047

IN THE SUPREME COURT OF FLORIDA

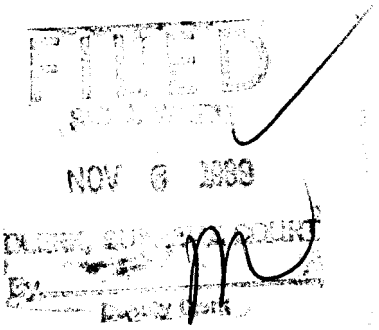
THE FLORIDA BAR,

Complainant,

vs. Case No. 72, 867

EDWARD C. ROOD,

Respondent.



RESPONDENT'S INITIAL BRIEF

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PRELIMINARY STATEMENT

The following abbreviations are used in this brief:

Resp. Ex.	=	Respondent's Exhibits
TFB Ex.	=	The Florida Bar's Exhibits
RR	=	Referee Report
RR supp.	=	Referee Report supplement by letter of The Florida Bar dated March 1, 1989
R I	=	Referee Trial Transcript - Vol. I
R II	=	Referree Trial Transcript - Vol. II
R III	=	Referee Disciplinary Hearing Transcript

TABLE OF CITATIONS

STATEMENT OF THE CASE

The case sub judice originated with The Florida Bar on March 1, 1984, upon its receipt of a written complaint filed by Dr. Dale C. Alverson. (Resp. Ex. 10, R II 196). Dr. Alverson was the Michigan doctor who had been a co-defendant in a 'bad-baby' medical malpractice suit filed in Michigan Federal Court in which Mr. Rood had been involved as local referring counsel. (R I 158). The original complaint was dismissed by The Florida Bar in August, 1984. (R II 194). The complaint was reopened a second time by The Florida Bar on February 11, 1987 and forwarded to a grievance committee on March 26, 1987. (RR supp.). The Thirteenth Judicial Circuit Grievance Committee then found probable cause for further disciplinary action on March 17, 1988. (RR supp.).

On August 10, 1988 The Florida Bar filed its Complaint. The Referee conducted the trial on November 18 and 29, 1988. On February 28, 1989, the Referee determined the discipline to be recommended. His report was not filed until July 26, 1989. On August 25, 1989 Respondent filed a Motion to Reconsider, Correct and Clarify Report of Referee. An order denying Respondent's motion was entered by the Referee on the same day without a hearing.

Respondent timely filed his Petition for Review on October 2, 1989 and The Florida Bar petitioned for review on October 5, 1989.

STATEMENT OF THE FACTS

In July of 1980, Mr. and Mrs. Nance consulted with Mr. Edward C. Rood concerning their potential cause of action as a result of the various birth defects affecting their newborn child, Chelsea. (R II 129). She was born in Marquette, Michigan on September 19, 1979, suffering from a seizure disorder, cerebral palsy and progressive hydrocephalus. (R II 204). The Cerebral Palsy Association had referred the family to Tampa to seek the services of Dr. Robert Gunderman, a specialist in pediatric neurology. (R II 302). During the initial visit Dr. Gunderman diagnosed progressive hydrocephalus, a previously undiagnosed condition which required immediate surgery. (R II 130).

Mr. Rood agreed to meet with Dr. Gunderman to discuss whether there had been any previous deviation from the appropriate standard of care. (R II 131). That meeting took place in the doctor's office on August 18, 1980. Prior to that visit, Mr. Rood had never met or communicated with Dr. Gunderman in any way. (R II 144, 204).

At that conference, Dr. Gunderman orally advised Mr. Rood that based upon the limited record he had available, Dr. Alverson "had not done anything wrong". (R II 205). The opinion was based upon his understanding that a computerized CT Scan was unavailable in the rural Michigan hospital in which Chelsea was delivered and that Dr. Alverson was a general pediatrician and not a pediatric neonatologist. (R

II 132, 135, 205). Following that conference, Dr. Gunderman dictated a memo to his own file outlining his oral opinion. (R II 205). That memo was not created in the presence of Mr. Rood, nor did the doctor ever advise Mr. Rood that he had created it. (R II 205). Following the conference, Mr. Rood advised the Nances of the doctor's initial oral opinion and that he did not think that they had a case. (R II 134, 135). The Nances then explained to Mr. Rood that Dr. Gunderman's assumptions were incorrect. They explained that following her delivery, Chelsea had been transferred to Marquette General Hospital, a regional medical facility which did have an available computerized CT Scan. (R II 282). In fact, they had even discussed the possible use of that CT Scan on Chelsea, but Dr. Alverson had advised against it because the $250.00 was too expensive. (R II 283). They further pointed out that Dr. Alverson was in fact a pediatric neurologist and not just a pediatrician. (R II 282).

In light of this new information, Mr. Rood advised the Nances to discuss this with Dr. Gunderman during their next visit. (R II 135, 206, 183, 184). They were to inquire if the doctor would then be a witness in the case. (R II 135). The Nances later reported back to Mr. Rood that Dr. Gunderman was "astounded" that the equipment was readily available and never utilized and that such did not meet the appropriate standard of care. (R II 137, 206, 284). Based upon the Nances oral report of Dr. Gunderman's new opinion,

Mr. Rood agreed to assist them in pursuing their medical claim. (R II **137).** Because the birth and negligent treatment had occurred in Michigan, Mr. Rood referred the case to a Michigan firm that specialized in handling medical malpractice "bad baby" cases. (R II **137).**

With the Nances consent, Mr. Rood engaged the firm of Robb, Ditmar, Thompson and Parsons who had a national reputation in this field. (R I 157). They assigned Mr. George Thompson as lead counsel. (R I **57).** It was Mr. Thompson's responsibility to primarily work up the case, draft the complaint, determine the appropriate defendants and to file the complaint in Michigan. (R I **171).**

Upon filing the lawsuit in Michigan Federal Court against several medical providers, including Dr. Alverson, the defendants served Interrogatories upon Mr. Thompson as lead counsel. (R I **79).** Interrogatory number **11** asked if any other lawsuit had been filed by the Nances. (TFB Ex. **3).** Drafted answers by Mr. Rood were forwarded back to Mr. Thompson with a cover letter advising that number 11 had been answered with a "technical **no"** but suggesting that an amendment be considered because he was in the process of filing a suit for the Nances against Eckerd Drug Company. (TFB Ex. 5, R II **175).** Mr. Thompson's office received the drafted answers, prepared finalized answers and mailed them directly to the Nances for signature. (R I **78).** The Nances then returned the signed copies directly back to Mr. Thompson's office who filed them with the court in Michigan

in January of 1982. (TFB Ex. 4, R II 181). Mr. Rood was never provided a copy of the completed answers nor was he provided with a copy of the signed answers filed with the court. (R I 78, R II 181). Mr. Rood advised Mr. Thompson that the Eckerd suit had been filed, as suggested in Mr. Rood's cover letter, prior to the answers being filed. (R I 80, R II 180). However, Mr. Thompson neglected to amend Interrogatory 11, because "he just didn't think of it". (R I 81).

Dr. Gunderman was first deposed by counsel for all defendants in the Michigan case on April 8, 1982. (R II 157). Several months later the defendants sent Mr. Thompson a Notice of Record Subpoena for Dr. Gunderman's file. (R I 73). Mr. Thompson called and wrote to Dr. Gunderman advising him not to disclose specific work product material and medical literature contained in his file. (R I 73). Mr. Thompson then telephoned Mr. Rood and asked that he follow-up on his request to Dr. Gunderman to remove the privileged work product material from the file for purposes of the Record Subpoena. (R II 73, 74, 75). On June 30, 1983, Mr. Rood telephoned Dr. Gunderman's office and asked that "correspondence from he and co-counsel be removed from the file." (TFB Ex. 16, R II 152). It was Mr. Thompson's belief that correspondence and medical literature sent to Dr. Gunderman was privileged work product and not discoverable evidence pursuant to Michigan's Evidence Rules. (R I 75). On September 9, 1983, Dr. Gunderman was deposed

for the second time and at this time the existence of his file memo and initial opinion concerning the negligence of Dr. Alverson was fully discussed. (TFB Ex. 20, R II 208).

The lawsuit on behalf of the Nances against Eckerd Drug Company was filed on November 2, 1981, by Mr. Rood's office. The lawsuit alleged the negligent filling of a prescription regarding Chelsea's seizure activity which had further exacerbated the child's condition. (R II 159-161).

Interrogatories in the Eckerd case were then sent to Mr. Rood by counsel for Eckerd Drug Company, Garold Morlan. Thereafter, Mr. Rood mailed the unanswered interrogatories to his clients who were then residing in Missouri. (R II 170, 171). Mr. Rood received the completed and notarized answers from his clients and delivered them to Mr. Morlan on May 4, 1983. (TFB Ex. 10). However, he realized that his clients had misunderstood and, therefore, had incompletely answered three questions. Those three questions dealt with the names and addresses of all prior doctors and hospitals. Mr. Rood immediately telephoned Mr. Morlan and so advised him. (R II 163). The same day he also prepared supplemental answers which completely and fully answered the questions. He then mailed them to the Nances in Missouri, and upon receipt served them on Mr. Morlan on May 24, 1983, 20 days later. (Resp. Ex. 7, 8, and R II 163, 164, 171).

The Michigan cause of action was ultimately settled in December, 1983 by the payment of policy limits of $200,000.00 by the principal defendant with a $25,000.00

contribution from the hospital. (TFB Ex. **18).** Following the settlement, the Nances elected not to pursue their remaining count against Dr. Alverson for several reasons. One, due the settlement reached with the other defendants, a trial against only Dr. Alverson created an empty chair argument. (R II 274). The estimated trial expenses were $20,000 to **$30,000.** (R II 274). A verdict in excess of $225,000.00 was necessary before any recovery was possible against Dr. Alverson and that was unlikely in this very rural community, which had never before returned a Plaintiff's verdict in a medical malpractice case. (R I **80).** Moreover, the Nances wanted to return to their home in Austraila, to enroll Chelsea in a special disability program. (R I **83).** Therefore, the case against Dr. Alverson was dismissed and the Eckerd lawsuit abandoned. (TFB Ex. **18,** R II 172).

POINT I

THE REFEREE'S FINDINGS OF FACT ARE NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE OR ARE CLEARLY ERRONEOUS.

ARGUMENT SUMMARY

Because the record in this case so clearly fails to support the Referee's findings, we challenge the presumptness of correctness that would normally attach.

The Referee's findings are both unsupported by the record and are contrary to the record. Thus, the Court should reject those findings.

ARGUMENT - POINT I

The factual conclusions determined by the Referee, material to the recommendations of guilt and discipline, are not supported by the record or are clearly erroneous and therefore should not be accepted by this Court. Several material conclusions are not supported by any evidence in the record; several are supported by circumstantial evidence equally consistent with opposite conclusions; several are speculative; and several can only be the result of the Referee having knowledge of prior civil litigation, rather than the result of an analysis of matters in evidence.

The Florida Bar has the burden of proving all material allegations by clear and convincing evidence. The Florida Bar v. McCain, 361 So.2d 700 (Fla. 1978). And although a referee's findings of fact are to be given a presumption of correctness, each factual conclusion must be supported, clearly and convincingly by evidence in the record. Otherwise, the findings will not be accepted by this Court for they lack the necessary evidentiary support. The Florida Bar v. Wagner, 212 So.2d 770 (Fla. 1968) and The Florida Bar v. Stalnaker, 485 So.2d 815 (Fla. 1986). Furthermore, because this Court is the court of original jurisdiction, the record should be closely scrutinized to ensure that it contains the substantial evidence necessary to prove each and every conclusion of the Referee.

In the case sub judice, the Referee's material findings

and ultimate conclusions are necessarily dependent upon two fundamental conclusions. One, that Mr. Rood knew before September 9, 1983, of the existence of Dr. Gunderman's memo. Two, that he removed it from the doctor's office file. (See RR para. 7, 15, 19, 20, 25 summary) These conclusions are unsupported by the record, are contrary to the evidence, and are clearly erroneous.

When the only proof of a fact is circumstantial it cannot be sustained unless the evidence is inconsistent with every other reasonable hypothesis. Mayo v. State, 71 So.2d 899 (Fla. 954), McArthur v. State, 351 So.2d 972 (Fla. 1977), and State v. Law, 14 FLW 387 (Fla. 1989).

Here, the record is replete with evidence proving only the converse - that Mr. Rood did not know the memo existed! Specifically, Mr. Rood's former paralegal testified that it was her responsibility to obtain and review all medical records in all malpractice cases, including the Nance case. She further stated that Mr. Rood did not review these medical records. (R II 120, 121, 123). Dr. Gunderman testified that the preparation of the memo was done outside Mr. Rood's presence and that he never advised Mr. Rood of the memo's existence. (R II 205). Moreover, Mr. Rood testified, without contradiction, that prior to the doctor's deposition on September 9, 1983, he did not know of the memo. Clearly, he knew of the doctor's opinion, but not the memo. (R II 157, 269). Furthermore, both Dr. Gunderman and Mr. Rood stated that Mr. Rood never had access to Dr.

Gunderman's file. (TFB Ex. 23 and R II 146, 284).

No testimony or documentation was introduced by The Florida Bar controverting this evidence. No evidence was offered relevant to Mr. Hood's actual knowledge of the memo. And, in fact, The Florida Bar did not even allege in its complaint such knowledge. The Referee had to reach such a conclusion based solely upon his own speculation. In view of this total lack of supporting evidence, combined with the record of contrary evidence, this conclusion is clearly erroneous.

The Referee's conclusion that Mr. Rood concealed the memo from "everyone" and removed or caused it to be removed from Dr. Gunderman's file, must be closely examined. (RR 25 b, c, d). Even if it is assumed that Mr. Rood somehow knew of the memo, the record is devoid of any evidence proving these additional conclusions, directly or circumstantially. It is clear from the record that Mr. Rood, as well as the Nances, discussed Dr. Alverson's initial opinion with Mr. Thompson on numerous occasions. (R I 66, 71, 97).

Furthermore, the Referee's conclusions do not include a finding of how, when or by whom the memo was removed. The record contains no direct or circumstantial evidence proving that Mr. Rood removed the memo or caused it to be removed. In an attempt to prove its allegations and meet its burden, The Florida Bar introduced documentary evidence and the testimony of Mr. Morlan, Dr. Gunderman, Mr. Carpenter (counsel for Dr. Alverson) and Dr. Alverson. An analysis of

this evidence reveals that no documentation exists proving Mr. Rood removed the memo. Apparently the Bar contends, and the Referee concluded, that a telephone call from Mr. Rood to Dr. Gunderman's office on June **30, 1983** convincingly proved that Mr. Rood caused the memo to be removed. This is incorrect. The transcript of the record of that call clearly proves that Mr. Rood referred only to "correspondence" between the attorneys and Dr. Gunderman. (TFB Ex. 16 and RR 17). Furthermore, at that time it was not known to exist by Mr. Rood and, therefore, could not have been the subject of the telephone call.

These facts are totally inconsistent with any conclusion that the memo was removed and clearly do not prove that Mr. Rood caused its removal. The testimony of Mr. Morlan and all other witnesses is also contrary to this conclusion. No testimony was presented tending to prove any act by Mr. Rood which caused the removal of the memo. Dr. Alverson's testimony was not relevant to this issue. Mr. Carpenter's testimony indicated only that the memo was not in the doctor's file as of September **9, 1983,** the second deposition. (R II 150, 151 and TFB Ex. **31).** He, of course, had no knowledge of when or how the memo may have become separated from the file. (R II 151). Therefore, they too had no knowledge of when or how the memo came out of the file. On the other hand, the record includes Mr. Rood's sworn testimony that he never had access to Dr. Gunderman's file, that he did not know of the memo, and he did not

remove or conceal that memo from anyone. (R II 146, 269).

Most importantly, Mr. Morlan, The Florida Bar's witness, stated that he did receive the memo when he requested a copy of the file! (R I 36). This evidence proves one important fact - that the memo had not been removed. It is also inconsistent with a conclusion that Mr. Rood removed or concealed the memo from everyone.

Conversely, the evidence is consistent with the memo having been simply lost or misplaced prior to the second deposition. This very well could have occurred while Dr. Gunderman's file was being copied on several occasions before that deposition. (R II 220, 221). This conclusion is also supported by the fact that other documents were lost from the file. (R II 220, 221).

Accordingly, in view of the total absence of record evidence proving clearly and convincingly that Mr. Rood committed any act removing the memo; combined with the fact that the memo was received by Mr. Morlan; combined with the total lack of evidence proving that Mr. Rood ever had an ability to remove the memo; the Referee's conclusions, as summarized in paragraphs 25b, 25c and 25d of his report, are clearly erroneous.

The Referee also concluded that Mr. Rood knowingly prepared false and incomplete interrogatory responses with the intent to conceal the Nance v. Tobin lawsuit from Eckerd's counsel and vice versa. (RR 25e). As a basis for this conclusion the Referee apparently, considered that

Defendant Alverson served the Nances with an interrogatory requesting information about other lawsuits filed on their behalf. (RR 9 and TFB Ex. 3). As the Nances were uncertain as to the exact status of their Eckerd case they requested Mr. Rood's input in answering this question. (R II 175). Mr. Rood drafted an answer of "NO", but he did not file or serve that answer. In November, he mailed the interrogatories in draft form, to lead counsel in Michigan. He also wrote lead counsel specifically advising him that this answer was technically correct, but suggesting that an amendment would be appropriate when suit was actually filed. (TFB Ex. 5 and R II 175). *Two* and one half months later in January, **1982**, Mr. Thompson had the answers typed, sent back to the Nances in Missouri, and served them on defendants without amending the answer or providing a copy to Mr. Rood. (TFB Ex. 4 and R II **181**). This occurred despite the fact that Mr. Rood verbally advised Mr. Thompson that the Eckerd case was in fact filed before the answers were served. (R II 180).

Therefore, the record is clear that Mr. Rood prepared only a draft answer to interrogatories to be reviewed by lead counsel. It also proves that Mr. Rood noticed lead counsel that another suit had been filed before the answers were served and that an amendment to the answer was proper. The record also proves that Mr. Rood did not prepare, serve, or even review the final answers. Moreover, the trial testimony reveals that at the time of transmitting the answers to Mr. Thompson, Mr. Rood was unaware that the

Eckerd case had actually been filed. In fact, to the best of his knowledge, his letter of November 18, 1981 was exactly correct and a legal action was being considered, but not yet filed. (R II 176). Based upon this record, a finding that Mr. Rood knew his suggested answer to be incorrect and was concealing this information is only speculative and is not supported by clear and convincing evidence.

As a further conclusion based only upon the inaccuracy of this one interrogatory answer, the Referee finds that Mr. Rood caused his clients to "indirectly commit perjury". (RR 11) Perjury is defined by Florida Statutes § 837.012, as the making of a false statement, under oath, which the ~~maker~~ believes not to be true. Here, there is no question that the interrogatories answered by the Nances were believed by them to be true at the time of the preparation. Therefore, they did not commit perjury. The answers were also believed by Mr. Rood to be true. (R II 176) Therefore, perjury was not committed. Furthermore, perjury cannot be "indirectly" committed by one person causing another to answer a question. Accordingly, this "finding" serves only to cast an element of moral and criminal reprehensibility upon the record for review by this Court. Such a finding is unwarranted, unfair and unjustly prejudicial, both to this Court's determination of guilt and consideration of discipline.

In concluding that interrogatory answers were

incorrectly prepared with the intent to conceal the Nance v. Tobin case from counsel for Eckerd, the Referee has ignored an essential fact - no interrogatory propounded by Eckerd requested any information concerning other lawsuits! (Resp. Ex. 7, 8). Moreover, the record clearly proves that all requested information was provided. On May 4, 1983, Mr. Rood served the initial answers upon Eckerd's counsel. (TFB Ex. 10). The answers were incomplete as to only those questions requesting the identity of the child's past medical providers. In recognition of the fact that his clients had misunderstood the questions, Mr. Rood arranged for them to immediately supplement the answers with complete and accurate information. (R II 164). Then, upon receipt from the clients of the supplements, Mr. Rood served them upon Mr. Morlan on May 24, 1983, just twenty days later. (TFB Ex. 7, 8 and R II 162, 163). Therefore, Mr. Rood clearly provided all requested information, none of which concerned the pending Michigan case.

Such conduct is neither consistent with Mr. Rood intentionally providing incorrect information, as the answers came directly from the clients; nor is it consistent with any intent to mislead, as complete and accurate information was provided immediately upon discovery of inaccuracies. Even more indicative of the incorrectness of this conclusion is the testimony of the recipient himself, Mr. Morlan testified as follows:

Question: "Mr. Morlan, during your entire relationship with Ed Rood concerning Nance versus Eckerd, did you ever formulate an opinion that Mr. Rood was attempting to withhold any information from you?"

Answer: "No". (R I 40).

That testimony summarizes the conclusion and understanding of the one person most knowledgeable of all relevant facts and most directly affected by the acts of Mr. Rood. Certainly, if Mr. Morlan felt at the Referee trial that no information had been concealed, a contrary conclusion by the Referee is clearly erroneous.

Accordingly, each of these conclusions of fact by the Referee should not be accepted by this Court, and should be rejected as being unsupported by the record and clearly erroneous.

POINT II

THE REFEREE'S RECOMMENDATIONS OF GUILT SHOULD NOT BE ACCEPTED BY THIS COURT BECAUSE THE RECOMMENDED RULE VIOLATIONS ARE NOT SUPPORTED BY THE EVIDENCE NOR THE FINDINGS OF FACT.

ARGUMENT SUMMARY

This Court is constitutionally vested with the responsibility of determining whether violations of the Code of Professional Responsibility have occurred in a disciplinary case. (Art. V, Sec. 15, Fla. Const.). A Referee serves the Court by formulating recommendations of guilt based upon his conclusions of fact and an application of the rules to those facts. However, where, as here, the factual conclusions reported are not sufficient to support recommendations of specific rule violations, those recommendations must be rejected. The report and trial record both require such action in this case.

ARGUMENT - POINT II

The Referee recommends a finding of guilt for a violation of Rule 1-102(A)(4). This rule requires proof, by clear and convincing evidence, of specific intentional misconduct, including dishonesty, deceit, fraud, or misrepresentation. The record in the case sub judice, albeit containing some evidence of carelessness, is devoid of any evidence of dishonest or improper motive, or of any intentional misrepresentation. Furthermore, the findings of fact do not support such a conclusion. Therefore, the record lacks support for this recommendation of guilt and should not be accepted.

Rule 7-102(A)(3) requires proof of a knowing failure to disclose that which is required by law to be revealed. As was shown herein, the evidence does not prove a failure to disclose by Mr. Rood. The Referee's report itself is unsupportive of this recommendation because it fails to identify any person or entity to whom Mr. Rood was required to reveal information. And most importantly, the report does not describe any information required to have been disclosed or set forth any applicable legal requirement. Instead, the Referee's recommendations are based upon generalized conclusions unsupported by evidence and in turn, unsupportive of this finding. Such a vague report should not be accepted by this Court as it fails to comport with fundamental ideals of due process.

A necessary element to be proved by Rule 7-102(A)(6) is the creation of false evidence. This, necessarily, requires a determination that false evidence was created. The Referee's report does not identify anything as false evidence! Because the report does not state what evidence was false, it is vague and should not be accepted. More specifically, the record lacks any evidence of Mr. Rood knowing any matter to be false. Certainly the memo was not false. Clearly, the Eckerd interrogatories filed by Mr. Rood were incorrectly prepared by the client, not Mr. Rood, and immediately corrected by him. (R II 164). Clearly, the Nance v. Tobin interrogatories were answered in good faith, explained to lead counsel by Mr. Rood, and filed by lead counsel without Mr. Rood seeing them. (R II 176, 177, 181). These facts fail to prove that any false "evidence" was knowingly created by Mr. Rood. Therefore, neither the letter nor the intent of this rule has been violated in this case.

Similarly, the record does not support the Referee's recommendation as to Rule 7-109(A). Again, the "evidence" to have been suppressed is not identified. Is that because The Florida Bar did not prove clearly and convincingly any evidence to have been suppressed? Or, is this merely a reaction to the non-admitted documents and allegations of The Florida Bar concerning prior civil action? In either event, the rule was not violated. Neither the written questions or answers were admissible evidence. The memo was

not proven nor even alleged to be admissible evidence. The doctor's opinion may have become evidence but the record does not indicate the suppression of that opinion in any way. Furthermore, The Florida Bar failed to negate the existence of the relevant doctor/patient and attorney/client privileges as they related to these facts. Therefore, again, The Florida Bar failed to carry its burden of proof. Moreover, no evidence was introduced clearly and convincingly proving the suppression of any evidence. For all these reasons, this recommendation is clearly erroneous.

Finally, nothing clearly proven by The Florida Bar reflected adversely on Mr. Rood's fitness to practice law. His failure to impose fool-proof office procedures, his failure to follow-up his suggestion to lead counsel to amend the interrogatories, and his failure to personally review the medical records, may be indicative of misplaced reliance on others. It does not, however, years later, reflect adversely upon Mr. Rood's ability to now practice law. This is particularly true in view of the certification, experience and retrospective analysis of these circumstances by Mr. Rood during the many intervening years which have passed. (R III 12-16). Therefore, this recommendation should also be rejected.

POINT III

THE FACTORS OF AGGRAVATION CONSIDERED BY THE REFEREE ARE NOT SUPPORTED BY THE RECORD AND SHOULD BE REJECTED.

ARGUMENT SUMMARY

Five factors of aggravation were considered by this Referee in determining the discipline to be recommended. These factors, however, are not based upon record evidence. Several are in fact contrary to the only relevant evidence and reflect misunderstandings or misapplications of the evidence by the Referee. Therefore, all factors of aggravation should be rejected by this Court.

ARGUMENT - POINT III

In Section E of his report, the Referee enumerates five aggravating factors which he considered in recommending discipline. None of the factors are supported by the record and should not be considered by this Court in determining any appropriate discipline.

In paragraph (4)(a), the Referee concluded that Mr. Rood's conduct indicated a dishonest or selfish motive. The record contains no evidence of any such motive. The record does, however, contain evidence of no selfish motive by Mr. Rood. His uncontroverted testimony proved that he would not have benefitted from any result obtained in the underlying representation, because he was compensated without regard to case results. (R II 126). Therefore, nothing in the record supports this factor and it should not be used to enhance any discipline imposed.

Similarly, the record does not indicate a pattern of misconduct as found by the Referee to exist. As has been suggested herein, the facts proven by clear and convincing evidence are inconsistent with the generalization attributed to Mr. Rood's conduct by the Referee. It should be noted that Mr. Rood was not charged in the allegations of the Complaint with any pattern of misconduct, as this proceeding is based upon only one transaction. The intent of this factor is to enhance otherwise appropriate discipline where a respondent has committed cumulative misconduct over a

period of time in separate transactions. The Florida Bar v. Bern, 425 So.2d 526 (Fla. 1983). Here, however, the conduct was limited to one isolated representation during an extended time period. Therefore, this factor of cumulative misconduct is not relevant to the facts presented and this factor should not be considered.

The report also states that Mr. Rood had refused to acknowledge the wrongful nature of his conduct. Such a conclusion misconstrues the record. Mr. Rood cannot acknowledge the wrongful conduct charged because it did not occur. However, the record does reflect Mr. Rood's interim maturity as a practitioner and his recognition of a need to be more attentive and disciplined in his handling of cases with associated counsel. (R II 243). But to more severely discipline an attorney when he continuously and justifiably maintains his innocence of misconduct, is contrary to all fundamental ideals of due process and justice. Would this Court have a member of The Florida Bar testify under oath that he acknowledges the wrongful nature of this conduct when he knows of no wrongful conduct?

In 1980, when Mr. Rood first undertook investigation of the claim by the Nances, he had been a member of The Florida Bar for less than seven years. During that time he had served as a Senate aid for one year and served as an assistant state attorney for approximately two years. He had privately practiced law for only four years and handled only one other medical malpractice case. (R 111, 11, 12). Prior then to 1980, his experience as an attorney was limited. His experience as a private civil practictioner was even more limited. Therefore, this factor is totally inapplicable to any appropriate discipline and should be rejected.

Finally, as a matter of aggravation the Referee concludes that Mr. Rood caused the Nances to commit perjury. As has been seen herein, the record is not supportive of this conclusion, and it is legally erroneous. Furthermore, the use of this factor to enhance discipline is inappropriate and unfair as the same finding is apparently the basis for recommendations of guilt. Therefore, this factor should also be rejected.

Accordingly, no factors of aggravation are supported by the record and the discipline recommended by the Referee should, therefore, be rejected.

POINT IV

THE REFEREE'S RECOMMENDED DISCIPLINE SHOULD NOT BE ACCEPTED BY THIS COURT AS A RESULT OF THE DELAY IN PROSECUTION BY THE FLORIDA BAR.

ARGUMENT SUMMARY

The conduct which has been alleged to be violation of the rules of ethics involved the representation of clients by the respondent in a malpractice case. That representation began in **1980** and terminated in **1983.** It was not until July, **1989** that the Referee proceeding was terminated. The many years of delay were solely the result of conduct by The Florida Bar and the Referee. Therefore, the discipline recommended by the Referee must be rejected in recognition of the right of Respondent to be diligently prosecuted and the need for this Court to convey to its Bar and Referee the necessity of due diligence.

ARGUMENT - **POINT IV**

The responsibility of diligently prosecuting a disciplinary case rests with The Florida Bar. The Florida Bar v. Randolph, 238 So.2d 635 (Fla. 1970) and The Florida Bar v. Rubin, 362 So.2d 12 (Fla. 1978). When a disciplinary case is not handled with diligence this Court has held that the delay necessitates the mitigation of otherwise appropriate discipline. The Florida Bar v. Randolph, supra. and The Florida Bar v. Papy, 358 So.2d 4 (Fla. 1978). Furthermore, where the delay in prosecution has been substantial, has resulted in prejudice to the Respondent, and results from conduct by The Florida Bar intended to bolster its case or prove aggravation, the Respondent is entitled to a dismissal of the charges, The Florida Bar v. Rubin, 362 So.2d 12 (Fla. 1978).

Rule 3-7.5(k), Rules Regulating The Florida Bar, requires a referee to file his report within thirty (30) days of the trial unless leave of this Court is granted, upon a showing of good cause. Delay by a referee in filing his report as required by this rule is also grounds for imposing less severe discipline. The Florida Bar v. Guard, 453 So.2d 392 (Fla. 1984).

Here, neither The Florida Bar nor the Referee acted diligently in administering their duties. This delay is contrary to the principles established by this Court and is violative of the Rules Regulating The Florida Bar, which are

the same rules for which Mr. Rood now faces discipline.

The Florida Bar had actual knowledge of the alleged facts as early as March 1, **1984.** (R II **196).** In **1984,** The Florida Bar determined that this matter did not involve conduct violative of the rules and canons of ethics. (R II **194).** Then, in February, **1987,** the Bar re-opened its investigation of the identical case. (RR supp.). One year later, in March, **1988,** the grievance committee found probable cause on the re-opened case. (RR supp.). The Florida Bar filed a complaint on August 10, **1988.** Not until February, **1989,** approximately two years after re-opening the case, was Mr. Rood's Referee trial concluded. Five months later, the Referee filed his report.

This Court, in its decision of The Florida Bar v. Randolph, supra., clearly recognized the need for diligent prosecution to avoid the inherent prejudice to the public and the respondent. In that decision this Court stated:

> "(I)nordinate delays are indeed unfair and even unjust to the one accused. They permit violators to remain active in the practice. They dim the memories of witnesses. They mar effective and efficient enforcement of the canons of ethics. Worst of all perhaps, they undermine the public confidence in the bar's announced determination to keep its own house," (P. **638)**

Also, in **1979** this Court rejected a speedy trial rule which was also recommended by its committee and chaired by Justice Karl. In so doing, it again stated its concern with delay but expressed its optimism that the then recent

amendments to the Integration Rule would protect respondents from proceedings taking longer than six months. Supreme Court Special Committee for Lawyer Disciplinary Procedures to Amend Integration Rule, Article II and Article XI, 373 So.2d 1 (Fla. 1979). Moreover, this Court has held that a respondent has a right to demand diligence by the Bar because the Bar has consistently demanded attorneys to turn "square corners". The Florida Bar v. Rubin, 362 So.2d 12 (Fla. 1978). As evidenced by these proceedings, the delays in prosecution which this Court hoped to be no longer an occurrence, still exist despite its continued admonishments to the Bar and referees.

Here, all of the factors which inure to the prejudice of a respondent as a result of delay are present. He and his family have been exposed to a professional and personal embarrassment a result of the public nature of these proceedings. He has suffered the inherent anxiety resultant from being accused of misconduct, having the matter dismissed, then re-opened and then a Referee trial two years and five months later. And his case continues even now and will continue into 1990. Therefore, Mr. Rood has obviously suffered from having to live under the "Cloud of uncertainty, suspicions, and accusations" for an excessive period of time. The Florida Bar v. Rubin, supra.

In addition, Mr. Rood was substantially prejudiced at trial. The memory of Garold Morlan was clearly dimmed by the passage of time. Therefore, his recollection of

evidence favorable to Mr. Rood, such as the specific substance of telephone conversations, was unavailable. (R I 35). Also, the decision by The Florida Bar to dismiss this investigation and then re-open it after years of litigation, resulted in the destruction of evidence and the dismantling of Mr. Rood's file. (R II **267).** This all was to Mr. Rood's disadvantage and to the advantage of the Bar. The due process requirement of a fair trial was, therefore, denied.

This delay had an additional significant effect upon Mr. Rood. It caused him to be the subject of adverse publicity prior to a determination of guilt. Had Mr. Rood been prosecuted in a diligent manner in **1984,** this matter would have been concluded prior to January 3, **1987** and this matter would not have necessarily become public after the filing of the Bar's complaint. On that date, the Rules Regulating The Florida Bar became effective. The Florida Bar Re Rules Regulating The Florida Bar, **494** So.2d **977** (Fla. **1986).** Those rules significantly changed the former Integration Rule 11.12 (l)(d) by eliminating a respondent's right to a motion to maintain confidentiality. Under the new rules, Mr. Rood was afforded no opportunity to maintain a confidential status of this proceeding after the filing of the complaint. Such would not have been the case prior to **1987.**

As a result of The Florida Bar's conduct, it has been approximately nine years since Mr. Rood's representation of the Nances began, approximately five and one-half years

since the Bar learned of the alleged acts, fifteen months since the filing of the Complaint, and five months since the filing of the Referee report. Obviously, The Florida Bar has failed to "turn square corners"! This delay serves to substantially mitigate any discipline.

It is also important for this Court to consider that all material facts alleged by the Bar and accepted by the Referee, occurred not later than June, **1983** and as early as **1980**. Therefore, more than six years have elapsed since the conduct complained of occurred. During this time, Mr. Rood has conducted an active practice and has represented hundreds of clients without discipline. (R III 15). Therefore, the primary purposes of discipline, to protect the public interest and preserve the purity of the Bar, are not served by the suspension of a respondent six years after the conduct occurred. The Florida Bar v. Welch, 272 So.2d **139** (Fla. 1972).

Accordingly, Mr. Rood has been denied due process by causing him to be prejudiced and punished, prior to final judgment being rendered by this Court. See: The Florida Bar v. Guard, **453** So.2d **394** (Fla. **1984).** Therefore, this recommended discipline should be rejected so it becomes clear to the Florida Bar and Referee that delay will not be tolerated.

POINT V

THE REFEREE'S RECOMMENDED DISCIPLINE SHOULD NOT BE ACCEPTED BY THIS COURT BECAUSE IT IS UNJUSTIFIED BY THE FACTS AND IS TOO SEVERE IN LIGHT OF THE LACK OF AGGRAVATION AND THE SUBSTANTIAL MITIGATION.

ARGUMENT *SUMMARY*

This proceeding involves substantive facts which occurred many years ago; a record unsupportive of the factual conclusions; a record unsupportive of any rule violations; substantial delays by The Florida Bar and Referee; no aggravation; substantial mitigation; and an interim period characterized by meaningful contributions by the Respondent to his community and profession. Accordingly, the Court should reject the recommended discipline and dismiss the allegations for lack of record support and because of the substantial delay by The Florida Bar and the Referee.

ARGUMENT - POINT V

Based upon his recommendations of guilt, findings of fact, and findings of aggravation, the Referee recommends that Mr. Rood be suspended for a period of one year. This discipline should be rejected for several significant reasons. First, the clearly erroneous conclusions of fact, conclusions of aggravation, and recommendations of guilt do not support this recommendation. Secondly, such discipline is too severe in light of the substantial mitigation which exist. Moreover, because of the passage of time and the substantial contributions to society and the profession by Mr. Rood, the purposes of Bar discipline will not be served by a suspension.

The material factual conclusions have been shown to be unsupported by the record and clearly erroneous. Based upon these erroneous conclusions, the Referee recommends guilt of the several enumerated rules. However, as shown herein, the recommendations are also erroneous because the essential elements of each rule were not proven, nor found as fact. Furthermore, the aggravating factors used to enhance the recommended discipline are unsupported by the record and are inapplicable. Therefore, the Referee's recommended discipline of one year is unjustified by the record.

Moreover, assuming arguendo that the Referee's recommended discipline would be appropriate if supported by the record, it is undeniably inappropriate in this case.

Throughout the history of our integrated Bar, this Court has held that disciplinary proceedings are primarily directed at protecting the public from misconduct, while also ensuring that the public is denied the services of a qualified lawyer as a result of undue harshness. The Florida Bar v. Guard, 453 So.2d 392 (Fla. 1984), The Florida Bar v. Pahules, 233 So.2d 130 (Fla. 1970) and The Florida Bar v. Welch, 272 So.2d 139 (Fla. 1972).

Furthermore, only where an isolated incident involves an offense such as "embezzlement, bribery of a juror or court officer and the like, should suspension or disbarment be imposed." Welch, Id. Even then, a respondent should be given the benefit of every doubt when the record shows him to be of good reputation and with no prior disciplinary records. Welch, Id.

Conversely, punishment is not a consideration in determining appropriate discipline. It does not serve to protect the public, it does not enhance the image of our profession, nor does it serve to foster rehabilitation of our members. It serves only to damage the person who has erred by eliminating his ability to earn a living, and by denying him that privilege which he sacrificed and labored to obtain. Therefore, as this Court recently held, in clear and unambiguous language, the purpose of a bar disciplinary action is not to punish. State v. DeBock, 512 So.2d 164 (Fla. 1987).

In this case, Edward Rood is before this Court having

practiced law for sixteen years with an untarnished record. (RR (E)(5)(a)). Since representation of the Nances he has obtained civil trial Board certification by this Bar and The National Board of Trial Advocacy. The State certification written exam included a mandatory ethical section which Mr. Rood successfully passed. (R III 15). During this interim period, he has served his family, his Bar, his community and his church in an exemplary fashion. (R III 15). He has provided substantial assistance to those in need of legal services, without compensation. (R III 14). He enjoys an excellent reputation. (RR (E)(5)(b)). This background is indicative of an attorney who is personally and professionally committed in such a manner that he is unlikely to knowingly violate our rules. Therefore, no discipline is appropriate and Mr. Rood should be given every opportunity to continue serving his clients and the public. See: The Florida Bar v. Goodrich, 212 So.2d 764 (Fla. 1968).

Furthermore, to suspend Mr. Rood, in 1990, for one year will require him to cease practicing while his petition for reinstatement is filed, considered by a referee and reviewed by this Court. Therefore, for all intents and purposes, the recommended discipline will prohibit Mr. Rood from practicing law for approximately two years and during that time will deny the public the services of a qualified lawyer until 1992. This is totally inappropriate for alleged misconduct occurring over six to nine years ago. This is especially true considering Mr. Rood's lack of any disciplinary action

in the interim and based upon his strong reputation within his community.

Realistically, it is evident that the recommended discipline can serve no purpose other than to severely punish Mr. Rood and his family. And to do so without proof of self-serving motive, without proof of prejudice to his clients and without proof of the misuse of trust funds or other illegal conduct and without harm to clients, is contrary to the holdings of this Court.

Finally, the prejudice and consequences already suffered by Mr. Rood, his interim record of exemplary conduct, and the presence of substantial mitigation, require no further punishment. Additionally, the substantial delay by The Florida Bar obviates any benefit to its membership in now imposing severe discipline requiring proof of rehabilitation Finally, in view of his many years of discipline free practice, extensive pro bono work, his recognition of the need for improved practice procedures, probation is also inappropriate Accordingly, this Court should reject the Referee's recommended discipline and his findings of fact as being totally unsupported by the record by clear and convincing evidence.

CONCLUSION

The facts and circumstances of this case demand the rejection of the Referee's conclusions and recommendations. The record does not contain clear and convincing evidence of intentional misconduct. No evidence exists to support many of the Referee's findings of fact or aggravation. As a result, the recommendations of guilt are, at best, vague and legally insufficient. More accurately, the recommendations are erroneous.

Moreover, the circumstances giving rise to this proceeding occurred more than six and as long as nine years ago. Since that time, Mr. Rood has conducted himself in an exemplary manner. He has practiced law now for sixteen years with an untarnished disciplinary record and a substantial record of community and professional service. The factors of mitigation are numerous and substantial. The Florida Bar has delayed this proceeding without justification and to the prejudice of the public and the respondent. The absence of aggravation is clear.

Therefore, to now impose any discipline would be unjust and inconsistent with any purpose other than to punish a member of our profession.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished, by U.S. Mail/Hand Delivery to BONNIE L. MAHON, ESQ., Assistant Staff Counsel, The Florida Bar, Suite C-49, Tampa Airport Marriott Hotel, Tampa, Fla. on this the 6TH day of November, **1989.**

Respectfully submitted,

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