photos and her receipts that she gave him.

On cross-examination she testified that she did not know if Mr. Kassier attempted to mail her a check for $350 (T.263). She was told that she would receive the other items from Mr. Kassier (T.263-264), as well as a cashier's check (T.264).

Lititia Potts testified. She retained Mr. Kassier and paid him $250. She has not received the return of the money (T.266).

The Respondent proffered that Mr. Kassier gave the checks to his secretary to return them to the two witnesses. The secretary was incompetent and failed to do so.

The ledger from Mr. Kassier's personal account showed that he wrote checks to Ms. Potts and Ms. Harris on August 11, 1996. The ledger is Respondent's Exhibit B (T.267-268).

Additionally, the Respondent had cashier's checks in the amount of $250 payable to Letitia Potts and $350 payable to Lillie Harris (T.269).

The Referee observed that it appeared that the ledger showed that the two checks had been written but it looked as though the account would have been overdrawn (T.270).

Mr. Kassier explained that there were other checks that were written, and had been deducted from the balance, that he knew were not going to be deposited. There was enough money in the account to pay for the checks written to Ms. Harris and Ms. Potts (T.270).

Mr. Kassier showed the Referee that checks had been voided in the ledger so that he knew that they were not sent or he had sent them and arrangements had been made for the return of the checks (T.271-273).

On cross-examination he testified that he physically prepared the checks for Lillie Harris and Letitia Potts (T.277).

On re-direct, he testified that he learned that Ms. Potts and Ms. Harris had not received the checks just a week earlier at the hearing (T.280). When he went into the hearing and testified on direct he believed that the checks had been mailed to Ms. Potts and Ms. Harris. He believed that they had received the checks since he had heard nothing to the contrary (T.280).

The Respondent offered to give the cashier's checks to the Bar and have the Bar send them to Ms. Potts and Ms. Harris. The Bar asked that the Respondent do so. He did (T.281-*282).*

The Referee asked:

> " 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)

Bar Counsel responded:

> "*That all makes a lot of sense* and it's all very unfortunate that it's a bright person that does it . . . ." *(Ibid)*

Bar counsel then uttered its mantra that removal of trust funds mandates disbarment in all cases, regardless of mitigation or other factors (T.244).

The Referee observed:

> "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 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, its got to happen. No question its got to happen." (T.292; 294)

This Petition for Review followed.

POINT ON REVIEW

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

SUMMARY OF THE ARGUMENT

Mr. Kassier should be suspended for no more than ninety days, as was the attorney in ***The Florida Bar v. Cramer,*** 643 So.2d 1069 (Fla. 1994). The evidence in mitigation is powerful and the testimony of good character and reputation was superb.

The cases cited by the Bar for disbarment are inapposite, This Court has rejected the Bar's automatic disbarment argument in ***The Florida Bar v.*** *McShirley*, 573 So.2d 807 (Fla. 1991). The other cases cited by the Bar equally are distinguishable.

The Referee did not find that Mr. Kassier did not tell the truth, contrary to the Bar's argument. The Bar's argument concerning Jonathan Turner is improper, unfair, and was not permitted 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.* ***Cramer, 643 So.2d 1069 (Fla. 1994), governs.

In Cramer the attorney encountered serious health problems in 1990. He was out of the office for five months. He returned to work on a restricted basis. Between March, 1991 and March, 1992 he became delinquent in employee taxes amounting to $43,635.71. The Internal Revenue Service sent a notice of intent to levy. The attorney feared that the IRS would garnish his operating account and left in his trust account fees he had earned on behalf of a company he owned. He then made deposits and disbursements under the name of his company, from his trust account, to pay operating and personal expenses.

The attorney also represented another client, the defendant in a civil case. A settlement was reached and the client was to pay the plaintiff a sum of money. He gave the attorney $13,743.42 as settlement payment which was to be deposited in the attorney's trust account. Instead, the attorney deposited the money into the operating account and used them for office operating expenses. The attorney later deposited his own money into his trust account to make up for the money he spent.

The attorney also failed to maintain his trust account in substantial minimum compliance with the rules regulating The Florida Bar for 1991 and 1992. However, he certified on his 1991 and 1992 Bar dues statement that he maintained his trust account in

substantial minimum compliance with the rules. Numerous checks were returned on his office account because of insufficient funds and negative balances existed on about nine occasions.

The referee found that the attorney had violated many Rules, including Rule 3-4.3 (engaging in conduct which is unlawful or contrary to honesty and justice)and Rule 4-8.4 (c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation).

The referee recommended a ninety day suspension. The Bar agreed. The attorney petitioned for review, primarily contesting the referee's fmdings of dishonesty, in particular the findings that Rules 3-4.3 and 4-8.4 (c) were violated.

This Court rejected the attorney's challenge to the referee's findings of dishonesty:

> "In order to find that an attorney has acted with dishonesty, misrepresentation, deceit, or fraud, the necessary element of intent must be proven by clear and convincing evidence. . . In the instant case, Cramer was on notice that the IRS intended to levy. He then made deposits into and disbursements out of his trust account to pay operating expenses because he thought the IRS might garnish his operating account. Cramer maintains that he was only attempting to acquire additional time to negotiate a payment plan with the IRS, and that under the circumstances, he was justified in securing his accounts 'in any manner possible.' We disagree. Cramer's knowing and deliberate misuse of a client trust account was done in an attempt to mislead the IRS. We find that this behavior amounts to dishonesty, deceit, or misrepresentation. The stipulations and testimony provide competent and substantial evidence to support the referee's findings of fact and recommendations of guilty, including the findings and recommendations involving dishonesty." (643 So.2d at 1070)

This Court approved the recommendation of a ninety day suspension, finding substantial mitigation, his health problems, his cooperation, and the lack of injury to any client:

". . . *We agree with the Florida Bar* that a ninety day suspension best fits the circumstances of this case. . . ." (643 So.2d at 1070-1071) (Emphasis Added)

The mitigation standard 9.3 of the Standards for Imposing Lawyer Sanctions, sets out many mitigation factors which are present here. They are:

(a) Absence of a prior disciplinary record.

(c) Personal or emotional problems.

(d) Timely good faith effort to make restitution or to rectify consequences of misconduct.

(e) Full and free disclosure to Disciplinary Board or cooperative attitude toward proceedings.

(f) Inexperience in the practice of law. Mr. Kassier had no experience in the business aspect of the practice of law until 1990.

(g) Character and reputation.

(l) Remorse, The Bar's statement, at p.24, that Mr. Kassier had no remorse is flat-out wrong. See T. 166-170, and p. 10 of the Bar's brief.

The disbarment cases cited by the Bar are inapposite.

The Florida Bar v. Shanzer, *572* So.2d 1382 (Fla. 1991), involved an attorney who had violated trust account recording requirements, had retained the interest in his trust account for personal use and had misappropriated funds and had shortages in his trust account. He had made some restitution but still owed $3,643.76. The opinion does not say when the attorney commenced making restitution. Here, restitution was complete long *prior*

to the Bar's investigation. In *Shanzer,* this Court found that the referee did not abuse his discretion in not finding the attorney's emotional and mental problems impaired his judgment so as to diminish culpability, Here, 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). In *Shanzer,* there was no evidence of character or reputation. Here, there was overwhelming evidence of good character and reputation.

The Florida Bar v. *McIver,* 606 So.2d 1159 (Fla. 1992), involved numerous trust account violations, shortages from the attorney's trust accounts, improper allocation of clients' fees, and the use of estate funds for purposes other than the estate. 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. Mitigation was slight. *McIver* is not this case.

The Florida Bar v. Schiller, 537 So.2d 992 (Fla. 1989), resulted in a three year suspension. The attorney disclosed a deficit of approximately $10,000 in his trust account after notification that a grievance had been filed against him. Before meeting with the Bar, he deposited $9,000 of his own funds in his trust account. An audit disclosed deficits increasing to over $29,000 over a five year period. The attorney borrowed money and covered the shortage after a determination was made of the exact deficit. He testified that he knowingly wrote checks on the trust account without authorization and that he used his clients' money for his own purposes. The misappropriations did not directly damage any

client. The referee noted that the attorney seemed to be genuinely remorseful and appeared to be a good candidate for rehabilitation.

The attorney in *Schiller* made no effort at restitution until a grievance had been filed against him. Mr. Kassier made full restitution before anyone knew that any money had been taken. In *Shiller*, there was no evidence of personal or emotional problems. Here, the Referee specifically found such problems *(RR* p.7). In *Schiller*, there was no evidence of character and reputation. Here, there was overwhelming evidence of good character and reputation

The purpose of attorney discipline is three-fold:

> "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))

Accord The Florida Bar v. Fitzgerald, 541 So.2d 602 (Fla. 1989); *The* ***Florida Bar v. Hartman,*** 519 So.2d 606 (Fla. 1988).

This Court has rejected the Bar's automatic disbarment argument:

> ". . . To disbar [an attorney] 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." *(The Florida Bar v. McShirley, 573* So.2d 807, 809 (Fla. 1991))

The Bar cites ***The*** *Florida* ***Bar*** v. ***Davis,*** 361 So.2d 159 (Fla. 1978), and ***The Florida Bar*** *v. Mayo,* 439 So.2d 888 (Fla. 1983), in which attorneys receive one year suspensions for issuing worthless checks.

In ***Davis, the*** attorney acted with knowledge that there were insufficient funds to cover the checks. Judgments were entered against him. The judgments were not satisfied. The note was not paid.

Here, full restitution was made. Here, the check to the attorney in Gainesville was returned for insufficient funds under very unusual circumstances and made good, as set forth ***supra*** in the Statement of the Facts.

The checks to the clerk's office involved negligence, at the worst, and they were made good, as set forth ***supra*** in the Statement of Facts.

In *Mayo,* the attorney issued a worthless check that was returned. Later attempts at collection were unsuccessful even though the attorney gave assurance that he would pay. He did not make restitution. The attorney filed no responsive pleadings and did not appear at the final hearing although he received notice. He did not respond to the Bar's requests for admissions.

Interestingly, and significantly, three Justices concurred although they believed that a one year suspension was: ". . . too severe and drastic for the offense charged. . . ." 439 So.2d at 889. They concurred: ". . .only because Mr. Mayo did not see fit to seek review or favor us with a brief as requested by ***the Court." Ibid.*** One Justice dissented.

The Bar cites ***The*** *Florida* ***Bar v. Daniel,*** 641 So.2d 133 1 (Fla. 1994); and ***The Florida***

Bar v. ***Jones,*** 543 So.2d 751 (Fla. 1989), in which multiple instances of neglect warranted suspension. However, ***in Daniel,*** the attorney had received two thirty day suspensions just the year before for neglecting clients' legal matters. He was suspended for ninety-one days.

In ***Jones,*** the attorney also failed to make restitution to his client. Additionally, the attorney totally failed to cooperate. He failed to appear either in person or by counsel at the grievance committee hearing, and at the final hearing even though he had notice. Moreover, this Court notified the attorney on three separate occasions that his brief was overdue. The attorney failed to file a brief. He was suspended for ninety-one days.

The Bar's argument, at pp.21-22, that Mr. Kassier did not tell the truth about returning the money to Lillie Harris and Lititia Potts is incorrect and untenable. First, the Referee did not find that Mr. Kassier had not told the truth. He merely found that Ms. Harris and Ms. Potts: ". . . had not been paid at the time due to what the respondent testified was an error by his secretary in not mailing out the checks. . . ." (RR 6). Second, this was the only finding that the Referee could make. He could not find that Mr. Kassier did not tell the truth. Ms. Harris testified that she did know if Mr. Kassier attempted to mail her a check for $350 (T.263). Mr. Kassier testified that he physically prepared the checks for Lillie Harris and Letitia Potts (T.277). He learned that they had not received the checks just a week earlier, in the hearing (T.280). When he testified on direct that he believed that the checks had been mailed to Ms. Potts and Ms. Harris he believed that they had. He believed that they had received the checks since he had heard nothing to the contrary (T.280).

The Bar's citation of ***The Florida Bar*** *v. Rightmyer*, 616 So.2d 953 (Fla. 1993), is

woefully misplaced. In *Rightmyer*, the attorney had been ***convicted*** of ***three*** counts of perjury. The Referee had recommended that the attorney be suspended for twelve months. This Court ordered him disbarred: ". . . in light of Rightmyer's perjury ***conviction."*** 616 So.2d at 954 (Emphasis Added).

The Bar's argument concerning Jonathan Turner, at pp.22-23, is improper and unfair. The Bar attempted the argument before the Referee. The Referee sustained the objection:

> "I will sustain the objection to that aspect of it. I don't think you can argue that aspect of it." (T.224)

The Bar states, at p.24, that the Referee did not mention the character testimony presented. It is correct, The Referee should have considered that testimony. It was splendid.

This, most emphatically, is not a case of an attorney who wilfully steals. Mr. Kassier was sloppy and negligent. The Referee recognized that. A ninety day suspension is in order and will meet the second requirement of *Pahules* that:

> ". . . 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. . , ." (233 So.2d at 132)

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

CONCLUSION

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

JEPEWAY AND JEPEWAY, P.A.
Suite 407, Biscayne Building
19 West Flagler Street
Miami, Florida 33 130
Tele.: (305)377-2356

By:, L. M. Jepeway, Jr.
Louis M. Jepeway, Jr.
Fla. Bar No. 113699

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing **Initial Brief of Respondent, Andrew Michael Kassier** was mailed to **RANDI KLAYMAN LAZARUS,** Bar Counsel, The Florida Bar, Suite M-100, Rivergate Plaza, 444 Brickell Avenue, Miami, Florida 33 13 1 this 19th day of July, 1997.

By: L. M. Jepeway, Jr.
Louis M. Jepeway, Jr.