IN THE SUPREME COURT OF FLORIDA



THE FLORIDA BAR,

Complainant,

v.

FRANCIS R. MORSE,

Respondent.

----------/

Case No. 75,357
(TFB No. 87-27,956(13C))

# INITIAL BRIEF OF THE FLORIDA BAR

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## SYMBOLS AND REFERENCES

In this Brief, the appellant, The Florida Bar, will be referred to as "The Florida Bar" or "The Bar". The appellee, Francis R. Morse, will be referred to as "Respondent". "TR" will denote the transcript of the Final Hearing held before the Referee on October 22, 1990. "R" will refer to the record in this cause. "RR" will refer to the Report of Referee. "DTR" will denote the transcript of the Disciplinary Hearing held before the Referee on November 7, 1990.

## STATEMENTS OF THE FACTS AND OF THE CASE

On or before December 17, 1982, Rockne Jordon incurred personal injuries resulting from an auto/pedestrian accident in Michigan. The automobile driver involved in the accident was insured by the Automobile Club of Michigan Insurance Group (hereinafter referred to as ACMIG) and said company offered to pay Mr. Jordan $2,500.00 for the injuries he sustained in said accident. The insurance companies offer of settlement was not acceptable to Mr. Jordan thus, in April, 1985, Mr. Jordan retained the law firm of Slater and Morse, P.A. to represent him in a personal injury action against the insurance company and its insured. (TR,p.79,L.20-21,p.82,L.1-11; RR,p.1).

On July 31, 1985, the law firm of Slater and Morse, P.A. sent a demand letter to the ACMIG wherein a recommendation of settlement in the amount of $25,000.00 was made by the firm. A postscript at the end of the firm's demand letter advised the insurance company that if the company's offer of $2,500.00 was not increased significantly, the firm would associate Michigan co-counsel and file suit in Wayne County, Michigan. (R, Bar's Composite Exhibit 4). On August 20, 1985, a claims representative for the ACMIG sent a letter to the Respondent's law partner, Dennis Slater, and advised that the company's offer of settlement on Mr. Jordan's personal injury claim remained at $2,500.00. (R, Bar's Composite Exhibit 5).

Thereafter Dennis Slater, the attorney handling the Jordan claim, negligently allowed the statute of limitations to expire

on Mr. Jordan's claim. (TR,p.14,L.22-25,p.15,L.1-7). After Mr. Slater determined that the statute of limitations had expired on Mr. Jordan's claim, he took the Jordan file to the Respondent and asked the Respondent to attempt to negotiate some sort of settlement with the insurance company. (TR,p.32,L.20-24, p.34,L.5-12).

On or about February 4, 1986, the Respondent contacted the insurance company hoping that the company might have overlooked the fact that the statute of limitations had run. The Respondent spoke with an agent from the insurance company in an effort to settle Mr. Jordan's claim for $2,500.00 however, the agent advised the Respondent that an offer would not be made due to the fact that the statute of limitations had run. (TR,p.34,L.11-25, p.35,L.1-4). After speaking with the agent for the insurance company, the Respondent wrote a note to Dennis Slater dated February 4, 1986, which stated as follows:

> "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).

Thereafter, either the Respondent or one of the Respondent's office staff at Respondent's direction, contacted Mr. Jordan and advised Mr. Jordan that he could come to the office and pick up a settlement check on his personal injury claim against ACMIG. (TR,p.41,L.19-23, p.42,L.8-10, p.86,L.14-19). Mr. Jordan never

authorized the law firm of Slater and Morse, P.A. to settle his personal injury action for the sum of $2,500.00 or any other figure. (TR,p.66,L.13-15, p.87,L.4-7). In addition, Mr. Jordan was never advised of the fact that the law firm had allowed the statute of limitations to run on his claim. Mr. Jordan was also never advised, by the Respondent, of the fact that the law firm had committed malpractice and was therefore willing to pay Mr. Jordan the sum of $2,500.00 in settlement of his claim. Further, Mr. Jordan was never advised by the Respondent to consult with another attorney in regard to his legal remedies regarding the firm's malpractice. (TR,p.42,L.12-21, p.43,L.21-25, p.44,L.1-2, p.89,L.4-25). The law firm of Slater and Morse, P.A. did not have malpractice insurance due to Mr. Slater's disciplinary record with The Florida Bar. (TR,p.43,L.3-7).

On or about February 25, 1986, a Slater and Morse, P.A. escrow account check in the amount of $2,500.00 was made to the order of Rockne Jordan. The escrow account check indicated that the check was for a "final recovery" and it was signed by the Respondent. (R, Bar Exhibit 6). The Respondent testified at the Final Hearing that he signed the escrow check when it was blank. (TR,p.58,L.1-20). There were no trust funds belonging to Mr. Jordan in the Respondent's escrow account at the time that the escrow account check for $2,500.00 was issued. (TR,p.54,L.20-23).

On or after February 25, 1986, Mr. Jordan, as directed, went to the Respondent's law office to pick up the "settlement" check

on his personal injury claim. The Respondent's entire office staff was aware of the firm's malpractice in the Jordan case and was instructed, with Respondent's knowledge, not to let Mr. Jordan know that the firm was paying the purported settlement sum of $2,500.00 on the personal injury claim. (TR,p.118,L.3-11). When Mr. Jordan went to the Respondent's law office to pick up the check, he received the same in an envelope. Mr. Jordan opened the envelope when he got in his car to leave. He was surprised to see a check for only $2,500.00 since the insurance company offered $2,500 prior to the involvement of Slater and Morse, P.A. In addition, Mr. Jordan noticed that the settlement check was drawn on an account belonging to the law firm of Slater and Morse, P.A. rather than an account belonging to ACMIG (TR,p.87,L.8-25). Thereafter, Mr. Jordan contacted the insurance company and was eventually advised that the statute of limitations had run on his claim and that they were free of liability and had not paid on the claim. (TR,p.89,L.4-21). Sometime later, Mr. Jordan discovered that he could sue the law firm of Slater and Morse, P.A. for malpractice in regard to his personal injury action. However, at the time that Mr. Jordan realized the same, the statute of limitations had expired on the malpractice claim. (TR,p.91,L.6-15,p.92,L.5-6).

On or about March 16, 1987, Mr. Jordan filed a complaint against the Respondent with The Florida Bar. (R, Respondent's Exhibit 1). On January 24, 1990, The Florida Bar filed a complaint against the Respondent with the Supreme Court of

Florida. On October 22, 1990, a Final Hearing was held before the Honorable Stephen O. Rushing in regard to Mr. Jordan's complaint. At the conclusion of the Final Hearing the Referee found the Respondent guilty of violating Disciplinary Rule 1-102(A)(4), Code of Professional Responsibility in effect prior to January 1, 1987 (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); Disciplinary Rule 1-102(A)(6), Code of Professional Responsibility in effect prior to January 1, 1987 (a lawyer shall not engage in any other conduct that adversely reflects on his fitness to practice law); Disciplinary Rule 7-101(A)(3), Code of Professional Responsibility in effect prior to January 1, 1987 (a lawyer shall not intentionally prejudice or damage his client during the course of the professional relationship); Rule 5-1.1, Rules of Discipline (Integration Rule 11.02 (4) prior to January 1, 1987) (money or other property entrusted to an attorney for a specific purpose, including advances for costs and expenses is held in trust and must be applied only to that purpose);and Rule 5-1.1(a) (Integration Rule 11.02 (4)(b) prior to January 1, 1987) (any bank or savings and loan association account maintained by a member of The Florida Bar to comply with Rule 4-1.15, Rules of Professional Conduct, is and shall be clearly labelled and designated as a trust account).

On November 7, 1990, a Disciplinary Hearing was held in this cause. During the disciplinary hearing, Bar Counsel asked the Referee to discipline the Respondent by suspending him from the

practice of law for ninety (90) days. At the conclusion of the disciplinary hearing, the Referee recommended that the Respondent be disciplined by a ninety (90) day suspension. However, he also recommended that the imposition of the sanction be suspended. In addition, the Referee recommended that Respondent be placed on one (1) year probation with the following three (3) conditions:

1. If a finding of probable cause is made by a Grievance Committee during the period of probation, the suspended ninety (90) day suspension shall be immediately imposed on Respondent;

2. Respondent's trust account shall be audited by The Florida Bar at the beginning of the probationary period, and at three (3) month intervals thereafter during the period of probation; if one of the audits concludes that Respondent's trust account is not in substantial compliance with Chapter 5, Rules Regulating Trust Accounts, Respondent shall immediately be suspended for a ninety (90) day period; and

3. Payment of costs of the Bars proceedings.

The Florida Bar Board of Governors reviewed the Report of Referee and voted to seek a ninety (90) day suspension; one (1) year probation with a condition of probation being that the Respondent submit to and pay for quarterly trust account audits by The Florida Bar with the first audit occurring at the beginning of the probationary period; and payment of the Bar's costs in the disciplinary proceeding.

## SUMMARY OF ARGUMENT

The Respondent in this case intentionally made misrepresentations to his client by failing to advise his client of all the pertinent facts regarding the status of the client's case. In addition, the Respondent intentionally prejudiced or damaged his client. Further, the Respondent used other clients' trust funds to pay for his firm's malpractice.

It is the Bar's position that the Respondent's misconduct warrants a ninety (90) day suspension notwithstanding the mitigating factors found by the Referee. The Bar's position is supported by case law and The Standards for Imposing Lawyer Sanctions. There is no justification nor precedence for the Referee's recommendation that the Respondent not be required to serve the recommended sanction in this case of a ninety (90) day suspension.

In addition, the Referee's recommended discipline fails to achieve the purpose for which disciplinary sanctions are ordered by this Court.

The Respondent's egregious misconduct in this case is a disgrace to the legal profession. Therefore, The Florida Bar respectfully requests this Court to disapprove the Referee's recommendation that the Respondent not be required to serve the recommended discipline of a ninety (90) day suspension, and suspend the Respondent from the practice of law for ninety (90) days and require him to serve one (1) year probation and pay the Bar's costs incurred during the disciplinary proceeding.

## ARGUMENT

ISSUE: WHETHER A NINETY (90) DAY SUSPENSION, IMPOSITION OF WHICH IS SUSPENDED, PLUS ONE (1) YEAR PROBATION, IS A SUFFICIENT DISCIPLINARY SANCTION FOR AN ATTORNEY WHO MAKES A MISREPRESENTATION TO HIS CLIENT; INTENTIONALLY PREJUDICES OR DAMAGES HIS CLIENT DURING THE COURSE OF THE PROFESSIONAL RELATIONSHIP; AND USES OTHER CLIENTS' TRUST FUNDS TO PAY FOR HIS FIRM'S MALPRACTICE.

The Referee found the Respondent made an intentional misrepresentation to his client, Rockne Jordan, by failing to advise Mr. Jordan of the fact that the statute of limitations had run on his cause of action against the ACMIG and its insured; by failing to advise Mr. Jordan 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 ACMIG; and by failing to advise Mr. Jordan of the fact that the escrow account check was a sum being offered by Slater and Morse, P.A. in settlement of the claim rather that by the ACMIG. (RR,p.2, paragraph 7). In addition, the Respondent intentionally prejudiced his client during the course of the professional relationship by consciously and deliberately failing to advise Mr. Jordan of the fact that Slater and Morse, P.A. had negligently failed to file a lawsuit against the ACMIG and its insured, within the statute of limitations and by failing to advise Mr. Jordan to seek legal counsel with regard to the legal remedies available to Mr. Jordan. (RR, p. 2,3, paragraph 8).

Further, the Respondent used other clients' trust funds to pay for his firm's malpractice by issuing a $2,500 check to Mr. Jordan from his trust account, which was improperly labeled as an "escrow account", at a time when there were no funds belonging to Mr. Jordan in said account. (RR, p.3, paragraph 9). The Respondent's misconduct warrants a ninety (90) day suspension plus one (1) year probation and assessment of costs.

The Referee in the instant case recommended that the Respondent be disciplined by a ninety (90) day suspension, imposition of which he recommended be suspended, plus one (1) year probation. (RR, p.4, paragraph IV). The Referee made said recommendation after taking into account several factors which he considered in mitigation and in aggravation of 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 responsibility for the Jordan case. (RR, p.4, paragraph V(4)).

At the conclusion of the disciplinary hearing in this cause, the Referee stated that "without some of the mitigating factors

that are present in this case, I would be inclined to give a suspension of longer than ninety (90) days so that there wouldn't be automatic reinstatement". (DTR,p.47,L.10-14). The Bar submits that the mitigating factors found by the Referee are not sufficient to justify suspending the imposition of a ninety (90) day suspension against Respondent.

The Bar concedes that the Respondent was an inexperienced attorney at the time of the misconduct in this case. However, the Respondent was not a young naive attorney. The Respondent was approximately forty (40) years old when he engaged in the misconduct in this case. (RR, p.4, paragraph V(1)). Furthermore, legal experience is not required to avoid violating the rules with which Respondent has been charged.

The Bar also concedes that Respondent's law partner, Dennis Slater, was a senior attorney to Respondent and responsible for the Jordan case. However, when the Respondent first met Mr. Slater in the spring of 1983, Mr. Slater was suspended from the practice of law for unethical behavior and the Respondent was aware of the suspension. (TR,p.18,L.16-18). In addition, when the Respondent began working with Mr. Slater, he was well aware of Mr. Slater's bad reputation in the legal community for ethics and morals. (TR,p.19, L.2-7). Further, the Respondent never testified, and the record is devoid of any evidence to suggest, that Mr. Slater influenced, directed or advised the Respondent to deceive, or mislead, Mr. Jordan in regard to the status of Mr. Jordan's claim.

The aggravating factors found by the Referee are as follows:

1. The Respondent had a dishonest or selfish motive; and

2. The Respondent engaged in multiple offenses. (RR,p.4, paragraph V(5).

The Respondent had a dishonest or selfish motive to intentionally deceive and/or misrepresent facts to Mr. Jordan in regard to the status of Mr. Jordan's personal injury claim since Slater and Morse, P.A. did not have malpractice insurance due to Mr. Slater's disciplinary record. (TR,p.43, L.3-7). The Respondent's law firm may have been potentially liable for any judgment that Mr. Jordan may have been able to obtain through a malpractice action. However, since Respondent failed to advise Mr. Jordan to seek other counsel in regard to the firm's malpractice, Mr. Jordan was not aware of the fact that he could sue Slater and Morse, P.A. for malpractice until after the statute of limitations ran on the malpractice cause of action. (TR,p.91, L.9-25, p.92,L.1-17). As for the aggravating factor of "multiple offenses", the Respondent not only engaged in a misrepresentation to his client, but he also intentionally prejudiced or damaged his client by failing to advise Mr. Jordan of his firm's conflict of interest as a result of the firm's malpractice. Also he had a serious trust accounting violation in that other clients' trust funds were used to pay for the firm's malpractice. It is the Bar's position that the aggravating factors in this case offset, if not outweigh, the mitigating factors considered by the Referee. Clearly, the imposition of a

ninety (90) day suspension should not be suspended as recommended by the Referee.

In addition, a ninety (90) day suspension with the imposition of said sanction being suspended, plus one (1) year probation, fails to achieve the purpose for which disciplinary sanctions are ordered by this Court in that it is not fair to society, it is not sufficient to punish the breach of ethics by Respondent, and it is not a severe enough sanction to deter others who might be prone or tempted to become involved in like violations. The Florida Bar v. Pahules, 233, So.2d 130 (Fla. 1970).

Further, neither The Florida Bar Rules of Discipline nor case law provide for the suspension of a disciplinary sanction imposed against an attorney for unethical conduct.

The Respondent's misconduct in this case is comparable to the misconduct of Mr. Brooks in The Florida Bar v. Brooks, 504 So.2d 1227 (Fla. 1987). Mr. Brooks was retained by Merril Marty to litigate an employment discrimination case. Ms. Marty's case was dismissed without prejudice due to Mr. Brooks' failure to file a pre-trial stipulation in the case within thirty (30) days and for failing to respond within fifteen (15) days to the Magistrate's Order to Show Cause. Mr. Brooks did not inform his client of the dismissal of her case. Instead, Mr. Brooks continually misrepresented to his client that the case was active and progressing. In addition, on several occasions, Mr. Brooks informed his client of certain fictitious trial dates and then

cancelled the same with his client shortly before the client was to appear for the trial. The Referee found Mr. Brooks guilty of violating the former Disciplinary Rule 1-102(A)(4) for engaging in conduct involving deceit and misrepresentation; former Disciplinary Rule 6-101(A)(3) for neglecting a legal matter entrusted to him; and former Disciplinary Rule 7-101(A)(1) for failing to seek the lawful objectives of his client. Noting that Mr. Brooks was emotionally stressed at the time of the disciplinary violations, the Referee recommended that Mr. Brooks receive a public reprimand and a five (5) day suspension with automatic reinstatement. The Supreme Court upheld the Referee's recommended discipline.

As in Brooks, the Respondent engaged in misrepresentations to Mr. Jordan in regard to the status of the client's case. The Bar recognizes that Mr. Brooks actively misrepresented facts to his client whereas, the Respondent engaged in a misrepresentation by failing to advise his client of all pertinent facts regarding his case. Regardless of this fact, the clients of Mr. Brooks and the Respondent were deceived by the misrepresentations of their attorney.

A distinguishing factor between Brooks, and the case sub judice is that Brooks' misconduct did not prejudice his client since the client's case was dismissed without prejudice and could be refiled. Although the Respondent was not responsible for neglecting Mr. Jordan's case by allowing the statute of limitations to run, he was responsible for intentionally

prejudicing and/or damaging Mr. Jordan by consciously and deliberately failing to advise his client that the firm had negligently failed to file suit within the statute of limitations, and by failing to advise Mr. Jordan to seek legal counsel with regard to the legal remedies available to him. (RR, p.3, paragraph II,8).

An additional distinguishing factor between Brooks and the case sub judice is that Brooks did not misuse client trust funds. The Respondent knowingly or negligently used other client trust funds to pay Mr. Jordan for the firm's malpractice. (TR,p.52, L.16-21,p.53,L.4-8,p.58,L.1-25,p.59,L.1-8). The Respondent attempted to avoid responsibility for this serious infraction by testifying during the Final Hearing in this cause, that he must have signed the escrow account check made payable to Mr. Jordan, prior to the check being made out, because he never would have executed the escrow check if it had been filled in since Mr. Jordan was to be paid from the firm's operating account. (TR,p.56,L.13-16). The Referee in this cause accepted as true the Respondent's testimony in regard to executing a blank escrow account check. However, the following testimony by the Respondent in response to questions propounded by Bar Counsel establishes that it was the Respondent's bookkeeper's practice to attach the blank escrow account check to the client's file:

> Q. (By Mr. (sic) Bloemendaal) Was it your custom to sign blank checks?
> A. On occasion we would do that. On occasion if the bookkeeper -- because the

> bookkeeper only worked part-time, she only came in like three days a week. If a case got ready for disbursement like on Monday and -- I don't remember what day she worked, but let's say she worked Tuesday. I think she worked Monday, Tuesday, and Thursday. So let's say that this check got ready for disbursement over the weekend or on a Wednesday. The file may be brought into me with the appropriate number of trust account checks for disbursement and I would sign the checks. I wouldn't go through and fill it out because we had a bookkeeper. Then those signed checks would go to the bookkeeper who would fill in the amounts based on the closing statements. (emphasis supplied) (TR,p.58,L.18-25,p.59, L. 1-8).

By his own testimony, Respondent would not have executed a blank escrow account check without having a client file attached to the check. One can only conclude that, at the very least, Respondent knew that the check was related to the Rocky Jordan matter.

Another distinguishing factor is that unlike Brooks, there was no evidence in this case indicating that the Respondent was emotionally stressed at the time of the misconduct.

A further distinguishing factor between Brooks, and the instant case is that Mr. Brooks made misrepresentations to his client to cover up his neglect whereas the Respondent made misrepresentations to Mr. Jordan not only to cover up his firm's neglect but also to avoid financial liability for his firm's malpractice. (TR,p.175,L.14-17). Also, not only Respondent, but everyone in Respondent's office, was aware of the conspiracy to deceive Mr. Jordan and were instructed with Respondent's knowledge, not to let Mr. Jordan know that the firm was paying

the purported settlement sum of $2,500. During the Final Hearing in this cause, the Respondent's own witness, Eileen Atman, supported the accuracy of this fact by testifying as follows in response to questions propounded by the Respondent's attorney, Mr. Mirk:

> Q. Okay, Did anyone ever tell you that either Mr. Morse or Mr. Slater were trying to hide from Mr. Jordan the fact that a mistake had been made with the case?
> A. No. No one ever said they were trying to hide it. It was just more or less we'll get him to take the $2500 and not -- you know, it was kind of indicated get him to take the $2500 and not let him know that the firm was paying him the $2500.
> Q. Okay, And who indicated that to you?
> A. I really don't remember. It was just -- it was like something that was going on in the office that everybody was aware of it but you don't remember who told you or the exact, you know, person telling you. (Emphasis supplied) (TR, p.17,L.24-25, p.18, L.1-11).

Clearly, the Respondent engaged in a misrepresentation by omission in order to avoid the possibility of being liable to Mr. Jordan for more than $2500 which was a settlement sum that Mr. Jordan never authorized.

The Respondent's misconduct in this cause is more egregious than the misconduct of Mr. Brooks, yet the recommended discipline in this case is not as severe as the discipline imposed against Mr. Brooks since the referee in this case recommended that imposition of the recommended sanction of a ninety (90) day suspension against Respondent be suspended. Mr. Brooks was suspended from the practice of law for five (5) days and required to serve the same therefore, the Respondent should not be

permitted to avoid serving the recommended suspension in this case.

The Florida Standards for Imposing Lawyer Sanctions (hereinafter referred to as The Standards) also supports 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 injury to a client.

Clearly the Respondent knew or should have known that he was dealing improperly with client trust funds when he executed an allegedly blank "escrow account" check since it was the bookkeeper's practice to attach the client file to the blank check. (TR,p.58,L.18-29, p.59,L.1-8). The Respondent's misconduct was at the very least, grossly negligent and potentially could have caused injury to a client unrelated to the Jordan case since there were no funds belonging to Mr. Jordan in the trust account.

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

to the Respondent's firm when Mr. Slater negligently allowed the statute of limitations to run on Mr. Jordan's claim. (RR,p.2, paragraph II,8). The Respondent had an affirmative duty to advise Mr. Jordan of the conflict and to advise him to consult another attorney to obtain legal advise regarding his legal options at that time. (RR, p.3, paragraph II,8). The Respondent intentionally failed to advise Mr. Jordan of the firm's conflict of interest, which caused actual injury or prejudice to Mr. Jordan since Mr. Jordan was not aware that he could sue the firm for malpractice until after the statute of limitations ran on the malpractice claim. Further, Mr. Jordan was never given his day in court and will never know the value of his personal injury claim or his malpractice 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 knowingly and intentionally deceived Mr. Jordan by failing to advise his client of all pertinent facts regarding the status of his claim against ACMIG. The Respondent's conduct injured Mr. Jordan in that Mr. Jordan will never know the true value of his claim against the ACMIG. (TR,p.125,L.9-11).

Section 9.0 of The Standards, "Aggravation and Mitigation", sets forth factors that may justify an increase or decrease in the degree of discipline to be imposed against an attorney for unethical conduct. The Referee found four (4) mitigating

factors, three (3) of which are set forth in the above referenced section of The Standards and two (2) aggravating factors, both of which are included in Section 9.0 of The Standards. The mitigating factor in this case that "the Respondent was under the influence of his law partner Dennis Slater, who was a senior attorney to Respondent and responsible for the Jordan file", is not recognized by The Standards as a mitigating factor which should be considered by a Referee. Nor is there any basis in the record to conclude that Mr. Slater influenced Respondent's actions in this matter.

It is the Bar's position that the aggravating factors in this case offset, if not outweigh, the mitigating factors. Therefore, the appropriate degree of discipline in this case should not be decreased and the Respondent should be required to serve a ninety (90) day suspension from the practice of law, plus one (1) year probation, with a condition of probation being that the Respondent be required to submit to and pay for quarterly audits by The Florida Bar beginning with the commencement of the probationary period.

There is no justification for the Referee's recommendation that the Respondent not be required to serve the recommended sanction of a ninety (90) day suspension, especially in light of the Referee's position that absent the mitigating factors in this case a suspension of more than ninety (90) days would have been appropriate for Respondent's misconduct.

## CONCLUSION

The Referee's recommended discipline in this case is inappropriate due to the serious nature of the Respondent's misconduct, the injury to Respondent's client, and the lack of meaningful and sufficient mitigation.

WHEREFORE, The Florida Bar respectfully requests this Court to suspend Francis R. Morse from the practice of law for a period of ninety (90) days and place him on probation for one (1) year, with a condition of probation being that the Respondent submit to and pay for quarterly trust account audits by The Florida Bar, with the first audit occurring at the commencement of the probationary period. In addition, The Florida Bar requests this Court to require the Respondent to pay for the Bar's costs associated with this disciplinary proceeding.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief has been furnished by Certified Mail, Return Receipt Requested P 300 207 022, to Francis R. Morse, at 610 W. Waters Avenue, Suite A, Tampa, FL 33604; and a copy to John T. Berry, Staff Counsel, The Florida Bar, Ethics and Discipline Department, 650 Appalachee Parkway, Tallahassee, Florida 32399-2300, this 25th day of February, 1991.

Bonnie L. Mahon

BONNIE L. MAHON