IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Petitioner,

v.

EDWARD B. ROOD,

Respondent.

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Case No. 78,795
TFB No. 90-10,733(13E)
90-11,550(13E)

Case No. 78,74[illegible]
TFB No. 91-10,534(13E)

AMENDED INITIAL BRIEF

OF

THE FLORIDA BAR

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SYMBOLS AND REFERENCES

In this brief, The Florida Bar, appellant will be referred to as "The Florida Bar" or "The Bar". The appellee, Edward B. Rood, will be referred to as "Respondent".

"RI" will refer to the record in Supreme Court Case No. 78,741. "RII" will refer to the record on Count I of Supreme Court Case No. 78,795. "RIII" will refer to the record on Count III of Supreme Court Case No. 78,795.

"TRI" will refer to Volume I and II of the transcript of the final hearing on Supreme Court Case No. 78,741 held on January 21, 1992. "TRII" will refer to Volume I, II, and III of the transcript of the final hearing on Count I of Supreme Court Case No. 78,795 held on February 26 and 27, 1992. "TRIII" will refer to Volume I and II of the transcript of the final hearing on Count III of Supreme Court Case No. 78,795 held on April 20, 1992. "TRIV" will refer to the transcript of the discipline hearing on Supreme Court Case Nos. 78,741 and 78,795 held on June 19, 1992.

"RRI" will refer to the Report of Referee dated July 15, 1992, on Counts I and III of Supreme Court Case No. 78,795. "RRII" will refer to the Report of Referee dated July 15, 1992 on Supreme Court Case No. 78,741.

"The fraudulent conveyance case" will refer to Supreme Court Case No. 78,741. "The Stephenson case" will refer to Count III of Supreme Court Case No. 78,795. "The Ng case" will refer to Count I of Supreme Court Case No. 78,795.

STATEMENT OF THE FACTS AND OF THE CASE

CASE NO. 78,795

On October 22, 1991, The Florida Bar filed a three (3) Count Complaint against the Respondent. On March 24, 1992, The Florida Bar voluntarily dismissed Count II of the Complaint. On March 31, 1992, The Florida Bar filed an Amended Complaint as to Count III. The facts relating to Count I and III are as follows:

COUNT I - (TFB NO. 90-10,733(13E))

Heidi I. Stephenson, a minor, was involved in a slip and fall accident at Skateland of Brandon on September 6, 1981, which resulted in injury to Heidi. (R, TFB Exhibit #1). On or about September 25, 1982, Heidi's father, Kleber Stephenson, retained the law firm of Rood, Hapner and Dekle to pursue a personal injury action against Empire Fire and Marine Insurance Company and its insured, Skateland of Brandon. David Webster, an attorney with the firm of Rood, Hapner and Dekle, (later known as Rood and Webster) handled the Stephenson case. (R, TFB Exhibit #1).

In or about May, 1984, the Stephenson's agreed to settle the personal injury case for $50,000. On or about May 23, 1984, a guardianship case was opened for Heidi Stephenson in the Circuit Court for Hillsborough County, Florida, Probate Division, since Heidi was a minor (14 years old). On or about July 6, 1984, the law firm of Rood and Associates (f/k/a Rood and Webster) issued a check in the amount of $26,068.45 to Kleber Stephenson, individually and as parent and natural guardian of Heidi Stephenson. (RII, TFB Exhibit #1). $20,000.00 of the foregoing

check was designated for the benefit of Heidi Stephenson. The $20,000.00 was ordered to be deposited in a guardianship account at Barnett Bank of Tampa and funds were only to be withdrawn by Order of the Probate Court. (RII, TFB Exhibit #1).

In July, 1984, the Respondent's son, Edward C. Rood, disbursed the settlement proceeds directly to the Stephensons without insuring that the funds were deposited into a proper guardianship account. (TRII, pp.166-167). Thereafter, the Stephensons purchased two (2) $10,000.00 Certificates of Deposit, at Barnett Bank, in their names, in trust for Heidi Stephenson. (TRII, p.167; RII, TFB Exhibit #34). Between July, 1984 and December, 1986, the Stephensons spent their daughter's $20,000.00. (RII, TFB Exhibit #4).

Sometime between May, 1984 and October, 1986, David Webster left the Respondent's law firm. The Stephenson's guardianship case remained with Respondent's firm. (TRII, pp.19-21).

On October 16, 1986, Judge Alvarez issued an Order to Show Cause in the Heidi Stephenson guardianship case due to the fact that an annual accounting and an inventory had not been filed. The Order to Show Cause was sent to both David Webster at the Rood law firm and to the Stephensons. (RII, TFB Exhibit #2). There was no response to the Order to Show Cause and on December 17, 1986, Judge Alvarez issued a Contempt Notice to David Webster and the Stephensons. The Contempt Notice scheduled a hearing for February 25, 1987. (RII, TFB Exhibit #3).

The Rood law firm received a copy of the Contempt Notice and

Respondent asked his secretary, Jan Taylor, to handle the preparation of appropriate forms for the Stephensons to execute to close the case. (TRII, pp.24-30). On January 13, 1987, Respondent's secretary sent the Stephensons a letter which enclosed an Inventory of Guardian and a document entitled Annual Return of Guardian of Property to be executed by the Stephensons. (RII, TFB Exhibit #15 and #16). The Stephensons did not complete and return the forms to Respondent. On January 27, 1987, Respondent's secretary sent another letter to the Stephensons which requested a phone call regarding said forms. (RII, TFB Exhibit #17).

Sometime between January 27, 1987 and February, 1987, Barbara Stephenson, Heidi's mother, sent a letter to the Respondent which stated that all of Heidi's money had been spent, that she hadn't answered Respondent's inquiries because she was scared, and that she was ready to be punished for spending the money if the same was necessary. (RII, TFB Exhibit #4).

On February 6, 1987, Respondent's secretary sent Mrs. Stephenson a letter which advised that the Respondent had been given Mrs. Stephenson's letter and had scheduled a hearing before Judge Alvarez for March 20, 1987. (RII, TFB Exhibit #5).

On March 20, 1987, Barbara and Heidi Stephenson met with Respondent at Respondent's office and thereafter went to the courthouse for the hearing with Judge Alvarez. Respondent attended the hearing before Judge Alvarez without the Stephensons. After the hearing, Respondent advised the Stephensons that everything was taken care of but that Heidi had to be paid the $20,000.00 by her

eighteen (18th) birthday. Heidi was due to turn 18 years old five months after the hearing. (TRII, pp.34-37).

The Stephensons intended to repay the $20,000.00 to Heidi by selling a piece of the property that they had inherited from a relative. The property become involved in litigation and could not be sold prior to Heidi's eighteenth birthday on August 27, 1987. (TRII, p.175, L.1-19).

Respondent failed to take any further action in regard to Heidi Stephenson's guardianship case until April, 1988 when another Order to Show Cause, setting a hearing for June 22, 1988, was issued by Judge Alvarez. (RII, TFB Exhibit #12). The Order to Show Cause was issued due to the fact that an Annual Accounting and an Inventory had not been filed.

In June, 1988, Barbara Stephenson executed an Annual Return of Guardian of Property and Heidi Stephenson executed an Acknowledgement of Receipt of Property. Both of the foregoing documents were false at the time they were executed and filed with the Court on June 22, 1988. (RII, TFB Exhibit #13 and #14; TRII, pp.178-179). An Inventory and a Petition for Discharge of Co-Guardians was not filed with the Court in June, 1988. Thus, the Heidi Stephenson Guardianship remained opened. (RII, TFB Exhibit #18).

On June 9, 1989, Judge Alvarez issued another Order to Show Cause in the Heidi Stephenson Guardianship case which scheduled a hearing for August 17, 1989. (RII, TFB Exhibit #18). The Respondent received the Order to Show Cause and asked Dennis Lopez,

an attorney in his office, to handle the matter. (TRII, pp.84-85).

On July 10, 1989, Mr. Lopez sent the Stephensons a Petition for Discharge of Co-Guardians to be signed by Barbara Stephenson and a Waiver of Notice, a Receipt, Approval of Accounting and Consent to Discharge of Co-Guardians to be signed by Heidi. (RII, TFB Exhibit #19). Heidi and Barbara Stephenson signed the foregoing documents even though the same were false and returned the forms to Mr. Lopez. (TRII, pp.185-186).

On August 4, 1989, Mr. Lopez went on vacation for a week. While Mr. Lopez was on vacation, the Respondent's son, Edward C. Rood, signed the Petition for Discharge of Co-Guardians and filed the Petition, Heidi's Receipt, Approval of Accounting, Waiver of Notice, and Consent to Discharge form and a proposed Order of Discharge with the Probate Court. (TRII, p.102 - 103).

On August 14, 1989, the day Mr. Lopez returned from vacation, a clerk from the probate court, Mary Cummings, contacted Mr. Lopez in regard to Heidi Stephenson's guardianship case. Ms. Cummings made an inquiry as to whether Heidi's funds were disbursed without a court order. (RII, TFB Exhibit #23).

After talking to Ms. Cummings, Mr. Lopez contacted Heidi and Barbara Stephenson and was advised that the $20,000.00 had not been disbursed to Heidi. (TRII, pp.107-108).

The following day, August 15, 1989, Barbara and Heidi Stephenson met with Mr. Lopez at Respondent's office. During the meeting, Barbara and Heidi Stephenson advised Mr. Lopez that Respondent required them to sign false documents in June, 1988,

knowing said documents were false. The Stephensons advised Mr. Lopez that the Respondent told them that the documents had to be signed, in spite of their falsity, in order to keep Mrs. Stephenson from going to jail. The Stephensons also advised Mr. Lopez that they thought he (Mr. Lopez) knew that the June, 1988 and July, 1989 documents were false since he worked for Respondent. (TRII, pp.111-113). At the conclusion of the meeting, Mr. Lopez asked the Stephensons to come back the following day to discuss what should be done to resolve the guardianship case.

On August 16, 1989, Barbara and Heidi Stephenson again met with Mr. Lopez. During the meeting, Mr. Lopez took a sworn statement from Heidi Stephenson wherein he suggested that the Stephensons either speak with Respondent or obtain independent counsel. (RII, TFB Exhibit 26).

On August 16, 1989, following the meeting with the Stephensons, Mr. Lopez met with Respondent and advised Respondent of the allegations made by the Stephensons and of Heidi's statement that she had not received the $20,000.00. Respondent advised Mr. Lopez that he could not remember the Stephenson's case and would need to review the court file the following morning. Mr. Lopez advised Respondent that a hearing was scheduled in the guardianship case the next morning (August 17, 1989). (TRII, pp.124-128).

On the morning of August 17, 1987, Respondent met with Judge Alvarez. Respondent failed to advise Judge Alvarez of the fact that false documents had been submitted to the court. As a result thereof, Judge Alvarez entered the Order of Discharge closing the

guardianship case. (RII, TFB Exhibit #33). Upon returning from the hearing, Respondent met with Mr. Lopez and advised him that the guardianship case had been closed. (TRII, p.128-129).

Mr. Lopez, concerned with the fact that the guardianship was closed based on false documents, submitted an affidavit to the Probate Court. (RII, TFB Exhibit #27). After Lopez submitted an affidavit to Judge Alvarez, the Order of Discharge was voided by the judge. (TRII, p.140).

The guardianship case was eventually closed after the Stephensons provided their daughter with a promissory note. (TRII, p.143).

COUNT III - (TFB NO. 90-11,550(13E))

On or about November 25, 1988, Respondent prepared and executed a Worthless Check Complaint wherein he alleged that in October, 1988, Michael Ng gave him four (4) worthless checks in return for cash from Respondent. (RIII, TFB Exhibit #1).

On January 27, 1989, Respondent executed three (3) Worthless Document Affidavits wherein he claimed that on October 21, 1988, Michael Ng gave him a check in the amount of $11,000.00 in return for cash and that the same was returned from the bank marked NSF; that on October 22, 1988, Michael Ng gave him a check in the amount of $9,500.00 in return for cash and that the check was returned from the bank marked NSF; and that on October 23, 1988, Michael Ng gave him a check in the amount of $32,000.00 as payment on a debt owed and that the check was returned from the bank marked NSF. (RIII, TFB Exhibit #1).

Based on Respondent's three affidavits, the Pinellas/Pasco County State Attorney's office filed three criminal Informations against Michael Ng charging him with obtaining property in return for worthless checks, a third degree felony, and issuing a worthless check, a second degree misdemeanor. (RIII, Exhibit #1).

Between April 15 and 17, 1989, Respondent gambled on backgammon games with Mr. Ng at Respondent's office apartment in Tampa, Florida. (RIII, TFB Exhibit #2). Respondent advised Mr. Ng that if he (Mr. Ng) won enough money, the three (3) checks would be returned to Mr. Ng. (RIII, TFB Exhibit #2, p.15). On April 15, 1989, Mr. Ng won $15,800.00 and $8,400.00 on backgammon games with Respondent and two (2) I.O.U.'s were prepared for said sums and initialed by Respondent. On April 16, 1989, Mr. Ng won $32,400.00 playing backgammon with Respondent and an I.O.U. was prepared and initialed by Respondent. On April 17, 1989, Mr. Ng won $19,600.00 from Respondent while playing backgammon and another I.O.U. was prepared for said sum and initialed by Respondent. Even though Mr. Ng won a substantial sum of money from Respondent, Respondent refused to surrender the three (3) checks. (RIII, TFB Exhibit #3).

On May 18, 1989, a capias was issued for Michael Ng's arrest and on June 1, 1989, Mr. Ng was in fact arrested. (TRIII, p.11).

On June 27, 1989, Michael Ng gave a sworn statement to the State Attorney's office wherein he stated that on October 21, 22, and 23, 1988, he and Respondent were gambling while playing backgammon. Mr. Ng stated that, during the course of play, he ran out of cash and as a result thereof, he issued Respondent the three

(3) Checks he was being prosecuted on for writing. Mr. Ng also advised the State Attorney's Office, in his sworn statement, that he and Respondent had been gambling on backgammon games for approximately three (3) years. In support of this statement, Mr. Ng provided the State Attorney's Office with six (6) torn pieces of paper which he claimed were original I.O.U.s' initialed by Respondent on the dates indicated thereon, as evidence of Respondent's indebtedness to Mr. Ng due to losses incurred from gambling on backgammon games. Four (4) of the six (6) I.O.U.s' were dated between April 15, 1989 and April 17, 1989, approximately three (3) months after Respondent filed a complaint against Mr. Ng for issuing worthless checks. The fifth and sixth I.O.U.s' were in the amount of $3,000.00 and $1,998,000.00 and contained Respondent's initials. (RIII, TFB Exhibit #3).

Mr. Ng also produced to the State Attorney's office, copies of thirteen (13) checks drawn on various accounts of Respondent, either made out to Mr. Ng, cash or no payee and signed by Respondent. Mr. Ng swore under oath that the checks were given to him by Respondent as a result of gambling losses incurred by Respondent while playing backgammon. (RIII, TFB Exhibit #3).

On July 6, 1989, Respondent appeared at the State Attorney's Office and, as part of the State Attorney's investigation of Mr. Ng's case, Respondent was deposed under oath by the Chief Assistant State Attorney, Allen P. Allweiss. (RIII, TFB Exhibit #4).

During the deposition, Respondent swore under oath that all of the information contained in the three (3) worthless documents

Affidavits that he executed against Mr. Ng were true and correct. (RIII, TFB Exhibit #4).

Respondent was shown the original I.O.U.s produced by Mr. Ng and was asked if the initials contained on the original documents were in his handwriting. Respondent continually denied that the initials on five (5) of the I.O.U.s were in his handwriting. Respondent testified under oath that the I.O.U.s contained forgeries of his initials. (RIII, TFB Exhibit #4).

Respondent was asked when he had last played backgammon with Mr. Ng. Respondent swore under oath that he had not played backgammon with Mr. Ng since Mr. Ng gave him the three (3) checks in October, 1988. (RIII, TFB Exhibit #3).

Respondent was shown copies of the thirteen (13) checks produced by Mr. Ng and was asked whether or not the signatures on the thirteen (13) checks were in his handwriting. Respondent testified under oath that on seven (7) of the checks, he could not be certain of whether or not the signatures contained on the checks were in his handwriting. Respondent further testified that he might have given the seven (7) questionable checks to Mr. Ng as markers on backgammon games. Respondent testified that the six (6) remaining checks did not contain his signature and were forgeries. (RIII, TFB Exhibit #3).

During Respondent's sworn deposition on July 6, 1989, Mr. Allweiss asked Respondent for handwriting exemplars which Respondent gave. Respondent's handwriting exemplars, the six (6) original I.O.U.s and the thirteen (13) checks were forwarded to the

Florida Department of Law Enforcement (FDLE) Crime Laboratory for an analysis as to common authorship between Respondent's handwriting exemplars and the signature on the thirteen (13) checks and the initials on the six (6) I.O.U.s. (RIII, TFB Exhibit #3 and Exhibit #5).

On September 6, 1989, a senior crime lab analyst issued a report which indicated that Respondent placed his initials on five (5) of the six (6) I.O.U.s. The analyst could not compare Respondent's handwriting on the sixth I.O.U. since one of Respondent's initials was in block print rather than in cursive writing as was Respondent's exemplars. (RIII, TFB Exhibit #5).

The analyst also concluded that there was a strong probability that Respondent executed the signatures appearing on the thirteen checks however, a more definitive conclusion could not be rendered since copies rather than original checks had been produced for the analysis. (RIII, TFB Exhibit #5).

On October 4, 1989, Respondent provided a second sworn statement to Allen Allweiss of the State Attorney's Office on the Michael Ng matter. (RIII, TFB Exhibit #6). At the beginning of the sworn statement, Mr. Allweiss advised Respondent that the senior handwriting analyst had made a determination that the initials on the I.O.U.s and the signatures on the various checks were in fact executed by Respondent. Even after being advised of the foregoing, Respondent initially denied that the initials on the I.O.U.s were in his handwriting. However, after Mr. Allweiss advised Respondent that he was committing perjury and after an off

the record conversation, Respondent admitted that the I.O.U.s contained his handwriting as to the initials on the documents. At the same time, Respondent admitted that the signatures on the thirteen (13) checks were in fact in his handwriting. Respondent also claimed that the thirteen (13) documents which looked liked checks were not in fact checks. (RIII, TFB Exhibit #6).

Respondent also admitted during the sworn statement that he had in fact played backgammon with Mr. Ng in April, 1989 however, he claimed he did not think it was for money. (RIII, TFB Exhibit #6).

At the conclusion of the sworn statement of October 4, 1989, Respondent executed a request not to prosecute the Worthless Check cases against Mr. Ng and as a result thereof, the cases were dismissed by nolle prosse. (RIII, TFB Exhibit #7 and 8).

The State Attorney for Pasco/Pinellas County considered filing charges against Respondent for perjury, however, for internal reasons, the office chose not to do so. (TRIII, pp.38-39).

On February 27 and 28, 1992 a final hearing on Count I was held before Circuit Judge Dennis P. Maloney, Referee.

On April 20, 1992, a final hearing was held on Count III.

On April 22, 1992, the Referee issued a memorandum which set forth his intention to find Respondent guilty on Count I of violating Rule 4-3.3(a)(1); Rule 4-3.3(a)(4); Rule 4-8.4(b); Rule 4-8.4(c); and Rule 4-8.4(d). As to Count III, the Referee, in his memorandum, stated his intention to find Respondent not guilty of the violations charged in the Amendment to Count III of The Bar's

Complaint.

The Report of Referee in Case No. 78,795, dated July 15, 1992, incorporates the Referee's Memorandum of April 22, 1992 with respect to his recommendations. In the report, the Referee recommends that on Count I, Respondent be suspended from the practice of law for one (1) year. The Florida Bar is challenging the Referee's recommended discipline on Count I and his finding that the Bar failed to prove Count III.

CASE NO. 78,741

(TFB NO. 91-10,534(13E)

In June, 1974, Respondent purchased a piece of property located on U.S. Highway 98 in Lakeland, Florida (hereinafter, the Lakeland Property) from Alan and Ruth Barber for $157,500.00. The Barbers were directed to executed a Warranty Deed in favor of Edward C. Rood, Respondent's son. The Lakeland Property was a gift from Respondent to his son. The warranty deed contained no reservation of rights in favor of Respondent, nor were there any other documents, of record or otherwise, indicating that Respondent had an interest in the property. (RI, Exhibit #2.1 and TFB Exhibit #3, p.3).

In 1984, Dr. Alverson and Physicians Insurance Company (PICO) filed a lawsuit against Respondent's law firm, Edward C. Rood individually, and Dr. Gunderman individually for, among other things, fraud and conspiracy to defraud. This lawsuit (hereafter, the Michigan Alverson v. Rood case) was filed in the Federal Court for the Western District of Michigan. Respondent's law firm was

dismissed from the lawsuit early in the litigation. (TRI pp.45-47; RI, TFB Exhibit #1, pp.92-94 and TFB Exhibit #2.14).

In November 1986 the Michigan Alverson v. Rood, case was tried before a jury. The jury returned a verdict finding Edward C. Rood and Dr. Gunderman jointly and severally liable for fraud and conspiracy to defraud. (RI, TFB Exhibit #2.1). Respondent became aware of the jury's verdict shortly after the same was rendered. (TRI, p.144).

On November 6, 1986 a document entitled "Judgment In A Civil Case" was entered in the Michigan Alverson v. Rood case which memorialized the jury's verdict. The judgment was in the principal amount of $196,453.00. (RI, TFB Exhibit #2.1).

On May 27, 1987, the trial judge in the Michigan Alverson v. Rood case granted a Motion for Judgment Not Withstanding the Verdict as to the entire portion of the judgment against Dr. Gunderman and as to the portion of the judgment against Edward C. Rood with respect to the finding of liability for conspiracy to defraud. (RI, TFB Exhibit #16).

On May 28, 1987, a document entitled "Amended Judgment In A Civil Case" was entered in the Michigan matter. (RI, TFB Exhibit #4).

On June 24, 1987, Edward C. Rood appealed the amended Michigan Judgment, as did the Plaintiffs, with respect to the trial judge's granting of the Motion for Judgment Notwithstanding the Verdict. (RI, TFB Exhibit #23).

On September 8, 1988, the U.S. Court of Appeals for the Sixth

Circuit of Michigan issued a mandate (RI, TFB Exhibit #5) affirming the jury's verdict and as a result thereof, the verdict was reinstated by Order dated January 26, 1989. (RI, TFB Exhibit #6).

On September 20, 1987, while the appellate proceedings on the Michigan Alverson v. Rood case were pending, Edward C. Rood fraudulently conveyed the Lakeland Property to the Respondent (RI, TFB Exhibit #2.4) to prevent his creditors, PICO and Alverson, from levying on the same. (RRII, Section II). At the time of the fraudulent conveyance, the Lakeland Property was free of any encumbrances and had a fair market value of over one million dollars. (RI, TFB Exhibit #10).

Respondent knew of his son's fraudulent intent at the time of the transfer and assisted his son in the fraud by accepting the conveyance. (RRII, Section II). Respondent paid no consideration directly to Edward C. Rood for the property. In addition, the deed reflected that documentary stamps totaling only 55 cents were paid. (RI, TFB Exhibit #10; RRII, Section II).

At the time of the conveyance, Respondent was aware of the existence of the Michigan judgment against his son as he had been informed of the judgment shortly after the jury's verdict and also during a criminal trial against his son, Edward C. Rood, in December, 1986. (RI, TFB Exhibit #9, p.13). In addition, after the conveyance of the Lakeland Property to Respondent, Edward C. Rood did not have sufficient non-exempt assets to satisfy the Michigan judgment. (RRII, Section II).

On November 4, 1987, less than two (2) months after the

fraudulent conveyance, Respondent submitted a financial statement to First Florida Bank reflecting that he owned the Lakeland property free and clear of encumbrances and that it was valued at 1.9 million dollars. (RI, TFB Exhibit #2.7). First Florida Bank established for Respondent, a line of credit for up to one million dollars and took back a mortgage on the Lakeland Property. (TRI, pp.160-163).

On January 4, 1988, Respondent further encumbered the Lakeland Property by agreeing to assume a $100,000 debt of E.C. Rood, his son, to First Florida Bank dated March 27, 1987. The obligation was secured by a second mortgage on the Lakeland Property dated February 17, 1988. (RRII, Section II).

On March 31, 1989, Respondent entered into an Option To Purchase Real Estate Agreement with Walter Wright wherein Mr. Wright agreed to purchase the Lakeland Property for 1.7 million dollars contingent upon the property being rezoned. The option had an initial term of two (2) years and the buyer was given the right to extend the option for an additional two (2) years. (RI, TFB Exhibit #2.8). The option was never exercised, but encumbered the property during the time Alverson was attempting to reverse the fraudulent conveyance. (TRI, pp.163-164).

On March 28, 1989, three days prior to the Option to Purchase Real Estate Agreement referred to above, Dr. Alverson and PICO filed a Complaint For Creditors Bill in Polk County, Florida against Respondent and his son, (hereinafter the Polk County Alverson v. Rood case). The Polk County Alverson v. Rood case

involved allegations that Edward C. Rood, with the knowledge and assistance of Respondent, fraudulently conveyed the Lakeland Property to Respondent to avoid paying the Michigan Judgment. (RI, TFB Exhibit #10; TRI, p.163).

During the course of the Polk County Alverson v. Rood case, Respondent filed, with the court, an affidavit in opposition to Motion for Summary Judgment dated October 27, 1989. Paragraph 8 of Respondent's affidavit stated, as follows:

> 8. That Edward B. Rood had no knowledge of the entry of the subject judgment at the time of the conveyance of the subject property from Ed, Jr. to Edward B. Rood. Edward B. Rood became aware of the judgment sometime later after the conveyance. (RI, TFB Exhibit #12).

The Polk County Alverson v. Rood case was tried before Circuit Judge Bentley on July 30, 1990. On August 27, 1990 an Amended Final Judgment was entered in the case. In the Amended Final Judgment, Judge Bentley found that Edward C. Rood conveyed the Lakeland Property to Respondent with the intent to defraud Dr. Alverson and PICO, his creditors. Judge Bentley also found in the Amended Final Judgment that the conveyance to Respondent was void under Florida Statute Section 726.01. In making this ruling, Judge Bentley held that Respondent had not paid adequate consideration for the Lakeland Property; he knew of the pending allegations against his son; he knew that an unpaid judgment was still in existence and he knew that his son was insolvent in that his son had no other means with which to satisfy the Michigan judgment in full. (RI, TFB Exhibit #10).

After Judge Bentley's ruling, which vested title to the

Lakeland property with Edward C. Rood, Respondent stopped making payments on his line of credit with First Florida Bank. As a result thereof, the Bank pursued to conclusion, a foreclosure action on its mortgage which encumbered the Lakeland Property. The bank purchased the Lakeland Property at a U.S. Marshall sale. (TRI, p.91 and pp.166-168).

On November 4, 1991, Respondent purchased the Lakeland Property from First Florida Bank for $564,299.42. A quit claim deed was issued to Respondent, however, at the time of the discipline hearing in this cause, held on June 19, 1992, Respondent had not recorded the same. (RI, Discipline hearing Exhibit #1; TRIV, p.9).

An evidentiary hearing before the Referee, Dennis P. Maloney, was held on this case on January 21, 1992.

On July 15, 1992, the Referee issued his report wherein he recommended that Respondent be found guilty of violating Rule 4-3.3(a)(1); Rule 4-3.3(a)(4); Rule 4-8.4(b); Rule 4-8.4(c) and Rule 4-8.4(d). (RRII, Section III).

On June 19, 1992, a disposition hearing on discipline was held. On July 15, 1992, the Referee issued his Report wherein he recommended that Respondent be suspended from the practice of law for a period of one (1) year and thereafter until Respondent proves rehabilitation. (RRII, Section VII).

On August 4, 1992, The Florida Bar filed a Petition for Review of the Referee's not guilty recommendation in Count III of Supreme Court Case No. 78,795 and the Referee's recommended discipline in

Supreme Court Case No. 78,795 as to Count I and Supreme Court Case No. 78,741. In addition, on August 4, 1992, The Florida Bar filed a Motion to Consolidate, for the purpose of appeal, Supreme Court Case Nos. 78,741 and 78,795.

On or about August 14, 1992, Respondent filed a cross-petition for review in both cases.

On August 26, 1992, this Court granted The Florida Bar's Motion to Consolidate, for the purpose of appeal, Supreme Court Case Nos. 78,741 and 78,795.

This brief is written in support of The Florida Bar's Petitions for Review.

SUMMARY OF THE ARGUMENT

On Count III of Supreme Court Case No. 78,795, the Referee found that the Bar failed to prove, by clear and convincing evidence, the allegations in its Amended Complaint and he recommended that the Respondent be found not guilty. The Referee's ruling is clearly erroneous and contrary to the evidence presented during the final hearing on April 20, 1992.

During the final hearing on the Ng case (Count III), the Bar presented unrebutted expert testimony that the Respondent committed perjury in his sworn statements of July 6, 1989 and October 4, 1989 and his Worthless Document Affidavits. The Bar's documentary evidence alone established by clear and convincing evidence that Respondent lied under oath on several occasions and as such, Respondent should have been found guilty of violating Rules 4-8.4(b),(c), and (d) of the Rules of Professional Conduct.

On Count I of Supreme Court Case No. 78,795, the Referee found that Respondent knowingly and intentionally encouraged, advised, and caused his clients to execute false documents and thereafter knowingly and intentionally caused the false documents to be filed with the Probate Court. The Referee also found that Respondent failed to competently and diligently pursue Heidi Stephenson's guardianship case to conclusion. The Referee recommended a one (1) year suspension for Respondent's misconduct.

In Supreme Court Case No. 78,741, the Referee found that Respondent engaged in a course of fraudulent conduct by assisting his son in the fraudulent conveyance of the Lakeland property and

by knowingly submitting a false affidavit to a court. The Referee recommended a one (1) year suspension for Respondent's misconduct. The Referee did not specify whether this one (1) year suspension was to run concurrent with or consecutive to the one (1) year suspension recommended on Count I of Supreme Court Case No. 78,795.

It is the Bar's position that the Respondent's misconduct in Supreme Court Case Nos. 78,741 and 78,795 warrants disbarment. In fact, it is the Bar's position that Respondent's misconduct in each case individually warrants disbarment. This position is supported by recent case law and by Florida Standards for Imposing Lawyer Sanctions.

The Florida Bar requests this Court to reject the Referee's recommendation that Respondent be found not guilty on Count III of Supreme Court Case No. 78,795; reject the Referee's recommended discipline on Count I of Supreme Court Case No. 78,795 and in Supreme Court Case No. 78,741; and disbar Respondent from the practice of law in this State.

ARGUMENT

I. WHETHER THE REFEREE'S FINDING THAT THE FLORIDA BAR FAILED TO PROVE COUNT III OF SUPREME COURT CASE NO. 78,795, BY CLEAR AND CONVINCING EVIDENCE IS CLEARLY ERRONEOUS BASED ON TESTIMONY AND EVIDENCE SUBMITTED AT TRIAL.

The Referee, in his Report, found that Count III of Case No. 78,795 had not been proven by clear and convincing evidence. (RRI, Section I). The Referee made no findings of fact as to this Count of the Complaint. The Florida Bar would respectfully submit that the evidence presented proved, by the clear and convincing standard, that Respondent violated the Rules of Professional Conduct alleged by the Bar in its Amended Complaint, by executing false affidavits to initiate a criminal complaint alleging that Michael Ng wrote worthless checks, and by making false sworn statements, to an Assistant State Attorney in the criminal investigation of Mr. Ng.

In The Florida Bar v. Stalnaker, 485 So. 2d. 815, 816 (Fla. 1986) this Court held that "a referee's findings of fact are presumed to be correct and should be upheld unless clearly erroneous or lacking in evidentiary support." In addition, Rule 3-7.7(c)(5), Rules of Discipline, 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 portion of the Report of Referee recommending that Respondent be found not guilty is clearly erroneous.

At the final evidentiary hearing in this cause, held on

April 20, 1992, The Florida Bar called former Sixth Circuit Assistant State Attorney Allen Allweiss to testify. Allweiss testified that he became employed with the Pinellas/Pasco State Attorney's office in 1963 and worked as a prosecutor full time continuously until 1973, thereafter becoming an Executive Assistant State Attorney. Allweiss further testified that he became chief of the Career Criminal Unit at the State Attorney's office in 1979 until 1980, when he returned to private practice. In January 1988, Allweiss returned and headed the Pasco office of the State Attorney's office and remained in that position until May, 1990. (TRIII, pp.5-6). Allweiss testified that he had prosecuted approximately 325 felony criminal jury trials.

After preliminary questioning, Allweiss was permitted to testify as an expert, as to his opinion regarding criminal matters in general and the elements of the crime of perjury in particular. (TRIII, pp.7-8, 37).

Mr. Allweiss testified that, in his opinion, based on the facts and his experience and expertise as a criminal prosecutor, Respondent lied in his original sworn affidavits, and sworn statements about whether he was gambling with Ng on backgammon subsequent to October, 1988; lied about whether he had signed the IOU's and checks; and lied about whether he had ever gambled for money on backgammon with Ng in Pasco County. (TRIII, pp.36-37). Allweiss further testified that he was familiar with case law relating to the crime of perjury and

that, in his opinion, Respondent committed the crime of perjury in his sworn affidavits and sworn statements. (TRIII, pp.37-38). After review of the facts, the State Attorney's office decided, as a matter of prosecutorial discretion, not to pursue criminal perjury charges against Respondent. One of the factors considered by that office was that Respondent had indicated that he was "seriously" considering resigning from The Florida Bar. (TRIII, pp.38-39).

At the final hearing in this cause, Respondent testified that his affidavits and sworn statements were accurate and truthful in asserting that Mr. Ng's checks of October, 1988 were issued in return for loans and in repayment of a prior debt. In an effort to support his position, Respondent produced and submitted into evidence two (2) documents (RIII, Respondent's Exhibit #1) purportedly signed by Michael Ng, which indicated that in 1988, loans were made to Mr. Ng by the Respondent; that the same were repaid and criminal charges dropped; and that he and Respondent did not gamble on backgammon for money. The documents purportedly signed by Mr. Ng were not sworn to, were not notarized, were undated and were contrary to Michael Ng's sworn statement to the State Attorney's Office on June 27, 1989. In addition, the Respondent failed to provide any proof that the signatures contained on the two (2) documents were actually that of Mr. Ng.

In further support of his position, Respondent called

Charles Foster to testify. Mr. Foster testified that he has been a friend of Respondent for nine (9) years. (TRIII, p.91). Foster testified at the final hearing that Ng told him that Respondent had loaned Ng money "sometime in '88 or the first part of '89." (TRIII, p.92).

Foster's testimony was impeached by his prior sworn statement to the State Attorney's office on July 17, 1989. (TRIII, p.92). In his prior sworn statement, Foster testified he was told that Respondent had lent money to Ng but he could not remember who advised him of the same. (TRIII, p.93). Foster sought to rehabilitate his testimony at the final hearing by claiming that within a week or two after his sworn statement of July 17, 1989, Ng told him he had borrowed money from Respondent. (TRIII, pp.92,93). Foster also testified that he never saw Respondent and Ng gamble for money on backgammon. (TRIII, pp.86,87). This testimony is consistent with Ng's sworn testimony that he and Respondent never gambled for money on backgammon in the presence of anyone other than their girlfriends. (TRIII, p.22). Foster's testimony is also consistent with Respondent's testimony that he and Ng always played backgammon in private. (RIII, TFB Exhibit #4, p.33).

The Respondent also called James Lake as a witness to testify in support of his position that the checks from Ng in October, 1988 were for loans rather than gambling debts. Mr. Lake testified that while in Respondent's condominium, Unit Q-4, on a Friday, he witnessed Respondent giving Ng $11,000.00

in cash in return for a check. He also testified that the following day, Saturday, while in Respondent's kitchen, he witnessed Respondent giving Ng another $9,500.00 or $10,000.00 in return for a check from Ng. (TRIII, pp.108-109). The Bar impeached Lake's testimony with the sworn witness affidavits (RIII, TFB Exhibit #1) executed by Respondent in January, 1989. The documents signed by Respondent indicated that the exact physical location where the checks changed hands was 1 Paradise Drive, T-8, Land O'Lakes, Florida which is Ng's address. (RIII, TFB Exhibit #1).

Lake also testified that he never saw Respondent and Ng gamble for money. (TRIII, p.111). Again, this testimony is consistent with Ng's sworn statement that he and Respondent gambled in private and Respondent's sworn testimony that he and Ng played backgammon in private.

Respondent testified at the final hearing that on Friday, October 21, 1988, Mr. Ng called him at his office between 5:00 and 5:15 p.m. and asked to borrow $20,000 in cash. Respondent also testified that Ng stated he would give Respondent a check in exchange for the cash. It was established that Respondent and Ng had accounts at the same bank and that said bank remained open until 6:00 p.m. on Fridays. (TRIII, p.164). When asked why Ng did not go to the bank to cash his check, Respondent could not provide an explanation. (TRIII, pp.166-169).

Ng's sworn testimony that the consecutively dated October

checks represented payment to Respondent of gambling debts is more consistent with Ng and Respondent's pattern of playing backgammon for an entire weekend as was the case in April, 1989.

Like Mr. Lake, Respondent testified at the final hearing that Mr. Ng gave him the three (3) checks of October, 1988 in his (Respondent's) condominium, Unit Q-4. When the Bar sought to impeach Respondent with is own sworn witness affidavits, (RIII, TFB Exhibit #1) Respondent explained that a sheriff's deputy prepared the affidavits and that he (Respondent) made a mistake in executing the affidavits without verifying all of the information contained therein. (TRIII, pp.171-173). Thereafter, the Bar impeached Respondent's testimony with another document executed by Respondent and entitled Worthless Check Complaint which was prepared by Respondent approximately one (1) month after Ng issued the October 1, 1988 checks. Respondent's Worthless Check Complaint provided, in Respondent's handwriting, that the exact physical location where the checks changed hands was 1 Paradise Drive, T-8, Land O'Lakes, Florida. (RIII, TFB Exhibit #9).

Respondent also testified at the final hearing that he made a mistake when he testified under oath on July 6, 1989, that he had not played backgammon with Ng since Ng gave him the Worthless Checks of October, 1988. Respondent had played backgammon with Mr. Ng less than three (3) months prior to his July 6, 1989 sworn statement. Respondent testified that his

mistake was due primarily to his poor memory, and his depression and illness at the time of his sworn testimony. On April 16 and 17, 1989, Ng won over $76,200.00 while playing backgammon with Respondent. (RIII, TFB Exhibit #3). The Respondent's testimony that he forgot about playing backgammon with Mr. Ng in April, 1989 is unworthy of belief. Prior to playing backgammon with Ng on April 15, Respondent told Ng that if he (Ng) won enough money the three (3) checks dated October 21-23, 1988 would be returned to Ng. (RIII, TFB Exhibit #2, p.15). Even a cursory review of all of Respondent's sworn testimony shows that Respondent has a highly selective memory.

The Respondent sought to support his testimony that he was suffering from depression and was sick with the flu, at the time of his July 6, 1989 sworn testimony, by calling two (2) doctors to testify on his behalf.

Dr. Joseph Cabanzo, a general surgeon who retired in 1987, and has been a friend of Respondent for over forty (40) years, testified that in June, July, August and perhaps September, 1989, the Respondent had been depressed about a recurrence of polio and that the same affected Respondent's "little pastime called golf". (TRIII, p.97). Dr. Cabanzo had never treated Respondent for any illness, he was not a psychiatrist or psychologist, and he could not testify that Respondent's alleged depression affected his memory. (TRIII, pp.95-106).

Dr. J.S. Reece, a friend of Respondent for approximately twenty (20) years, testified by telephone that he received a telephone call from Respondent in early July, 1989 and that Respondent complained of flu like symptoms. He also testified that he prescribed medication to Respondent based on the telephone call. (TRIII, pp. 123-124). On cross-examination, Dr. Reece testified that he recalled the events which allegedly occurred in July, 1989, based on his memory and a handwritten note which he found in a five inch stack of old message cards located on his credenza. He testified that the alleged note did not have a date on it. Notwithstanding this fact, Dr. Reece testified that he had a specific recollection of the time and the date that the Respondent contacted him in regard to the flu. Curiously, the doctor did not have a file on Respondent. In addition, the Respondent did not produce the alleged note of Dr. Reece during the final hearing. Finally, Dr. Reece testified that, based on his recollection, Respondent's flu did not last for more than a day or so. (TRIII, pp.124-128).

Dr. Reece's testimony was not credible. Even assuming the testimony is accurate, it did not establish Respondent was sick with the flu on July 6, 1989 when he provided a false sworn statement. Further, Dr. Reece's testimony did not establish that Respondent's alleged flu symptoms caused a loss of memory.

During the final hearing, Respondent admitted that,

during his July 6, 1989 sworn statement, he had denied that the original I.O.U's were in his handwriting, but he claimed he made such a denial because Mr. Allweiss asked questions regarding the same in terms of owing money and in terms of evidence of indebtedness. (TRIII, p.178). Respondent also testified "if he had just said to tell me, forget whether it was indebtedness, are those your initials, I could have said I will look into it and see." (TRIII, p.144).

During Respondent's sworn statement of July 6, 1989, Mr. Allweiss did ask Respondent specific questions in regard to the initials on the I.O.U.s. The following questions were asked by Mr. Allweiss and Respondent made the following responses in regard to the initials on five (5) original I.O.U.s:

Q. Mr. Rood, is this your initials?
A. No, sir.
Q. Are these your initials?
A. No, sir.
Q. Is that your initials?
A. No, sir.
Q. Is that your initials?
A. That E looks a little like mine, but the R doesn't. That one is harder to tell.
Q. All right, sir. We'll designate this as Number 6 composite.
A. Alright.
Q. Number 6, 6A, B, C, and D being the one you say the R looks -- I think you said the E looks like it but the R doesn't.
A. The E looks a little bit like it, but the R is not mine at all.
Q. And then on A, B, and C, you are saying those aren't your initials?
A. They are not. (RIII, TFB Exhibit #4, p.21, L.6-25).

Mr. Allweiss's questions were not asked in terms of owing money or in term of indebtedness. The Respondent was only

asked whether the initials in the documents were his.

During Respondent's sworn statement of October 4, 1989, Mr. Allweiss again made inquiries and Respondent provided the following responses in regard to the initials on the original I.O.U.s:

> Q. I'm giving you the opportunity right now to tell the truth or forever hold your piece. That's what it boils down to.
> A. Let me look at it. I really wish I brought my file.
> Q. Well, you don't need a file to tell the truth, Ed. I'm showing you what purports to be Exhibit B, Exhibit C, and Exhibit D. Tell me if those are your initials, Ed. Last time you told me they are not. Under oath you told me. Now, tell me today, are those your initials?
> A. I would like to have my file that indicates what happened on this day.
> Q. I didn't ask you what happened.
> A. I know.
> Q. I'm asking you are those your initials?
> A. These to my knowledge are not my initials. I do not remember ever signing that.
> Q. I didn't ask you if your remember that. I'm asking you if those are your initials, Ed.
> A. I do not believe they are my initials.
> Q. Do you understand you're committing perjury again, Ed? Do you understand that?
> A. I'm telling you, I don't believe they are mine. (RIII, TFB Exhibit #6, p.8; L.24-25 and p.9, L.1-21).

During the final hearing, Respondent also claimed he had denied that the initial on the I.O.U.s were his because the dollar sign and I.O.U. was not written on the documents when he initialed them. (TRIII, pp.179-181). During Respondent's sworn statements on July 6, and October 4, 1989, Respondent never advised Mr. Allweiss, on the record, that the initials on the five (5) original I.O.U.s were in his handwriting but that the dollar sign and I.O.U. was not written on the

document when he executed the same. (TRIII, p.182).

During the final hearing, Respondent testified that he made a mistake when he testified under oath in July, 1989 that most of the checks produced during the sworn statement contained forgeries of his signature. He testified that he discovered his mistake several weeks after his sworn testimony when he reviewed his records and determined that he had issued the checks to golfers during a golf tournament in Pine Valley or Atlantic City. (TRIII, pp.185-186).

Respondent did not immediately notify Mr. Allweiss of his alleged error. In fact, he did not even advise Mr. Allweiss of the foregoing during his sworn statement on October 4, 1989. (RIII, TFB Exhibit #6).

Ng's sworn statement of June, 1989 (RIII, TFB Exhibit #2) indicates that all of the checks that he submitted to Mr. Allweiss were given by Respondent for gambling debts incurred by Respondent during backgammon games. Ng's sworn testimony is consistent, in part, with Respondent's sworn testimony of July, 1989. In July 1989, Respondent testified that he and Ng would exchange checks while playing backgammon, as a way of keeping score. (RIII, TFB Exhibit #4, p.23). Respondent also testified in July, 1989 that he and Ng were "gambling for backgammon." When Mr. Allweiss asked whether the gambling was for money, Respondent initially answered "yes". Respondent then corrected his testimony by stating "well, it wasn't gambling for money; it was for markers." Respondent further

testified "we've had markers, but they were not to be cashed, markers to keep score. We never did decide what would happen if one of us ended up ahead because we usually broke even." (RIII, TFB Exhibit #4, pp.30-31).

During the final hearing, Respondent denied testifying during his sworn statement of July, 1989, that some of the checks he was shown in July could have been markers on backgammon games that were not intended to be cashed. (TRIII, p.201).

Ng testified, in the June, 1989 statement, that every time he sought to cash one of Respondent's checks for gambling debts, the bank would call Respondent for his approval and Respondent would stop payment on the check. (RIII, TFB Exhibit #2, p.10).

During the final hearing, Respondent testified that none of the checks that he was shown during his July, 1989 sworn statement were even attempted to be deposited or cashed. (TRIII, p.206). Contrary to Respondent's testimony, a check made out to Michael Ng in the amount of $54,000.00 was endorsed and deposited into one of Ng's business accounts. (RIII, TFB Exhibit #3). Also, contrary to Respondent's testimony, and in support of Ng's testimony, five (5) checks indicated that payment was stopped and one of the checks indicated that the check was held for ten (10) days before payment was stopped. (RIII, TFB Exhibit #3). During the final hearing, the Bar confronted Respondent with the checks

which indicated that payment had been stopped and he was asked why the documents had "stop payment" on them. Respondent answered Bar Counsel's question by stating "(h)e or somebody just wrote on here stop payment. The bank never wrote this on there." Respondent was then asked, "why would Mr. Ng write stop payment on these checks? Why?" Respondent testified "because somebody like you would feel that it means something." (TRIII, pp.206-207).

Respondent testified during the final hearing that a check in the amount of $17,000 and issued to Michael Ng on May 14, 1988, was for a loan. Respondent also testified that Ng repaid the loan. (TRIII, pp.209-210). Respondent's testimony was shown to be false when Bar Counsel produced evidence that the $17,000.00 check had been returned by the bank due to insufficient funds. (TRIII, p.206; RIII, TFB Exhibit #3).

In most instances, the testimony of Respondent and his witnesses was impeached, rebutted by the Bar's evidence, or it was established to be irrelevant to the allegations in the Amended Complaint. On the other hand, the Bar's documentary evidence alone proved that Respondent committed the crime of perjury. The unrebutted expert testimony of Mr. Allweiss supports this position.

Based on the foregoing, this Court should reject the Referee's finding that the Bar failed to prove it's case by clear and convincing evidence, and find Respondent guilty of violating Rules 4-8.4(b),(c) and (d) of the Rules of

Professional Conduct; (a lawyer shall not: (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects; (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation; or (d) engage in conduct that is prejudicial to the administration of justice).

In addition, the Bar respectfully requests this Court to disbar Respondent from the practice of law for his egregious misconduct.

II. WHETHER TWO ONE (1) YEAR SUSPENSIONS ARE AN APPROPRIATE DISCIPLINE FOR AN ATTORNEY WHO, KNOWINGLY AND INTENTIONALLY ENCOURAGES, ADVISES AND CAUSES HIS CLIENTS TO SIGN FALSE DOCUMENTS; KNOWINGLY AND INTENTIONALLY COMMITS PERJURY; KNOWINGLY AND INTENTIONALLY SUBMITS FALSE SWORN DOCUMENTS TO A COURT; AND WHO PARTICIPATES IN FRAUDULENT CONDUCT IN A CONVEYANCE OF REAL PROPERTY.

In Supreme Court Case No. 78,741, the Referee found that Respondent engaged in a course of fraudulent conduct by assisting his son in the fraudulent conveyance of the Lakeland property, in an effort to prevent his son's creditors from obtaining the same. (RRII, Section II). In addition, the Referee found that during the course of the Polk County Alverson v. Rood case, which involved a lawsuit on the fraudulent conveyance of the Lakeland property, Respondent knowingly and intentionally executed a false affidavit and thereafter submitted the same to the Court. (RRII, Section II). The Referee recommended a one (1) year suspension for Respondent's misconduct.

Likewise, on Count I of Supreme Court Case No. 78,795, the Referee found that Respondent knowingly and intentionally encouraged, advised, and caused his clients, Heidi and Barbara Stephenson, to execute false documents in June, 1988 and thereafter knowingly and intentionally filed the false documents with the Probate Court. In addition, the Referee found that Respondent failed to competently and diligently pursue and conclude Heidi Stephenson's guardianship case to conclusion. (RRI, Section III). The Referee recommended

another one (1) year suspension for Respondent's misconduct. The Referee did not specify whether the one (1) year suspension was to be consecutive to or concurrent with the one (1) year suspension in Supreme Court Case No. 78,741. Regardless of this Court's interpretation of the Referee's recommended disciplines, it is the Bar's position that two (2) concurrent one (1) year suspensions or an aggregate two (2) year suspension is insufficient for Respondent's misconduct. "No breach of professional ethics, or of the law, is more harmful to the administration of justice or more hurtful to the public appraisal of the legal profession than the knowledgeable use by an attorney of false testimony in the judicial process. When it is done it deserves the harshest penalty." Dodd v. The Florida Bar, 118 So. 2d. 17 (Fla.1960), at p.19.

On Count III of Supreme Court Case No. 78,795 (The Ng case), The Florida Bar alleged, in its Amended Complaint, that Respondent knowingly provided false affidavits and made false statements, under oath, to the Pinellas/Pasco County State Attorney's office. (RIII, Amended Complaint). The Referee recommended that Respondent be found not guilty of the allegations in Count III of Supreme Court Case No. 78,795. (RRI, Section II). The Florida Bar's Argument on Issue I establishes that the Referee's ruling is erroneous. The Bar proved by clear and convincing evidence that the Respondent knowingly and intentionally committed perjury.

Regardless of this Court's ruling on Issue I of this brief, disbarment is the appropriate discipline for Respondent's egregious pattern of misconduct as found in Supreme Court Case Nos. 78,741 and 78,795 (Count I). If this Court agrees with the Bar on Issue I, and finds that Respondent violated Rules 4-8.4(b), (c), and (d), the same only serves to bolster the Bar's position that Respondent should be disbarred from the practice of law in this State.

The Bar's position that Respondent should be disbarred for his multiple infractions of the Rules of Professional Conduct is supported by case law.

In Dodd v. The Florida Bar, 118 So. 2d. 17 (Fla. 1960), Dodd was found to have urged and advised several persons, including his clients, to give false testimony in a personal injury action. This court disbarred Mr. Dodd notwithstanding the fact that Mr. Dodd had no prior disciplinary record.

In The Florida Bar v. Agar, 394 So. 2d. 405 (Fla. 1980), Mr. Agar represented the husband in an uncontested divorce. The judge assigned to the divorce action had a policy that a spouse could not testify as to residency. Agar was aware of the judge's policy and suggested that the client's wife testify as to residency, and testify falsely as to her name and her relationship with the husband. The wife provided this false testimony to the court and Agar failed to notify the court of the false testimony. The Referee recommended a four (4) month suspension. On review, this court held that

disbarment was appropriate for Agar's misconduct. In finding for disbarment, this court stated as follows:

> The punishment in Dodd was disbarment, and we believe that must be the punishment here. We have reviewed those disciplinary cases called to our attention by The Florida Bar and respondent concerning use of false testimony by an attorney, and we acknowledge that in some cases the punishment has been significantly less than that sought by The Florida Bar here. However, to the extent that those cases with lighter punishments do not substantially differ from the instant case in the degree of participation by the attorney or some other significant factor, they represent the exception to the general rule of strict discipline against deliberate, knowing elicitation or concealment of false testimony. Id. at 406.

In The Florida Bar v. Lewin, 342 So. 2d. 513 (Fla. 1977), Lewin, while acting as a personal representative of an estate, made investments of estate funds without a court Order or the consent of the beneficiary, had the beneficiary execute a receipt indicating she had received the funds when she had not, and then filed the false receipt with the probate judge in order to obtain his discharge as personal representative. Lewin was disbarred for his misconduct.

Respondent's misconduct in the case involving the Stephenson guardianship matter (Supreme Court Case No. 78,795) is substantially similar to the misconduct of Dodd, Agar, and Lewin in the cases cited above. As in the cases involving Dodd, Agar and Lewin, Respondent encouraged, advised and caused his clients, Barbara and Heidi Stephenson, to execute

false documents. (RRI, Section III). Like Lewin, Respondent had Heidi Stephenson swear under oath that she had received her guardianship funds when the same was false. Respondent caused Heidi, who was 18 years old at the time, to commit perjury by telling her that her mother could go to jail for spending the funds if Heidi failed or refused to sign the false document. (RRI, Section III; TRII, pp.231-233 and 255). After both of the Stephensons signed the false documents, Respondent caused the documents to be filed with the probate court. (TRII, p.63). A year later, Respondent succeeded in having the probate judge enter an order of discharge, (RII, TFB Exhibit #33), closing the guardianship, based not only on the false documents executed by the Stephenson in June, 1988, but also on additional false documents executed by the Stephensons in July, 1989 which included an inventory stating that the settlement funds had been paid to Heidi. (RII, TFB Exhibit #27 and #31; RRI, Section II). When an attorney in Respondent's office discovered that the documents were false and that an Order of Discharge was entered by the judge based on the false documents, that attorney advised the court of the same and the Order was voided. (TRII, pp.138-140; RII, TFB Exhibit #27 and #31).

After the Order of Discharge was voided, Barbara Stephenson, the guardian of Heidi, hired another attorney to represent her in the guardianship case. Thereafter, Respondent took steps to cover up his knowledge of and

participation in the execution of the false documents from the probate judge. Specifically Respondent contacted Ms. Stephenson's new attorney, and advised him that Barbara and Kleber Stephenson should execute a promissory note to Heidi prior to a hearing scheduled before the probate judge on September 8, 1989 so that the judge could not ask Heidi or her parents about the perjured documents. Ms. Stephenson's attorney advised Respondent that the judge could ask anything he wanted to during the hearing. Respondent disagreed and indicated that he had case law that stood for the proposition that the judge should not ask about criminal matters in a public hearing. Further, in closed chambers, prior to the hearing before the judge on September 8, 1989, Respondent advised the judge that there was no reason to ask the Stephensons about the perjured documents. At the same time, Ms. Stephenson's attorney advised the judge that he had been informed that the Stephensons were not the targets of a criminal investigation, that he had explained to the Stephensons their Fifth Amendment rights, but that they wanted to answer any questions that the judge wanted to ask them. (RIII, TFB Exhibit #36). The judge did not ask the Stephensons any questions about the false documents.

Like Dodd, Agar and Lewin, the Respondent should be disbarred from the practice of law for his egregious misconduct in the Stephenson matter regardless of the fact that he has no prior disciplinary record.

The following cases involve conduct by attorneys which is similar to the misconduct of Respondent in the fraudulent conveyance and Ng matters.

In The Florida Bar v. Ryder, 540 So. 2d. 121 (Fla. 1989), Ryder was disbarred for committing perjury in connection with sworn testimony before a grand jury.

In The Florida Bar v. O'Malley, 534 So. 2d. 1159 (Fla. 1988), O'Malley was found to have wrongfully removed collateral from a safety deposit box collateral for a criminal defendant's bond, and refused to give the collateral to the criminal defendant's attorney after the defendant was acquitted on the criminal charges. Thereafter, O'Malley testified falsely, under oath during a deposition, as to the whereabouts of the collateral. The Referee recommended a ninety (90) day suspension and two (2) years probation based on his belief that O'Malley did not act with a bad intent or to directly benefit himself. The Referee's recommended discipline was also based on numerous mitigating circumstances which included the following:

1. O'Malley was experiencing marital difficulties at the time of his misconduct;

2. He had a serious alcohol problem;

3. He eventually paid nearly $70,000.00 as restitution;

4. He had only been practicing law for 2 1/2 years;

5. O'Malley had a good reputation for honesty; and

6. He showed remorse as well as recognition of the wrongfulness of his conduct. Id. at p.1162.

On review, this court ordered a three (3) year suspension for O'Malley's misconduct. In so ruling, this Court held that but for the mitigating factors this would have been a case for disbarment.

Respondent's misconduct in the case involving the fraudulent conveyance of the Lakeland property (Case No. 78,741) is similar to, yet more serious than, the misconduct of Mr. O'Malley and Mr. Ryder. Like O'Malley and Ryder, Respondent committed the crime of perjury when he intentionally and knowingly executed and submitted a false affidavit to the court in an effort to defeat a Motion for Summary Judgment. (RRII, Sections II and III). Respondent also knowingly permitted his son to submit a false affidavit to the court. (RRII, Section III). Respondent committed perjury for his own pecuniary gain in that, if it was deemed by the Court that Respondent was a bonafide purchaser of the Lakeland property for value, based on Respondent and his son's affidavits, then the creditors of Edward C. Rood would be defeated in their attempt to set aside the fraudulent conveyance of the Lakeland property to Respondent.

In addition to committing the crime of perjury, Respondent also engaged in a scheme to defraud his son's creditors of an asset they could have levied upon. Shortly after Edward C. Rood fraudulently conveyed the Lakeland Property to Respondent, Respondent gave First Florida Bank a mortgage on the property in return for a line of credit up to

one (1) million dollars. (RRII, Section II; RI, TFB Exhibit #2.7). In furtherance of Respondent's scheme to defraud his son's creditors, Respondent intentionally stopped making the mortgage payments on the property and permitted the bank to pursue and conclude a foreclosure action. Then, after the Bank purchased the property from the United States Marshall, the Respondent purchased the property back from the bank. The Respondent's actions eliminated the rights of his son's creditors to levy on the property. (TRI, pp.91 and 166-168).

Contrary to O'Malley, the Referee did not find substantial mitigating circumstances for Respondent's misconduct. Unlike O'Malley, there was no evidence of marital difficulties by Respondent at the time of the misconduct and there was no evidence that the Respondent had an alcohol problem. In addition, the Respondent did not make restitution to his son's creditors as did O'Malley. Instead, as set forth above, the Respondent took deliberate and decisive steps to ensure that the creditors could not obtain the property. Further, the Respondent did not show any remorse or recognition of the wrongfulness of his misconduct and unlike O'Malley, at the time of his misconduct, Respondent had practiced law for approximately 48 years.

Also contrary to O'Malley is the fact that the Respondent does not have a good reputation in the community for truthfulness and veracity. During the discipline hearing before the Referee, three (3) well established attorneys

testified that Respondent has a bad reputation for truthfulness and veracity. (TR.IV, p.27-28, 54-55).

In the fraudulent conveyance case, the Referee did find mitigating factors which included the lack of a prior disciplinary record, substantial contributions of time to Bar related activities and substantial monetary contributions to various charitable and non-profit organizations. (RRII, Section VII). These mitigating factors do not reach the magnitude of the mitigating factors found in O'Malley. Further, the Referee found the existence of aggravating factors which included, a pattern of misconduct, dishonest or selfish motive, substantial experience in the practice of law, and refusal to acknowledge wrongful nature of conduct. (RRII, Section VII). The aggravating factors either outweigh or offset the mitigating factors therefore there is no justification for a reduction in the degree of discipline from disbarment to a one (1) year suspension.

Respondent's participation in the fraudulent conveyance of the Lakeland property alone warrants a minimum of a ninety-one (91) day suspension. See The Florida Bar v. Scott, 566 So. 2d. 765 (Fla. 1990). Respondent's successful scheme to defraud his son's creditors coupled with his criminal act of perjury warrants disbarment.

Respondent's misconduct in the case involving Ng is also similar to the misconduct of O'Malley and Ryder. Like O'Malley and Ryder, Respondent committed perjury by knowingly

and intentionally providing false sworn testimony and affidavits to the State Attorney's Office, in an effort to have Ng wrongfully prosecuted for issuing worthless checks. (TRIII, pp.36-38). Like Ryder, and in accordance with O'Malley, Respondent's misconduct in the Ng matter warrants disbarment due to the lack of substantial mitigation.

The Respondent's actions in the instant proceedings show that he engaged in a pattern of misconduct involving dishonesty, fraud, deceit and misrepresentation for the period covering from September, 1987 through October, 1989. In addition, the Referee specifically found that Respondent lied during the final hearing in the fraudulent conveyance case (Case No. 78,741) when he testified that at the time of the transfer of the Lakeland property he was unaware of the Michigan Judgment. (RRII, Section II). Based on the foregoing cases and argument, disbarment would be the only appropriate discipline for any one of the three (3) separate incidents of misconduct by the Respondent. The Respondent is clearly unworthy of being a member of The Florida Bar and he should be disbarred in ordered to protect the public and to deter other lawyers from engaging in the same or similar misconduct.

The Bar's position that the Respondent should be disbarred for his multiple offenses is supported by Florida Standards For Imposing Lawyer Sanctions (hereinafter referred to as The Standards).

Standards 5.0 through 5.12 provide, in part, as follows:

> **5.0 Violations of Duties Owed to the Public**
>
> **5.1 Failure to Maintain Personal Integrity**
> Absent aggravating or mitigating circumstances, and upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, or in cases with conduct involving dishonesty, fraud, deceit, or misrepresentation:
>
> 5.11 Disbarment is appropriate when:
> (b) a lawyer engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or
>
> (e) a lawyer attempts or conspires or solicits another to commit any of the offenses listed in sections (a)-(d); or
>
> (f) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.
>
> 5.12 Suspension is appropriate when a lawyer knowingly engages in criminal conduct which is not included within Standard 5.11 and that seriously adversely reflects on the lawyer's fitness to practice.

The Respondent's misconduct in the Stephenson guardianship matter is directly on point with Standard 5.11(b),(e) and (f). In addition, the Respondent's misconduct in the fraudulent conveyance and Ng matters is directly on

point with Standard 5.11(b) and (f).

Standards 6.0 through 6.11 provide as follows:

> **6.0 Violations of Duties Owed to the Legal System**
>
> **6.1 False Statement, Fraud, and Misrepresentation**
> Absent aggravating or mitigating circumstances, and upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving conduct that is prejudicial to the administration of justice or that involves dishonesty, fraud, deceit, or misrepresentation to a court:
>
> 6.11 Disbarment is appropriate when a lawyer: (a) with the intent to deceive the court, knowingly makes a false statement or submits a false document; or (b) improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.

Again, Respondent's misconduct in the fraudulent conveyance case, the Stephenson guardianship case, and the Ng case falls directly on point with Standard 6.11 making disbarment appropriate for Respondent's misconduct, absent, aggravating and mitigating circumstances.

Standard 9.31 of the Standards provides that "mitigation or mitigating circumstances are any considerations or factors that may justify a reduction in the degree of discipline to be imposed. Standard 9.32 of the Standards sets forth the factors which may be considered in aggravation. As previously set forth, the Referee found three (3) mitigating factors.

Only one of the mitigating factors found by the Referee is included in Standard 9.32 and that factor is the absence of a prior disciplinary record.

Although the Referee found the existence of mitigating factors, he also found aggravating factors. Standard 9.21 of the Standards provides that "Aggravation or Aggravating circumstances are any considerations or factors that may justify an increase in the degree of discipline to be imposed". Standard 9.22 of the Standards sets forth factors which may be considered in aggravation. As previously set forth, the Referee found four (4) aggravating factors in both the Stephenson matter and the fraudulent conveyance matter. All four (4) of the aggravating factors are set forth in Standard 9.22.

At most, the mitigating factors offset the aggravating factors found by the Referee leaving disbarment as the appropriate discipline on any one of the offenses committed by Respondent.

CONCLUSION

Based on the foregoing argument and authority, this Court should overturn the Referee's finding of not guilty in Count III of Supreme Court Case No. 78,795 as clearly erroneous and disbar the Respondent for his misconduct in Supreme Court Case Nos. 78,741 and 78,795.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing Amended Initial Brief has been furnished by U.S. Mail to Sid J. White, Clerk of the Supreme Court of Florida, Supreme Court Building, 500 South Duval, Tallahassee, Florida 32399-1927; a copy to E.B. Rood, Respondent, 200 Pierce Street, Tampa, Florida 33602-5084, Richard T. Earle, Jr., Counsel for Respondent, at 150 Second Ave. North, Suite 910, Bank of Florida Building, St. Petersburg, FL 33701, and a copy to John T. Berry, Staff Counsel, The Florida Bar, Legal Division, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, this 2ND day of December, 1992.

Bonnie L. Mahon
Assistant Staff Counsel