IN TEE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

EDWARD C. ROOD,

Respondent.
_____/

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

REPORT OF REFEREE

A. **Summary of Proceedings:**

Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to Rule 3-7.5, Rules of Discipline, a final hearing was held on November 18, 1988 and February 28, 1989. The enclosed pleadings, orders, transcripts and exhibits are forwarded to The Supreme Court of Florida with this report, and constitute the record in this case.

The following attorneys appeared as counsel for the parties:

For The Florida Bar: BONNIE L. MAHON and RICHARD A. GREENBERG

For The Respondent: DONALD A. SMITH, JR.

B. **Findings of Fact as to Each Item of Misconduct of Which the Respondent is Charged:**

After considering all the pleadings and evidence before me, I find the following:

1. In July 1980, Ernest and Cathy Nance consulted with respondent regarding the advisability of filing a medical malpractice lawsuit against several Michigan physicians and hospitals, including Dr. Dale C. Alverson, a Neonatologist, who had treated the Nances' daughter, Chelsey, for certain birth-related nervous system disorders.

2. On August 18, 1980, respondent consulted with Dr. Richard Gunderman, a Tampa physician specializing in pediatric neurology, who had previously diagnosed Chelsey as being hydrocephalic. Chelsey was now Dr. Gunderman's patient. During this consultation

Dr. Gunderman specifically informed respondent that there had been no negligence in Dr. Alverson's treatment of Chelsey. After the consultation, Dr. Gunderman prepared a memorandum (known hereafter 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 not 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."
> (Emphasis supplied.)

The memo was made a part of Chelsey's medical records.

3. When respondent conveyed the essence of Dr. Gunderman's verbal "no negligence" opinion to Mr. and Mrs. Nance, comments made by them made it appear to respondent that Dr. Gunderman had been either uninformed or misinformed about the availability of certain sophisticated diagnostic equipment at and following Chelsey's birth. At a subsequent meeting between Dr. Gunderman and Mr. and Mrs. Nance, Dr. Gunderman changed his original "no negligence" opinion to one that Dr. Alverson had indeed been negligent in his treatment of Chelsey. It is unclear how this new opinion was conveyed to respondent but it obviously was. Dr. Gunderman subsequently agreed to testify as an expert witness in the to-be-filed lawsuit, notwithstanding his previous oral and written opinions that Dr. Alverson had not been negligent.

4. In February 1981, Mr. and Mrs. Nance executed a standard contingent fee contract retaining respondent to file a medical malpractice lawsuit against Dr. Alverson, a Dr. Tobin and Bell

Memorial Hospital, in Michigan. Respondent then retained George Thompson, a Michigan attorney, to serve as co-counsel.

5. Respondent obtained all of Chelsey's medical records, which included the Gunderman memo. Respondent sent a copy of these records to Mr. Thompson. Inexplicably, the Gunderman memo was not among the records received by Mr. Thompson. Respondent never informed Mr. Thompson of the existence of the Gunderman memo or of the oral "no negligence" opinion.

6. On August 15, 1981 respondent filed a medical malpractice lawsuit against Dr. Alverson, and others, in the United States District Court for the Western District of Michigan, Northern Division (known hereafter as Nance v. Tobin).

7. Respondent's testimony in various forums, including the final hearing, 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 in Nance v. Tobin was taken, is rejected in its entirety as being totally unworthy of belief. I am satisfied that respondent knew of the Gunderman memo and that he engaged in a course of conduct to deliberately conceal its existence from everyone as hereinafter described.

8. On November 2, 1981 respondent filed a separate lawsuit for Mr. and Mrs. Nance against Eckerd Drugs for the misfilling of a prescription for Zorontin written by Dr. Gunderman for Chelsey. This lawsuit (known hereafter as Nance v. Eckerd) was filed in Florida, without the knowledge of Michigan co-counsel.

9. On November 5, 1981, three days after the filing of the Florida suit, Michigan counsel in Nance v. Tobin served Interrogatories on the Nances. Interrogatory No. 11 asked:

> "Have you ever filed an action or made claim against any person, firm, or corporation for damages for personal injuries or illness other than this?"

By letter dated November 8, 1981, the Nances specifically asked respondent to answer Interrogatory No. 11 for them, which respondent did, with the answer "NO."

10. On November 18, 1981 respondent transmitted the Answers to Interrogatories to Michigan co-counsel with a letter containing the following:

> "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."

In fact, the Eckerd lawsuit had already been filed.

11. At the final hearing, and in various other forums, respondent attempted to blame faulty office procedures, or human error, for the incorrect response to Interrogatory No. 11. He maintains that he was unaware that the lawsuit had been filed. Frankly, if this were an isolated incident, his explanation "might" be believable, but it isn't an isolated incident -- it is all part of a continuing course of conduct designed to conceal, mislead and obfuscate. Respondent never advised Mr. Thompson that the Eckerd suit had been filed, nor did respondent seek to amend the answer to Interrogatory No. 11. On January 19, 1982 the Nances swore to the Nance v. Tobin Interrogatories, thus, indirectly committing perjury.

12. Counsel in the Florida suit of Nance v. Eckerd also served Interrogatories on the Nances. 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 preceeding the accident in this cause sued upon, the nature or ailment or illness or other disability or for whatever reasons said doctor was consulted?"

The Nances, with the knowledge and approval of respondent, answered Interrogatory No. 13 with Dr. Gunderman's name only. Interrogatory No. 14 then asked:

> "Give the names and addresses of all hospitals where the minor plaintiff has been hospitalized as an in-patient or an out-patient for her entire life, and as to each state." (Emphasis supplied.)

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

13. The respondent testified at the final hearing that he thought Interrogatories Nos. 13 and 14 were asking for doctors and hospitals relating only to the Eckerd Drug incident. The respondent's testimony in this regard is rejected in its entirety because Interrogatories No. 4 and No. 8 specifically address the question of any doctors or hospitals visited by Chelsey Nance as a result of the Eckerd Drugs incident only.

14. I find that the respondent deliberately attempted to conceal the pendency of the Nance v. Tobin, et al. lawsuit filed in Michigan from Eckerd Drugs and its counsel. In fact, counsel for Eckerd Drugs did not learn of the lawsuit in Michigan until he received a copy of Dr. Gunderrnan's records on Chelsey Nance which contained a copy of the Gunderman memo.

15. On April 4, 1982 Dr. Gunderman was deposed by Dr. Alverson's counsel. During the deposition, Dr. Gunderman testified that he felt Dr. Alverson's treatment of Chelsey Nance was below the standard of care because Dr. Alverson had not made the diagnosis of progressive hydrocephalsus with a CAT-scan. I find that the respondent intentionally and deliberately concealed, or attempted to conceal, from Dr. Alverson and his attorney, Dr. Gunderman's prior opinion as reflected in his memorandum dated August 18, 1980. Dr. Gunderman's opinion was concealed from Dr. Alverson's attorney despite numerous discovery requests.

16. Subsequent to Dr. Gunderman's deposition of April 4, 1982, the attorney for Eckerd Drugs informed Dr. Alverson's attorney of Dr. Gunderman's August 18, 1980 memorandum. This was the first time that Dr. Alverson's attorney became aware of the Gunderman memo. Of course, the Gunderman memo had the very real potential of impeaching Dr. Gunderman's trial testimony. Respondent's assertion that the Gunderman memo actually would have helped his case defies logic and any notion of sound trial tactics.

17. After counsel for Eckerd Drugs gave a copy of the Gunderman memo to Dr. Alverson's counsel, a second deposition of Dr. Gunderman was scheduled. Prior to the second deposition, Dr. Alverson's counsel requested a copy of medical records regarding Chelsey Nance from Dr. Gunderman. The respondent advised Dr. Gunderman not to send the records. In addition, prior to the second deposition of Dr. Gunderman, Mr. Rood called Dr. Gunderman's office and left a message with Dr. Gunderman's secretary which was placed in Chelsey's file:

> "Regarding Chelsey Nance, he [Rood] would like us to throw away any correspondence to or from the attorney in our file on Chelsey. If you do not feel confident in throwing this away, mail them to him and he will throw them away."

18. The second deposition of Dr. Gunderman was held on September 9, 1983. Dr. Alverson's counsel discovered the respondent's message to Dr. Gunderman in Dr. Gunderman's file. In addition, Dr. Alverson's attorney discovered that the Gunderman memo was missing from Dr. Gunderman's medical chart regarding Chelsey Nance.

19. I find that the respondent removed, or caused to be removed, the original of the Gunderman memo from Dr. Gunderman's own files.

20. I find that the respondent attempted to conceal the existence of the Gunderman memo from everyone involved in the Nance v. Tobin lawsuit. Implicit in this finding is, of course, a finding that the respondent knew of the existence of the Gunderman memo.

21. In December 1983 Mr. and Mrs. Nance caused the lawsuit against Dr. Alverson to be dismissed.

22. In connection with the dismissal, I find that the allegations contained in paragraphs 34 and 35 of The Bar's Complaint do not constitute violations of any Disciplinary Rules.

23. On February 28, 1984 Dr. Alverson and his medical malpractice insurance carrier filed suit against respondent and Dr. Gunderman alleging that they had caused a spurious lawsuit to be filed against Dr. Alverson. A jury verdict against both respondent and Dr. Gunderman was subsequently affirmed on appeal.

24. The findings and conclusions in this report are made without regard to any findings in, or results of, the lawsuit mentioned in paragraph 23 above. No weight whatsoever was given to the allegations in paragraphs 38, 39, 40, 41, 42, 43, 44, and 45 of The Bar's Complaint. Exhibits 26, 27, 28, 29, and 30 in support of those allegations are received only for the purpose of establishing the fact that the misconduct independently found in this report was also part of the lawsuit.

25. Thus, respondent's misconduct may be summarized as follows:

a. respondent knew of the existence of Dr. Gunderman's memo of August 18, 1980;

b. respondent concealed Dr. Gunderman's memo from everyone;

c. respondent failed to provide co-counsel with the Gunderman memo, or any information about it;

d. respondent removed, or caused to be removed, from Dr. Gunderman's file the original Gunderman memo; and,

e. respondent 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.

C. **Recommendation as to Whether or Not the Respondent Should Be Found Guilty:**

I recommend that the respondent be found guilty of violating the following Disciplinary Rules:

DR 1-102(A)(4) (engage in conduct involving dishonesty, fraud, deceit, or misrepresentation);

DR 1-102(A)(6) (engage in 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 suppress any evidence that he or his client has a legal obligation to reveal or produce.)

D. **Recommendation as to Disciplinary Measures to be Applied**:

The Florida Bar recommends disbarment, however, in view of the substantial mitigating factors set forth in paragraph E, I recommend that respondent be suspended for a period of one (1) year.

E. Personal History and Past Disciplinary Record:

After a finding of guilty and prior to recommending discipline pursuant to Rule 3-7.5(K)(4), Rules of Discipline, I considered the following personal history and prior disciplinary record of the respondent, to wit:

(1) Age: 41 years old

(2) Date Admitted to Bar: December 14, 1973

(3) Prior Disciplinary Record: None

(4) Aggravating Factors:

(a) dishonest or selfish motive;

(b) a pattern of misconduct;

(c) refusal to acknowledge wrongful nature of conduct;

(d) substantial experience in the practice of law;

(e) causing his clients to unknowingly commit perjury by supplying them with false answers to Interrogatories and thereafter having his clients swear to the same.

(5) Mitigating Factors:

(a) absence of prior disciplinary record;

(b) excellent character and reputation;

(c) substantial and meaningful contributions to legal and non-legal communities, including substantial pro bono legal services; charitable contributions; church related contributions; community involvement with youth work and organizations;

(d) isolated nature of this transaction;

(e) delay in the prosecution of this matter by The Florida Bar which was not attributable to respondent;

(f) 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.

F. Statement of Costs and Manner in Which Costs Should Be Taxed:

I find the following costs were reasonably incurred by The Florida Bar:

(1) Grievance Committee Level

(a)	Administrative Costs	$ **150.00**
(b)	Court Reporting Costs	**330.62**
(c)	Bar Counsel Expenses	**18.40**
(d)	Misc. (Copies)	**554.10**

(2) Referee Level

(a)	Administrative Costs	$ **150.00**
(b)	Court Reporter Costs	**1,752.83**
(c)	Bar Counsel Expenses	**267.50**
(d)	Misc. (Research)	**17.35**
(e)	Staff Inv. Exp.	**676.40**
	ESTIMATED COSTS TO DATE:	**$3,917.20**

It is apparent that other costs might be incurred in the future, if further proceedings are necessary in this matter. It is recommended that such future costs, together with the foregoing costs, be charged to the respondent and that interest at the statutory rate shall accrue and be payable beginning thirty **(30)** days after the judgment in this case becomes final unless a waiver is granted by the Board of Governors of The Florida Bar.

Dated this 24th day of July, **1989.**

William A. Norris, Jr., Referee

Copies furnished to:

Donald A. Smith, Jr., Attorney for Respondent
Bonnie L. Mahon, Assistant Staff Counsel
John T. Berry, Staff Counsel