IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Case No. 72,867
(TFB No. 87-25,898(13C))

v.

EDWARD C. ROOD, JR.,

Respondent.

.... /

FILED
SID J. WHITE
NOV 27 1989
CLERK, SUPREME COURT
By
Deputy Clerk

COMPLAINANT'S ANSWER BRIEF *AND* INITIAL BRIEF IN SUPPORT OF CROSS PETITION FOR REVIEW

BONNIE L. MAHON
Assistant Staff Counsel
The Florida Bar
Suite C-49
Tampa Airport, Marriott Hotel
Tampa, Florida 33607
(813) 875-9821
Attorney No. 376183

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
SYMBOLS AND REFERENCES	iii
STATEMENT OF THE FACTS AND OF THE CASE	1-5
SUMMARY OF ARGUMENT	16-18
ARGUMENT	
I. The Referee's findings of fact which are supported by clear and convincing evidence and are not clearly erroneous, should be upheld	19-30
11. The Referee's recommendations of guilt should be upheld by this Court in light of the evidence in this case	32-35
111. The factors of aggravation considered by the Referee are supported by the record and should be upheld; however, several of the mitigating factors are not supported by the record and should be rejected	36-40
IV. The Referee's recommended discipline should not be accepted by this Court since there was no delay by the Bar in the prosecution of this case	41-45
V. The appropriate discipline for the Respondent's egregious course of misconduct in this case is disbarment since the mitigating factors present in this case do not outweigh the aggravating factors....	46-49
CONCLUSION	50

TABLE OF AUTHORITIES

CASES	PAGE
The Florida Bar v. Stalnaker...................... 485 So.2d 815 (Fla.1986)	19
The Florida Bar v. Randolph......................... 238 So.2d 635 (Fla.1970)	40, 41
Rule 3-7.6(c)(5)................................... Rules Regulating The Florida Bar	31
Florida's Standards For Imposing Lawyer Sanctions... approved by The Florida Bar Board of Governors in November, 1986	18, 46, 47, 48

SYMBOLS AND REFERENCES

In this Brief, the Appellant/Cross-Appellee, Edward C. Rood, Jr., will be referred to as "the Respondent". The Appellee/Cross-Appellant, The Florida Bar, will be referred to as "The Florida Bar" or "The Bar". "TRI" will refer to volume I of the transcript of the Final Hearing held on November 18, 1988. "TRII" will refer to volume II of the transcript of the Final Hearing held on November 18, 1988. "RR" will refer to the Report of Referee dated July 24, 1989. "R. Supp." will refer to a letter from The Florida Bar to the Referee, dated March 1, 1989. "R" will refer to the record in this cause.

STATEMENT OF THE FACTS AND OF THE CASE

In July, 1980, Ernest and Cathy Nance consulted with the Respondent regarding the possibility of filing a medical malpractice lawsuit against several physicians and hospitals, including Dr. Dale C. Alverson, a Michigan Neonatologist who had treated the Nance's infant daughter, Chelsey, for certain nervous system disorders. (TRII,p.129,L.18-19; RR,p.1).

On August 18, 1980, the Respondent consulted with Dr. Richard Gunderman, a Tampa, Florida physician, who diagnosed Chelsey Nance as being hydrocephalic and who treated the child for said disorder. (TRII,p.130,L.15-18; p.131,L.13-14). At the August 18, 1980 meeting, Dr. Gunderman specifically informed the Respondent that, in his opinion, there had not been any negligence on the part of Dr. Alverson in reference to Dr. Alverson's treatment of Chelsey Nance. (TRII,p.132,L.2-9). Dr. Gunderman documented his opinion in a written memorandum dated August 18, 1980, (hereinafter referred to as the Gunderman memo) which stated:

"Chelsey Nance

The date of the conference was 8-18-80.

Conference was with Mr. Rood, attorney. Made an appointment to discuss Chelsey Nance. The patient's family is questioning whether or not there should be a lawsuit brought against Dr. Dale Alverson of Marquette, Michigan for delaying the diagnosis of the hydrocephalus as we had diagnosed. The discussion was fairly long, but basically amounted to 1) even in finding the hydrocephalus at the time that we did there is no guarantees and even no certitude that what we did will be of benefit to her. 2) Certainly I do not feel that there is any negligence on the part of Dr.

> Alverson. 3) It may not have been diagnosed prior to the time that I saw the patient.
>
> Basically that was the extent of the discussion, and the only other possibility would be to repeat the scan in about six months to see if more brain tissue returned, which I doubt will happen.
>
> I explained to Mr. Rood I would be happy to discuss this with Mr. and Mrs. Nance." (R. Bar Exhibit 15).

The Gunderman memo was made a part of Dr. Gunderman's medical records regarding Chelsey Nance. (R. Bar Exhibit 23,p.224,L.1-6; RR,p.2).

Subsequent to the meeting on August 18, 1980, Dr. Gunderman met with the Nances, who provided him with information to the effect that a C.A.T. scan was available to Dr. Alverson. This information allegedly caused Dr. Gunderman to change his opinion in regard to the negligence of Dr. Alverson. Subsequently, Dr. Gunderman agreed to testify as an expert witness in the to-be-filed lawsuit, notwithstanding his previous opinion that Dr. Alverson had not been negligent. (TRII, p.206,L.2-25; RR,p.2).

On December 3, 1980, the Respondent requested and received from Dr. Gunderman a copy of all of Chelsey Nance's medical records in Dr. Gunderman's possession. A copy of the Gunderman memo was included in the medical records the Respondent received from Dr. Gunderman. (R. Bar Exhibit 25,p.360,L.16-20, p.420,L.13-14).

In February, 1981, the Nances executed a contingency fee contract retaining the Respondent to file a medical malpractice

lawsuit against Dr. Alverson, Dr. Tobin, and Bell Memorial Hospital. (R. Bar Exhibit 25,p.289,L.7-8).

On February 3, 1981, the Respondent requested and received from Dr. Gunderman,a second copy of all of Chelsey Nance's medical records. A copy of the Gunderman memo was included in the medical records which the Respondent received from Dr. Gunderman's office. (R. Bar Exhibit 25,p.361,L.14-18,p.420, L.17-19).

Although the Respondent received two complete copies of Dr. Gunderman's records regarding Chelsey Nance, including two (2) copies of the Gunderman memo, he testified at the final hearing in this cause that he was unaware of the Gunderman memo until Dr. Gunderman's second deposition, because he never reviewed Dr. Gunderman's medical records on Chelsey Nance.(TRII,p.252,L.18-21; RR,p.3). The Referee found the Respondent's testimony to be totally unworthy of belief. The Referee also found that the Respondent knew of the Gunderman memo and engaged in a course of conduct to deliberately conceal its existence from everyone. (RR,p.3).

After the Respondent received copies of all of Dr. Gunderman's medical records on Chelsey Nance, he retained George Thompson, a Michigan attorney, to serve as co-counsel. (TRI,p.57,L.11-25,p.58,L.1; RR,p.3).

On February 18, 1981 and February 26, 1981, the Respondent sent Mr. Thompson what was purported to be a complete copy of Dr. Gunderman's medical records regarding Chelsey Nance. (R. Bar

Exhibit 25,p.421,L.6-7,p.422,L.1-25,p.423,L.1-3). Although Mr. Thompson received the two copies of Dr. Gunderman's medical records on Chelsey Nance from the Respondent, he never received a copy of the Gunderman memo. Mr. Thompson was unaware of the Gunderman memo until Dr. Gunderman's second deposition on September 9, 1983. (R. Bar Exhibit 22,p.96,L.1-6,p.97,L.4-7; TRI, p.69,L.16-19; RR,p.3).

On August 15, 1981, the Respondent and his co-counsel filed a medical malpractice lawsuit against Dr. Tobin, Dr. Alverson and Bell Memorial Hospital, in the United States District Court for the Western District of Michigan, Northern Division (hereinafter referred to as Nance v. Tobin). (R. Bar Exhibit 1).

On November 2, 1981, the Respondent filed a separate lawsuit on behalf of the Nances in the State of Florida against Janis Mathews and Jack Eckerd Corporation (hereinafter referred to as Nance v. Eckerd) for damages to Chelsey Nance resulting from a misfilled prescription for Zarontin, which had been prescribed by Dr. Gunderman. (TRII,p.159,L.8-24,p.161,L.1-13).

On November 5, 1981, three days after the filing of the Florida lawsuit, the defense counsel in Nance v. Tobin served Interrogatories on the Nances. (R. Bar Exhibit 3). Interrogatory number 11 asked:

> "Have you ever filed an action or made a claim against any person, firm, or corporation for damages for personal injuries or illness other than this?" (R. Bar Exhibit 3).

The Nances did not know how to answer Interrogatory No. 11 because they did not know the status of the Nance v. Eckerd lawsuit. By a letter dated November 8, 1981, the Nances asked the Respondent to answer Interrogatory No. 11 for them. The Respondent answered Interrogatory No. 11, "No". (R. Bar Exhibits 4 and 5; TRII,p.228,L.2-15).

By letter dated November 18, 1981, the Respondent forwarded the Nance's Answers to Interrogatories in the Nance v. Tobin case to his co-counsel, George Thompson. Respondent's letter to Mr. Thompson stated, "Both sets of Interrogatories inquire as to whether the Nances had filed any other legal actions. We have answered those with a technical no. However, you should be aware that we are in the process of filing a limited pharmaceutical damage claim against a local pharmacy for incorrectly filling a prescription for Chelsey Nance. Please advise if you wish to amend that answer." (R. Bar Exhibit 5).

When Mr. Thompson received the Respondent's letter of November 18, 1981, he was upset and immediately called the Respondent to make sure the Respondent did not file a lawsuit on behalf of the Nances against Eckerd because he felt the lawsuit would jeopardize the Nances' Michigan case. The Respondent did not inform Mr. Thompson that he had already filed the suit. Sometime prior to Dr. Gunderman's second deposition, the Respondent informed Mr. Thompson of the fact that the Eckered lawsuit had been filed; however, he also informed Mr. Thompson that the suit was filed against the wrong parties, thus it was

dismissed. The Respondent also informed Mr. Thompson that he would not refile the suit. (TRI,p.80,L.9-21; R. Bar Exhibit 25, p.389,L.10-22,p.390,L.11-15; TRII,p.244,L.9-16). The Respondent named the wrong defendants in the Nance v. Eckerd lawsuit. However, the lawsuit was not dismissed. The Respondent did not tell Mr. Thompson about the pendency of the Nance v. Eckerd lawsuit until September, 1983. (R. Bar Exhibit 25,p.389,L.9-10, p.390,L.13-15).

The Respondent testified that he did not know the Nance v. Eckerd lawsuit had been filed when he answered Interrogatory No. 11. (TRII,p.176,L.15-18; R. Bar Exhibit 25,p.342,L.4-11;RR,p.4). The Respondent attempted to blame faulty office procedures, or human error, for the incorrect response. (RR,p.4). The Referee rejected the Respondent's testimony based on all of the facts in this case. The Referee found that the Respondent's false answer to Interrogatory No. 11 was part of a continuing course of conduct by the Respondent designed to conceal, mislead and obfuscate from opposing counsel, the pendency of the Nance v. Eckerd lawsuit. (RR,p.4). The Respondent did not amend the answer to Interrogatory No. 11 at any time. (TRII,p.180,L.3-5).

On January 19, 1982, the Nances' Answers to Interrogatories in Nance v. Tobin were sworn to by the Respondent's clients. (R. Bar Exhibit 6 & 7). The Respondent's concealment of the existence of the Nance v. Eckerd lawsuit caused his clients to unknowingly commit perjury. (RR,p.4).

Sometime prior to January 27, 1983, the Respondent amended the Complaint against Eckerd Drugs by changing the names of the defendants and pursued the case without advising Mr. Thompson. (TRII,p.245,L.4-25; R. Bar Exhibit 25,p.389,L.10-22,p.390,L.12-15; R. Bar Exhibit 32 and 33).

After the Answers to Interrogatories were filed in Nance v. Tobin, Mr. Carpenter, Dr. Alverson's counsel, sought to obtain medical authorizations for doctors and hospitals from the Nances. The Respondent and his co-counsel refused to provide Mr. Carpenter with the medical authorizations requested; however, they did agree to send Mr. Carpenter copies of all of Dr. Gunderman's medical records in Mr. Thompson's possession. (R. Bar Exhibit 31,p.148,L.22). Mr. Thompson sent Mr. Carpenter a complete copy of all the medical records he had on Chelsey Nance. However, Mr. Carpenter did not receive the copy of the Gunderman memo of 8-18-80, since the Respondent did not send Mr. Thompson a copy of the same. In fact, Mr. Carpenter did not find out about the Gunderman memo until approximately late May or early June 1983. (R. Bar Exhibit 31,p.148,L.18-25,p.149.L.12-25,p.150,L.1-3, p.151,L.18-20).

On April 8, 1982, Dr. Gunderman's first deposition was taken in Nance v. Tobin. Prior to the deposition, the Respondent went through Dr. Gunderman's medical records on Chelsey Nance. (R. Bar Exhibit 25,p.436,L.20-23).

On January 27, 1983, Garold Morlan, Counsel for Eckerd Drugs, served Interrogatories on the Nances. (TRI,p.30,L.2-3). Interrogatory No. 13 asked:

> "State the names and addresses of all doctors who have seen or consulted with you in connection with the minor plaintiff preceding the accident in this cause sued upon, the nature or ailment or illness or other disability or for whatever reasons said doctor was consulted?" (R. Bar Exhibit 10).

The Nances, with the knowledge and approval of the Respondent, answered Interrogatory No. 13 with Dr. Gunderman's name only. The Respondent testified that the answer to Interrogatory No. 13 was a fair, complete and accurate statement. (R. Bar Exhibit 25,p.349,L.6-17). Eckerd Drugs Interrogatory No. 14 then asked:

> "Give the names and address of all hospitals where the minor plaintiff has been hospitalized as an in-patient or out-patient <u>for her entire life</u>, and as to each state." (Emphasis Supplied) (R. Bar Exhibit 10).

The Nances, with the knowledge and approval of the Respondent answered Interrogatory No. 14 by only listing St. Joseph's Hospital in Tampa, Florida.

The Respondent testified that he thought Interrogatory Nos. 13 and 14 were asking for doctors and hospitals relating only to the Eckerd Drugs incident. (R. Bar Exhibit 25,p.352,L.1-2). Eckerd Drugs' Interrogatories No. 4 and No. 8 specifically addressed the question of any doctors and hospitals visited by Chelsey Nance as a result of the Eckerd Drugs incident only. (R. Bar Exhibit 10). The Respondent deliberately attempted to conceal the pendency of the <u>Nance v. Tobin</u> lawsuit filed in Michigan from Eckerd Drugs and its counsel. (RR,p.5).

When the Respondent submitted incomplete answers to the interrogatories in Nance v. Eckerd, counsel for Eckerd Drug sent the Respondent Supplemental Interrogatories. Only after the Respondent received the Supplemental Interrogatories did he and his clients inform Mr. Morlan of all doctors and hospitals seen by Chelsey Nance. (R. Respondent Bar Exhibit 8).

The Respondent never advised Mr. Morlan of the lawsuit pending in Michigan. (TRII,p.235,L.2-3). However, subsequent to May 20, 1983, Mr. Morlan found out about the Michigan lawsuit after he had a court reporter conduct an unannounced record copy deposition of Dr. Gunderman's medical records on Chelsey Nance. (R. Bar Exhibit 31,p.173,L.19-23; TRI,p.35,L.24-25,p.36,L.1-8). Mr. Morlan's copy of Dr. Gunderman's file included a copy of the Gunderman memo. (TRI,p.36,L.9-13). When Mr. Morlan received a complete copy of Dr. Gunderman's file, he reviewed the same and found a letter from Jack Carpenter advising Dr. Gunderman that he was representing Dr. Alverson incident to the Nance v. Tobin lawsuit. After reviewing the aforementioned letter and the Gunderman memo, Mr. Morlan contacted Mr. Carpenter to inquire about the Michigan lawsuit. (TRI,p.36,L.2-15). It was during this conversation with Mr. Morlan that Mr. Carpenter first found out about the Gunderman memo. (R. Bar Exhibit 31,p.150,L.2-7). In fact, after the aforementioned conversation Mr. Morlan sent Mr. Carpenter a complete copy of Dr. Gunderman's file, which included the Gunderman memo. (R. Bar Exhibit 31,p.150,L.16-25, p.151,L.1-2).

Subsequent to Dr. Gunderman's first deposition, the Nances had amended the Nance v. Tobin lawsuit to include Marquette General Hospital as a defendant. Mr. Carpenter and the attorneys for Marquette General Hospital wanted to re-depose Dr. Gunderman and therefore scheduled a deposition for September 9, 1983. (R. Bar Exhibit 31,p.153,L.17-25; R. Bar Exhibit 20). In addition, shortly before the Pre-trial conference in Nance v. Tobin, Mr. Carpenter was provided with medical authorizations executed by the Nances. After obtaining the medical authorizations Mr. Carpenter prepared and served a record copy subpoena on Dr. Gunderman. (R. Bar Exhibit 31,p.148,L.11-25,p.149,L.1-11,p.153, L.25,p.154,L.1-3).

On or about June 30, 1983, the Respondent called Dr. Gunderman's office and left a message with Dr. Gunderman's secretary which was placed in Chelsey Nance's file. The message taken down by the secretary stated:

> "Regarding Chelsey Nance, he [referring to the Respondent] would like us to throw away any correspondence to or from the attorney in our file on Chelsey. If you do not feel comfortable about throwing this away, mail them to him and he will throw them away. Next week we will be getting requests to have our files xeroxed. He does not want this information to get into defense hands." (R. Bar Exhibit 16; R. Respondent's Exhibit 10, Statement of Claim, p.5).

On or about August 31, 1983, Dr. Gunderman received Mr. Carpenter's subpoena for medical records on Chelsey Nance. Thereafter, Dr. Gunderman had a member of his staff call the Respondent to inquire whether or not Dr. Gunderman should send his original medical records to Michigan per the subpoena. (R.

Bar Exhibit 25,p.397,L.17-21). The Respondent advised the staff member to inform Dr. Gunderman not to send the records to Mr. Carpenter since Mr. Carpenter already received a copy of all of Chelsey's medical records.(R. Bar Exhibit 25,p.398,L.16-24,p.399, L.1-4).

On September 9, 1983, Dr. Gunderman's second deposition was taken in the case of Nance v. Tobin. (R. Bar Exhibit 20). Present at the deposition were the Respondent, Mr. Thompson, Mr. Carpenter, Nick Bridges, the attorney for Marquette General Hospital, and others. While Mr. Bridges was questioning Dr. Gunderman, Mr. Carpenter reviewed the doctor's medical records on Chelsey Nance. While reviewing the medical records, Mr. Carpenter did not find the Gunderman memo of 8-18-80, but he did discover the "throw away" message from the Respondent to Dr. Gunderman. (R. Bar Exhibit 31,p.154,L.14-17,p.155,L.22-25,p.156, L.1-3 and 13-22). Thereafter, Mr. Carpenter confronted Dr. Gunderman with a copy of the August 18, 1980 memo he had obtained from Garold Morlan and the "throw away" message from the Respondent. When Dr. Gunderman was confronted with these documents, he immediately became upset and from that point on he did not testify well in the deposition. (R. Bar Exhibit 22,p.85,L.25,p.86,L.1). In fact, Mr. Thompson testified that Dr. Gunderman "backed off from some of his earlier opinions about the evidence of central nervous system involvement and progressive hydrocephalus, and he didn't seem to have the same strong opinions'' that he had in the first deposition. (R. Bar Exhibit 22,p.86,L.1-5).

The Respondent removed or caused to be removed the original Gunderman memo from Dr. Gunderman's file. In addition, the Respondent attempted to conceal the Gunderman memo from everyone involved in the Nance v. Tobin lawsuit. (RR,p.6).

On September 15, 1983, Mr. Thompson sent a letter to the Respondent which stated in part as follows:

> "Ed, please get back with me on the date when the original drug complaint was filed. I think we need to amend Ted and Cathy's Interrogatory answers (belately obviously) to reflect the second suit. If the drug case was already filed at the time they answered 'No' to Interrogatories, I believe our answer should reflect the fact that they were unaware that the suit had already been filed.
>
> I told Ted and Cathy that if worse came to worse and we thought that this error or the memo in Gunderman's file would result in impeachment of their testimony, it might be necessary to file a withdrawal of your firm as counsel...
>
> ...Ed, I have some other concerns which were raised by the Gunderman dep and my realization this week that the drug case has not been dismissed and is, in fact, being actively pursued..." (R. Bar Exhibit 25,p.389,L.9-22, p.390,L.12-15).

Thereafter, in December, 1983, the Nances dismissed their lawsuit against Dr. Alverson due to the events that occurred during Dr. Gunderman's second deposition. (R. Bar Exhibit 22,p.87,L.7-9; R. Bar Exhibit 18). In addition, the Nance v. Eckerd lawsuit was dismissed for lack of prosecution. (TRII,p.172,L.10-13).

On February 28, 1984, Dr. Alverson and his medical malpractice insurance carrier filed suit against the Respondent and Dr. Gunderman, (hereinafter referred to as Alverson v. Rood),

alleging fraud and conspiracy to defraud by the Respondent and Dr. Gunderman. (R. Bar Exhibit 21). In addition, on the same date, Dr. Alverson filed with The Florida Bar a grievance against the Respondent in regard to the Respondent's conduct in the Nance v. Tobin lawsuit.

Dr. Alverson's grievance complaint was sent to the Respondent under The Florida Bar File No. 13C84H86. On March 27, 1984 the Respondent sent a response to Steve Rushing, Branch Staff Counsel of the Tampa office of The Florida Bar which stated as follows:

> "Dr. Alverson has filed suit against myself, co-counsel and Dr. Gunderman in Federal Court in Michigan. While it would be inappropriate to comment specifically on the allegations at this time, our answer to the complaint affirmatively denies all of the allegations." (R. Respondent Exhibit 10).

On August 9, 1984 Steve Rushing sent a letter to Dr. Alverson, with a copy to the Respondent, which stated that The Florida Bar File No. 13C84H86 was being closed due to insufficient evidence that the Respondent violated the Code of Professional Responsibility.

On October 28, 1986, a trial by jury commenced in the Alverson v. Rood lawsuit pending in Michigan. On November 5, 1986, the jury returned a verdict against the Respondent and Dr. Gunderman which was affirmed on appeal. (RR, p. 6)

On February 11, 1987, The Florida Bar opened File No. 87-25,898 (13C) against Respondent based on the Michigan jury verdict. Florida Bar File No. 87-25,898(13C) is the case here on review.

On February 17, 1987, a letter of inquiry regarding the Alverson v. Rood verdict was sent to the Respondent. A follow up letter was sent to the Respondent on March 11, 1987. The instant case was sent to the Grievance Committee on March 26, 1987. A grievance Committee hearing was held on October 21, 1987, December 10, 1987 and January 19, 1988. The grievance committee found probable cause on March 17, 1988. (R. Supp).

On August 10, 1988, The Florida Bar filed a formal complaint in this case.

On November 18, 1988, a final hearing was held in this case before the Honorable William A. Norris. At the conclusion of the final hearing, Judge Norris recommended that the Respondent be found guilty of violating DR 1-102,(A)(4)(a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation), DR 1-102(A)(6)(a lawyer shall not engage in any other conduct that adversely reflects on his fitness to practice law), DR 7-102(A)(3)(a lawyer shall not conceal or knowingly fail to disclose that which he is required by law to reveal), DR 7-102(A)(6)(a lawyer shall not participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false), and DR 7-109(A)(a lawyer shall not supress any evidence that he or his client has a legal obligation to reveal or produce). In addition, the Referee found the Respondent not guilty of violating DR 7-102(A)(2) (a lawyer shall not knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such

claim or defense if it can be supported by a good faith argument for an extension, modification, or reversal of existing law). Further, the Referee recommended that the Respondent be disciplined by a one year suspension. The Referee also recommended that the Respondent be responsible for the Bar's costs in this proceeding. The Referee gave no weight in this case to the jury's verdict, the Michigan Judge's rulings or the decision of the U.S. Court of Appeals in Alverson v. Rood.

The Respondent filed a Petition for Review on October 2, 1989. The Florida Bar filed a Petition for Review on October 5, 1989. On November 6, 1989, The Bar was served with the Respondent's Initial Brief. This brief is filed in answer to the Respondent's Initial Brief and in support of the Bar's Cross-Petition for Review.

SUMMARY OF THE ARGUMENT

The Respondent's Initial Brief presents several arguments alleging that the Referee's findings of fact and recommendations of guilt are erroneous; that the aggravating factors considered by the Referee are unsupported by the record; and that the Referee's recommended discipline is not justified.

The Referee found that the Respondent knew of the existence of Dr. Gunderman's memo of August **18, 1980;** that the Respondent engaged in a course of conduct to conceal Dr. Gunderman's memo from everyone; that he removed or caused to be removed from Dr. Gunderman's file, the original Gunderman memo; and that he knowingly prepared, or caused to be prepared false and incomplete interrogatory responses with the intent to conceal the existence of the Nance v. Tobin lawsuit from opposing counsel in the Nance v. Eckerd case, and vice versa. The Respondent denied engaging in the aforementioned acts set forth above. However, the Referee found the Respondent's testimony totally unworthy of belief and rejected the same. The Referee's rejection of the Respondent's testimony was justified in light of the numerous contradictory and evasive statements made by the Respondent in the instant case and in the Alverson v. Rood case.

The Referee's findings of fact are presumed to be correct and it is the Respondent's burden to demonstrate that the Report of Referee is erroneous, unlawful or unjustified. The Respondent

has failed to rebut the presumption of correctness. The facts in this case, taken as a whole, clearly support not only the Referee's findings of fact, but also his recommendations of guilt and thus the same should be upheld.

The Respondent challenges the aggravating factors considered by the Referee in this cause. All of the aggravating factors are supported by the record and should be upheld.

The Bar challenges four of the mitigating factors considered by the Referee in this cause. There is no testimony or evidence in the record in regard to the Respondent's "character and reputation" in the legal community, thus this mitigating factor should be rejected by this Court. In addition, the Bar did not "delay" its prosecution against the Respondent. Even if this Court disagrees, delay by the Bar cannot be considered as a mitigating factor unless the Respondent is prejudiced by the same. The Respondent's own testimony supports the fact that he was not prejudiced by any delay by the Bar in this action; therefore this Court should reject "delay" as a mitigating factor in the instant case. The suggested mitigating factor of "isolated nature of this transaction" is a duplication of the mitigating factor of "absence of a prior disciplinary record", and therefore this factor should be rejected by the Court. Likewise, the mitigating factor of "substantial passage of time between the transactions forming the basis of this disciplinary matter and the date of this report, and the absence of similar events during that period of time" encompasses the mitigating

factors of "absence of a prior disciplinary record" and "delay in the prosecution of this matter"; therefore this mitigating factor should be rejected by this Court.

The Respondent also challenges the Referee's recommended discipline as being too severe. It is the Bar's position that the Referee's recommended discipline is too lenient. Under Florida's Standards for Imposing Lawyer Sanctions, given the facts of this case, disbarment is the only appropriate discipline for the Respondent's course of misconduct.

The Florida Bar asks this Court to approve the Referee's findings of fact, his recommendations of guilt, and the aggravating factors considered by the Referee. However, the Bar respectfully requests this Court to reject the purported mitigating factors challenged by the Bar, and the Referee's recommended discipline, and to disbar the Respondent from the practice of law.

ARGUMENT

THE REFEREE'S FINDINGS OF FACT, WHICH ARE SUPPORTED BY CLEAR AND CONVINCING EVIDENCE AND ARE NOT CLEARLY ERRONEOUS, SHOULD BE UPHELD.

The Respondent challenges the Referee's findings of fact as being unsupported by clear and convincing evidence. A Referee's findings of fact are presumed to be correct and should be upheld unless clearly erroneous or lacking in evidentiary support, since the Referee had an opportunity to personally observe the demeanor of the witnesses and to assess their credibility. The Florida Bar v. Stalnaker, 485 So.2d,815 (Fla. 1986). The Referee's findings of fact are supported by the record in this cause, and should be upheld.

The Respondent challenges the Referee's finding that the Respondent knew of the Gunderman memo prior to September 9, 1983 and engaged in a course of conduct to deliberately conceal the memo's existence from everyone. This finding is supported by clear and convincing evidence.

During the Final Hearing in this cause and during the Michigan Trial in the case of Alverson v. Rood, the Respondent testified that he never reviewed Chelsey's medical records and was thus unaware of the existence of the Gunderman memo until September 9, 1983 when Dr. Gunderman's second deposition was taken in Nance v. Tobin. The Referee rejected the Respondent's testimony in this regard as being totally unworthy of belief. (RR,p.3).

The Referee's rejection of the Respondent's testimony as being totally unworthy of belief is justified in light of all of the facts in this case and the Respondent's conflicting testimony in both the Alverson v. Rood case and the instant case. The Respondent testified in the Michigan case of Alverson v. Rood, and in the case sub judice, that he had in his file two (2) complete copies of Dr. Gunderman's medical records on Chelsey Nance, including two copies of the Gunderman memo. (R. Bar Exhibit 25,p.361,L.17-18, p.393,L.8-11). He further testified that he obtained these two complete copies of Dr. Gunderman's medical records on Chelsey Nance (including the Gunderman memo) by virtue of requests to Dr. Gunderman for copies of the same, on December 30, 1980 and February 3, 1981. (R. Bar Exhibit 25, p. 420,L.3-19; TRII,p.250,L.17-22,p.253,L.2-4).

At the Final Hearing in this cause, the Respondent testified as follows, in response to questions propounded by his counsel:

> Q. Mr. Rood, you now know that Dr. Gunderman dictated a memo to his file concerning that first meeting with you, don't you?
> A. That's correct.
> Q. Mr. Rood, did you know that back in August of 1980?
> A. I had no idea at all that he had recorded his thoughts into a memo. He didn't do it while I was there, he never discussed it with me, he never sent a copy. The first time that I was aware that that memo existed was when it appeared at the second deposition of Dr. Gunderman. (Emphasis Supplied) (TRII,p. 134,L.7-18).

This testimony is contrary to the Respondent's trial testimony in the Michigan case as referenced above.

In the instant case, the Respondent testified that he was unaware of the two Gunderman memos contained in his file on

Chelsey Nance because he never reviewed Chelsey's medical records in his file. (TRII,p.138,L.8-10). Although the Respondent claims that he himself never reviewed the records in his file, his paralegal did, and she provided the Respondent with a summary of the documents contained therein, and the Respondent reviewed the same. (TRII,p.138,L.22-25). Based on the exculpatory nature of the Gunderman memo, it is more likely than not that the Respondent's paralegal called this document to the Respondent's attention. Even if this is not the case, the Respondent certainly became aware of the memo prior to Dr. Gunderman's first deposition in April, 1982. In the Alverson v. Rood case, the Respondent testified that prior to Dr. Gunderman's first deposition, he met with Dr. Gunderman and went through Dr. Gunderman's medical file on Chelsey Nance. (R. Bar Exhibit 25,p.436,L.23-24). The Gunderman memo was in Dr. Gunderman's file after April, 1982. (TRI,p.35,L.9-25,p.36,L.1-13). In the instant case, the Respondent testified that he never had access to Dr. Gunderman's medical file on Chelsey Nance. (TRII,p.146,L.15-18). The Respondent's testimony in the instant case is contrary to the Respondent's testimony in the Alverson v. Rood case.

In addition, the Respondent allegedly sent copies of all of Dr. Gunderman's medical records on Chelsey to his co-counsel on February 18, 1981 and on February 26, 1989. (TRII,p.421,L.6-7, p.422,L.1-3, 24-25,p.423,L.1-3). However, Mr. Thompson never received a copy of the Gunderman memo of 8-18-80. In fact, the

Gunderman memo is the only medical record that Mr. Thompson knows of that he never received from the Respondent or Dr. Gunderman. (R. Bar Exhibit 22,p.96,L.5-6,23-25,p.97,L.1-7, p.133,L.12-16). Why didn't Mr. Thompson receive a copy of the Gunderman memo when the Respondent's file on Chelsey Nance contained two (2) copies of the same? The answer can only be that the Respondent removed, or caused to be removed, the Gunderman memo from the medical records that he forwarded to Mr. Thompson. (RR,p.6).

The Respondent not only failed to provide his co-counsel with a copy of the Gunderman memo, but contrary to the Respondent's assertion in his brief, he also failed to inform Mr. Thompson of the oral "no negligence" opinion expressed by the doctor on August 18, 1980. (R. Bar Exhibit 22,p.95,L.2-6; TRI,p.95,L.8-11).

Further the Respondent advised Dr. Gunderman on August 31, 1983 "not to send copies of records to Mr. Carpenter [counsel for Dr. Alverson in Nance v. Tobin]. He [Mr. Carpenter] already has all copies." (R. Bar Exhibit 25,p.397,L.17-20,p.399,L.2-4). Mr. Carpenter had not obtained a copy of the August 18, 1980 memo through discovery; thus, he did not have a copy of all of Dr. Gunderman's medical records on Chelsey Nance. Prior to August 31, 1983, Mr. Carpenter had received his copies of Dr. Gunderman's records from Mr. Thompson. The records did not contain the Gunderman memo since Mr. Thompson had not received the same from Respondent. (R. Bar Exhibit 31,p.149,L.12-14 and 23-25,p.150,L.1). The Respondent and his co-counsel had refused to provide medical authorizations for doctors and hospitals from

the Nances to the opposing counsel; however, they agreed to provide copies of the medical records that Mr. Thompson had on the child. (R. Bar Exhibit 31, p.148,L.8-21).

Mr. Carpenter became aware of the Gunderman memo when Mr. Morlan, counsel for Eckerd Drugs, advised him of the same in late May or early June, 1983. (R. Bar Exhibit 31,p.150,L.2-7 and 16-25). Mr. Morlan became aware of the Gunderman memo when he received a copy of the same through an unannounced record copy deposition on Dr. Gunderman's medical file on Chelsey Nance in the Nance v. Eckerd case. (R. Bar Exhibit 31,p.173,L.19-23). When Mr. Carpenter was informed about the Gunderman memo, he sought to discover why he had not received a copy of the Gunderman memo from Mr. Thompson and the Respondent.

Shortly before the pretrial conference in Nance v. Tobin, Mr. Carpenter finally obtained, from the Nances, medical authorizations for doctors and hospitals. Thereafter, Mr. Carpenter sent Dr. Gunderman a record copy subpoena. On August 31, 1983, Respondent advised Dr. Gunderman to ignore this subpoena. (R. Bar Exhibit 25,p.397,L.17-20,p.399,L.2-4). In addition, the Respondent left a message with Dr. Gunderman's office instructing Dr. Gunderman to "throw away correspondence to or from the attorneys'' in the Chelsey Nance file. (R. Bar Exhibit 16). Respondent testified that he believed the correspondence could be thrown away because he considered the correspondence to be covered by the work-product privilege. (TRII,p.155,L.2-9; R. Bar Exhibit 16, and 25,p.437,L.23-25,p.438,

L.1-3). He further testified that he considered the Gunderman memo to be privileged. **(TRII,p.253,L.6-21,p.254,L.1-16).**

The Gunderman memo of August 18, 1980 which was in Dr. Gunderman's file in late May or early June of 1983 was not in Dr. Gunderman's file at the time of Dr. Gunderman's second deposition on September 9, 1983. The "throw away" memo was dated June 30, 1983. (R. Bar Exhibit 16). The evidence is clear and convincing that the Respondent "removed or caused to be removed, the original of the Gunderman memo from Dr. Gunderman's own file". (RR,p.6).

The Respondent also challenges the Referee's finding that the Respondent deliberately attempted to conceal the pendency of the Nance v. Eckerd lawsuit from Dr. Alverson's counsel. This finding by the Referee is supported by the record in this case.

On November **2,** 1981, the Respondent filed the Nance v. Eckerd lawsuit. (RR,p.3). On November 5, 1981, three (3) days later, Michigan counsel in Nance v. Tobin served interrogatories on the Nances. (RR,p.3 and R. Bar Exhibit 3). Answers to these Interrogatories were filed January 19, 1982. (R. Bar Exhibit 6). Interrogatory No. 11 asked the Nances if they had filed any other lawsuit. (R. Bar Exhibit 3). The Nances didn't know the status of their claim against Eckerd *so* by letter dated November 8, 1981, they asked Respondent to Answer the Interrogatory for them. (R. Bar Exhibit 10). The Respondent answered Interrogatory No. 11 "no" and forwarded the Nances' Answer to Interrogatories to his co-counsel by letter dated November 18, 1981. In the letter,

the Respondent did not advise Mr. Thompson of the fact that the Nance v. Eckerd suit was filed. Instead he told Mr. Thompson he was in the process of filing a lawsuit against Eckerd. (R. Bar Exhibit 5 and 10).

The Respondent testified at the Final Hearing in this case that at the time he answered Interrogatory No. 11 he did not realize the Nance v. Eckerd lawsuit had been filed. In addition, the Respondent testified he didn't know the lawsuit had been filed by his clerical staff due to the fact that he had placed a "hold" sticker on the Nance v. Eckerd Complaint. (TRII,p.176,L.15-18,p.178,L.10-16). The Respondent's testimony was not credible for the following reasons:

1. The Respondent's paralegal, Barbara Bunting, testified that the "hold" sticker on the Nance v. Eckerd lawsuit was attached to the Complaint after the Respondent had a heated discussion with Mr. Thompson regarding the filing of the Eckerd Drugs lawsuit. (TRII,p.116,L.4-18).
2. Mr. Thompson testified he called the Respondent in regard to the Nance v. Eckerd lawsuit only after he received the Respondent's letter of November 18, 1981, wherein the Respondent stated he was in the process of filing a limited lawsuit against a local pharmacy for incorrectly filling a prescription for Chelsey. (TRI,p.80,L.16-21).
3. At the time the Respondent sent the letter of November 18, 1981, and at the time the Respondent had the phone conversation with Mr. Thompson regarding the Nance v. Eckerd case, the lawsuit had already been filed at least two (2) weeks previously.
4. In the Michigan case, the Respondent never testified about a "hold" sticker on the Nance v. Eckerd complaint. The Respondent testified quite to the contrary. When asked "Did you tell anybody 'Don't file this, whatever you do!', the Respondent replied "no Sir, I didn't. It was my expectation that the lawsuit was to be filed." (R. Bar Exhibit 25,p.340, L.14-18).

5. The Respondent testified in the case sub judice that he didn't discover that the Nance v. Eckerd complaint had been filed until approximately three (3) weeks after he wrote the letter dated November 18, 1981 to Mr. Thompson. (TRII,p.177,L.10-13).
6. The Respondent never amended the answer to Interrogatory No. 11. (TRII,p.180,L.3-5).
7. The Respondent didn't inform Mr. Thompson of the fact that he was pursuing the Nance v. Eckerd lawsuit until after Dr. Gunderman's second deposition. (R. Bar Exhibit 25, p.389,L.9-22, p.390,L.11-16).
8. The Respondent acknowledged signing the original Complaint in Nance v. Eckerd indicating a readiness to file the same. (TRII,p.178,L.7-8).

The Referee, in evaluating the Respondent's explanation for answering Interrogatory No. 11 "no", stated "his explanation 'might' be believable, but it isn't an isolated incident--it is all a continuing course of conduct designed to conceal, mislead and obfuscate". (RR,p.4).

The Respondent also challenges the Referee's finding that Respondent caused his clients to unknowingly commit perjury.

This finding by the Referee is based on the following: Respondent caused the Nances, in January of 1982 (2 months after the filing of Nance v. Eckerd on November 2, 1981) to swear to Interrogatory No. 11 (Nance v. Tobin) that they never previously filed an action or made a claim against any person, firm, or corporation for damages for personal injury or illnesses other than in that action. Respondent answered that question for the Nances in response to their letter to him dated November 8, 1981. (R. Bar Exhibit 4). Mr. Thompson and the Nances were without knowledge of the falsity of said Response.

The Referee found that Respondent deliberately exposed the Nances (his clients) to a charge of perjury. He did not find that the Nances committed perjury.

The Respondent further challenges the Referee's finding that the Respondent deliberately attempted to conceal the pendency of the Nance v. Tobin lawsuit from Eckerd Drugs and its counsel. This finding by the Referee is based on the Nances' answers to Interrogatories in Nance v. Eckerd. Interrogatory No. 13 asked for the names of all of the doctors Chelsey Nance had seen before the Eckerd Drugs incident. The Nances with the approval of the Respondent answered Interrogatory No. 13 with Dr. Gunderman's name only even though the child had seen numerous other doctors including Dr. Alverson. Interrogatory No. 14 asked for the names of all the hospitals where Chelsey was hospitalized as an in-patient or an out-patient for her entire life. The Nances with the Respondent's approval answered Interrogatory No. 14 with St. Joseph's Hospital in Tampa, Florida only, even though the child had been hospitalized in other hospitals including Bell Memorial and Marquette General Hospital. (R. Bar Exhibit 10).

The Respondent was aware of the inaccurate responses to Interrogatory Nos. 13 and 14; however, he submitted the answers to Eckerd's counsel on May 4, 1983 without correcting the same, because he didn't think it made any difference. (R. Bar Exhibit 25,L.9-10; TRII,p.240,L.3-9).

During the trial in the Alverson v. Rood case, the Respondent testified as follows to questions propounded by Dr.

Alverson's counsel in regard to Interrogatory No. 13:

> Q. (By Mr. Glass) And the answer was, "Dr. Gunderman".
> A. Yes sir.
> Q. And you believe that is a fair, complete and accurate statement in answer to that question?
> A. I do.
> Q. What about all the other doctors who had seen this patient preceding the accident in this cause sued upon up in Michigan?
> A. I don't think that's what they're asking for there.
> Q. You don't read that question that way?
> A. No. They knew about all of them. That's not what they're asking for there.
> Q. Well, you say, "They knew all about them?"
> A. Sure. I told them. They knew everything about it. I had had in depth discussions with them. (R. Bar Exhibit 25,p.349,L.13-25,p.350,L.1).

In addition, during the Alverson v. Rood trial, the Respondent testified as follows to questions propounded by Dr. Alverson's counsel in regard to Interrogatory No. 14:

> Q. ...Now the answers are given there, and would you tell us what those answers are?
> A. The answers are for the -- for the hospitalization in reference to this particular incident.
> Q. Right. The question was give us the names of all hospitals where this child has been for his/her entire life, and the answer given by you and your client was, "St. Joseph Hospital, Tampa, Florida," correct?
> A. Correct.
> Q. You did not tell Mr. Morlan, the attorney representing Eckerd Pharmacy, about the extensive hospitalization of Chelsey Nance that had gone on in two hospitals in the State of Michigan?
> A. I had absolutely told them everything about it, and I told the adjuster everything about it.
> Q. Why not tell them again in these sworn statements under oath, Mr. Rood?
> A. The clients answered those. The client was under the impression that they were asking for questions in relation to this incident. When the answer came in typed, we just sent them on.
> Q. You just sent these in this time?
> A. Yes, sir.
> Q. I thought you said you reviewed these to make sure they're [sic] accurate and complete.

A. I read them. They were typed, signed and prepared. I just sent them on. The defense knew about it. I didn't think it made any difference.
Q. You didn't think it made any difference. But the effect of it was, or at least on the face of these documents is, that a lawyer asking for answers to interrogatories in a lawsuit in which you are involved is seeking to know information about whether or not your client may have been hospitalized anywhere else, and the information you chose to give back to him through your client, under oath, did not disclose to him in these answers to interrogatories the existence of other material evidence, did it?
A. No, Sir. I had discussed in depth with him the problems. What he wanted in those interrogatories, what we were talking about on the phone, and we were having lots of conversations, is he wanted to know the details of the doctors and the hospitals and the relationship to the limited case that we had filed against his client.
(R. Bar Exhibit 25,p.350,L.8-25,p.351,L.1-25).

Contrary to the Respondent's testimony, Interrogatory Nos. 13 and 14 did not relate solely to the doctors and hospitals involved in the Eckerd Drug incident. Interrogatories No. 4 and No. 8 specifically addressed the question of doctors and hospital visited by Chelsey Nance as a result of the Eckerd Drug incident only. (R. Bar Exhibit 10).

In addition, contrary to the Respondent's testimony, Mr. Morlan testified as follows in response to questions propounded by Bar Counsel:

Q. Okay. Prior to serving these interrogatories on the Nances did you have in depth discussions with Mr. Rood regarding Chelsey Nances extensive medical history?
A. No.
Q. Prior to serving your first set of interrogatories did you give the names of all, did Mr. Rood give the names of all doctors and hospitals that Chelsey Nance had consulted with or been in; any hospitals that she had been in from date of birth?
A. No. Mr. Rood didn't. (TRI,p.34,L.15-24).

The Respondent would like this Court to believe that he voluntarily amended the Nances' answers to Interrogatories No. 13 and 14 (Nance v. Eckerd). In fact, he only amended those answers when Mr. Morlan submitted Supplemental Interrogatories to the Nances in regard to Interrogatory Nos. 13 and 14. On May **24, 1989,** the Respondent submitted to Mr. Morlan the Nances' answers to the Supplemental Interrogatories. (R. Respondents Exhibit 7). The Nances' Supplemental Answers to Interrogatories provided the complete list of the doctors and hospitals seen by Chelsey.

The Respondent wanted to conceal the pendency of the Nance v. Tobin case from Eckerd's counsel because, as the Respondent testified in the instant case, he wanted to settle the Nance v. Eckerd case as quickly as possible so that the settlement proceeds could be used to pay expert witnesses in the Nance v. Tobin case. **(TRII,p.174,L.8-11,p.234,L.3-9).** Also, the Respondent wanted to conceal the Nance v. Tobin lawsuit from Mr. Morlan because he knew that he had a serious problem in the Eckerd case of proving causation and/or damages, in light of the Michigan lawsuit. **(TRII,p.234,L.10-15,p.247,L.5-13).** Obviously, the Respondent wanted to conceal the Nance v. Tobin lawsuit from Eckerd's counsel because the same would jeopardize the settlement negotiations with Mr. Morlan.

The Referee's finding that the Respondent attempted to conceal the Nance v. Tobin lawsuit from Eckerd's counsel is supported by clear and convincing evidence and should be upheld.

In review, the Referee found throughout his report, that the Respondent's testimony was not worthy of belief and the Referee

rejected the Respondent's testimony. A cursory review of the Respondent's trial testimony in Alverson v. Rood and in the instant case supports the Referee's view of the Respondent's credibility. The Respondent's testimony was evasive, unresponsive, and impeachable on occasions too numerous to count and/or set forth. In addition, the Respondent received two copies of Dr. Gunderman's memo dated August 18, 1980; he concealed the memo from his co-counsel and his opposing counsel; he claimed he considered the memo to be covered by the work product privilege; he instructed Dr. Gunderman to destroy correspondence between attorneys which he considered to be covered by the work product privilege; he went through Dr. Gunderman's medical file on Chelsey prior to Dr. Gunderman's first deposition; the memo was missing from Dr. Gunderman's medical file at the time of Dr. Gunderman's second deposition; and he submitted false and incomplete answers to interrogatories in the Nance v. Tobin case and the Nance v. Eckerd case. All of the aforementioned facts support all of the Referee's findings of fact in this case.

Rule 3-7.6(c)(5), Rules Regulating The Florida Bar, specifically states that, "upon review, the burden shall be upon the party seeking review to demonstrate that a Report of Referee sought to be reviewed is erroneous, unlawful, or unjustified." The Respondent has failed to meet this burden; therefore, the Referee's findings should be upheld.

THE REFEREE'S RECOMMENDATIONS OF GUILT SHOULD BE UPHELD BY THIS COURT IN LIGHT OF THE EVIDENCE IN THIS CASE.

The Respondent challenges the Referee's recommendation that the Respondent be found guilty of violating DR 1-102(A)(4), Code of Professional Responsibility. The Respondent contends that the record is devoid of evidence establishing that the Respondent engaged in conduct involving fraud, deceit, or misrepresentation. Quite to the contrary, the record is replete with evidence to support the Referee's recommendation.

As set forth in the previous argument, the Respondent in the Nance v. Tobin case knowingly answered Interrogatory No. 11 falsely and submitted the same to the Defendant's counsel under the sworn signature of the Nances; he submitted incomplete answers to interrogatories in the Nance v. Eckerd case; he concealed the Gunderman memo from his co-counsel and opposing counsel, he removed or cause to be removed the Gunderman memo from Dr. Gunderman's file. (RR,p.3-7). All of the aforementioned acts by the Respondent constitute conduct involving fraud, deceit, and misrepresentation. Thus the Referee's recommendation of guilt as to DR 1-102(A)(4) should be approved by this court.

The Respondent also challenges the Referee's recommendations that the Respondent be found guilty of violating DR 7-102(A)(3) and DR 7-109(A), Code of Professional Responsibility. The Respondent contends that there is insufficient evidence in the record to establish that the Respondent suppressed, concealed, or

knowingly failed to disclose that which he is legally required to reveal. Contrary to the Respondent's assertion, the record amply supports the Referee's recommendation.

As previously set forth, the Respondent intentionally submitted a false answer to Interrogatory No. 11 in Nance v. Tobin. By law, the Respondent was required to amend the answer to Interrogatory No. 11, yet he failed to do so. In addition, opposing counsel made a discovery request for all of Dr. Gunderman's records on Chelsey Nance. The Respondent and his co-counsel refused to provide opposing counsel with medical authorization forms from the Nances and this fact restricted the opposing counsel's efforts to obtain the records directly from Dr. Gunderman. The Respondent and Mr. Thompson agreed to produce copies of Dr. Gunderman's records from the records they had obtained. Mr. Thompson provided the records to opposing counsel, since he was in Michigan, as were the opposing attorneys. (R. Bar Exhibit 31,p.148,L.8-21). The Respondent knew that Mr. Thompson did not get the Gunderman memo, thus he knew that opposing counsel would not receive a copy of the memo when Mr. Thompson sent copies of his records to opposing counsel. Therefore, the Respondent knowingly suppressed or concealed the memo from opposing counsel contrary to law.

Further, the Respondent instructed Dr. Gunderman to "throw away all correspondence to or from attorneys" in his file regarding Chelsey Nance. (R. Bar Exhibit 16). The correspondence between attorneys was evidence in the case, albeit, possibly

inadmissable (TRII,p.257,L.6-9); thus the Respondent instructed Dr. Gunderman to destroy evidence relative to the Nance v. Tobin case. In addition, the Referee found that the Respondent removed, or caused to be removed, the Gunderman memo from Dr. Gunderman's file. (RR,p.6). As established in the prior argument, this finding by the Referee is supported by clear and convincing evidence. The Gunderman memo constituted potential evidence in the Nance v. Tobin case and the Respondent suppressed or concealed this evidence contrary to law.

By reason of the foregoing, the Referee's recommendation that the Respondent be found guilty of violating DR 7-102(A)(3) and DR 7-109(A) should be upheld.

The Respondent challenges the Referee's recommendation that the Respondent be found guilty of violating DR 7-102(A)(6), Code of Professional Responsibility, on the grounds that there is insufficient evidence to support a finding that the Respondent created evidence when he knew or it was obvious the evidence was false. There is clear and convincing evidence in the record to support the Referee's recommendation.

As previously stated, the Respondent knowingly gave a false answer to Interrogatory No. 11 in Nance v. Tobin in an effort to conceal the pendency of the Nance v. Eckerd lawsuit from the attorneys for the Defendants in Nance v. Tobin. The Respondent's false answer constitutes false evidence and therefore the Referee's recommendation should be upheld.

Finally, the Respondent challenges the Referee's recommendation that the Respondent be found guilty of violating

DR 1-102(A)(6) on the grounds that nothing clearly proven by The Florida Bar reflects adversely on the Respondent's fitness to practice law.

As set forth in the prior argument the Respondent concealed evidence, knowingly submitted false answers to Interrogatories, knowingly concealed facts and documentary evidence from his own co-counsel, and instructed a witness to destroy evidence. Clearly the Respondent's conduct adversely reflects on his fitness to practice law. In fact, any attorney who engages in such conduct should not be permitted to practice law in this State. Therefore, the Referee's recommendation of guilt as to DR 1-102(A)(6) should be upheld.

THE AGGRAVATING FACTORS CONSIDERED BY THE REFEREE ARE SUPPORTED BY THE RECORD AND SHOULD BE UPHELD; HOWEVER, SEVERAL OF THE MITIGATING FACTORS ARE NOT SUPPORTED BY THE RECORD AND SHOULD BE REJECTED.

The Respondent contends that the five (5) aggravating factors considered by the Referee in recommending discipline in this case are not supported by the record. The Respondent's claim is without merit.

In Section E of the Report of Referee, the Referee enumerates five (5) aggravating factors which he considered in determining discipline in this case. These aggravating factors are as follows:

1. Dishonest or selfish motive;
2. A pattern of misconduct;
3. Refusal to acknowledge wrongful nature of conduct;
4. Substantial experience in the practice of law; and
5. Causing his clients to unknowingly commit perjury by supplying them with false answers to Interrogatories and thereafter having his clients swear to the same. (RR,p.8).

The first aggravating factor of "dishonest or selfish motive" is supported by the record. At the final hearing the Respondent testified that he had a set annual compensation and that his compensation was not dependent upon the results obtained in any lawsuit. (TRII,p.126,L.1-6). However, in the Alverson v. Rood case, the Respondent testified that a large money judgment for the Nances would also result in a large money fee for himself. (R. Bar Exhibit 25,p.321,L.2-6). Thus, the Referee's first aggravating factor is supported by the record.

As to the aggravating factor of **"a** pattern of misconduct", the Referee found that the Respondent engaged in a course of conduct designed to conceal evidence and mislead opposing counsel. (RR,p.3-7). As established in the first argument of this Brief, the record is supported with evidence to establish the aggravating factor of **"a** pattern of misconduct".

The aggravating factor of "refusal to acknowledge wrongful nature of conduct" is also supported by the record. The Respondent instructed Dr. Gunderman to destroy evidence by throwing away correspondence between attorneys. In addition, the Respondent knew that the answer he gave to Interrogatory No. 11 in Nance v. Tobin was false, yet he failed to amend the same. The Respondent's own testimony supports the aforementioned facts, yet the Respondent cannot acknowledge his misconduct.

The aggravating factor of "substantial experience in the practice of law" is supported by the record. The Respondent insinuates in his brief that he was inexperienced in the practice of law at the time of the acts relating to this case. The Respondent had practiced law for approximately seven (7) years when he commenced representation of the Nances and ten (10) years by the time the case ended. (TRII,p.124,L.18-19). It doesn't take seven years to learn the Rules of Civil Procedure.

The aggravating factor of "causing his clients to unknowingly commit perjury by supplying them with false answers to Interrogatories and thereafter having his clients swear to the same" is also supported by the record. As previously set forth

in the prior arguments, the Respondent knowingly provided his clients with a false answer to Interrogatory No. 11 in Nance v. Tobin; thus the Respondent caused his clients to be exposed to a charge of perjury and therefore this factor should be upheld.

All of the Referee's aggravating factors are supported by the record and should be upheld: however, several of the mitigating factors considered by the Referee are not supported by the record. The Bar is not challenging the mitigating factor relating to the fact that the Respondent does not have a prior disciplinary record. In addition, the Bar is not challenging the mitigating factor relating to the Respondent's contributions to the community and church.

The Bar does take issue with the finding as a mitigating factor that the Respondent has an excellent reputation and is of good character. The record is devoid of any testimony as to the Respondent's "character and reputation". Character witnesses were not utilized by either party in the instant case. The Bar also challenges the mitigating factor relating to delay by The Florida Bar in prosecuting this case. The Bar did not delay the prosecution of its case against the Respondent.

On February 28, 1984, Dr. Alverson filed a grievance against the Respondent regarding the Respondent's actions in Nance v. Tobin. The Respondent responded to the grievance on March 27, 1984 by advising Steve Rushing, Branch Staff Counsel of the Tampa office of The Florida Bar, that Dr. Alverson filed suit against the Respondent, his co-counsel, and Dr. Gunderman in Michigan. The Respondent also advised Steve Rushing that he could not

comment on the allegations at that time because of the pending lawsuit; therefore he simply denied all of the allegations. The Respondent's letter clearly suggested that the dispute with Dr. Alverson was a civil matter, not a Bar matter, and that he could not cooperate with the Bar during the pendency of the civil suit. Mr. Rushing summarily dismissed the grievance of Dr. Alverson on August 9, 1984 on the grounds that there was insufficient evidence at that time to support a finding that the Respondent violated the Code of Professional Responsibility. (R. Respondent's Exhibit 10).

Subsequently, on November 5, 1986, the Michigan trial in Alverson v. Rood concluded with a jury verdict that was unfavorable to the Respondent and Dr. Gunderman. On February 11, 1987, the Bar opened a new file against the Respondent based on the jury verdict in Michigan. The case on review represents the aforementioned file. It took the Bar less than two (2) years to advance this case from the investigative stage to a final hearing. Two years is not egregious in light of the fact that the case encompassed facts, documents, records and trial and deposition transcripts from three other cases: the Michigan cases of Nance v. Tobin, and Alverson v. Rood, and the Florida case of Nance v. Eckerd. The record in this cause is voluminous and the issues are numerous. Based on the foregoing, this court should reject as mitigating the length of time it took to take this case to final hearing.

Even if this Court agrees with the Referee that the Bar unneccessarily delayed the proceedings against the Respondent, the delay did not prejudice the Respondent. At the final hearing of this case, the Respondent testified that he was better prepared for this case than he was for the Michigan case of Alverson v. Rood which occurred two (2) years prior to the Final Hearing in this case. **(TRII,p.267,L.6-8,12,13).** The Respondent's own testimony supports the lack of prejudice by any delay. There must be a showing of prejudice before delay by the Bar can be considered by the Referee as a mitigating factor. The Florida Bar v. Randolph, 238 So.2d **635** (Fla.1979). Since there is no evidence of prejudice to the Respondent, this Court should reject delay as a mitigating factor.

The two remaining recommended mitigating factors noted by the Referee are: the isolated nature of this transaction; and substantial passage of time between the transaction forming the basis of this disciplinary matter and the date of this report, and the absence of similar events during that period of time. These two factors should be rejected by this Court since they are repetitious of the mitigating factors of ''absence of a prior disciplinary record" and "delay by The Florida Bar."

Based on the foregoing, the Bar respectfully requests that this Court uphold the aggravating factors found by the Referee and reject the mitigating factors except for "absence of a prior disciplinary record" and "substantial contribution to the community and the church."

THE REFEREE'S RECOMMENDED DISCIPLINE SHOULD NOT BE ACCEPTED BY THIS COURT SINCE THERE WAS NO DELAY BY THE BAR IN THE PROSECUTION OF THIS CASE.

The Respondent contends that the Referee's recommended discipline of a one year suspension should not be accepted by this Court in light of the delay in the prosecution by the Bar.

The Referee recommended a one year suspension rather than disbarment, as recommended by the Bar, due to the mitigating factors set forth in the Report of Referee. (RR, p.8). The most serious mitigating factor considered by the Referee was "delay by the Bar". The Florida Bar did not delay it's proceedings against the Respondent; thus, it is the Bar's position, that the Referee's recommended discipline is too lenient and should be rejected by this Court in favor of disbarment.

As pointed out by the Respondent in his initial brief , it is the Bar's responsibility to diligently prosecute disciplinary proceedings against an attorney. The Florida Bar v. Randolph, 238 So.2d 635 (Fla. 1970). The Bar diligently prosecuted the disciplinary proceedings against the Respondent.

On March 1, 1984, The Florida Bar received from Dr. Dale C. Alverson, a grievance Complaint against the Respondent. Dr. Alverson's complaint alleged that the Respondent engaged in unethical conduct during the litigation of Nance v.Tobin (R. Respondent's Exhibit 10). A Florida Bar file was opened under case No. 13C84H86, and thereafter Dr. Alversons grievance complaint was forwarded to the Respondent on March 27, 1984. The Respondent sent The Florida Bar his response to Dr. Alverson's Complaint, stating:

> "Dr. Alverson has filed suit against myself, co-counsel, and Dr. Gunderman in Federal Court in Michigan. While it would be inappropriate to comment specifically on the allegations at this time, our answer to the Complaint affirmatively denies all of the allegations." (R. Respondents Exhibit 10).

The Respondent's response clearly indicates that he considered the matter to be civil in nature and, further, that he would not cooperate by specifically addressing the allegations in Dr. Alverson's Complaint in light of the civil lawsuit pending against him.

On August 9, 1984, the Complaint was summarily dismissed by The Florida Bar due to insufficient evidence. Clearly, The Bar did not delay its proceedings in regard to Case No. 13C84H86, for it was investigated and closed within five and half (5 1/2) months.

Subsequent to the dismissal of The Florida Bar File No. 13C84H86, a trial by jury was held in the Michigan case of Alverson v. Rood. On November 5, 1986, the jury returned an unfavorable verdict against Respondent and Dr. Gunderman. Subsequent thereto the Florida Bar received newly discovered evidence and additional information as a result of the Jury's verdict in Alverson v. Rood. On February 11, 1987, The Bar opened a new file against Respondent under case number 87-25,989 (13C), which is the instant case. (R. Supp.).

On February 17, 1987, The Florida Bar sent a letter of inquiry to the Respondent, requesting a response to The Florida Bar's Complaint in regard to the matters raised in the Alverson v. Rood case and the Jury's verdict. The Respondent did not

respond to The Bar's initial letter; therefore a follow-up ten (10) day letter was sent to the Respondent on March 11, 1987. (R. Supp.).

On March 26, 1987, the grievance file relating to the instant case was forwarded to a grievance committee. Thereafter, grievance committee hearings were held on October 21, 1987, December 10, 1987, and January 19, 1988. On March 17, 1988, the Thirteenth Judicial Circuit Grievance Committee "C" found probable cause for further disciplinary proceedings. Thereafter, on August 10, 1988, The Florida Bar filed its Complaint in this cause. (R. Supp.).

A Final Hearing on the case at issue was held on November 18, 1988. On February 28, 1989, a disciplinary hearing was held before the Referee and on July 24, 1989 Judge Norris entered his Report of Referee.

As shown above, the instant case was not pending for over six years. Rather, The Bar diligently pursued _this_ case and brought it to a Final Hearing in one (1) year and nine (9) months, which is not unreasonable in light of the voluminous record in this cause.

The case at hand is a complex matter since it covers three separate lawsuits: _Nance v. Tobin_, _Nance v. Eckerd_, and _Alverson v. Rood_. The Bar's case included 524 pages of trial transcripts from the _Alverson v. Rood_ case; a deposition Transcript of George Thompson from the _Alverson v. Rood_ case consisting of 141 pages; and numerous other documents and records from all three of the aforementioned cases.

The Respondent also complains of the length of time that elapsed between the disciplinary hearing held on February 28, 1989 and the issuance of the Referee's report. Subsequent to the Final Hearing and the Disciplinary Hearing in this cause, the Referee was required to read the trial Transcripts from the Alverson v. Rood case, and the deposition transcript of George Thompson, since The Bar utilized these transcripts in it's case in chief in lieu of live testimony from the Respondent, Mr. Thompson, Dr. Gunderman and Mr. Carpenter. In addition, the Referee had to review the Final Hearing transcript and the Disciplinary hearing transcript from this case, which consisted of 415 pages, and all of the documents and records introduced into evidence. Based on the voluminous record in this cause, the time that Judge Norris took to issue his report was not unreasonable.

Even if this Court feels that The Bar delayed its proceedings against the Respondent, there was no prejudice to the Respondent. The Respondent contends that he has been prejudiced in this case because he has been subjected to adverse publicity prior to a determination of guilt by this Court. The adverse publicity that the Respondent received was in regard to the jury verdict in Alverson v. Rood.

The Respondent also contends that he was prejudiced by The Bar's delay because the memory of Garold Morlan was dimmed by the passage of time. The Respondent specifically points out in his brief that Mr. Morlan could not recall the substance of the telephone conversations held with the Respondent. What the

Respondent fails to point out is that Mr. Morlan specifically recalled that he did not have numerous conversations with the Respondent and that the Respondent never informed him by phone of all of the names of the doctors and hospitals seen by Chelsey Nance. (TRI,p.34,L.15-24). What Mr. Morlan could not recall is conversations with the Respondent that never occurred.

The Respondent also claims that the Bar's delay resulted in the destruction of evidence and the dismantling of the Respondent's file because of the Michigan litigation. The Respondent cannot blame The Bar for his failure to maintain his records. In addition, the Respondent could have obtained any records that he did not have from his own trial counsel in Michigan who would have maintained the same.

Furthermore, at the Final Hearing, the Respondent testified: "I have been able to review and introduce into evidence documents that we never had in Michigan, some key documents we never had, and we never discussed...I'm better prepared today than we were in the Michigan Trial". Respondent was able to review his Michigan trial testimony and attempt to correct the same.

Based on the foregoing, there was no delay by The Bar in the prosecution of this case, and even if the Court disagrees, the Respondent was not prejudiced by the same, thus delay is not a mitigating factor in this case. With the absence of "delay" as a mitigating factor the Referee's recommended discipline is too lenient and should be rejected by this Court in favor of disbarment.

THE APPROPRIATE DISCIPLINE FOR THE RESPONDENT'S EGREGIOUS COURSE OF MISCONDUCT IN THIS CASE IS DISBARMENT SINCE THE MITIGATING FACTORS PRESENT IN THIS CASE DO NOT OUTWEIGH THE AGGRAVATING FACTORS.

The Referee recommended that the Respondent be disciplined by a one (1) year suspension rather than disbarment as recommended by The Florida Bar, because of the mitigating factors set forth in the Report of Referee. (RR, p.8). As set forth in Complainant's third argument of this Brief, this Court should reject all of the mitigating factors found by the Referee except for "absence of a prior disciplinary record" and "substantial contribution to the community and the church". The facts of this case and the aggravating factors found by the Referee clearly outweigh the aforementioned mitigating factors.

It is The Bar's position that disbarment is the appropriate discipline for the Respondent's course of misconduct in this case. The Bar's position is supported by Florida's Standards For Imposing Lawyer Sanctions (hereinafter referred to as The Standards), approved by The Florida Bar's Board of Governors in November, 1986.

The following Sections of The Standards apply to the Respondent's misconduct in this case:

> Section 6.1 "False Statements, Fraud, and Misrepresentation"
> Under this section, disbarment is appropriate when an attorney improperly withholds material information and causes injury or potentially serious injury to a party, or causes a significant or potentially adverse effect on the legal proceeding.

Section 6.2 "Abuse of the Legal Process"
Under this Section, disbarment is appropriate when a lawyer knowingly violates a Court order or Rule with the intent to obtain a benefit for the lawyer or another, and causes serious injury or potentially serious injury to a party, or causes serious or potentially serious interference with a legal proceeding.

As established in the previous arguments, the Respondent attempted to conceal the Gunderman memo from his co-counsel and his opposing counsel in Nance v. Tobin. In addition, the Respondent attempted to conceal, from Eckerd Drugs' counsel, information relating to the Nance v. Tobin case, including all of the names of all of the doctors and hospitals seen by the child. Further, the Respondent attempted to conceal from the Defendant's counsel in Nance v. Tobin, the pendency of the Nance v. Eckerd lawsuit and vice versa. The Respondent's withholding of material information and his concealment of evidence was prejudicial to Dr. Alverson and was potentially prejudicial to Eckerd Drugs.

The Gunderman memo concealed by the Respondent was exculpatory in nature and thus favorable to Dr. Alverson. In fact, after Dr. Gunderman was confronted with the memo during his second deposition, Dr. Alverson was dismissed from the Nance v. Tobin lawsuit. In addition, after Mr. Morlan found out about the Nance v. Tobin lawsuit, the Respondent did not pursue the Eckerd case and the same was dismissed for lack of prosecution.

According to the aforementioned Sections of The Standards, aggravating and mitigating factors can be considered in

determining the appropriate discipline for an attorney's misconduct.

Section 9.2 of The Standards, sets forth aggravating factors that may justify an increase in the degree of discipline to be imposed. All of the aggravating factors considered by the Referee and set forth in his report, are also set forth in this Section of The Standards.

Section 9.3 of The Standards sets forth mitigating factors that may justify a reduction in the degree of discipline to be imposed. As previously argued and established only two of the mitigating factors considered by the Referee are supported by the record: (1) Absence of a prior disciplinary record; and (2) Substantial contributions to the community and church. These two mitigating factors are listed under Standard 9.3; however, they are not sufficient to outweigh the aggravating factors and decrease the degree of discipline in this case.

In addition, the Respondent violated the discovery rules when he concealed the Gunderman memo from his opposing counsel in Nance v. Tobin after discovery requests were made for a complete copy of Dr. Gunderman's medical records on Chelsey Nance; when he advised Dr. Gunderman to disregard the records subpoena requiring Dr. Gunderman to forward his original medical records on Chelsey Nance to Michigan for copying; when he instructed Dr. Gunderman to destroy evidence by throwing away all correspondence from attorneys in his medical file on Chelsey Nance; when he removed

or caused to be removed, the Gunderman memo from Dr. Gunderman's file; and when he submitted a false answer to Interrogatory No. 11 in Nance v. Tobin. These acts of misconduct on the part of the Respondent were prejudicial to the defendants in the Nance v. Tobin case.

The Bar contends that the mitigating factors in this case are insufficient to overcome the aggravating factors and do not justify a reduction in the degree of discipline which should be imposed against the Respondent. However, the aggravating factors present in this case do justify an increase in the degree of discipline which should be imposed against the Respondent.

The facts of this case clearly establish that the Respondent knew of the existence of the Gunderman memo; engaged in a course of conduct to conceal Dr. Gunderman's memo from everyone including his co-counsel; removed or caused to be removed from Dr. Gunderman's file the original Gunderman memo; and knowingly prepared, or caused to be prepared, false and incomplete interrogatory responses with the intent to conceal the existence of the Nance v. Tobin lawsuit from opposing counsel in the Nance v. Eckerd case, and vice versa.

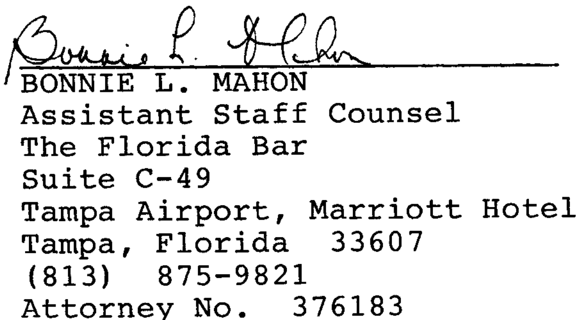
By reason of the foregoing, disbarment is the only appropriate discipline for the Respondent's egregious misconduct. Therefore, The Bar respectfully requests this Court to reject the Referee's recommended discipline of a one year suspension and disbar the Respondent from the practice of law.

CONCLUSION

Disbarment is the only appropriate discipline for the Respondent's misconduct in this case.

WHEREFORE, The Florida Bar respectfully requests this Court to uphold the Referee's findings of fact and recommendations of guilt; reject all of the Referee's mitigating factors except "absence of a prior disciplinary record" and "substantial contributions to the community and church"; and reject the Referee's recommended discipline and disbar the Respondent, Edward C. Rood, Jr., from the practice of law.

Respectfully submitted,



BONNIE L. MAHON
Assistant Staff Counsel
The Florida Bar
Suite C-49
Tampa Airport, Marriott Hotel
Tampa, Florida 33607
(813) 875-9821
Attorney No. 376183

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Answer Brief has been furnished by U.S. Mail, to Donald A. Smith and Scott K. Tozian, Attorneys for the Respondent, at 109 N. Brush Street, Suite 150, Tampa, Florida 33602; and a copy to John T. Berry, Staff Counsel, The Florida Bar, Ethics and Discipline Department, 650 Appalachee Parkway, Tallahassee, FL 32399-2300, this 22nd day of November, 1989.

BONNIE L. MAHON