IN THE SUPREME COURT OF FLORIDA

Supreme Court Case
No. 90,325

THE FLORIDA BAR,

Complainant,

vs.

ANDREW MICHAEL KASSIER,

Respondent.
_____/

CORRECTED REPLY BRIEF AND CROSS-ANSWER BRIEF OF RESPONDENT, ANDREW MICHAEL KASSIER

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

TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE FACTS

Dr. Holly Schwartztol testified on July 22, 1997. She is a psychologist and has practiced psychology since 1981 in Miami, Florida (T.39-40). She has been in private practice since 1984 (T.40-41).

Mr. Kassier has been her patient for psychotherapy, off and on, since 1990 (T.41). The initial diagnosis for Mr. Kassier was adjustment reaction with mixed emotional features which is a combination of anxiety and depression related to what was occurring in his life (T.41). When Mr. Kassier started seeing her he was having severe marital problems, which was the initial reason he came to her (T.41-42). Over the years he had an underlying depression which became a severe depression by January, 1997 (T.42).

Mr. Kassier talked to her about his experience with Jon Turner. The first time was in 1995. Mr. Kassier told her that he had helped him in legal matters and he felt that Mr. Turner was a man who really wanted to become rehabilitated. Mr. Kassier told her that Mr. Turner was going to be working with him in his office.

She saw Mr. Kassier only a few more times in 1995 and very little in 1996, about three times. She tried to reach Mr. Kassier several times, but it was difficult. Mr. Kassier did not return her phone calls. She was not aware of the extent of the involvement with Mr. Turner until Mr. Kassier came back in January,

1997 (T.42).

When Mr. Kassier first told her about Mr. Turner he said that he felt that it would be a win-win situation for both of them. Mr. Kassier was having difficulty with the management of his office from a business perspective, not from practicing, but with all the nuts and bolts of running the office (T.43-44). Mr. Kassier told her that Mr. Turner said he had a lot of experience in that area and that he could help him. Mr. Kassier said he was just going to give Mr. Turner a few things to start, things that Mr. Kassier was having trouble with, to ease Mr. Turner into helping him with the office.

Mr. Kassier said that he was pleased with Mr. Turner at first, in the very, very beginning (T.44). Mr. Kassier was beginning to see some problems within six or seven weeks of Mr. Turner being in the office (actually, Mr. Kassier still wanted to see Mr. Turner's being helpful to him. Mr. Kassier was beginning to identify what looked to her as some problems. They were problems with the staff, people in the office were being asked to do things that they did not want to do, or something like that. She did not remember this in great detail (T.45). People who had been working for Mr. Kassier for some time then had a new person coming in and telling them what to do. There was the beginning of some dissatisfaction among the people working with him (T.46).

Mr. Kassier began seeing her again in January, 1997. He

missed an appointment in March and she called him. It became very difficult for her to reach him. She became very concerned because when she had seen him in January he was extremely depressed. She referred him to a psychiatrist for medication for the first time in January, 1997. Mr. Kassier was depressed and anxious, highly, highly anxious in February and March (T.46).

She phoned him on March 10, 1997 in Palm Beach. He was very, very anxious she said: "I really need to talk to you." Mr. Kassier said: "well, I'm being treated like an errand boy and I have no privacy either at home or in the office and it's impossible for me to speak with you." (T.47).

She has done a lot of work with people who have been abused and with people who have been victims of cults and that sort of thing. She said to Mr. Kassier: "You sound as if you're being in some way programed and I'm very concerned for your mental safety and I hope that you will get help from your friends or somebody to help you get out of there and get back some how to Dade County," and I said, "Please. Even if you can't come in, leave me a message and let me know how you're doing." She was very, very concerned, almost to the point of calling someone and having someone go see what was going on. It sounded like somebody who was trapped in some way (T.48).

She thought that Mr. Kassier, who she has known for a very long time, was not acting at all as himself and that he was being

controlled in some way. She concluded that Mr. Kassier would have difficulty getting away from Mr. Turner (T.49-50). She was not entirely clear why he would have difficulty getting away from Mr. Turner, but she had learned that Mr. Kassier had moved to Palm Beach, and his calls and everything else were being monitored. She thought that when that happens to an adult, when he wasn't even able to speak to her on the telephone with any kind of comfort, even on a portable phone, that he was having difficulty getting away from Mr. Turner.

Mr. Kassier returned to Miami and resumed seeing her in May, 1997 (T.50).

Mr. Kassier told her about difficulties with Mr. Turner in the office. There were difficulties with other staff members. There were difficulties with checks that had been written of which he was unaware. It seemed like little by little, it was dawning on Mr. Kassier that all kinds of things were happening, that this was permeating all his relationships, business relationships and friendships, everything, that it was very, very serious (T.51).

Mr. Kassier is a very intelligent man (T.51). Mr. Kassier told her that he was mistaken about Mr. Turner (T.52). She has seen this before. People can be very convincing but sometimes they are not what they seem. It is not a lack of intelligence that permits someone to get involved with people with whom they should not be involved. It happens all the time. Mr. Kassier is a very

trusting person (T.52). Mr. Kassier is a caring person (T.52-53). She has heard of the kinds of people that Mr. Kassier has defended and what he has done for them over the years. She has heard how he conceptualizes people in cases, both personally and professionally. If he has a flaw, it is that he looks for the very best in people, no matter what. He just keeps looking for the best. That is what happened here. Even though there were hints along the way, maybe very large hints, he kept feeling that well, no (T.53). He believed in Mr. Turner and he believed that Mr. Turner really wanted to become rehabilitated and so Mr. Kassier kept looking for that piece rather than focusing as much as he might have on some of the clues along the way (T.53-54).

She has seen Mr. Kassier regularly since May, 1997. He is presently taking Prozac, a moderate dose, fifty milligrams. It has been beneficial. Mr. Kassier is doing much, much better. She is very relieved, of course. It is not just the Prozac. Mr. Kassier is in individual and group therapy (T.54).

Mr. Kassier was scared to death by all of this (T.54-55). This was a terrifying experience for him and he was so depressed. Now, the depression is lifting and his whole thought process is becoming more aware and her sense is that he will not make this kind of error of judgment again (T.55).

Mr. Kassier's prognosis is excellent (T.55).

She recommends that Mr. Kassier remain in therapy for the

foreseeable future and continue taking Prozac (T.55). Work is beneficial for Mr. Kassier (T.55).

Mr. Kassier expressed great embarrassment and very deep humiliation when he talked to her about the Bar matters (T.63).

There is no indication that Mr. Kassier has been untruthful to her (T.63).

Margaret Rosenbaum, Mr. Kassier's wife, from whom he is separated, explained why she and Mr. Kassier became involved with Mr. Turner. They believe in rehabilitation (T.401).

Mr. Kassier testified that he thought that Mr. Turner could help him in the office and that he saw it as a chance to give Mr. Turner an opportunity to turn his life around (T.662).

Mr. Kassier complied with this Court's order tardily (T.652).

POINTS ON REVIEW

I

THE REFEREE ERRED IN ASSESSING THE TOTAL AMOUNT OF COSTS AGAINST MR. KASSIER BECAUSE THE REFEREE RECOMMENDED THAT MR. KASSIER BE ACQUITTED ON FIVE OF THE EIGHT COUNTS; THE ISSUE OF THE COST AMOUNT SHOULD BE REMANDED TO THE REFEREE FOR AN EQUITABLE AND FAIR ACCOUNTING.

II

THIS COURT MUST APPROVE THE REFEREE'S RECOMMENDATION THAT MR. KASSIER BE SUSPENDED FOR SIX MONTHS. INDEED, MR. KASSIER ALREADY HAS BEEN SUSPENDED FOR WELL OVER A YEAR UNDER THE EMERGENCY SUSPENSION WHICH WAS PREDICATED UPON THE CHARGES INVOLVED IN THIS MATTER. SIGNIFICANTLY, THE REFEREE FOUND THAT MR. KASSIER SHOULD BE FOUND NOT GUILTY OF FIVE OF THOSE EIGHT CHARGES. THE BAR DOES NOT SEEK REVIEW OF THOSE RECOMMENDATIONS.

III

THE BAR'S ASSERTION THAT MR. KASSIER SHOULD BE DISBARRED IS HYPERBOLE AT ITS WORST.

A

MR. KASSIER OBEYED THIS COURT'S ORDER, ALBEIT TARDILY.

B

DISHONORED CHECKS

C

MR. TURNER LIED TO, DECEIVED, AND STOLE FROM MR. KASSIER.

D

THE REMAINDER OF THE BAR'S ARGUMENTS ARE REPETITIOUS.

SUMMARY OF THE ARGUMENT

I

The costs should be apportioned between the parties or each party must bear its own costs, since Mr. Kassier was found not guilty on five of eight charges.

II

This Court must approve the Referee's recommendation that Mr. Kassier be suspended for six months. He has been suspended on an emergency basis for well over one year predicated upon the same charges in this complaint. The Referee recommended that he be found not guilty on five of the eight charges. A suspension of six months is more than sufficient.

III

Disbarment would be egregiously improper. There was only one new check charge. It was resolved. Mr. Kassier obeyed this Court's order, albeit tardily.

The Bar relies upon decisions which bear no resemblance to this case.

ARGUMENT

I

THE REFEREE ERRED IN ASSESSING THE TOTAL AMOUNT OF COSTS AGAINST MR. KASSIER BECAUSE THE REFEREE RECOMMENDED THAT MR. KASSIER BE ACQUITTED ON FIVE OF THE EIGHT COUNTS; THE ISSUE OF THE COST AMOUNT SHOULD BE REMANDED TO THE REFEREE FOR AN EQUITABLE AND FAIR ACCOUNTING.

In *The Florida Bar v. Davis*, 419 So.2d 325 (Fla. 1982), the referee recommended that the attorney be found guilty of one count and not guilty of two counts of the complaint. The referee recommended that the Bar only be awarded a portion of its costs. The Bar sought review of the cost assessment.

This Court approved the assessment of costs:

> "The bar incurred costs much greater than those recommended by the referee. The underassessment of costs was caused in part by the finding of not guilty in two of the three charges. The referee recommended one-third recovery on some of the costs such as the court-reporter. The underassessment was likely influenced by a perception of the referee that the costs were greatly disproportionate to those generally generated in a disciplinary action. We have set no hard or fast rules relative to the assessment of costs in disciplinary proceedings. In civil actions the general rule in regard to costs is that they follow the result of the suit, section 57.041, Florida Statutes (1981), *Dragstrem v. Butts*, 370 So.2d 416 (Fla. 1st DCA 1979), and in equity the allowance of costs rests in the discretion of the court. *National Rating Bureau v. Florida Power Corp.*, 94 So.2d 809 (Fla. 1956).
>
> We hold that the discretionary approach should be used in disciplinary actions. Generally, when there is a finding that an attorney has been found guilty of

> violating a provision of the code of professional responsibility, the bar should be awarded its costs. At the same time the referee and this Court should, in assessing the amount, be able to consider the fact that an attorney has been acquitted on some charges or that the incurred costs are unreasonable. The amount of costs in these circumstances should be awarded as sound discretion dictates. In this case the bar submitted no information on its costs restricted to count I. We find that the referee's recommendation of allowing one-third of certain costs where there has been a finding of guilt on one charge but not on others to have been reasonable." (419 So.2d at 328)

In *The Florida Bar v. McCain*, 361 So.2d 700 (Fla. 1978), the Referee recommended that the attorney be found guilty of some, but not all the charges in the complaint. The Referee also recommended that the Bar and the attorney bear their own costs.

This Court approved the Referee's cost assessment:

> "While we find that McCain has been shown by clear and convincing evidence to have committed the acts charged in Counts IIIA and IIIC, we must agree with the Referee that The Florida Bar took an excessively broad approach to this case and failed to early abandon counts that could not be proved. For this reason we find it inequitable to impose all costs of these proceedings upon McCain. Thus, each party shall bear its own costs." (361 So.2d at 707)

One concurring opinion discussed the cost assessment in greater detail:

> "I think there is value in identifying more precisely the reasons I have voted to uphold the referee's recommendation that we deny the Bar its cost of prosecution, some $25,908.76. The Bar originally found 'probable cause' against McCain as to six generic acts of ethical misconduct. Faced with the prospect of having all of its charges dismissed by the referee for their lack of specificity, the Bar filed an amended complaint and later a second amended complaint. The Bar later amended its complaint orally at a pre-trial conference,

and further amended it by stipulation after five days of testimony at the final hearing.

Of the 20 specific acts of alleged misconduct which went to the Referee after all evidence and testimony was presented, only two had been found to be supported by clear and convincing evidence to the satisfaction of either the referee or the Court. In its cross-assignment of error to this Court, the Bar expressed dissatisfaction with the referee's findings as to 6 of the 18 charges which were dismissed or stricken. It is apparently satisfied that the referee fairly evaluated the record as to the 12 other charges.

In considering the assessment of costs, the referee reported that

> '[t]he Bar wilfully undertook this most complex, expensive and time-consuming prosecution. It continued to prosecute this matter when it knew or should have known from the advice of Bar Counsel that it could not prove a large number of the charges set forth in its amended complaint or its second amended complaint. . . This entire matter was poorly and illogically planned by the Bar. It was laboriously presented before me at the final hearing. It has been largely a trial by insinuations, inferences, and innuendos accompanied by a minimum of evidence of a clear and convincing degree.'

When this case was first here to prevent the Bar from exercising disciplinary control over McCain for his conduct while on the bench, I joined Justice Sundberg in his admonition to the Bar in connection with any disciplinary proceedings it might commence against former judicial officers:

> 'The Florida Bar as an arm of this Court is charged to act responsibly. If it acts irresponsibly this Court has the power and the duty to impose appropriate sanctions against the offending members.'

The Bar's absorption of its costs for this proceeding is clearly warranted." (361 So.2d at 708)(England, J., concurring)

Here, the Bar filed an eight count complaint against Mr. Kassier (App. A). The Referee recommended that Mr. Kassier be found not guilty of five of the eight counts (RR, pp.7-8). The Bar seeks no review of those recommendations. Fairness, justice, and equity require that costs be taxed against Mr. Kassier *only* as to those counts for which the Referee recommended that he be found guilty.

The Bar's statement, at p.9, that the charges at issue are the same charges which resulted in this Court's entry of an order suspending Mr. Kassier on an emergency basis is curious. This Court entered the emergency suspension on the presumption that Mr. Kassier was guilty of the charges set forth in the Bar's Petition for Emergency Suspension. The Referee, after hearing, concluded that Mr. Kassier should be found not guilty of five of the eight charges. The Bar has not sought review of the Referee's recommended findings of not guilty on the five charges.

The Bar's statement that the Referee made no recommendation that the suspension be dissolved is misleading. The question of the dissolution of the suspension was not before the Referee.

The Bar places far too much reliance upon *The Florida Bar v. Miele*, 605 So.2d 866 (Fla. 1992). There, this Court found: ". . . nothing in the record suggesting that costs were unnecessary, excessive, or improperly authenticated. . . ." 605 So.2d at 868. Here, the Referee recommended that Mr. Kassier be found guilty on

Counts II, III, and IV. Count II concerned Mr. Kassier's failure timely to comply with this Court's order requiring him to comply with a subpoena duces tecum. Count III concerned Mr. Kassier's presentation of a worthless check in the amount of $290.00 as payment for the storage of his clients' files. Count IV involved a worthless check in the amount of $779.50 to an employee. This was part of the earlier matter, *The Florida Bar v. Kassier*, Case No. 87,617 (RR.p. 4, ¶23), presently pending in this Court. How much time, effort, and expense could the Bar have had in these very simple matters?

The Bar's reliance upon *The Florida Bar v. Gold*, 526 So.2d 51 (Fla. 1988), is misplaced. There, the charge upon which the Referee recommended that the attorney be found not guilty was encompassed within the investigation of his conduct for which the Referee recommended that the attorney be found guilty: ". . . Investigation of the charge of misrepresentation was encompassed within the investigation of respondent's conduct *and caused no additional expense*. It was respondent's misbehavior which injured the client and caused the complaint. We see nothing in the record to suggest that the costs incurred were unnecessary, excessive, or not properly authenticated. . . ." (526 So.2d at 52) (Emphasis Added). Here, the Referee recommended that Mr. Kassier be found not guilty on Counts I, V, VI, VII, and VIII. These are discreet charges. They bear no relation to Counts II, III, and IV.

The Bar whines, at p.10, that Mr. Kassier's misconduct resulted in the particular charges for dishonored checks for which the Referee recommended a finding of not guilty. First, that makes no sense. How can misconduct result in a recommendation that Mr. Kassier be found not guilty? Second, the Referee found that:

> ". . . I do not find as to these specific charges [the ones resulting in not guilty recommendations] that the Respondent engaged in any dishonest act and that T. Jonathan Turner did, in fact, mislead the Respondent and abused the trust and confidence inappropriately placed in him by the Respondent. I find the testimony of T. Jonathan Turner is not credible nor worthy of belief." (RR, p.8-9)[1]

The Bar's reliance upon *The Florida Bar v. Wilson*, 616 So.2d 953 (Fla. 1993), similarly is misplaced. There, the auditor's work and the court-reporter's fees involved both proven and unproven charges. This Court held that the fees were not readily segregated. That situation is not present here. The costs can be apportioned easily or each party can bear its own costs.

Mr. Kassier repeats:

> "'[t]he Bar willfully undertook this most complex, expensive and time-consuming prosecution. It continued to prosecute this matter when it knew or should have known from the advice of Bar Counsel that it could not prove a large number of the charges. . .
>
> This entire matter was poorly and illogically planned by the Bar. It was laboriously presented . . . at the final hearing. It has been largely a trial by insinuations, inferences, and innuendos accompanied by a minimum of evidence of a clear and convincing degree.'" (*The Florida Bar v. McCain*, 361 So.2d 700, 708 (Fla.

---

[1] Mr. Turner was the Bar's key witness.

1978)(England, J., concurring))

This Court must remand this cause to the Referee with instructions to redetermine costs and to assess costs against Mr. Kassier only on the Counts for which the Referee recommended that he be found guilty.

II

THIS COURT MUST APPROVE THE REFEREE'S RECOMMENDATION THAT MR. KASSIER BE SUSPENDED FOR SIX MONTHS. INDEED, MR. KASSIER ALREADY HAS BEEN SUSPENDED FOR WELL OVER A YEAR UNDER THE EMERGENCY SUSPENSION WHICH WAS PREDICATED UPON THE CHARGES INVOLVED IN THIS MATTER. SIGNIFICANTLY, THE REFEREE FOUND THAT MR. KASSIER SHOULD BE FOUND NOT GUILTY OF FIVE OF THOSE EIGHT CHARGES. THE BAR DOES NOT SEEK REVIEW OF THOSE RECOMMENDATIONS.

The Florida Bar v. Bloch, 500 So.2d 529 (Fla. 1987); *The Florida Bar v. Scott*, 566 So.2d 765 (Fla. 1990); and *The Florida Bar v. Cramer*, 643 So.2d 1069 (Fla. 1994), mandate that this Court approve the Referee's recommendation that Mr. Kassier be suspended for six months.

In *Block*, the attorney represented the sellers in the sale of a condominium. He tardily deposited the Twenty Thousand Dollars 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 as 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 was required to provide the monthly reconciliations and his trust account bank statements to the Bar and it was required that the reconciliations be certified by the C.P.A. as to accuracy and validity. The Five Thousand Dollar costs were to be paid on a payment schedule.

In *Scott*, the attorney had been a close friend of a man who passed away. In the three years before the friend's death, the friend conveyed three parcels of real estate to the attorney in order to avoid creditors. The attorney was aware of the reason for 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.

In *Cramer*, the attorney encountered serious health difficulties in 1990. He was out of his 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 $43,651.71. The Internal Revenue Service sent a notice of intent to levy. The attorney was concerned that the Internal Revenue Service would garnish his operating account and left fees he had earned on behalf of a company he owned in his trust account. 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 a defendant in a civil case. A settlement was reached and his client was to pay the plaintiff some money. The client gave the attorney $13,743.42 as settlement. This was to be deposited in the attorney's trust account. Instead, the attorney deposited the money in his operating account and used it for his office operating expenses. The attorney later deposited his own money into his trust account to make up for the money he had 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 had maintained his trust account in substantial minimum compliance with the Rules. Numerous checks from his office account were returned 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 suspension of ninety days. The Bar *agreed*.

The attorney petitioned for review, primarily contesting the referee's findings 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 1071)

This Court approved the recommendation of a suspension for ninety days, finding substantial mitigation, the attorney's 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)

Here, Mr. Kassier has been suspended for well over a year on eight charges. The Referee found him not guilty on five of them. Surely, that is enough.

III

THE BAR'S ASSERTION THAT MR. KASSIER SHOULD BE DISBARRED IS HYPERBOLE AT ITS WORST.

The Bar has made a tidal wave out of a trickle.

A

MR. KASSIER OBEYED THIS COURT'S ORDER, ALBEIT TARDILY.

Mr. Kassier complied with this Court's order tardily (T.652).

The Bar's reliance upon *The Florida Bar v. Mims*, 501 So.2d 596 (Fla. 1987), and *The Florida Bar v. Horowitz*, 697 So.2d 78 (Fla. 1997), is misplaced.

In *Mims*, the attorney failed to comply with court orders, failed to appear at a scheduled pre-trial conference and admitted to neglecting another case before a federal judge. He did not seek review of the referee's recommendation of a one year suspension.

In *Horowitz*, the Bar filed three separate complaints against the attorney. The attorney did not answer any of the three. The referee found the attorney guilty of violating numerous rules. A hearing was held solely on the issue of sanctions after the referee granted the Bar's motions for default. The referee recommended that the attorney be disbarred.

The attorney contended in this Court that he should not be disbarred because the referee failed to take into account that he was suffering from clinical depression when the misconduct

occurred. The Bar argued that the referee did consider the attorney's mental state and that disbarment was warranted because the referee found the attorney guilty of multiple violations of more than twenty of the rules regulating The Florida Bar.

In the first case, the attorney was retained to help a client become the legal guardian for her brain-damaged child. During at least a fourteen month period the client wrote several letters to the attorney requesting information on the progress of the guardianship matter. She also caused the director of social services at the center where the child was located to attempt to contact the attorney. The attorney failed to respond to the client or the administrators at the center during this fourteen month period. Officials at the center wrote to the client explaining the dire consequences of failing to have a living court-appointed guardian should the child need emergency treatment. The client faxed a copy of the letter to the attorney. The attorney failed to respond.

The Bar sent the attorney a copy of the original complaint form filed against him by the client and asked for a response. The attorney failed to respond. The Bar sent another letter to the attorney approximately twenty-five days later again asking for a response. Again, the attorney failed to respond.

In the second complaint the attorney was retained to represent a client who was appealing a decision of the Broward County Board

of Adjustment. The attorney filed a notice of appeal with the Board and a notice of appeal in the Seventeenth Judicial Circuit. He filed no paper on behalf of the client in the next eleven months. The circuit judge dismissed the case for lack of prosecution, stating that there was no activity in the case subsequent to the filing of the notice of appeal.

About nine months later, the client attended a meeting of the Board of Adjustment. The attorney did not attend. The client contacted the attorney after the meeting. The attorney told the client that he was aware of the final order and that he had filed papers on behalf of the client after the order was entered. The attorney told the client that he could come to his office on June 1, 1995, to see the paperwork. On the morning of June 1, 1995, the attorney's secretary called the client, at the attorney's direction, and told him that copies of the paperwork had been mailed to him on May 31, 1995. The client went to the attorney's office anyway on June 1, 1995. The client saw his file, which had nothing in it after the 1993 notice of appeal.

The client never received anything in the mail from the attorney's office, after he had been told that the papers had been mailed. The attorney failed to return the client's phone calls or otherwise inform him of the true status of the matter.

The attorney charged a $1,000.00 retainer. He filed a notice of appeal, but did no other work for the client. Thus, he charged

a clearly excessive fee.

A grievance committee issued a subpoena duces tecum on July 26, 1995, to the attorney, compelling him to produce to the Bar no later than September 18, 1995, specific documents pertaining to his trust account. A substantial portion of the subpoenaed materials were minimum trust accounting records as defined by Rule 5-1.2(b) of the Rules Regulating The Florida Bar. The attorney produced only the canceled checks and bank statements pertaining specifically to the client's matter.

In the third case, a general contractor retained the attorney to collect payments due in two construction projects. He was to file mechanics' liens and collect the amounts claimed due there under through appropriate foreclosure proceedings. The attorney filed a claim of lien in the amount of $77,215.90 on one project and claim of lien in the amount of $42,742.20 on the other project. He neither took action to extend the liens nor to commence any proceedings to foreclose them within the applicable statutory period. The liens expired because of the attorneys' failure to act. He did not inform his client of the expiration of the liens. The attorney also falsely informed the client that a trial date would be set shortly, even though he knew that there was to be no trial setting, because the liens had expired.

Another client retained the attorney to collect payment on another construction project. The attorney filed a claim of lien

in the amount of $21,052.50. He took no action to extend the lien nor to commence any proceedings to foreclose the lien. The lien expired.

The second client retained the attorney in connection with a claim for payment on another project. He settled the claim for $9,162.00. He collected the settlement proceeds in full. He did not inform the client of his receipt of the settlement proceeds. The client made numerous requests and demands for an accounting and payment of its share of the settlement proceeds. The attorney did not remit or account to his client until after the client had filed a complaint with the Bar.

The attorney remitted less to the client than the client claimed he was entitled to receive. The client disputed the amount it received from the attorney, claiming it was entitled to an additional $750.00. The attorney failed to remit the disputed $750.00 to his client or to place the disputed amount in his trust account pending resolution of the dispute.

The Bar issued a subpoena duces tecum directed to the attorney regarding the transactions referred to in the complaint. The attorney failed to produce deposit slips, canceled checks, cash receipts, disbursement journal, ledger cards, bank statements, or other documentary support for all disbursements and transactions from the trust accounts.

The attorney asked the referee to consider his mental health

as a mitigating factor. The referee stated in his report:

> "'Addressing respondent's mental state as suggested by the Florida Standards, he testified that he was suffering from depression brought on by being sued for malpractice by a client. This impaired his judgment when dealing with his clients or in responding to the bar's investigative inquiries. *However, no evidence was submitted to substantiate these statements or to show any improvement in Respondent's psychological state.*'" (697 So.2d at 83)

The referee considered and rejected the mitigating factor of clinical depression. The referee found no factors in mitigation and several aggravating factors: prior disciplinary history of a public reprimand, an admonishment, and a suspension; a pattern of misconduct; multiple offenses in which the acknowledgment of wrongdoing was very late in coming and does not seem sincere; and substantial experience in the practice of law, approximately sixteen years. The referee also found that the attorney's neglect had caused actual and potential injury to the first client, for whom the absence of a guardian could have caused serious injury in the event of a medical emergency, to the second client who paid the attorney $1,000.00 only to have his case stalled, and to the third client, which suffered financial harm after the mechanics' liens expired.

This Court concluded that: "There is no doubt that Horowitz' violation of numerous ethical requirements and total neglect of his clients was extreme misconduct. . . ." 697 So.2d at 83.

The attorney had received an admonishment for failure

adequately to communicate with his clients. He also was placed on probation and ordered to undergo a LOMAS review. He failed to undergo that review timely and this Court suspended him on that basis until completion of the review. This Court publicly reprimanded him in another case.

Horowitz does not even mention the attorney's failure to comply with a court order, contrary to the Bar's statement at p.13. The Bar's statement that the attorney was disbarred despite evidence of clinical depression is inaccurate. The attorney attempted to supplement the record as it related to his mental state with physicians' and hospital records, and other evidence. This Court rejected the attempt:

> ". . . Furthermore, disciplinary proceedings must follow the procedural rules, and this Court can only review the record which was properly before this referee. The evidence before the referee supported the referee's determination that Horowitz' claimed clinical depression failed to sufficiently mitigate the misconduct." (697 So.2d at 83)

All this was the "gross composite conduct". The difference between *Horowitz* and this case is night and day. Moreover, Dr. Holly Schwartztol testified at length about Mr. Kassier's mental difficulties and his underlying depression which became a severe depression (7/22/97, pp.39-63).

B

DISHONORED CHECKS

There is only one new check charge.

The Referee recommended that Mr. Kassier be found guilty on Count IV, the check to Lourdes Julia (RR,p.7). The Referee noted and held that this check was considered by him as aggravation in the earlier case, Case No. 87,617, presently pending in this Court. The Bar seeks to punish Mr. Kassier twice for this check. This violates any conceivable concept of the prohibition against double jeopardy.

Additionally, Mr. Kassier paid part of the check and the Referee noted that it has not been fully paid (RR,p.4,¶22). This was a check from Mr. Kassier's business, not from his law firm (RR,p.4,¶17).

The new check was a check in the amount of $290.00 to Michael Catalano, Esq., for Mr. Kassier's share of the rent of a storage facility he shared with Mr. Catalano (RR,p.3, ¶s 9, 10, and 11). However: "The matter has been resolved between Mr. Catalano and the Respondent." (RR,p.3, ¶16).

Mr. Kassier's clients' files were in no jeopardy. Mr. Catalano brought Mr. Kassier's twelve or thirteen boxes to his office. The next day Mr. Kassier went to Mr. Catalano's office and removed all the client file boxes to his apartment (T.9).

Any assertion by the Bar that Mr. Kassier's clients' files

were in danger is incorrect.

The Florida Bar's reliance upon *The Florida Bar Re: Lopez*, 545 So.2d 835 (Fla. 1989), is untenable. There, the attorney petitioned for reinstatement after a three year suspension predicated upon his conviction of twenty-two felony counts.

The attorney was suspended in 1981 for tampering with witnesses by promising that he would dismiss a suit against them if they would change their testimony. This Court suspended him for a year, noting that he had committed a criminal act. In 1983, the attorney was convicted on a twenty-two count felony indictment in federal court. Each count involved the attorney's representation of aliens during which he wilfully and knowingly made or caused to be made false, fictitious statements as to material facts in applications to the United States Immigration and Naturalization Service. He was automatically suspended for three years following these convictions.

The attorney and his wife were the sole officers and shareholders in a corporation involved in real estate. The attorney had not filed Florida or federal tax returns for the years 1983 through 1987. The referee at the reinstatement hearing granted a continuance for the attorney to file the returns. Two weeks later he introduced copies of the federal tax returns. The referee concluded that this satisfactorily resolved the issue because the Internal Revenue Service was not complaining, the

attorney owed no money for the five year period, and the attorney had satisfactorily explained his failure to file. This Court disagreed because the attorney failed to include information concerning his failure to file the corporate returns in his petition for reinstatement. Moreover, that bore a remarkable resemblance to his conduct twenty years earlier when he withheld information in his application for admission to the Bar. Additionally, the attorney's petition for reinstatement reported that other than the arrest on the federal charges he had not been arrested or prosecuted for anything except a minor matter in 1981. However, he had been arrested for extortion in 1980 based upon an affidavit that he had hired a gunman to threaten an accountant for filing a complaint against him with The Florida Bar. The referee found and this Court agreed that his explanation for the failure to reveal this information was "absurd".

The attorney wrote 199 checks over a two year period which created overdrafts on his account. 48 were returned for non-sufficient funds. He testified that the returned checks were immediately made good, that he and the bank had an overdraft agreement, and that the bank erred in returning the 48 checks. The bank president testified that he had an oral overdraft agreement with the lawyer. The lawyer would call when he wished to make an overdraft and the president would approve the overdraft. Neither the president nor the attorney offered any explanation for the high

number of errors. That prompted this Court's statements that routinely writing bad checks, even if eventually made good, burdens the recipients and is fundamentally dishonest. It brings disrepute on the writer and the profession and is inconsistent with fitness to practice law.

Lopez was a reinstatement matter. The burden was the attorney's to show fitness to resume the practice of law. This Court noted that if it were a disciplinary proceeding the attorney would be subject to suspension or other discipline. The attorney wrote *48* bad checks, in addition to his other misconduct.

The Florida Bar v. Dubow, 636 So.2d 1287 (Fla. 1994), is equally inapposite. There, the attorney wrote 31 checks that were dishonored. Several were written on closed accounts. Others were dishonored because of insufficient funds and check-kiting. The attorney refused to pay the bank for the overdrafts and was sued. A judgment was entered against him. His trust account had shortages in two months.

The attorney was retained to prepare a warranty deed to real property and to obtain the signature of the grantor. He went from Miami to the Bahamas to obtain the signature and act as notary. The signature obtained was forged, due to the attorney's negligence. The attorney fraudulently notarized it as he was outside of the United States. The attorney recorded the deed conveying the property from the grantor to his client in Dade

County. He also formed a corporation which took title the property by warranty deed and placed a mortgage on the property. The attorney was named as a third party defendant in an action to quiet title. The complaint alleged his participation in the preparation, signing, and recording of a forged deed and the fraudulent notarization of the deed. Judgment was entered against him in the amount of $151,774.37. The attorney made no restitution. Additionally, the attorney demonstrated a pattern of misconduct which was ongoing. He had been fined by the bankruptcy court for lying to the court and attempted to offer into evidence at the hearing before the referee a satisfaction of judgment which he knew or should have known was a fraud. He also lied to the Bar concerning his employment status. He also co-mingled funds.

The Bar's reliance upon *The Florida Bar v. Solomon*, 589 So.2d 286 (Fla. 1991), is misplaced. There, the attorney had been suspended for six months after his conviction of failing to file a federal income tax return. He had received two private reprimands and had been suspended from practice in federal court prior to that. Then, he received a three year suspension predicated upon three counts of failing diligently to prosecute matters entrusted to him. He did not seed reinstatement.

The attorney then wrote checks on the bank accounts of businesses in which he was involved with knowledge that there were insufficient funds in the accounts. He kited checks among his bank

accounts. He deposited in his own account checks which belonged to the clients of an attorney for whom he worked as an office manager. He forged his deceased mother's signature on a homestead exemption application and forged both of his deceased parents' signatures on a homestead application the following year.

The Florida Bar v. Diaz-Silveira, 557 So.2d 570 (Fla. 1990), is worlds apart from this case. There, the attorney was given a public reprimand and placed on probation for misconduct resulting from trust accounting irregularities. Three years later the Bar filed an eleven count complaint against him.

Count XI contained the most serious charges. The attorney issued 10 checks from his trust account which were dishonored because of insufficient funds. The trust account was overdrawn twenty times. The attorney issued 50 checks from his special trust account which were dishonored because of insufficient funds. This trust account was overdrawn twenty-three times.

The attorney issued 245 checks from his operating account which were returned because of insufficient funds. This account was overdrawn one hundred and fifteen times.

The attorney consistently failed to preserve the integrity of entrusted funds, co-mingling them with personal and operating account monies. He deposited clients' funds in the operating account and used them to satisfy personal and business obligations. He used additional clients' funds to pay obligations previously

incurred.

On at least two occasions the attorney used clients' funds for unrelated matters. When he finally paid the clients the checks were dishonored because of insufficient funds.

The attorney deposited a total of $30,000.00 in personal funds in his trust account in one month to cover shortages.

The attorney wrote eleven checks from his regular operating account to his trust accounts in one year which were dishonored because of insufficient funds. In every instance the attorney's regular bank balance was insufficient to cover the worthless checks and of five occasions the account was overdrawn.

The worthless checks the attorney deposited into his trust account increased his balance for a few days, until they were dishonored. This was an attempt to cover outstanding checks issued from the trust account, *i.e.*, check kiting.

C

MR. TURNER LIED TO, DECEIVED, AND STOLE FROM MR. KASSIER.

"'This case is not unlike that old adage or homily that "no good deed goes unpunished."'" *The Florida Bar v. Barcus*, 697 So.2d 71,75 (Fla. 1997).

There is no doubt that Mr. Turner, not Mr. Kassier, committed the dishonest acts:

> "Although I have recommended 'not guilty' on the charges involving dishonesty which have not been substantiated, I do find that the Respondent did, in

> fact, in many instances place his employee, T. Jonathan Turner, in a position to use the checks of the law firm in an inappropriate manner and that third parties were, in fact, damaged as a result. *However, I do not find as to these specific charges that the Respondent engaged in any dishonest act and that T. Jonathan Turner did, in fact, mislead the Respondent and abused the trust and confidence inappropriately placed in him by the Respondent. I find the testimony of T. Jonathan Turner is not credible nor worthy of belief."* (RR,pp.8-9) (Emphasis Added)
>
> The Referee also wrote that:
>
> "I note that most of the charges filed were those charging acts of dishonesty as to checks returned for 'insufficient funds' and 'account closed.' As to these charges, *I have found the Respondent 'not guilty' on the basis that those checks were, in fact, misused by his employee."* (RR,p.9) (Emphasis Added)

Margaret Rosenbaum, Mr. Kassier's wife, from whom he is separated, explained why she and Mr. Kassier became involved with Mr. Turner. They believe in rehabilitation (T.401).

Dr. Holly Schwartztol and Mr. Kassier talked about Mr. Kassier's involvement with Mr. Turner. The first time was in 1995. Mr. Kassier told her that he had helped Mr. Turner in legal matters and that he thought that Mr. Turner was a man who really wanted to rehabilitate himself. Mr. Kassier told her that Mr. Turner was going to be working with him in his office (T.42).

Mr. Kassier told her that he thought that it would be a win-win situation for both of them. Mr. Kassier was having difficulty with the management of his office from a business perspective, not from practicing, but with the nuts and bolts of running the office (T.43-44). Mr. Kassier told her that Mr. Turner said he had a lot

of experience in that area and that he could help him. Mr. Kassier said he was just going to give Mr. Turner a few things to start, things that Mr. Kassier was having trouble with, to ease Mr. Turner into helping him with the office (T.44).

Mr. Kassier told her about difficulties with Mr. Turner and the office. There were difficulties with other staff members. There were difficulties with checks that had been written of which Mr. Kassier was unaware. It seemed like little by little, it was dawning on Mr. Kassier that all kinds of things were happening, that this was permeating his relationships, business relationships and friendships, everything, that it was very, very serious (T.51). Mr. Kassier is a very intelligent man (T.51). Mr. Kassier told her that he was mistaken about Mr. Turner (T.52). She has seen this before. People can be very convincing but sometimes they are not what they seem to be. It is not a lack of intelligence that permits someone to become involved with people with whom they should not be involved. It happens all the time.

Mr. Kassier is a very trusting person (T.52). Mr. Kassier is a caring person (T.52-53). She knows of the kinds of people that Mr. Kassier has defended and what he has done for them over the years. She knows how he conceptualizes, both personally and professionally. If he has a flaw, it is that he looks for the very best in people, no matter what. He just keeps looking for the best. That is what happened here. Even though there were hints

along the way, maybe very large hints, Mr. Kassier kept feeling that well, no (T.53). Mr. Kassier believed in Mr. Turner and he believed that Mr. Turner really wanted to rehabilitate himself. Mr. Kassier kept looking for that piece rather than focusing as much as he might have on some of clues along the way (T.53-54).

She has seen Mr. Kassier regularly since May, 1997. He is presently taking Prozac, a moderate dose, fifty milligrams. It has been beneficial. Mr. Kassier is doing much, much better. She is very relieved, of course. It is not just the Prozac. Mr. Kassier is in individual and group therapy (T.54).

Mr. Kassier was scared to death by all of this (T.54-55). This was a terrifying experience for him and he was so depressed. Now, the depression is lifting and his whole thought process is becoming more aware and her sense is that he will not make this kind of error of judgment again (T.55).

Mr. Kassier's prognosis is excellent (T.55).

She recommends that Mr. Kassier remain in therapy for the foreseeable future and continue taking Prozac (T.55). Work is beneficial for Mr. Kassier (T.55).

Mr. Kassier testified that he thought that Mr. Turner could help him in the office and that he saw it as a chance to give Mr. Turner an opportunity to turn his life around (T.662).

The cases relied upon by the Bar or a far cry from this case.

In *The Florida Bar v. Dingle*, 235 So.2d 479 (Fla. 1970), the

attorney received $155.00 in trust for the purpose of buying title insurance. He co-mingled the $155.00 with his own funds. The client repeatedly requested the attorney to furnish the insurance or return the money. The attorney did not do so until several months after a complaint was made to the Bar. The attorney did not maintain a trust account, escrow account, or client's account in which to deposit trust funds.

The attorney also received a $700.00 check from an insurance carrier in settlement of a claim. The attorney obtained the client's endorsement on the check and gave the client his personal check for $420.00, the amount due the client after the attorney's fee was deducted. The attorney cashed the $700.00 insurance check. His personal check for $420.00 to the client was returned unpaid because of insufficient funds. The referee could not determine if restitution had been made.

The attorney had been suspended from federal practice by a federal district judge for failure to take an appeal in a criminal case in which he had represented the defendant. This Court then publicly reprimanded the attorney for his negligence of duty and unprofessional conduct.

The attorney admitted that he has always co-mingled his own funds with those of his clients and at the time of the hearing did not maintain a bank account of any kind because he had difficulties with the Internal Revenue Service.

The attorney said that he was honest but a poor bookkeeper.

In *The Florida Bar v. Hunt*, 441 So.2d 618 (Fla. 1983), the attorney had been disbarred. He also had received two private reprimands and a suspension for six months. He had been disbarred for practicing law in the form of a professional association in which non-lawyers were corporate officers and directors, practicing law while suspended for non-payment of his annual Bar dues, failing to promptly notify clients of the receipt of funds on their behalf, failing to account for and or deliver to them such funds, employing a disbarred attorney, his former partner, without providing the required reports to the Bar and allowing the disbarred attorney to be a signator on his trust account, instituting a frivolous action against his own client through another attorney, and permitting the disbarred attorney to practice law through his professional association.

When the attorney was suspended for violations of trust fund rules, he was ordered to wind up his practice and provide an accounting of his trust account to the Bar. He discovered that his trust account balance was zero. He testified that he had no reason to believe anyone other than his bookkeeper, his former partner who was disbarred at the time, had taken the money in the account. The former partner had disappeared.

The two counts in the case cited by the Bar involved the attorney's inability to account for funds given to him by clients.

The attorney instructed that the funds be placed in his trust account. However, he endorsed the checks in blank and someone, apparently the disbarred attorney, deposited the funds in the account of a business which he owned and operated. In the second count, a client gave the attorney $2,000.00 to hold in escrow pending closing on the sale of property. The attorney failed to turn the escrow funds over to the proper party when they came due. The funds had been deposited in the attorney's trust account but they became due after the attorney discovered that his trust account had been depleted.

The referee found that the attorney had failed properly to supervise the bookkeeping on his trust account. The attorney did not personally convert client funds but the referee found that his gross neglect of his trust account caused equally serious harm to the public.

In *The Florida Bar v. Graham,* 605 So.2d 53 (Fla. 1992), the attorney had been temporarily suspended because of allegations of theft of clients' funds, misrepresentations to the Bar during the disciplinary investigation, and a lack of trust account records and compliance with procedures.

The Bar then filed a formal complaint concerning the matters involved in the temporary suspension. The Bar charged the attorney with twelve counts of misconduct arising from theft of client funds, false representations to the Bar, and trust account

procedure violations.

The referee found that the attorney misappropriated $12,737.68 from settlement proceeds received on behalf of his client, an infant. The attorney lied to the Bar concerning disposition of the infant's settlement funds. The attorney wrote to the Bar that he held the infant's funds in a trust account. However, he had already misappropriated the funds for his own use. The attorney also falsely testified under oath that he had restored the misappropriated funds into a trust account. At the time of his testimony he had not done so. Additionally, after receiving the settlement fund the attorney failed to establish a guardianship account until his temporary suspension. He also failed to follow the trial court's order concerning the infant's claim by knowingly and deliberately making payments to the infant's mother without the guardianship court's permission.

The attorney also lied under oath that he had completely disbursed money that he had received for another client. At the time of his testimony an outstanding doctor's bill for $1,400.00 existed in the client's account. The $1,400.00 accounted for a portion of the $30,503.13 of the attorney's trust account shortages.

The attorney also co-mingled his personal funds with his operating account. He issued a worthless check in the amount of $25,000.00. He wrote four other checks which were dishonored for

insufficient funds. He also co-mingled his operating funds with his client trust account and a second client trust account in order to cover shortages.

The attorney also improperly allowed his wife, a non-lawyer, access to the operating account as a signatory. She issued 24 checks on the account which had no nexus to the attorney's practice. The attorney also failed to follow minimum trust accounting records and procedures.

Mr. Kassier's error was of the heart, not the head.

D

THE REMAINDER OF THE BAR'S ARGUMENTS ARE REPETITIOUS.

The remainder of the Bar's brief argues that misconduct not charged may be considered by the referee and that cumulative misconduct is punished more severely.

Here, there was only one knew check charge. It was resolved. Mr. Kassier's clients' files were in no jeopardy. Mr. Kassier complied with this Court's order, albeit tardily.

Moreover, these two charges occurred in the same general time period as those involved in Case No. 87,617 and involved Mr. Turner.

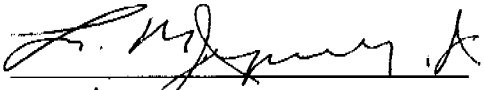
Additionally, at least mitigation standards 9.3(c), Personal or Emotional Problems, 9.3(f) Inexperience in the Practice of Law (Mr. Kassier had no experience in the business aspect of the practice of law until 1990), and 9.3(g), Character and Reputation are met.

CONCLUSION

This Court must remand this matter to the Referee with instructions to reassess costs and to assess costs against Mr. Kassier only on the counts for which he has been found guilty. This Court otherwise must approve the Report and Recommendation of the Referee.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing **Corrected Reply Brief and Cross-Answer Brief of Respondent, Andrew Michael Kassier** was mailed to **RANDI LAZARUS**, Bar Counsel, The Florida Bar, Suite M-100, Rivergate Plaza, 444 Brickell Avenue, Miami, Florida 33131 this 4th day of May, 1998.

By: 
Louis M. Jepeway, Jr.