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IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

DANIEL FOSTER JOY,

Respondent.

CASE NO. 85,422
TFB NOS. 94-10,671(12C)
94-11,328(12C)

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THE FLORIDA BAR'S INITIAL BRIEF

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SYMBOLS AND REFERENCES

In this Brief, The Florida Bar, will be referred to as "The Florida Bar" or "The Bar". The respondent, DANIEL FOSTER JOY, will be referred to as "Respondent". "T" will refer to the transcript of the final hearing before the Referee in Supreme Court Case No. 85,422 held on August 7-8, 1995. "T2" will refer to the transcript of the disciplinary hearing held on this case on January 8, 1996. "TFB Exh" refers to exhibits presented by The Florida Bar at the final hearing. "Resp. Exh" refers to exhibits presented by Respondent, Daniel Foster Joy.

The Report of Referee dated January 12, 1996, will be referred to as "RR". "Standards" will refer to the Florida Standards Imposing Lawyer Sanctions. "Rule" or "Rules" will refer to the Rules Regulating The Florida Bar.

STATEMENT OF THE FACTS AND CASE
CASE NO. 85,422

The Florida Bar adopts the findings of fact of the Referee as follows: Since approximately 1985, Respondent performed legal services for many corporations and partnerships with which Irwin Cantor (hereinafter referred to as "I. Cantor") was associated. (T., pp. 75, 351-352). Respondent also represented many of the corporations and partnerships with which I. Cantor's son, Joel Cantor (hereinafter referred to as "J. Cantor"), was associated. (T., p. 75, 352). In addition, Respondent and/or his law firm represented I. Cantor and J. Cantor on personal legal matters. (T., p. 352,366,367). Sam Cohen (hereinafter referred to as "Cohen") has been a business associate of I. Cantor and J. Cantor since approximately May, 1988, when Cohen first invested in some properties with I. Cantor. (T., p. 279). Cohen became acquainted with Respondent at that time because Respondent was the Cantors' attorney. Respondent and Cohen later became good friends. (T., pp. 279, 281-282, 353-354). In January of 1990, Respondent and/or his firm represented Cohen on an individual basis. (T., p. 368).

Morrison Court, Inc. (hereinafter referred to as "Morrison Court") was one of many Cantor/Cohen corporations engaged in the business of purchasing and managing real estate. (T., p. 72). Morrison Court was incorporated in October, 1990, by Respondent's then law partner, W. Peyton Gause, Jr. (T., pp. 71, 351, and Resp's Exh. #51). The initial Articles of Incorporation were filed with the Florida Secretary of State on November 1, 1990. (Resp's Exh. #41). Cohen was the sole initial director and president of Morrison Court. (T., pp. 70-71, 276 and Resp's Exh. #41). The initial shareholders of Morrison Court were I. Cantor, J. Cantor, Cohen, and two other investors. (T., p. 71). Shortly after incorporation, Morrison Court purchased the Morrison Court Apartments from G & O Properties (hereinafter referred to as "G & O") for approximately one million one hundred thousand dollars $1,100,000.00). (T., p. 72). The first mortgage on the property of approximately $900,000.00 was held by the Resolution Trust Company (hereinafter referred to as "RTC"). (T., p. 72). Morrison Court gave a second mortgage on the property to G & O for approximately $150,000.00 and paid G & O approximately $57,000.00 in cash, including closing costs. (T., p. 72).

On July 29, 1991, the Morrison Court Apartments were completely destroyed by fire. (T., pp. 71-72, 277). Midland Risk Insurance Company (hereinafter referred to as "Midland Risk"), the insurance carrier for the Morrison Court Apartment property, initially denied payment of Morrison Court's claim of loss due to suspicions of arson. (T., pp. 73, 278).

In approximately September 1991, J. Cantor, on behalf of Morrison Court, retained Respondent to pursue Morrison Court's claim against Midland Risk for the insurance proceeds. (T., pp. 75-76). Morrison Court initially agreed to pay Respondent $1,500.00 per month with the billings in excess of that amount to accrue monthly and be paid out of the proceeds of any subsequent recovery. (T., pp. 75, 356). In addition, Respondent was to receive five per cent (5%) of any net recovery by Morrison Court. (T., p. 75). Respondent's legal fees and costs were to be paid by the shareholders according to their respective interests in Morrison Court because the corporation had no rental income or funds with which to pay Respondent's fees and costs after the fire. (T., pp. 76-77).

In or about December, 1991, Respondent filed a complaint against Midland Risk on behalf of Morrison Court. Respondent also filed a complaint for declaratory judgment against the mortgagees, the RTC and G & O, for a judicial determination of whether either was entitled to any part of the insurance proceeds. (T., p. 78, 252 and Resp. Exh. #51).

In or about January, 1992, J. Cantor purchased his father's interest in Morrison Court and became president of the corporation. (T., pp. 70-71, 77). In approximately February and March, 1992, J.

Cantor made payments to Respondent for legal fees and costs without contribution by Cohen. (T., p. 77).

In or about January, 1992, Thomas Smith, Esq., (hereinafter referred to as "Smith") filed on behalf of G & O, its answer, cross claim to perfect an interest in the insurance proceeds and counterclaim to foreclose its mortgage on the property. (T., p. 223). The RTC likewise filed its answer and affirmative defenses and removed the case to federal court.

In or about May, 1992, J. Cantor purchased the interests of the two other shareholders in Morrison Court, leaving only J. Cantor (the majority shareholder and president) and Cohen (the minority shareholder) as owners of Morrison Court. (T., pp. 79-80).

In the early part of 1992, after several articles about the Cantors appeared in the *St. Petersburg Times*, Respondent began to develop a distrust of the Cantors and to doubt their capacity for truth and veracity. (T., p. 375). Respondent began to believe the Cantors to be corrupt, untrustworthy, and dishonest. (T., pp. 282, 306, 423).

By July, 1992, Morrison Court was delinquent in its monthly payments to Respondent and owed Respondent approximately $12,000.00 in legal fees. (T., p. 84). By a letter dated April 15, 1992, to

J. Cantor, Respondent demanded that Morrison Court live up to its agreement. (TFB Exh. #5). Thereafter, Respondent withdrew from the representation of Morrison Court. (T., p. 83). Respondent then sued the Cantors, Morrison Court, and Summerfield Mortgage Holding Company (a company owned by I. Cantor and Cohen) for unpaid legal fees and costs, plus interest, for a total in excess of $80,000.00. (T., pp. 365-366, 373). At that time, I. Cantor no longer held stock in his name in Morrison Court and J. Cantor did not own stock in Summerfield Mortgage. (T., p. 84). The $80,000.00 total represented fees and costs incurred by not only Morrison Court, but by Summerfield Mortgage and the Cantors individually. (T., pp. 366-367).

Respondent remained friends with Cohen after his withdrawal from representation of Morrison Court and they had on-going discussions about the Cantors. (T., p. 283). Respondent, however, distrusted the Cantors and frequently spoke to Cohen about the Cantors in a derogatory manner. (T., pp. 282, 378-379).

In or about July, 1992, Morrison Court retained Stanford Solomon (hereinafter referred to as "Solomon") and his law partner, Timothy Sweeney (hereinafter referred to as "Sweeney"), to represent its interests in the Midland Risk litigation. (T., p. 85).

In or about March, 1993, however, a settlement agreement was reached between Joy & Moran and Morrison Court, Summerfield Mortgage, I. Cantor, and J. Cantor regarding the outstanding legal fees whereby Respondent agreed to resume representation of Morrison Court regarding its law suit against Midland Risk. (T., pp. 85-87, TFB Exh. # 6). The settlement agreement provided that Respondent was to receive 20% of the first $200,000.00 and 15% of any additional recovery by Morrison Court relative to the insurance proceeds litigation with Midland Risk by Morrison Court. (T., p. 86, TFB Exh. #6). Pursuant to the settlement agreement regarding the outstanding legal fees, J. Cantor, as president of Morrison Court, executed a promissory note in favor of Joy & Moran in the amount of $40,000.00 to be payable from either the insurance proceeds or the sale of any asset belonging to Morrison Court. (T., pp. 86-88, TFB Exh. #7). The settlement agreement additionally provided that Respondent was to be lead counsel and Solomon and Sweeney were to assist as co-counsel. (TFB Exh. #6).

Both before and after Respondent resumed representation of Morrison Court, Cohen and Respondent had conversations regarding their concerns that any funds received by Morrison Court from Midland Risk in settlement or at trial would be siphoned off by the Cantors for their own personal purposes. (T., pp. 321-323, 370-

373, 380). After Respondent resumed representation of Morrison Court, Respondent provided Cohen with blind copies of correspondence between the Cantors and Respondent, and other attorneys associated with the litigation, without the knowledge of J. Cantor. (T., pp. 206, 285, 379-380). Respondent testified that he provided blind copies to Cohen because he knew the Cantors and Cohen had a falling out. (T., pp. 379-380). It was at this time that Cohen and Respondent began discussing that Respondent would endeavor to protect Cohen's interest in the insurance proceeds and Morrison Court against misuse by the Cantors. (T., pp. 284, 380).

In the summer of 1993, Respondent began to seriously negotiate a settlement with Midland Risk's attorney, as well as the attorneys for the mortgagees, the RTC and G & O Properties. Several failed attempts were made at reaching a settlement by the parties, including a formal settlement conference held on July 14, 1993. (T., pp. 147, 149-150). By a letter dated August 20, 1993, from Respondent to the RTC's counsel, Respondent stated that he had represented to Midland Risk that "Morrison Court would accept $600,000 and take care of G&O Properties." (Resp. Exh. #3).

On or about August 25, 1993, Respondent, on behalf of Morrison Court, entered into a settlement agreement with Midland Risk and the RTC whereby Midland Risk would pay a global settlement of

Morrison Court's claim in the amount of $1,250,000.00. The settlement agreement provided that Midland Risk would pay $750,00.00 directly to the RTC in satisfaction of its first mortgage and $500,000.00 to Respondent for the benefit of Morrison Court and G & O. (TFB Exh. #19, Resp. Exh. #4).

By a letter dated August 26, 1993, to Respondent and the other attorneys involved in the case, Midland Risk's counsel confirmed the instructions from Morrison Court and G & O for it to issue one check in the amount of $500,000.00 to Joy & Moran's Trust Account on behalf of Morrison Court and G & O Properties. (TFB Exh. #8). On or about August 27, 1993, Midland Risk sent a check in the amount of $500,000.00 to Respondent made payable to "Joy & Moran Trust Account on behalf of Morrison Court, Inc. & G & O Properties." According to the transmittal letter accompanying the check, per the settlement agreement, Respondent was "not authorized to disburse these funds to either Morrison Court or G & O Properties until such time as both Morrison Court and G & O Properties execute a full and complete Release." (TFB Exh. #18).

The $500,000.00 funds from Midland Risk were deposited into the Joy & Moran Trust Account #708295 at Northern Trust Bank of Florida on August 30, 1993. (TFB Exh. #2).

As a result of discussions between Respondent and Cohen regarding the best way for Respondent to protect Cohen's interest without the need for Cohen to hire other counsel, Respondent and Cohen agreed that Cohen would assign his interest in the insurance proceeds to Respondent and Respondent would keep Cohen's interest away from the Cantors. (T., p. 286). Respondent prepared and presented to Cohen for his execution a document entitled "Sale & Assignment," which provided:

> For and in consideration of $10.00 and other good and valuable consideration, receipt of which is hereby acknowledged, the undersigned, Sam Cohen, hereby sells, assigns, transfers, and conveys all of his right, title, and interest in and to all of the stock he owns in Morrison Court, Inc. and all of the stock he owns in Summerfield Mortgage holding Company, Inc. to Daniel Joy, without recourse.

(T., pp. 287-288, TFB Exh. #13).

On or about September 1, 1993, Cohen executed the "Sale & Assignment" upon the advice of Respondent, whom Cohen considered at that time to be his attorney regarding the Morrison Court funds, and without the advice of independent counsel. (T., pp. 287, 289, 292-294). Cohen testified that despite what the "Sale & Assignment" said, he did not sell his stock to Respondent nor did he receive $10.00 and other good and valuable consideration from Respondent. (T., pp. 288, 324). Cohen also testified that the assignment was prepared and executed in an attempt to protect his interest and to deceive the majority shareholder, J. Cantor. Cohen testified, "You know, deceiving the Cantors, it's like two negatives make a positive. When you deceive someone evil, it could be seen as a greater good." (T., p. 339). Cohen further testified that he would have compensated Respondent relative to the transaction if things had worked out. (T., pp. 294, 323).

Respondent did not in fact purchase Cohen's stock in Morrison Court. Respondent testified, "Sam Cohen assigned to me the stock. He was always the owner." (T., p. 450). Respondent further testified that he did not pay Cohen $10.00, but that there was other good and valuable consideration for the transfer of the stock. (T., p. 454). Both Respondent and Cohen failed to advise Morrison Court or J. Cantor, as the president, that Cohen's stock had been transferred to Respondent until a meeting between Respondent and the Cantors on September 17, 1993. (T., pp. 112-113, 289).

On September 1, 1993, at a meeting between the Morrison Court and G & O, the Cantors informed Smith, counsel for G & O, that they had not approved the settlement agreement and, therefore, intended to return the $500,000.00 to Midland Risk and to proceed to trial scheduled for September 13, 1993. (T., p. 254, Resp. Exh. #7). In reaction, Smith faxed a letter to Respondent on or about September

2, 1993, stating that his client, G & O, had an interest in the funds and that his client specifically did not authorize Respondent to return the funds to Midland Risk. (Resp. Exh. #7). Smith further stated in his letter that if a settlement could not be reached by noon of September 3, 1993, his client would expect payment in full out of the funds that Respondent was holding. (Resp. Exh. #7).

By letter dated September 3, 1993, faxed to Respondent by J. Cantor, as president of Morrison Court, Morrison Court directed Respondent to return the funds to Midland Risk no later than the close of the business day. (Resp. Exh. #8). On or about September 3, 1993, Respondent sent J. Cantor a copy of Smith's letter and advised J. Cantor that G & O had a lien and was entitled to co-control of the funds with Morrison Court. Respondent further advised J. Cantor in his letter that J. Cantor would "ignore G & O's position at Morrison Court's risk." (Resp. Exh. #9). Respondent did not return the settlement funds to Midland Risk.

On or about September 7, 1993, J. Cantor wrote a letter to Respondent advising him that he had not consented to the global settlement agreement. On September 9, 1993, J. Cantor wrote a letter to Midland Risk's counsel enclosing a copy of his September 3, 1993, letter to Respondent. (Resp. Exh. #13). On or about

September 9, 1993, Midland Risk filed a Notice of Settlement and subsequently a Motion to Compel and Enforce the Settlement Agreement. A hearing was scheduled for September 13, 1993. (Resp. Exh. #14).

On September 10, 1993, Solomon, on behalf of Morrison Court, filed a Motion to Strike Midland Risk's Motion to Enforce Settlement arguing that Morrison Court had not approved the settlement. (Resp. Exh. #15). In a letter to J. Cantor dated September 10, 1993, Respondent stated that he would advise the judge that the balance of the insurance proceeds were to be divided between Morrison Court and G & O based upon good faith negotiation to result in an agreed upon division according to the terms of the settlement agreement. (Resp. Exh. #16). Respondent suggested in his letter to J. Cantor that G & O would lose its claim to a portion of the settlement funds if the claims were dismissed with prejudice. (Resp. Exh. #16).

At the hearing on September 13, 1993, Respondent, with J. Cantor's consent, represented to the court that Morrison Court's claim against Midland Risk had been settled for $1,250,000.00 with $500,000.00 going to Morrison Court and G & O, to be divided later. Based on Respondent's representation to the court that it would negotiate with G & O in good faith to resolve their dispute as to the portion of the proceeds G & O was to receive, all parties moved for dismissal. (T., PP. 502-503). Smith, on behalf of G & O moved that his counts be dismissed without prejudice. The court, however, entered an order dismissing all claims with prejudice except G & O's count regarding foreclosure of its mortgage. (T., pp. 259-260, Resp. Exh. #52).

After the hearing on September 13, 1993, Respondent and the Cantors discussed the possibility of moving the insurance funds from Respondent's Trust Account to another trust or escrow account and possibly changing the corporate name of Morrison Court to protect the insurance proceeds from lien by Morrison Court's creditors, such as G & O. (T., pp. 410-412, 419-420, 490-491). Later, at approximately 12:15 p.m. on September 13, 1993, however, J. Cantor faxed a memo to Respondent wherein he stated that Respondent had indicated that Morrison Court was "not bound by G & O concerning the funds whatsoever." J. Cantor then advised Respondent, "If we are within the law as you say, why play games with name changes, it just makes us look that much worse down the road." J. Cantor went on to propose that Respondent take his fee, issue a check to Solomon for his fee, issue a check for $70,000.00 to Daniel Joy c/o G & O Properties to be held in escrow, and disburse the remainder to Morrison Court. (TFB Exh. #9).

Almost concurrent with J. Cantor's fax to Respondent, I. Cantor also faxed Respondent a letter at approximately 12:19 p.m. on September 13, 1993, wherein I. Cantor, who was no longer a shareholder of Morrison Court, stated that he hoped that Respondent had moved the escrow funds before he sent the letter to Smith, G & O's counsel. (Resp. Exh. #19).

Thereafter, on September 13, 1993, Respondent withdrew the insurance settlement proceeds in the amount of $500,000.00 by check #6749 made payable to cash. On the same date, the funds were deposited into an interest-bearing account #200037035 at Northern Trust Bank of Florida in the name of Madeline Joy, Trustee, for the benefit of 2311 MC Corp. (T., pp. 406-407, TFB Exh. #4). Madeline Joy is the wife of Respondent. (T., p. 101). The account was not labeled as a trust account and reflected Morrison Court's tax ID number. (T., pp. 421-422).

At the time of the transfer of the funds into the account in the name of Madeline Joy, Trustee, for the benefit of 2311 MC Corp. and subsequently, there was no corporation in existence in Florida known as "2311 MC Corp.". (T., pp. 101, 421). Furthermore, there was no trust document between Morrison Court and Madeline Joy relative to the funds deposited in the account. (T., pp. 101-102).

As a result of the transfer by Respondent of the insurance settlement funds into the account in the name of Madeline Joy, Trustee, for the benefit of 2311 MC Corp., the settlement funds were no longer being held in trust or escrow by Respondent or his law firm, but instead were being held in an account in the name of a non-lawyer as trustee of a non-existent trust for the benefit of a non-existent corporation without the express authorization of the beneficiaries, Morrison Court and G & O.

On September 13, 1993, Respondent received a fax from Smith wherein Smith stated that he presumed that Respondent was now in a position to disburse to G & O their portion of the insurance proceeds. Smith further took the position that Morrison Court had totally failed to negotiate in good faith and demanded immediate payment of his client's proceeds. (TFB Exh. #21).

On September 13, 1993, Respondent sent a letter by fax and mail to J. Cantor in response to J. Cantor's fax to Respondent of that same day. In his letter, Respondent stated that, in order to alleviate the Cantors worry about creditors attaching the money, "the funds have been disbursed from my Trust Account." (TFB Exh. #10). Respondent further stated that an interest-bearing Trust Account had been set up in the name of the 1123 MC Corporation. Respondent did not mention that the account was in the name of his wife, Madeline Joy, as trustee. (TFB Exh. #10).

Respondent also stated in his letter of September 13, 1993, to J. Cantor that the steps that J. Cantor proposed to take were "simply too dangerous" and "fraught with risk to me, as escrow agent, and simply will not be followed." (TFB Exh. #10). Respondent proposed to J. Cantor that he tell Smith, counsel for G & O, that he had disbursed the money from his Trust Account, which Respondent indicated in parenthetical to J. Cantor was "literally true." (TFB Exh. #10).

On or about September 15, 1993, Respondent sent a letter to Smith by fax and mail. (TFB Exh. #11). In his letter, Respondent represented to Smith that when G & O's claim was dismissed with prejudice, G & O's interest in the insurance proceeds terminated. On the second page of Respondent's letter, Respondent made the representation to Smith that "the funds held in my Trust Account have been disbursed from my Trust Account." Respondent did not disclose to Smith that the funds were deposited into an account in the name of Madeline Joy, Trustee, for the benefit of 2311 MC Corp. (TFB Exh. #11). Respondent acknowledged in his letter to Smith that a term of the settlement on which the federal judge's dismissal with prejudice was based was that "the parties would negotiate a resolution in good faith." (TFB Exh. #11).

On September 15, 1993, Smith faxed a letter to Respondent in response to Respondent's letter of that same date. In his letter, Smith stated:

> Second, any obligation my client may or may not have had to negotiate further in good faith was clearly terminated by your precipitous action in unilaterally disposing of the escrow funds. Initially, our clients were to negotiate the division and split of the funds which were being held in escrow, nothing more and nothing less. Since your client has taken the funds, certainly my client has been absolved and (sic) any further responsibility.

(TFB Exh. #20). On September 15, 1993, Respondent faxed and mailed a letter to Smith in response to Smith's letter. In his letter, Respondent stated:

> In court, on Monday, G & O Properties, through you, and Morrison Court, through me, affirmed all of the terms of the settlement, which necessarily includes the side-bar agreement between G & O and Morrison Court. On Monday, the Court made it quite clear that the duty to negotiate continues. The Court observed that it did not see the need to interfere with that side-bar agreement or the negotiations between two parties.

(TFB Exh. #22). Nowhere in Respondent's letter to Smith, however, did Respondent disclose to Smith that the funds were in an account in the name of Madeline Joy, Trustee, for the benefit of 2311 MC Corp., nor did he correct Smith's misunderstanding that the funds had been disbursed by Respondent directly to his client, Morrison Court. (TFB Exh. #22).

On September 16, 1993, Smith faxed a letter to Respondent in response to Respondent's letter. (TFB Exh. #24). In his letter, Smith stated, "Yesterday we discovered that my client's settlement proceeds were disbursed to Morrison Court." Smith further stated:

> So their (sic) is no misunderstanding, it appears that Morrison Court knowingly obtained and used my clients' money, and the party who disbursed the funds to them deprived my clients of a right to their property and appropriated said property to the use of some person not entitled thereto.

(TFB Exh. #24). On September 16, 1993, Respondent faxed and mailed a letter to Smith in response to Smith's letter of that same date. (TFB Exh. #25). Respondent did not disclose in his letter to Smith that the funds were in an account in the name of Madeline Joy, Trustee, for the benefit of 2311 MC Corp., nor did he correct Smith's misunderstanding that the funds had been disbursed by Respondent directly to his client, Morrison Court. (TFB Exh. #25).

By a letter faxed to Respondent on September 16, 1993, I. Cantor advised Respondent that he needed $250,000.00 from the Morrison Court insurance settlement proceeds by Monday, September 20, 1993, in order to bid on four parcels at an RTC auction on Tuesday, September 21, 1993. (Resp. Exh. #21).

On September 17, 1993, a meeting was convened at Smith's office to discuss the division of the settlement proceeds between Morrison Court and G & O. An agreement was reached during the meeting whereby Morrison Court would pay G & O a total of $135,000.00 in settlement of its claim against Morrison Court.

According to the agreement, $70,000.00 in cash was to be paid immediately out of the insurance proceeds and $65,000.00 was to be paid from the proceeds of the sale of the property. As part of the agreement, G & O would foreclose its mortgage for the benefit of Morrison Court in order to wipe out any inferior liens against the property. (T., pp. 111, 216-217, 242-244, Resp. Exh. #50).

After the settlement meeting with G & O, the Cantors and Respondent met at Respondent's office to discuss the distribution of the insurance proceeds. At Respondent's office, Respondent told J. Cantor that he had purchased Cohen's twenty percent (20%) interest in Morrison Court. (T., pp. 112-116, 450-451). Respondent then presented J. Cantor with a settlement disbursement sheet which reflected a division of the net insurance proceeds as follows:

Joel A. Cantor-80%	$234,560.00
Daniel Joy-20%	$ 58,640.00

(T., pp. 112-115, TFB Exh. #12). The settlement sheet additionally provided for $64,500.00 in fees and $6,000.00 in costs to be paid to Joy & Moran. (TFB Exh. #12).

Respondent testified that he told the Cantors during the meeting on September 17, 1993, that he was a twenty percent shareholder of Morrison Court. Respondent did not tell them that he had only been assigned the stock solely to collect Cohen's share of the insurance proceeds. (T., pp. 450-451). J. Cantor testified that the Respondent told him that "he had purchased (the stock) outright." (T., p. 116).

In a statement prepared by Respondent regarding the events that occurred on September 17, 1993, Respondent stated as follows:

> I prepared a sheet showing the receipt of $500,000 in settlement proceeds, expenses, and respective entitlements. Irwin Cantor became verbally abusive when we discussed my ownership interest in Morrison Court (20%) and the amount that interest was worth. Joel Cantor accused me of going behind his back to acquire the shares which I purchased from Sam Cohen.

(TFB Exh. #33, T., p. 449))

J. Cantor apparently then informed Respondent that additional shares of stock in Morrison Court had been issued to J. Cantor and his wife and as a result Cohen had only a 3.3% interest in Morrison Court. (T., pp. 449, 461-462). J. Cantor also accused Respondent of having entered into the global settlement agreement without his approval because Respondent had a financial interest in the settlement. (T., p. 1130. Thereafter, a fight ensued between J. Cantor and Respondent. Respondent pushed J. Cantor against a bookshelf and J. Cantor struck Respondent. J. Cantor left Respondent's office with the settlement sheet. (T., p. 113).

Respondent spoke with Cohen over the weekend after the September 17, 1993, meeting with the Cantors and advised him of the occurrences in his office, including the fight. (T., p. 290). Respondent also told Cohen that he was going to interplead the funds. (T., p. 291). Cohen then contacted Drew O'Malley (hereinafter referred to as "O'Malley"), an attorney who had been representing Cohen regarding some other legal matters, for legal advice on how he should proceed. O'Malley told Cohen that he would help him get legal counsel regarding the Morrison Court funds on Monday morning. (T., pp. 292-293).

On Saturday, September 18, 1993, J. Cantor, as president of Morrison Court, faxed Respondent a letter he had written the day before. The fax was not seen by Respondent, however, until Monday, September 20, 1993. (TFB Exh. #14). In the letter, J. Cantor advised Respondent that Morrison Court irrevocably terminated the law firm of Joy & Moran, P.A., and Respondent as counsel for Morrison Court effective September 17, 1993. J. Cantor also instructed Respondent not to distribute any monies from the insurance proceeds "held in the Joy & Moran P.A. Trust Account on behalf of Morrison Court, Inc." J. Cantor further indicted in his letter that Morrison Court deemed the agreement with G & O null and void and that Morrison Court would deal with G & O. (TFB Exh. #14).

On September 18, 1993, J. Cantor also faxed and mailed a letter to Smith advising Smith that Morrison Court had terminated Respondent as Morrison Court's counsel, but that Morrison Court would honor its agreement negotiated with G & O on September 17, 1993. (TFB Exh. #26). In his letter to Smith, J. Cantor also stated:

> In Mr. Joy's letter to you dated September 15, 1993, Mr. Joy indicated that the funds held in Mr. Joy's Trust Account have been disbursed. Mr. Joy outright lied to you and Morrison Court, Inc. In this regard. Mr. Joy continues to hold the funds and never intended to release one dime to anyone other than himself.

(TFB Exh. #26).

On September 20, 1993, Cohen faxed a letter to Respondent informing Respondent that he had spoken with O'Malley who had advised him that the funds should be interpled. Cohen told Respondent that he had spoken with two other attorneys that O'Malley recommended who also said that the funds should be interpled. (TFB Exh. #29). Cohen further stated in his letter to Respondent:

> Dan, even if we had not talked and planned and plotted and commisserated (sic) for weeks and months about this, to on a dime, go from being firm and tough to jello and giving up, is not fair.

(TFB Exh. #29). In his letter to Respondent, Cohen also indicated that based on his conversation with Respondent he believed Respondent was going to return the Sale and Assignment agreement to him and disburse the money to the Cantors. (TFB Exh. #29).

On September 20, 1993, check #2440 was issued by Madeline Joy, Trustee, from the Northern Trust Bank of Florida account #200037035, payable to the Joy & Moran Trust Account in the amount of $500,266.57, which represented the original $500,000.00 plus $266.57 in interest. The check was deposited on September 20, 1993, into the Joy & Moran Trust Account. (TFB Exh. #4).

On September 20, 1993, Respondent retained George McLain, Esq., (hereinafter referred to as "McLain"). On that date, McLain wrote a letter to J. Cantor, as president of Morrison Court, advising Morrison Court that papers to interplead the funds were being prepared. (Resp. Exh. #58). In response to McLain's letter, J. Cantor, as president of Morrison Court, faxed a letter to McLain in which he stated:

> If Mr. Joy wants to end this, a check must be delivered to Morrison Court, Inc. in the amount of $232,800 by no later than 5:00 p.m. Wednesday, September 22, 1993. Assuming this check is received, Morrison Court, Inc. will approve the following disbursements.

G & O Properties	$70,000.	
Thomas A. Smith	$ 1,800.	
Stanford R. Solomon	$100,000.	
Joy & Moran, P.A.	$90,000.	Fees
Joy & Moran, P.A.	$ 5,400.	Costs

((Resp. Exh. #27).

On September 21, 1993, Respondent received a fax from Smith in which he stated that "all settlement negotiations between my clients and Morrison Court have terminated, and there is apparently no settlement agreement." (Resp. Exh. #28). Respondent also received a fax from Cohen on September 21, 1993, in which Cohen directed Respondent to deposit his 20% share of the insurance funds into an account identified by Cohen. (TFB Exh. #27).

On September 22, 1993, Respondent wrote a letter to Cohen in which he enclosed the original "Sale & Assignment" executed by Cohen. Respondent also sent a copy of the letter to Cohen's counsel, O'Malley. (TFB Exh. #28).

On September 22, 1993, Respondent's counsel, McLain, received instructions to interplead the funds from Richard Fee, Esq., (hereinafter referred to as "Fee"), as legal counsel for Cohen. (Resp. Exh. #54).

After several failed attempts to arrive at a distribution agreement with J. Cantor, McLain drafted a Complaint for Interpleader which was filed on behalf of Respondent on September 22, 1993. The Complaint filed on behalf of Respondent asked that Respondent be awarded " a sum in excess of $200,000.00 on his claim against the Defendant corporation as a creditor and shareholder..." even though Respondent no longer held Cohen's stock or any other stock in Morrison Court. (T., pp. 556-559, TFB Exh. #36).

On or about September 28, 1993, McLain reached a settlement between Respondent and Morrison Court with regard to the dispute related to Respondent's attorney fees and also, with regard to the amount of the Midland Risk settlement proceeds Morrison Court was to pay to G & O. (T., p. 552).

On the same date Respondent, through his counsel, filed a Voluntary Dismissal of his Complaint against Morrison Court and J. Cantor. (TFB Exh. 37).

On or about September 28, 1993, in final settlement of the insurance claim, McLain, on behalf of Respondent, disbursed the following trust funds by checks issued on the Joy & Moran Trust Account:

$ 70,000.00	Smith Trust Account FBO G & O
$ 1,800.00	Thomas A. Smith
$100,000.00	Stanford R. Solomon, P.A.
$ 93,500.00	Joy & Moran
$234,700.00	Morrison Court, Inc.

The above distributions totaled $500,000.00. (TFB Exh. #35). The $266.57 in interest earned on the funds while being held in the interest-bearing account in the name of Madeline Joy, Trustee, for the benefit of 2311 MC Corp., was not distributed from Respondent's Trust Account. (T., pp. 465-467, TFB Exh. #35).

Based on the foregoing, on or about March 27, 1995, The Florida Bar filed a formal complaint with the Florida Supreme

Court, against the Respondent. The final hearing was held on August 7-8, 1995, before the Honorable Judge Kirby Sullivan, Referee, in Glades County, Florida. The Disciplinary hearing was held before the Referee on January 8, 1996, in Sarasota, Florida. The Referee entered his Report of Referee on January 12, 1996, making findings of fact and recommendations as to the guilt of the Respondent. The Referee recommended that Respondent be found guilty of violating the following Rules Regulating The Florida Bar: Rule 4-1.7(a); Rule 4-1.7(b); Rule 4-1.7(c); Rule 4-1.15(c); Rule 4-1.15(d); Rule 5-1.1(b); Rule 4-4.1 and Rule 4-8.4(c).

The Referee Report recommended that Respondent be disciplined by a public reprimand. Referee further recommended that Respondent be required to pay the costs of the disciplinary proceedings in the amount of five thousand five hundred and ninety-nine dollars and seventy-two cents ($ 5,599.72).

The Report of Referee was considered by the Board of Governors at its meeting which ended January 26, 1996. The Board of Governors voted to seek review of the discipline recommended by the Referee in his Report of Referee. The Bar filed a Petition for Review with the Supreme Court of Florida on January 30, 1996, challenging Referee's recommended discipline. The Bar is seeking a ninety-one (91) day suspension as opposed to a public reprimand.

SUMMARY OF THE ARGUMENT

In this Initial Brief, The Florida Bar argues that a ninety-one (91) day suspension rather than a public reprimand, is the appropriate discipline for Respondent's misconduct based on the serious nature of the Respondent's misconduct and the presence of aggravating factors.

The Referee found that Respondent had engaged in the following misconduct. Respondent represented two clients concurrently at a time when the two clients had directly adverse interests and failed to disclose to them the possible effect of the conflict.

Respondent mishandled the trust fund property by transferring the escrow funds from his law firm's trust account to a non-lawyer's interest bearing bank account. In so doing, Respondent not only as an attorney, but also as an escrow agent, failed to hold escrow funds entrusted to him for a specific purpose in a separate trust account and failed to abide by his client's decisions. Respondent breached his professional duty as well as fiduciary duty in safeguarding the funds, by handling it over to a non-lawyer. By disbursing the escrow funds to an interest bearing account in a non-lawyer's name, Respondent failed to treat the escrow funds as trust property.

Additionally, Respondent as escrow agent, failed to disclose to his principal, that the funds had been in the name of a non-lawyer as Trustee for the benefit of a non-existent corporation. Instead, Respondent mis-stated that the funds had been disbursed from his Trust Account, and intended that the principal would interpret it to mean that the funds had been disbursed from his Trust Account directly to his client. Respondent failed to correct the misunderstanding in further correspondence. In so doing, Respondent intentionally made a false statement, or misrepresentation by omission, to his principal(s) about a material fact, namely, disbursement of the escrow fund.

In light of the Referee's findings of fact and recommendations of guilt, the case law presented by The Bar, and the applicable Florida Standards for Imposing Lawyer Sanctions, a ninety-one (91) day suspension rather than a public reprimand is the appropriate sanction for Respondent's multiple misconduct.

This Court should uphold the Referee's findings of fact and recommendations of guilt. However, this Court should reject the Referee's recommendations of a public reprimand and instead suspend the Respondent from the practice of law for ninety-one (91) days with proof of rehabilitation required prior to reinstatement.

ARGUMENT

ISSUE : A PUBLIC REPRIMAND IS NOT THE APPROPRIATE DISCIPLINE FOR RESPONDENT, IN LIGHT OF THE SERIOUS NATURE OF HIS MISCONDUCT AND THE PRESENCE OF AGGRAVATING FACTORS.

Even though a referee's recommendation for discipline is persuasive, it is ultimately the Supreme Court's task to determine the appropriate sanction. The Florida Bar v. Reed 644 So. 2d 1355, 1357 (Fla. 1944). It is the Florida Bar's position that a ninety-one day suspension, rather that a public reprimand, is the appropriate sanction in the instant case in light of the seriousness of Respondent's multiple misconduct and the presence of other aggravating factors. The Bar's position is supported by the Florida case law and by the Florida Standards for Imposing Lawyer Sanctions.

The facts and the evidence in the instance case clearly support the findings of the Referee that Respondent:

(a) represented concurrently two clients who had adverse interests without the consent or knowledge of either client regarding the conflict,

(b) mishandled client funds by transferring the funds from Respondent's trust account to an interest bearing bank account in the name of a non-lawyer thereby violating his professional duties and his fiduciary duties as an escrow agent. By transferring the funds from his trust account to another account in the name of a non-lawyer, Respondent put the funds at potential risk of loss.

(c) made a misrepresentation by omission to one of the three principals that the funds had been disbursed, but failed to disclose that the funds had not been disbursed to his client, Morrison Court, but had been deposited into an interest-bearing account in the name of a non-lawyer.

Thus, Respondent's conduct basically violated three areas of the Rules Regulating The Florida Bar: conflict of interest, trust account violations, and misrepresentation.

CONFLICT OF INTEREST

Respondent represented Cohen concurrent with his representation of Morrison Court at a time when Cohen and Morrison Court had directly adverse interests. Respondent represented Morrison Court relative to the litigation against Midland Risk and the settlement of that claim between the parties. At the same time, Cohen, the minority shareholder, consulted Respondent for advice regarding his legal rights relative to the insurance settlement proceeds of Morrison Court. Respondent provided Cohen with such legal advice and suggested a course of action whereby Respondent would endeavor to protect Cohen's interests against potential harm by J. Cantor, the majority shareholder, sole director, and president of Morrison Court.

Cohen, relying on Respondent's advice, executed the "Sale & Assignment" agreement that was prepared by Respondent. On Respondent's advice, Cohen did not consult independent counsel relative to his execution of the "Sale & Assignment" or otherwise regarding his interest, as a minority shareholder, in the insurance settlement proceeds. Cohen believed that Respondent was representing him regarding the insurance proceeds matter. Cohen was willing to compensate Respondent for his services if everything had worked out according to their plan. The majority share holder, J. Cantor, as president of Morrison Court, did not consent to Respondent's representation of Cohen in the matter nor did he know about the representation. Respondent's intention to set aside Cohen's share of the insurance proceeds rather than distributing all of Morrison Court's share of the funds to Morrison Court, his client, demonstrates that Respondent's independent professional judgment on behalf of Morrison Court was materially limited by his responsibilities to Cohen.

As for conflicts of interest, Respondent's misconduct is similar to the misconduct in The Florida Bar v. Sofo, 21 Fla. L. Weekly S36 (January 1996). Sofo was general counsel for Micro, a corporation in which he also held stock. Micro entered into an agreement with another corporation (Neetco), selling some of Micro's assets and providing in the agreement that Neetco make periodic payments to Micro and its stockholders, including Sofo, and appointing Sofo as the general counsel of Neetco. While drawing a salary as general counsel for Neetco, Sofo also continued to represent Micro. Eventually, Neetco attempted to renegotiate the financing of the agreement with Micro which would result in significantly less compensation for Sofo's interest in both companies. Although Sofo was Neetco's general counsel, he attempted to protect Micro's interests which were at the time adverse to that of Neetco's. The Referee found that Sofo's representation of both Neetco and Micro regarding the transaction created a conflict of interest. The Referee noted that the conflict was exacerbated by Sofo's ownership of stock in both companies.

In Sofo, the Referee, after considering personal history and absence of a prior disciplinary record, recommended that Sofo be suspended from the practice of law for a period of one-year and thereafter until he proved rehabilitation. Sofo petitioned the Supreme Court of Florida to review the discipline recommended by the Referee and sought instead a public reprimand. On review, the Supreme Court found that a suspension rather than public reprimand was the appropriate discipline for Sofo's misconduct. The Supreme Court, however, reduced the suspension from one-year to ninety-one (91) days with reinstatement conditioned upon Sofo taking and passing the Multi-State Professional Responsibility Examination.

Respondent's misconduct is very similar to that of Sofo's. Like Sofo, Respondent represented concurrently two clients with adverse interests. Further, both Sofo and Respondent had no prior disciplinary record and substantial experience in the practice of law.

Even though Sofo engaged in further misconduct relative to his conflict of interest due to his owning an interest in both corporations that he concurrently represented, Respondent's misconduct is similar to Sofo's in that Respondent temporarily held a legal interest in Morrison Court as an agent of the minority shareholder and he represented to the majority shareholder that he owned the minority interest in Morrison Court.

Respondent's misconduct, however, was more egregious than Sofo's in that Sofo's misconduct was limited to engaging in misconduct related to conflict of interest, while Respondent additionally engaged in misconduct involving misrepresentation by omission and mishandling of trust funds. Sofo and the instant case also differ with respect to the aggravating factors present in each. In Sofo, the Referee found Sofo to have had substantial experience in the practice of law and to have had a selfish or dishonest motive. Although the Referee in the present case failed to delineate any aggravating factors, three aggravating factors were presented by Bar counsel: substantial experience in the practice of law, multiple misconduct within the same representation, and refusal to acknowledge the wrongful nature of his conduct. (T2, pp. 53, 54).

In The Florida Bar v. Pahules, 334 So. 2d 23 (Fla. 1976) the Referee found that Pahules was involved in transactions in which he had an irreconcilable conflict of interest. Pahules formed and owned stock in two corporations and undertook representation of both in spite of their conflicting interests. In consideration of the fact the Pahules was not involved in dishonesty, fraud, deceit, or misrepresentation, this Court suspended Pahules from the practice of law for three (3) months.

Like Pahules, Respondent engaged in representation that created a conflict of interest. Unlike Pahules, in addition to representing two clients with adverse interests, Respondent also engaged in misconduct that involved mishandling of trust funds and misrepresentation. Furthermore, there are aggravating factors present in the instant case that were not present in Pahules, which include the following: multiple offenses, refusal to acknowledge wrongful nature of the conduct, and substantial experience in the practice of law.

In light of the discipline imposed by this Court in Sofo and Pahules, a ninety-one (91) day suspension and a three (3) month suspension, respectively, the Referee's recommendation of a public reprimand in the instant case is insufficient. Respondent's misconduct involved not only conflict of interest, as in Sofo and Pahules, but also misrepresentation by omission and mishandling of trust funds. Like Sofo and Pahules, Respondent had no prior disciplinary record. Aggravating factors were present in this case, as well as in Sofo and Pahules. Therefore, a public reprimand as recommended by the Referee in this case is inconsistent with prior analogous case law and insufficient discipline for Respondent's misconduct.

In The Florida Bar v. Mastrilli, 614 So, 2d 1081 (Fla. 1993), Mastrilli undertook representation of two clients injured in the same accident: one was the driver and the other was the passenger in the same vehicle. Mastrilli, on behalf of the passenger, issued a demand letter against the driver's insurance carrier alleging negligence of the driver. Upon denial of the claim, Mastrilli sued the driver on behalf of the passenger.

The referee, concluding that Mastrilli violated the conflict of interest rule, recommended that Mastrilli be suspended for six (06) months from the practice of law. The Referee considered Mastrilli's lack of remorse to be an aggravating factor. On review, this Court approved the Referee's recommendation of a six (06) month suspension, stating that " Mastrilli either knew or should have known of the conflict; and there was a potential that his actions would expose his client, the driver, to a personal liability ...." Id. at 1082.

The Mastrilli case and the instant case are analogous in that both Mastrilli and Respondent represented on client against the interests of another client without the second client's knowledge or consent. Neither Mastrilli nor Respondent had any prior disciplinary record. Both Mastrilli and Respondent refused to acknowledge the wrongful nature of their misconduct.

Respondent, however, had substantial experience in the practice of law and had engaged in multiple offenses. Unlike Mastrilli, Respondent engaged in conduct involving not only conflict of interest, but also misrepresentation by omission and mishandling of trust funds. Respondent's misconduct was more egregious than Mastrilli's and should at the very least warrant a suspension of ninety-one (91) days, a discipline less severe than that imposed on Mastrilli.

MISHANDLING OF TRUST FUNDS

As for mishandling of trust funds, in order to secure a better bargaining position for his client, Respondent disbursed the escrow funds from his law firm Trust Account into an interest-bearing account in the name of his wife, as Trustee, for the benefit of a non-existent corporation. He did this without express or implied authorization of the principals, Morrison Court and G & O. Respondent's conduct put the escrow funds at risk of possible misapplication or theft in breach of his fiduciary duties. Respondent also failed to disburse to the principles the interest earned on the funds while in the interest-bearing account in his wife's name.

Respondent's misconduct as to mishandling of trust funds is very similar to the misconduct in The Florida Bar v. Dancu, 490 So. 2d 40(Fla. 1986). Dancu received life insurance proceeds on behalf of his client. Instead of holding it in trust for the client, he deposited the funds in a money market account in his own name without the consent or knowledge of his client. Notwithstanding this, he misrepresented to his client that the money had been placed in a trust account. Interest of eight thousand eight hundred twelve dollars ($8,812.00) was generated on the funds while in his money market account. When Dancu gave the insurance proceeds to his client, he did not include the interest. Dancu first responded to client inquiries concerning the interest by providing bank records which purported to show that the money had been held in a non-interest bearing account. Dancu later acknowledged that the interest was earned on the insurance proceeds and refunded the interest to the client after the client's accountant asked for further information.

Dancu entered into a consent judgment for an unconditional guilty plea which was approved by The Florida Bar and accepted by the referee. Based on that, the referee recommended a thirty (30) day suspension. This Court rejected the thirty (30) day suspension and suspended Dancu for six (6) months with proof of rehabilitation, including passage of the ethics portion of the Multi-State Bar Examination, required prior to reinstatement.

In giving its opinion, this Court stated "The single most important concern of this Court in defining and regulating the practice of law is the protection of the public from incompetent, unethical, and irresponsible representation." Id. at 41. The Court further stated, " Our primary purpose in the disciplinary process is to assure that the public can repose this trust with confidence. The direct violation of this trust by stealing a client's money, compounded by lying about it, mandates a punishment commensurate with such abuse." Id. at 41.

The instant case is factually harmonious with Dancu in many ways. Like Dancu, Respondent moved the escrow funds from his non-interest bearing trust account to an interest-bearing, non-trust account. Both Respondent and Dancu made misrepresentations to their principles regarding the location of the trust funds. Both in Dancu and the instant case, the transfer was done without the consent of their respective clients. The directions of Respondent's client, Morrison Court, regarding the disbursement are irrelevant since Respondent was acting not only as attorney for his client, but also as escrow agent for G & O. Furthermore, the evidence does not support Respondent's contention that he had his client's authorization to transfer the funds because all of the correspondence to Respondent from J. Cantor, as president/director/shareholder of Morrison Court, indicated that he did not authorize the transfer of the funds from Respondent's law firm Trust Account to a different account in the name of a non-attorney.

Dancu can be differentiated in several ways from the instant case. Dancu transferred the funds from his Trust Account to a separate account in his own name. Respondent transferred the funds from his firm's Trust Account to an account held by a non-lawyer. Therefore, the potential injury created by Respondent's transfer of the funds is much greater than that of Dancu, due to the fact that the funds were held by a non-attorney. Dancu refunded the interest to his client. Respondent, however, failed to disburse the interest that had accrued on the escrow funds to any of his principals. No aggravating factors were found in Dancu. However there are three aggravating factors in the instant case. Unlike Dancu, Respondent engaged in further misconduct of conflict of interest.

In another similar case, The Florida Bar v. Fine, 607 So. 2d 416 (Fla. 1992), Fine who served as personal representative of an estate without compensation, received a check for nine thousand four hundred dollars ($9,400.00) on behalf of the estate, his client. Rather than depositing the funds in an estate account, he moved the funds through his trust account into his operating account through a series of transactions. When called upon to do so, Fine repaid the funds for the benefit of the estate.

In Fine, the referee found many mitigating factors to wit: (1) replacing the funds before any disciplinary action had been instituted; (2) absence of actual harm to the client; (3) remorse; (4) absence of illegal intent or mens rea; (5) absence of prior disciplinary record. The referee recommended that Fine be found guilty of trust accounting violations and minor misconduct, but specifically did not find him to be guilty of conduct involving dishonesty, fraud, deceit, or misrepresentation. The Referee, therefore, recommended that Fine be suspended for ninety (90) days, that Fine be required to pass the ethics portion of the Florida Bar Examination, and that he pay the costs of the proceedings. Upon review, this Court approved the referee's findings and recommendations and suspended Fine for ninety days.

While the Fine case and the instant case are factually similar relative to the mishandling of trust funds, they are distinguishable in terms of Respondent's other misconduct. Unlike Fine, Respondent was found by the Referee to have engaged in conduct involving misrepresentation. Respondent was also found to have violated the Rules regarding conflict of interest. The referee in Fine found substantial mitigation, while the only mitigation present in the instant case is lack of a prior disciplinary record. Further, despite the Referee's failure to specifically find any aggravating factors in this case, Respondent had substantial experience in the practice of law, engaged in multiple acts of misconduct, and refused to acknowledge the wrongful nature of his conduct. The referee in Fine likewise did not find any aggravating factors.

In The Florida Bar v. Weiss, 586 So. 2d 1051 (Fla. 1991), Weiss was suspended for six (6) months for gross negligence in handling his client trust accounts resulting from his failure to properly supervise his accountant's work. However, in the instant case, the Respondent's mishandling of trust funds was deliberate as opposed to mere negligence or overlook. Respondent himself transferred the funds because Respondent wanted to place Morrison Court in a better bargaining position against G & O while also wanting to protect the insurance proceeds from Morrison Court's creditors. This is a clear indication that the transfer was done deliberately instead of in a grossly negligent manner.

If negligent handling of the trust funds warrants a six month suspension, then deliberate mishandling of trust funds should warrant at least a ninety-one (91) day suspension.

MISREPRESENTATION BY OMISSION

As to Respondent's misrepresentation by omission, soon after transferring the escrow funds into the interest bearing non-lawyer account, Respondent corresponded with Smith and advised him that as a result of the dismissal of G & O's federal lawsuit with prejudice, G & O's interest in the insurance proceeds terminated. Additionally, he misrepresented to Smith that the funds held in his

Trust Account were disbursed. However, Respondent failed to disclose to Smith that the funds had been deposited into an interest-bearing account in the name of Respondent's wife, as Trustee, for the benefit of 2311 MC Corp, a non-existent corporation. Respondent's misrepresentation was intentional and calculated in that Respondent intended Smith to misinterpret his statement to mean that Respondent disbursed the funds directly to Morrison Court. Respondent's intention to mislead Smith is evident by the fact that when Respondent received letters from Smith demonstrating Smith's misunderstanding, Respondent failed to correct it and allowed Smith to continue to believe that the funds were disbursed to Morrison Court. Since the security of the escrow funds was a material fact, Respondent intentionally made a misrepresentation by omission about a material fact.

Misrepresentation by **omission** has been recognized by the Florida Supreme Court. In The Florida Bar v. Webster, 647 So. 2d 816, 817 (Fla. 1994), the Supreme Court denied Webster's petition for reinstatement to practice law in Florida because Webster "engaged in a misrepresentation by omission". Id. at 817.

Webster filed applications for admission to the bars of Micronesia and Palau. On the application forms, Webster stated that he was a member in good standing with the Washington, D. C.

Bar, that he was a member of The Florida Bar, and that he was not under an order of suspension of disbarment from any authority. While the statements were technically true since Webster's suspension from the practice of law in Florida had terminated before he filed the applications, Webster was still on probation and was not in good standing with The Florida Bar. As the referee noted, Webster "played fast and loose with the facts." Id. at 817.

In the instant case, Respondent's misrepresentation by omission is very similar to the misconduct by Webster, in that both Respondent and Webster had intentions of deceiving the receivers of their statements.

In the case of The Florida Bar v. Stillman, 606 So. 2d 360 (Fla. 1992), Stillman was acting as counsel for a mortgage company providing financing for a real estate transactions. He was given specific instructions by his client that there could be no subordinate financing. When the contract was made, the property was already subject a mortgage lien, and Stillman secured an assignment in favor of the seller. The purchaser then executed a purchase money second mortgage and note that was prepared by Stillman. Stillman then issued a mortgage title insurance policy which failed to disclose the existence of the second mortgage. Stillman engaged in similar conduct on at least three (03) other occasions while representing the same client.

After finding two mitigating factors, namely , lack of prior disciplinary actions and lack of motive involving personal gain or greed, the referee recommended that Stillman be given a public reprimand **and** a suspension from the practice of law for six (06) months, with payment of disciplinary costs. However, on review, this Court, noting that his conduct required harsher discipline, suspended Stillman from practice of law for a period of one (01) year and thereafter until he established proof of rehabilitation.

Stillman's failure to disclose a material fact, the existence of the second mortgages, is analogous to Respondents's failure to disclose the whereabouts of the escrow funds.

The Florida Standards for Imposing Lawyer Sanctions also support The Bar's position that a suspension, rather than a public reprimand, is the appropriate discipline for Respondent's misconduct. Based on the facts of this case, the following sections of the Standards apply:

Standard 4.12 Failure to Preserve The Client's Property

Absent aggravating or mitigating circumstances 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.

Standard 4.32 Failure to Avoid Conflicts Of Interest

Absent aggravating or mitigating circumstances suspension is appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client.

Standard 4.62 Lack Of Candor

Absent aggravating or mitigating circumstances suspension is appropriate when a lawyer knowingly deceives a client, and causes injury or potential injury to a client.

Even though the Referee in the instant case did not specifically delineate aggravating factors in giving his recommendation, the following aggravating factors are applicable:

Standard 9.22 Aggravation

(d) multiple offenses

(g) refusal to acknowledge wrongful nature of conduct

(i) substantial experience in the practice of law

The Bar recognizes the following mitigating factor as applicable in the instant case:

Standard 9.32 Mitigation

(a) absence of a prior disciplinary record

In The Florida Bar v. Lord, 433 So. 2d 983,986 (Fla. 1983), this Court defined the objectives of Bar discipline as follows:

> "Discipline for unethical conduct by a member of The Florida Bar must serve three purposes: First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing a penalty. Second, the judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations."

The recommended sanction does not achieve the purpose for which disciplinary sanctions are ordered by this Court, nor is it consistent with the Florida Standards For Imposing Lawyer Sanctions.

Based on the foregoing Florida case law, the applicable Florida Standards for Imposing Lawyer Sanctions, the potential harm to the clients, the numerous aggravating factors present, and the lack of mitigation other than the absence of prior discipline, it is evident that a ninety-one (91) day suspension is the appropriate discipline for Respondent's misconduct.

CONCLUSION

A ninety-one (91) day suspension is the appropriate sanction rather than a public reprimand for an attorney who represented clients with adverse interests, made misrepresentations by omission, and in the same proceeding mishandled trust funds.

The Florida Bar respectfully requests this Court to uphold the Referee's findings of fact and recommendations of guilt; reject the Referee's recommended discipline; and suspend the Respondent, DANIEL FOSTER JOY, from the practice of law for ninety-one (91) days with attendance of Ethics School and proof of rehabilitation required prior to reinstatement and impose against the Respondent the costs of these proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief has been forwarded by U.S. Regular Mail to Hugh N. Smith and David Nelson, Counsel for Respondent, 101 E. Kennedy Blvd., Suite 1800, P.O. Box 3288, Tampa, FL 33601-3288; and a copy to John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300, this 27th day of February, 1996.

Susan R. Gralla

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Assistant Staff Counsel