IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

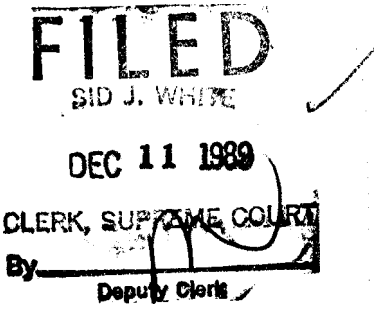
Complainant,

vs.

EDWARD C. ROOD,

Respondent.

CASE NO: 72,867



RESPONDENT'S REPLY BRIEF

Donald A. Smith, Jr, and
Scott K. Tozian
Smith and Tozian, P.A.
Counsel for Respondent
109 North Brush Street
Suite 150
Tampa, Florida 33602
(813)273-0063
Fla. Bar Nos: 265101
253510

TABLE OF CONTENTS

PRELIMINARY STATEMENT

The following abbreviations are used in this brief:

Resp. Ex.	= Respondent's Exhibit
TFB EX.	= The Florida Bar Exhibit
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	= Referee Trial Transcript - Vol. II
R III	= Referee Disciplinary Hearing Transcript

TABLE OF CITATIONS

REPLY TO COMPLAINANT'S STATEMENT OF FACTS

In its statement of facts The Florida Bar presents its version of the relevant circumstances of this case. However, it must be pointed out that many of the alleged facts in this section of the Bar's brief are not facts contained in the record. Instead, throughout its brief, the Bar cites its conclusions as facts. Of course, such conclusions are disputed and should not be confused with the facts supported by the record. The record facts are set forth in Mr. Rood's initial brief.

Furthermore, the Bar often provides this Court with its own conclusions in this section. These matters are identifiable by their "factual" appearance, but without citations to the record or the report.

Finally, this statement refers to matters resulting from a civil trial which were determined by the Referee to be irrelevant and inadmissible. Therefore, because they were not considered by the Referee, those matters should not be considered by this Court and are inappropriate for a statement of fact.

Accordingly, Mr. Rood submits that his statement of facts accurately and completely describes the circumstances of this case for review, and should be considered by this Court.

ARGUMENT SUMMARY

The case here for review is of unusual significance and of an unusual nature. It is significant to this Court, the membership of this bar, and the public because of the legal issues presented to this Court for determination.

This matter, as argued by the parties to the Referee and by briefs, requires this Court to clearly establish the quantity and quality of record evidence necessary to support a Referee's conclusions of fact, recommendations of guilt, and recommendation of discipline. The evidence necessary to sustain the Referee's conclusions does not exist because the record evidence is circumstantial only, and does not clearly prove the ultimate conclusions, to the exclusion of all other reasonable conclusions. Therefore, the conclusions of fact are erroneous, the resulting recommendations of guilt are erroneous, and any discipline is inappropriate.

REPLY ARGUMENT - POINT I

In this case, many of the facts are not at issue. However, the Referee's conclusions drawn from those facts are erroneous because they fail to be logically supported. Therefore, it is a review of the conclusions which presents itself for this Court's consideration.

In attempting to obtain affirmance of the Referee's conclusions, The Florida Bar first proposes that a few portions of Mr. Rood's testimony was at variance with his prior civil testimony and therefore his testimony was correctly rejected. It then suggest that all necessary conclusions should therefore be determined favorably to The Florida Bar. Secondly, the Bar argues that the Referee's conclusions are correct because of facts it cites in support thereof. Neither argument satisfies the fundamental requirements that the record support the Referee's conclusions by clear and convincing evidence and that circumstantial evidence exclude every other reasonable conclusion.

In arguing that Mr. Rood's testimony was correctly rejected, the Bar fails to acknowledge the two year time lapse between the testimony, the different questions propounded, the difference in forums, the difference in issues, and the substantial differences in the context of the questions and answers. These factors readily explain any minor

inconsistencies discovered by the Bar's post-trial study of the record. More importantly of course, such an argument diverts attention from the consistent and candid nature of all the testimony. This includes Mr. Rood's consistent testimony that he did not have knowledge of the memo prior to Dr. Gunderman's second deposition; he did not review the doctor's medical file prior to the second deposition; and he had no knowledge that the Eckerd suit had been filed at the time he drafted answers to Interrogatory number 11. [R II 157, 269; R II 146, 284; TFB Ex. 25, 436; R II 1761. Therefore, as evidenced by the limited matters cited by the Bar, the consistencies are far greater and are clearly more relevant than the alleged inconsistencies discovered by the Bar. Therefore, any suggestion that the Referee's findings are correct because of inconsistent testimony is clearly erroneous.

The Bar also claims that specific findings by the Referee are supported by the "evidence". However, the Bar significantly misinterprets the record evidence.

Specifically, the Bar argues that simply because Mr. Rood's office received a copy of the memo with the medical records, Mr. Rood knew it existed. This conclusion does not result from this fact. It also fails to acknowledge the uncontroverted testimony of Mr. Rood's medical paralegal that she was responsible for obtaining and reviewing all medical records and that Mr. Rood did not review the records in this

case. [R II 123]. Therefore, without direct evidence that Mr. Rood actually saw a copy of the memo, this conclusion of the Referee remains clearly erroneous because the circumstantial evidence remains just as consistent with the fact that Mr. Rood never saw the memo.

The Bar also states that Mr. Rood went through Dr. Gunderman's file prior to his first deposition. It then concludes that he knew of and removed the memo. Again, the conclusion is not necessarily a result of this premise. Furthermore, the only record evidence, as cited by the Bar, is directly contrary to this interpretation of the evidence. The record, at The Florida Bar Exhibit 25, page 436 and 437, is as follows:

> "Question: To the best of your recollection, did you review his medical file on Chelsey Nance prior to the deposition on April 9th, 1982?"
>
> "Answer: No, sir, I didn't review it. But I went through it -- the Doctor went through it with me. He was -- I was asking him about his theory of liability, and he was going through the records and talking to me about them. But I didn't review ~~them~~, no, sir. I don't know enough about the medical to review them, and ~~had not~~ looked ~~at his~~ file prior ~~to that time~~." (Emphasis added).

This evidence clearly proves that Mr. Rood did not review the medical file and had no knowledge of the memo. Therefore, the Referee's conclusions to the contrary are clearly erroneous because there is no supporting evidence.

The Bar further attempts to find support for the Referee's conclusions by mischaracterizing the evidence. It concludes

that Mr. Rood "submitted" false interrogatories in both the Nance v. Tobin and Nance v. Eckerd cases. Apparently, this use of "submission" is an attempt to avoid addressing the material issue of whether Mr. Rood ever actually prepared or served interrogatories.

The record is clear that Mr. Rood did not prepare or serve interrogatories in the Tobin case. Rather, he merely drafted answers for review by co-counsel. [R II 175 and TFB Ex. 5]. It was the responsibility of Mr. Thompson, as lead counsel, to prepare the interrogatories, mail them to the Nances in Missouri for execution, and to serve the finalized answers. [R I 57, 791. In fact, Mr. Rood was not provided a copy of the answers. [R II 1811. Therefore, because the Bar's argument is dependent upon a circumstance that does not exist, its argument in support of the finding of fact is erroneous.

In the Eckerd case the original interrogatory answers were prepared and signed by the Nances, without consultation with Mr. Rood. [Resp. Ex. 7, 8 and R II 170]. The supplemental interrogatory answers completely cured the misunderstanding of the questions by the Nances. They were prepared and served by Mr. Rood immediately after verbally advising opposing counsel of his clients' misunderstanding. [Resp. Ex. 7, 8, and R II 163, 164, 1711. Therefore, the Bar's argument that Mr. Rood intentionally attempted to mislead opposing counsel is totally contrary to the facts. The error of this conclusion is

conclusively proven by the testimony of counsel for Eckerd, Mr. Morlan, who stated that Mr. Rood never attempted to withhold information. [R 1401.

The Bar also argues that co-counsel, George Thompson, was never advised of Dr. Gunderman's initial opinion of no negligence. Of course, the record clearly proves that Mr. Thompson did know of Dr. Gunderman's initial opinion. [R I 66, 71, 97]. It was his knowledge of that opinion that caused him to investigate and confirm that the CT scan was available. [R I 65]. Again, the Bar's argument is predicated upon a misunderstanding of the record which does not support its position.

It is also suggested that the Referee correctly concluded that Mr. Rood attempted to mislead and conceal information as a result of the fact that specific interrogatories were incompletely answered. The Bar argues that the pendency of the Tobin case was intentionally concealed from Eckerd's counsel by the answers provided. However, the interrogatories only requested information concerning medical providers. [Resp. Ex. 7, 8]. No question was propounded by Eckerd asking for any information about pending lawsuits. Had it been asked, it would have been answered. Thus, there is no evidence to support this conclusion.

Just as illogically, it is suggested that somehow because co-counsel served an answer to an interrogatory in the Tobin

case, and despite the letter of clarification from Mr. Rood, and despite a lack of notice to Mr. Rood of the actual answers, Mr. Rood personally created false evidence and caused his clients to commit perjury. No evidence supports such a conclusion because he truly believed, as shown by his cover letter to co-counsel, that the Eckerd case had not been filed. Secondly, Mr. Rood was undeniably unaware of the answers that were ultimately provided. Therefore, the Bar's argument makes a quantum leap from one evidentiary matter to a conclusion, without the necessary logical bridge of support. Accordingly, this finding too is erroneous.

Therefore, the arguments submitted by the Bar are illogical, unsupported by the record, and contrary to the great weight of evidence. Thus, the Referee's findings of fact are incorrect.

REPLY ARGUMENT - POINT II

Do the findings of fact and the record require this Court to accept or reject the Referee's recommendations of guilt? Mr. Rood points out in his initial brief why the recommendations are legally defective and should be rejected. The Florida Bar argues that the findings of fact require acceptance because of the "facts" found by the Referee. The Bar's arguments fail because the recommendations are legally flawed and the underlying facts are erroneous.

As to DR 1-102 (A)(4), Code of Professional Responsibility, the Bar proposes four facts which it contends constitute a violation. However, as previously stated, the cited "facts" are not supported by the record and therefore cannot form a basis for concluding guilt. Also, none of the factors cited prove any intentional, dishonest, or deceitful conduct. Each is more consistent with unintentional conduct and an honest motive. Therefore, this recommendation of guilt should be rejected.

In arguing for acceptance of the recommendation as to DR 7-109 (A) and DR 7-102(A)(3), the Bar suggests that "by law" Mr. Rood was required to provide defense counsel with medical authorizations. No statute or procedural rule has been cited, nor does one exist requiring counsel for a plaintiff to provide

medical authorizations to defense counsel. Furthermore, the record fails to show that any such request was even directed to Mr. Rood.

Furthermore, the suggestion that Mr. Rood knew that Mr. Thompson did not have a copy of the memo is incorrect and is also contrary to all evidence. Once again, this suggestion by the Bar indicates that the necessary factual conclusions to support such a rule violation do not exist.

Also, important to any consideration of DR 7-102(A)(3) and DR 7-109(A), is a determination of whether "evidence" was at issue and if so, was it created by Mr. Rood, was it suppressed, and was it false. The Bar attempts to support the Referee's recommendations by merely characterizing all matters as evidence and by avoiding the other issues. However, neither at the trial of this cause nor in its brief is any legal support propounded for such an oversimplified theory of guilt.

Contrary to the Bar's suggestion, neither the correspondence of the attorneys nor the memo was necessarily evidence. These were privileged communications and were therefore protected from disclosure to persons beyond those intended to be privy to the communication. Mr. Rood's testimony established the privileged character of the correspondence and therefore the only conclusion supported by the record is that those matters were not evidence, as intended

by these rules. It is also clear that the memo was not removed from Dr. Gunderman's file as a result of Mr. Rood's telephone call. Both the telephone message and the memo were within the file when copied for Mr. Morlan after the telephone call occurred. [R I 36]. Therefore, again the record is devoid of evidence supporting the conclusions suggested by the Bar.

Furthermore, the record does not prove that Mr. Rood created false information. The information may have been incorrect, but it was not known by him to be so. Therefore, these recommendations of guilt are erroneous and should be rejected.

REPLY ARGUMENT - POINT III

In its argument concerning the issue of aggravation and mitigation, the Bar acknowledges two mitigating factors. One, that Mr. Rood has never before been disciplined for ethical misconduct. Secondly, that he has made significant contributions to his church and community. These factors are of significance because they evidence the true character and competency of this Respondent.

Several other additional mitigating factors found by the Referee are now questioned by the Bar. However, each finding is supported by the record and should be accepted by this Court.

Concerning the determination that delay occurred in the prosecution of this matter, the Bar suggests that it took years to advance this case from the investigating stage to final hearing and such time is inconsistent with delay. Of course, nothing was proffered at trial to explain why such a substantial length of time lapsed. Furthermore, it must be noted that as early as 1984 the Bar was aware of all relevant facts. But, it decided not to proceed and awaited a civil trial verdict in an attempt to bolster its case and simplify its burden of proof. This additional and prejudicial delay of three years, before re-opening the case, combined with the additional delay at the Referee level, clearly supports only one conclusion - the presence of substantial prejudicial delay.

The Bar's suggestion that two of the factors are repetitious indicates its failure to comprehend the characteristics of each factor and its refusal to acknowledge the provisions its Standards for Discipline, which it cites. Both the delay by the Bar and the substantial passage of time between the circumstances and this case, are enumerated as mitigating factors in the Standards adopted by The Florida Bar. See: Section 9.32, Florida Standards for Imposing Laywer Sanctions.

Also, because multiple misconduct is an aggravating factor recognized by the Standards, it is only fair and logical that one isolated matter should be considered as mitigation and it is not repetitive of other factors.

Accordingly, all factors of mitigation found by the Referee are clearly correct and are clearly separate and distinct matters recognized by the Board of Governors in promulgating these Standards.

On the other hand, the matters of aggravation are not supported by clear and convincing evidence and therefore the Bar failed in its burden to prove each factor. First, to suggest that a "pattern of misconduct" is proven by a conclusion that Mr. Rood engaged in a "course of misconduct" is once again to draw a parallel where one does not exist. Such illogical exercises should not be accepted here.

The Bar also argues that seven years of practice can only result in a conclusion of substantial experience. This is not a valid conclusion in view of the evidence here. The record is clear that Mr. Rood had been admitted to the Bar for only seven years prior to 1980. However, prior to his meeting the Nances, his experience had been limited to only two years as an assistant state attorney, one year out of active practice, and only four years as a private practitioner. [R III 11, 12]. Relative to members of our Bar with many years of experience in their respective areas of expertise, it cannot be said that Mr. Rood was a substantially experienced attorney. Accordingly, this factor should not be considered.

The argument that Mr. Rood caused his clients to unknowingly commit perjury is an oxymoron. The Bar continues to fail to indicate how a person can commit perjury without knowledge. It is without question that the Nances did not commit perjury, and no charge or suggestion of such a charge has ever been filed or considered by any court or law enforcement agency.

The Bar also argues that Mr. Rood has not assumed responsibility for the ethical violations alleged. That is correct, because Mr. Rood has not committed any acts which violated the Code of Professional Responsibility. However, Mr. Rood has candidly acknowledged his responsibility for his prior office procedures and for his inattention to the details of the

handling of the Tobin and Eckerd cases. [R III 39, 40]. He has also taken steps to improve those office policies and to improve his ability of serving as co-counsel. [R III 41, 421. Therefore, this aggravating factor is not supported by the record.

REPLY ARGUMENT - POINT IV

The Florida Bar argues that delay did not occur in this case. However, it does acknowledge that it is the Bar's responsibility, and not that of a respondent, to diligently prosecute a disciplinary case. Complainant also acknowledges that the original complaint was made March 1, 1984 and that after a six month investigative period, the case was dismissed. Also undisputed is the fact that in February, 1987, The Florida Bar re-opened this same case only as a result of a civil jury verdict. Based on this unilateral decision to discontinue prosecution until after a civil trial, the Bar now argues that its responsibility to diligently prosecute this case began in February, 1987 and not in March, 1984.

The Bar's argument fails to address the rule in effect in both 1984 and now, that an investigation shall not be suspended without the approval of the Board of Governors, even though the accused is made a party to a civil litigation. Rule 11.04(2)(c), Integration Rule of The Florida Bar and Rule 3-7.3, Rules Regulating The Florida Bar. Here, the Bar failed to obtain the approval of the Board to suspend its investigation for several years. Therefore, the Bar cannot now be heard to defend its substantial lack of diligence when in fact it violated the rules which it is sworn to enforce.

Furthermore, if, in fact, any delay was caused by the nature of the evidence presented, this too was only the fault of the Bar. Mr. Rood did not choose the evidentiary form to be used by the Bar in its case. The Bar chose its method of "proof" in a manner felt to be most favorable to its prosecution. To now argue that it is not guilty of delay because of the nature of the evidence presented is irresponsible and unpersuasive.

Finally, it is important for this court to consider the unusual circumstances represented by this case. This is a case where an investigation was completed and a determination made that no misconduct occurred. Years later, and only after Mr. Rood's file was dismantled and many notes and memos lost, The Florida Bar re-opened this matter for prosecution resulting in substantial prejudice to Mr. Rood. [R II 2671. As the agency charged with enforcing all rules regulating the professional conduct of this integrated bar, such delay cannot be tolerated. It only serves to establish an ethical double standard, one for The Florida Bar and one for all other attorneys. No other lawyer or firm could act with such a lack of diligence and such disregard for the rights of others with such impunity. If this Court is to continue requiring its members of the Bar to practice in accordance with the Rules Regulating The Florida Bar and to otherwise turn square corners, then so too it must require our disciplinary agency to conform to the same standards.

REPLY ARGUMENT - POINT V

The Florida Bar argues to this Court that disbarment is the appropriate disciplinary sanction. This argument is erroneous because the Referee's conclusions are based upon several erroneous conclusions, including that all the facts found by the Referee are legally supported by the record; that all recommendations of guilt are legally correct; that several mitigating factors are unsupported; that all aggravating factors are supported; and that the Florida Standards for Imposing Lawyer Sanctions require such discipline. Because each of these presumptions are necessary to the Bar's argument, should any one be determined not to exist, then it logically follows that disbarment is inappropriate. Here, as has been suggested, none of the factors necessary to support this recommended discipline exist and therefore disbarment, as well as discipline of any degree, is improper.

Secondly, as has been set forth herein and in the initial brief, the recommendations of guilt do not withstand the test of judicial review as they fail to be supported by either the record evidence or the findings of fact. Thirdly, even assuming arguendo, that only two factors of mitigation exist,

and further assuming that all factors of aggravation have been proven, disbarment is inappropriate. Section 3.0, 6.1, and 6.2 of the Florida Standards for Imposing Lawyer Sanctions, state that any recommended sanction is only a guide, and should be imposed only when aggravating or mitigating circumstances are not present. In view of the uncontroverted mitigation, as well as the several factors of mitigation found by the Referee, this requested discipline cannot be imposed by this Court. Also, the arguments propounded by the Bar fail to acknowledge the lack of evidence and the absence of findings by the Referee proving that the alleged acts caused serious or potentially serious injury; or caused a significant or potentially significant adverse affect on any legal proceeding; or that any intent to obtain a personal benefit existed. These factors are necessary elements of the cited sanctions. Since these elements do not exist, these sanctions are clearly inapplicable and disbarment is clearly inappropriate.

Additionally, the Bar's recommendation fails to address the circumstance it has conceded to be the most significant, i.e., delay. In view of the significant and unjustified delay having caused adverse affects upon Mr. Rood for these many past years, only a refusal to impose any disciplinary sanction is appropriate. Disbarment should not even be considered.

Moreover, it is clear that discipline is not intended to punish the accused attorney. State v. DeBock, 512 So. 2d 164 (Fla. 1987). Instead, its primary purpose is to protect the

public while ensuring that the public is not denied the services of a qualified lawyer. The Florida Bar v. Welch, 272 So.2d 130 (Fla. 1970). In 1984 Mr. Rood became a board certified civil trial attorney. [R III 15]. To now discipline Mr. Rood will result in the denial to the public of a well qualified attorney.

Accordingly, in view of the totality of circumstances presented by this case, including the many years since the circumstances occurred, the failure of the record to clearly prove any misconduct, and the absence of any purpose to be served by now imposing discipline, Mr. Rood respectfully requests this Court to impose no discipline.

CONCLUSION

Despite its substantial efforts at formulating persuasive arguments, the Bar's brief does not, and cannot, increase the quantity nor improve the quality of the evidence presented to the Referee as contained in this record. Neither can the efforts of the Bar cause logically unsound conclusions to become logically sound and legally correct. The Bar's brief cannot contest the findings of mitigation. No argument can eliminate or minimize the effects of years of unjustified delay. Finally, no reasonable argument exists to require the imposition of the ultimate discipline of disbarment, in view of the lack of evidence, the clear absence of guilt, and the substantial mitigation present in this case.

Accordingly, this Court should now clearly determine and hold that a case such as this should not be before it for review and should reject all findings of fact and recommendations of guilt, and order no discipline for Edward C. Rood, Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail delivery this 8th day of December, 1989, to: Bonnie L. Mahon, Assistant Staff Counsel, The Florida Bar, Suite C-49, Tampa Airport, Marriott Hotel, Tampa, Florida 33607.

Donald A. Smith, Jr.

DONALD A. SMITH, JR., ESQUIRE
SMITH AND TOZIAN, P.A.
109 North Brush Street
Suite 150
Tampa, Florida 33602
(813) 273-0063
Fla. Bar No: 265101