IN THE SUPREME COURT OF FLORIDA

4-10 047

THE FLORIDA BAR,

Complainant,

vs.

CASE NO. 75,357
(TFB No. 87-27,956[13C])

FRANCIS R. MORSE,

Respondent
_____/

ANSWER BRIEF OF FRANCIS R. MORSE

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STATEMENT OF THE FACTS AND OF THE CASE

While The Florida Bar correctly stated most of the facts of the case, several inaccuracies appear which are not supported in the record.

Mr. Rockne Jordon was represented by the law firm of Slater and Morse, P.A. for injuries sustained in a motor vehicle accident. As correctly stated by The Florida Bar, Dennis Slater was the attorney who handled the Jordon claim. After negligently allowing the Statute of Limitations to expire, Slater brought the file to the Respondent and asked the Respondent to attempt to negotiate some sort of settlement with the insurance company. After contacting the insurance company, the Respondent learned that they were unwilling to pay anything on the claim because of the fact that the Statute of Limitations had run. At that time the Respondent wrote the following note dated February 4, 1986:

> "D (Dennis) -
> $2,500 offer is now -0-
> I will call cl (client) tonight and advise that he (adjustor) will not come above the $2,500 and he'll (the client will) have his check in a week - want to try for some kind of release form? F (Frank)" (R, Bar Composite Exhibit 5, TR, 37, L.12-25,p, 38, L.1).

Clearly, this indicates the Respondent **thought** about making misrepresentations to the client. There is nothing in the record to indicate that the Repondent ever made these, or any other, misrepresentations to the client. To the contrary, the testimony of Ms. Eileen Amtmann indicates that the Respondent referred the file back to Slater to take care of his own problem.

The Florida Bar indicates that either the Respondent or one of the Respondent's office staff **at the Respondent's direction** (emphasis added) contacted Mr. Jordon with regard to picking up a "settlement" check. There is nothing in the record to indicate that the Respondent personally contacted Mr. Jordon or personally directed anyone in the office to contact him.

Respondent signed a blank Slater and Morse, P.A. escrow check. The record clearly indicates that the Respondent was unaware that Mr. Jordon had been paid with an escrow check until August 15, 1989 at the Grievance Committee hearing. (GCH, p.64, L.1-6, L.8-11) Until that time, Respondent believed Mr. Jordon had been paid from the Operating Account which had sufficient funds.

The Florida Bar also indicates that Mr. Jordon did not realize that he could sue the law firm of Slater and Morse, P.A. for malpractice until after the Statute of Limitations expired on the malpractice claim. The malpractice occurred in December, 1985 or shortly thereafter. The Florida Bar Complaint Form signed by Mr Jordon on March 16, 1987 clearly indicates in question 2.(a) that Mr. Jordon had discussed this matter with his present attorney, Dan Grieco, Esquire prior to filing the Complaint. This was clearly within the Statute of Limitations prescribed by Florida law.

On October 22, 1990, a final hearing was held before the Honorable Stephen O. Rushing in regard to Mr. Jordon's complaint. Based on the totality of the circumstances, Judge

Rushing found the Respondent guilty of violating various Disciplinary Rules as outlined in the Initial Brief of The Florida Bar.

At the Disciplinary Hearing held on November 7, 1990, Judge Rushing recommended that the Respondent be disciplined by a ninety (90) day suspension which was suspended as well as being placed on one (1) year probation with conditions.

SUMMARY OF ARGUMENT

There is no question that the Respondent in this case failed to advise Mr. Jordon that the Statute of Limitations had run on his case. Likewise, it is clear that the Respondent failed to advise Mr. Jordon that a conflict had arisen and he should seek the advise of independent counsel. Nothing in the record, however, reflects that the Respondent intentionally made misrepresentations to the client. To the contrary, the record is clear that Slater was the attorney handling the file. Only after the Statute of Limitations had run did the Respondent receive the file from Slater. Respondent "thought" about deceiving the client, as indicated in his note of February 4, 1986. There is no evidence that the Respondent actually followed through. In fact, the record reflects that the Respondent returned the file to Slater to take care of the problem that he himself had created.

Furthermore, there is no indication that the Respondent **intentionally** prejudiced or damaged his client. Moreover, the Respondent was unaware that the escrow account check which he negligently signed in blank was used to pay Mr. Jordon for the firm's malpractice.

It is the Respondent's position that his misconduct does not warrant a suspended ninety (90) day suspension and probation with conditions. The Respondent's position is that the appropriate discipline would be a Private Reprimand plus one (1) year probation with the conditions as outlined by the Referee.

It should be noted that Judge Rushing has much

experience in this field and served as Assistant Staff Counsel for The Florida Bar for many years. In that capacity, he became very familiar with grievance proceedings and disciplinary sanctions.

Based on the Respondent's lack of prior discipline and the fact that there are no grievances pending against the Respondent clearly demonstrate that this was an isolated incident which was out of character for the Respondent. Respondent has admitted from the start of these proceedings that mistakes were made. Truly lessons have been learned.

A ninety (90) day suspension would destroy the Respondent's small personal injury law practice of approximately 250 clients. The harm done to these clients would be irreparable and is unwarranted.

Webster's Encyclopedic Dictionary of the English Language at (page 300, 1989 Edition) defines egregious as "flagrant." While the regretable conduct of the Respondent was negligent and careless, it was clearly not egregious. Therefore, the Respondent respectfully requests this Court to approve the Referee's recommendation of a suspended ninety (90) day suspension plus one (1) year probation with conditions or to reduce the Referee's recommendation to a Private Reprimand plus one (1) year probation with the conditions as stated.

A R G U M E N T

ISSUES: WHETHER A NINETY (90) DAY SUSPENSION, IMPOSITION OF WHICH IS SUSPENDED, PLUS ONE YEAR PROBATION IS APPROPRIATE DISCIPLINE FOR AN ATTORNEY WHO THOUGHT ABOUT MAKING MISREPRESENTATIONS TO A CLIENT WITHOUT ACTUALLY MAKING MISREPRESENTATION TO THE CLIENT WHO NEGLIGENTLY SIGNED A BLANK TRUST ACCOUNT CHECK WHICH WAS MISAPPLIED WITHOUT THE ATTORNEY'S KNOWLEDGE OR APPROVAL.

The Referee found that the Respondent made a negligent misrepresentation to his client, Rockne Jordon, by failing to advise Mr. Jordon of the fact that the Statute of Limitations had run in his cause of action against the ACMIG and its insured by: failing to advise Mr. Jordon of the fact that the Statute of Limitations had run on his claim; by failing to advise Mr. Jordon of the fact that his firm had committed malpractice by allowing the Statute of Limitations to run; by submitting a firm escrow account check to Mr. Jordan in an amount identical to that previously offered by the insurance company; and by failing to advise Mr. Jordan of the fact that the escrow account check was a sum being offered by the law firm in settlement of the claim rather then by AAA insurance company. (RR, p.2, paragraph 7)

Based on the totality of the circumstances, the Referee found that Mr. Jordon was prejudiced when he was not advised of the fact that Slater and Morse, P.A. had negligently failed to file a lawsuit against ACMIG and its insured within the Statute of Limitations and by failing to advise Mr. Jordon to seek legal counsel with regard to the legal remedies available to Mr. Jordon.

The Respondent's unknowing use of other clients' trust funds was inadvertent and unintentional. The record clearly reflects that the Respondent was unaware that Mr. Jordon had been paid with an escrow check until the Grievance Committee hearing on August 15, 1989. Furthermore, no other clients' trust account disbursements were adversely affected by the payment to Mr. Jordon out of the wrong account.

The Referee correctly made his recommendation of disciplinary sanctions after taking into account several factors which mitigated and aggravated the Respondent's misconduct. (RR, p.4, Paragraph V; DTR, p. 47, L 9-15). The mitigating factors found by the Referee in this case are as follows:

1. The Respondent did not have a prior disciplinary record;

2. The Respondent had a cooperative attitude toward the disciplinary proceedings;

3. The Respondent had been out of law school less than four (4) years at the time of the misconduct; and

4. The Respondent was under the influence of a senior attorney who had primary responsibilty for the Jordan case.

The Respondent suggests that the mitigating factors outweigh the aggravating factors and, therefore, the disciplinary sanctions imposed by the Referee are appropriate if not too severe.

The Respondent submits that the biggest mistake he made was associating himself with Slater. It is worthy to note

that the professional relationship between Slater and the Respondent was terminated two months after this incident.

It is a well established fact that the purpose of discipline is to train the mind and character in accordance with the rules to ensure obedient order and obedience. See Webster's Encyclopedic Dictionary of the English Language (p.270, 1989 Edition). The lack of a disciplinary record of the Respondent was extremely important and weighed heavily in the Referee's decision. The Respondent had no record of disciplinary proceedings prior to this incident and presently has no grievances pending against him. Considering that the Respondent practices primarily in personal injury, this record is quite remarkable to say the least.

Although the law firm of Slater and Morse, P.A. did commit malpractice, Mr. Jordon did consult with another attorney within the time-frame of the Florida Malpractice Statute of Limitations. Mr. Jordon clearly could have taken whatever action was appropriate in the eyes of his new attorney prior to the time he filed the grievance which was prior to the running of the Malpractice Statute of Limitations.

The citation by The Florida Bar of the misconduct of Mr. Brooks in The Florida Bar vs. Brooks, 504 So.2d 1227 (Fla. 1987) is easily distinguished from the Respondent's misconduct. Mr. Brooks made a continual misrepresentation to his client and on several occasions lied to his client about fictitious trial dates. The Supreme Court upheld the Referee's recommended

discipline citing the fact that Mr. Brooks was emotionally stressed at the time. The Respondent's conduct can clearly be distinguished from the Brooks case in that there was no evidence presented by The Florida Bar that the Respondent actually made any misrepresentations to Mr. Jordon. To the contrary, the evidence reflected that there were no subsequent conversations between Mr. Jordon and the Respondent and that the Respondent referred the case back to Slater for appropriate handling and took no further action on the matter.

While the Brooks case did not involve the misuse of trust funds, The Florida Bar states in its brief that the Respondent "knowingly or negligently" used other clients' funds to pay Mr. Jordon for the firm's malpractice. The distinction between "knowingly" or "negligently" is of great significance. While it is clear that the Respondent negligently signed a blank escrow account check, there was no evidence that said check was attached to this file or that the Respondent had any knowledge whatsoever that that particular blank check would ultimately be completed by office personnel and disbursed to Mr. Jordon. The record demonstrates that the Respondent would not have signed an escrow check if it had been filled in since Mr. Jordon was to be paid from the firm's Operating Account. (TR, p.56, L.13-16).

The Referee, after hearing all of the evidence, concluded that the Respondent was testifying truthfully inspite of the bookkeeper's testimony with regard to standard practice and procedure on ordinary cases. Obviously, this was not an

ordinary case. Therefore, the Referee was correct in finding that the payment to Mr. Jordon was not handled in the ordinary way.

The Respondent concedes that there was a misrepresentation by omission. That misconduct, however, is clearly distinguishable from the misconduct in Brooks wherein thoughts were translated to actions. Inspite of that fact, The Florida Bar seeks discipline which is far more severe than the discipline which was approved by the Supreme Court in Brooks. In fact the five day suspension imposed upon Mr. Brooks was less severe than the discipline recommended by the Referee.

The Florida Standards for Imposing Lawyer Sanctions (hereinafter referred to as The Standards) does not support the Bar's contention that the Respondent should be disciplined by, and required to serve, a ninety (90) day suspension.

Section 4.1 of The Standards, entitled "Failure to Preserve the Client's Property," provides that absent aggravating or mitigating factors, a suspension is appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential conflict to a client.

This standard is clearly not met in that the Respondent negligently signed a blank trust account check which inadvertently and unknowingly was applied to Mr. Jordon. Although the standard practice on ordinary cases may have been to submit blank escrow account checks with the file when the settlement funds are to be disbursed, there was no evidence that this was actually done in this case which was far from ordinary.

After hearing the testimony and observing the candor and demeanor of the Respondent, the Referee correctly concluded that he was being truthful. Unless this Court chooses to dispute the finding of fact by the Referee, his finding must stand.

Section 4.3 of The Standards, entitled "Failure to Avoid Conflict of Interest," provides that absent any aggravating or mitigating factors, a suspension is appropriate when a lawyer knows of a conflict of interest and does not fully disclose to the client the possible effects of that conflict and causes injury or potential injury to the client.

The Respondent concedes that he had an affirmative duty to advise Mr. Jordon of the conflict and to advise him to consult another attorney to obtain legal advice regarding his legal options at that time. (RR, p.3, paragraph II,8). The evidence indicates that the Respondent returned the file to Slater assuming that he would take the appropriate action based on his years of experience as an attorney. Unfortunately, Slater did not take the appropriate action. The Respondent concedes that he should have been up front with the client notwithstanding the fact that the case was Slater's responsibility. Mr. Jordon did, however, consult with an attorney within the 2-year Statute of Limitations. Accordingly, he could have filed the malpractice suit to have his day in court and ascertain the value of his claim.

Section 4.6 of The Standards, "Lack of Candor," provides that absent aggravating or mitigating factors, a

suspension is appropriate when a lawyer knowingly deceives a client, and causes injury or potential injury to the client.

The Respondent concedes that Mr. Jordon was deceived by not being advised that the Statute of Limitations had run and he had a potential malpractice suit against Slater and Morse, P.A. Mr. Jordon clearly had the opportunity to file a malpractice suit within the Statute of Limitations had he chosen to do so after consulting with another attorney prior to March, 1987.

Section 9.0 of The Standards, "Aggravation and Mitigation," sets forth factors that may justify an increase or decrease in the degree of discipline imposed against the attorney for unethical conduct. While The Standards may not list the Respondent's status as a much junior law partner to Slater, it is clear that the Respondent was an inexperienced attorney and, therefore, it is reasonable to assume he would rely upon advice from that senior attorney prior to taking any action.

The Respondent submits that the mitigating factors in this case certainly outweigh the aggravating factors. Therefore, the appropriate degree of discipline in this case should be to reduce the discipline recommended by the Referee or, at the very least, uphold his recommendation. In that this is obviously an isolated and uncharacteristic incident, justice will be served by imposing a Private Reprimand together with one (1) year probation with the conditions as recommended by the Referee. This will serve to appropriately punish the Respondent and monitor his practice for one (1) year to confirm that this was, in fact, an

isolated incident.

In that Slater is known by this Court and The Florida Bar to have a propensity toward untruthfulness coupled with the fact that Mr. Jordon had no recollection of any conversations with the Respondent, it is worthy to note that the Respondent could have been untruthful throughout these proceedings and exonerated himself. To the contrary, however, the Respondent has been candid and truthful throughout these proceedings as noted by the Referee. (RR, p.4, paragraph V.)(4) (2).

CONCLUSION

The Referee's recommended discipline in this case is inappropriate. While there was misconduct on the part of the Respondent, the mitigating factors clearly outweigh the aggravating factors. Let the punishment fit the crime.

WHEREFORE, the Respondent respectfully requests this Court to order that he receive a Private Reprimand and be placed on probation for one (1) year with the conditions as outlined by the Referee.

Respectfully submitted,

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