IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

EDWARD C. ROOD,

Respondent.

_____/

Case No. 78,742

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

AMENDED ANSWER BRIEF

OF

THE FLORIDA BAR

Joseph A. Corsmeier
Assistant Staff Counsel
The Florida Bar
Suite C-49
Tampa Airport, Marriott Hotel
Tampa, FL 33607
(813) 875-9821
Florida Bar No. 492582

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

SYMBOLS AND REFERENCES

In this Brief, the Appellant, Edward C. Rood, Jr., will be referred to as the "Respondent". The Appellee, The Florida Bar, will be referred to as "The Florida Bar", "TFB" or "The Bar". E.B. Rood, Sr. will be referred to as "Rood, Sr." "TRI" will refer to the transcripts of the Final Hearing in this cause held on January 21, 1992. "TRII" will refer to the transcipts of the Final Hearing in the case of In Re: Petition For Reinstatement Of Edward C. Rood, Supreme Court Case No. 78,413, held on March 16, 17, 18, 1992. "DTR" will refer to the transcipt of Respondent's discipline hearing held on June 12, 1992. "RI" will refer to the record in this cause. "RII" will refer to the record in the case of In Re: Petition For Reinstatement Of Edward C. Rood, Supreme Court Case No. 78,413. "RR" will refer to the Report of Referee dated July 15, 1992.

STATEMENT OF THE FACTS AND OF THE CASE

The Respondent's Statement of the facts in his initial brief is incomplete and partially inaccurate. Therefore, in the interest of clarity, the Bar will restate the facts of this case.

In June, 1974, Edward B. Rood, Sr. (hereinafter Rood, Sr.), 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 execute a Warranty Deed in favor of Respondent, Rood, Sr.'s son. The Lakeland Property was a gift from Rood, Sr. to Respondent. The Respondent and Rood, Sr. claim that the gift was conditional. However, the warranty deed contained no reservation of rights in favor of Rood, Sr., nor were there any other documents, of record or otherwise, indicating that Rood, Sr. retained 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 Rood, Sr.'s law firm, Respondent individually, and Dr. Gunderman individually for, among other things, fraud and conspiracy to defraud. This lawsuit (hereinafter, the Michigan Alverson v. Rood case) was filed in the Federal Court for the Western District of Michigan. Rood, Sr.'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 Respondent and

Dr. Gunderman jointly and severally liable for fraud and conspiracy to defraud. (RI, TFB Exhibit #2.1). Respondent advised Rood, Sr. 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). Respondent and Rood, Sr. became aware of the written judgment no later than December 12, 1986 (one month after the jury verdict) when the State of Florida sought to introduce a certified copy of the judgment into evidence in a criminal proceeding against Respondent. Rood, Sr. represented Respondent in the criminal proceeding and vehemently objected to the proffering of the judgment into evidence. (RI, TFB Exhibit #9).

On May 27, 1987, the trial judge in the Michigan Alverson v. Rood case granted a Motion for Judgment Notwithstanding The Verdict as to the entire portion of the judgment against Dr. Gunderman and as to the portion of the judgment against Respondent 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. Respondent was solely liable for the judgment. (RI, TFB Exhibit #4).

On June 24, 1987, Respondent 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 original jury verdict was reinstated by Order dated January 26, 1989. (RI, TFB Exhibit #6).

On November 6, 1986, when the jury rendered its verdict in the Michigan Alverson v. Rood case, Respondent owned or had an interest in the following non-exempt assets: the Lakeland Property; a 1/3 interest in a condominium on Dale Mabry in Tampa; a 1/2 interest in a lot on Lemon Street in Tampa; a mortgage on a property owned by Shedrick in Tampa; and a 1/2 interest in a mortgage on a property owned by Cornett in Gainesville. (RR, Section II; TR I, p.70).

On November 24, 1986, eighteen days after the judgment was entered in the Michigan Alverson v. Rood case, Respondent encumbered the condominium on Dale Mabry in Tampa with a note and mortgage to the Bank of Tampa for $32,000. Repayment of the principle sum of the note was extended and was not due to be paid until February 24, 1990. (RI, TFB Exhibit #17).

When the judgment was entered in the Michigan Alverson v. Rood case, the Lakeland Property was encumbered by a balloon note and mortgage to Southeast Bank in the principle sum of approximately $140,000. (RI, TFB Exhibit #1, p.40 and Respondent's Exhibit 2.3). In late 1986, the bank refused to extend repayment of the note and threatened foreclosure if the note was not satisfied in full. (RI,

TFB Exhibit #1, pp.40-41 and Respondent's Exhibit #2.3).

On January 20, 1987, the note and mortgage on the Lakeland Property was paid in full. (RI, TFB Exhibit #1, p.41). Respondent paid the note and mortgage by borrowing $100,000 from his mother and approximately $41,000 from Rood, Sr. (TRI, p.229). At the same time, Rood, Sr. paid delinquent property taxes on the Lakeland Property for the preceding three years. (RI, TFB Exhibit #3).

A few weeks later, Winn Dixie entered into a contract with Respondent to purchase the Lakeland Property for 1.95 million dollars. The contract was contingent upon Winn Dixie rezoning the property. (TRI, pp.229, 230).

Two months later, on March 27, 1987, Respondent presented a financial statement to First Florida Bank claiming that he owned the Lakeland Property free of any encumbrances; that he was not involved in any lawsuits; and that the Lakeland Property was valued at 1.95 million dollars. The bank lent Respondent approximately $100,000, but did not encumber the Lakeland Property as a result of the transaction. (RI, TFB Exhibit #2.3(4); RR, Section II). Respondent used the loan proceeds to repay the $100,000 loan from his mother in January, 1987. (TRI, p.230).

In September, 1987, Respondent's contract with Winn Dixie, on the Lakeland Property expired. Winn Dixie could not rezone the property.

On September 20, 1987, while the appellate proceeding on the Michigan Alverson v. Rood case was pending, Respondent conveyed the

Lakeland Property to Rood, Sr. (RI, TFB Exhibit #2.4) to prevent his creditors, PICO and Alverson, from levying on the same. (RR, Section II). At the time of the conveyance, the Lakeland Property was free of any encumbrances and had a fair market value of over one million dollars. (RI, TFB Exhibit #10).

Rood, Sr. paid no consideration directly to Respondent for the Lakeland Property. In addition, the deed reflected that documentary stamps totalling only $.55 were paid. (RI, TFB Exhibit #10; RR, Section III). Also, Respondent's 1987 tax return did not reflect any consideration for the transfer. (RII, TFB Exhibit #11). Further, Respondent never filed a gift tax return in regard to the transfer of the Lakeland Property. (TRII, pp.211-214).

On September 30, 1987, just 10 days after Respondent deeded the Lakeland Property to Rood, Sr., Respondent sold the Shedrick mortgage and used the sales proceeds to pay his bills. (RI, TFB Exhibit #14). Appellate proceedings on the Michigan Alverson v. Rood case were still pending.

On November 4, 1987, less than two (2) months after the conveyance, Rood, Sr. 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 Rood, Sr. 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, Rood, Sr. further encumbered the Lakeland Property by agreeing to assume the $100,000 debt of Respondent's to

First Florida Bank dated March 27, 1987. The obligation was secured by a second mortgage on the Lakeland Property dated February 17, 1988. (RR, Section II).

On August 1, 1988, Respondent sold his 1/2 interest in the Cornett mortgage to his brother, Clay Rood. (RI, TFB Exhibit #13). The appellate proceedings on the Michigan Alverson v. Rood case were still pending at the time of this transaction.

On January 26, 1989, the original judgment in the Michigan Alverson v. Rood case was reinstated and shortly thereafter it was domesticated in the State of Florida.

On March 31, 1989, Rood, Sr. 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 for four years. (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 Rood, Sr. (hereinafter the Polk County Alverson v. Rood case). The Polk County Alverson v. Rood case involved allegations that Respondent, with the knowledge and assistance of Rood, Sr., fraudulently conveyed the Lakeland Property to Rood, Sr. 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. Paragraphs 4, 6, and 8 of Respondent's affidavit stated, as follows:

> 4. That during relevant times herein, the affiant owned an interest in real property in fee simple which had sufficient value to satisfy the subject judgment in that such property had a non-exempt tax assessment value of $223,435.
>
> 6. That at the time of the transfer of the subject property from the affiant to Edward B. Rood, the above-stated non-exempt assets owned by affiant were sufficient to satisfy the subject judgment.
>
> 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 #8).

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 Respondent conveyed the Lakeland Property to Rood, Sr. with the intent to defraud Dr. Alverson and PICO, his creditors. Judge Bentley also found in the Amended Final Judgment that the conveyance to Rood, Sr. was void under Florida Statute Section 726.01. In making this ruling, Judge Bentley held that Rood, Sr. had not paid adequate consideration for the Lakeland Property; he knew of the pending litigation 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).

Judge Bentley's ruling vested the legal title to the Lakeland Property in Respondent. Thereafter, a judgment for attorney fees and costs was entered in favor of the plaintiffs in the Polk County Alverson v. Rood case. Alverson and PICO sought to satisfy their judgment for attorney fees and costs by levying on the Lakeland Property. Alverson and PICO purchased the property at a U.S. Marshal sale which vested title to the property in them, subject to the mortgages Rood Sr. encumbered the property with.

Subsequently, Rood, Sr. 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 then purchased the Lakeland Property at a U.S. Marshal sale. (TRI, p.91 and pp.166-168).

On November 4, 1991, Rood, Sr. purchased the Lakeland Property from First Florida Bank for $564,299.42. A quit claim deed was issued to Rood, Sr. However, at the time of the discipline hearing in this cause, held on June 12, 1992, Rood, Sr. had not recorded the same. (RI, Discipline hearing Exhibit #1).

After the original judgment in the Michigan Alverson v. Rood case was reinstated in January, 1989, Dr. Alverson and PICO sought to levy Respondent's non-exempt assets which at that time only

included Respondent's 1/2 interest in the Lemon Street property and Respondent's 1/3 interest in the Dale Mabry condominium in Tampa. (RR, Section II).

Respondent's 1/2 interest in the Lemon Street property was eventually sold, at a U.S. Marshal's sale, to Respondent's brother, Clay Rood, for $62,001 and Alverson and PICO received the proceeds of the sale. The Respondent's 1/3 interest in the Dale Mabry condominium in Tampa which had a fair market value of approximately $45,000 (RI, TFB Exhibit #22, p.7), but was encumbered by a $32,000 mortgage, was sold to one of Respondent's partners in the property for $3,000. (RR, Section II; RI, TFB Exhibit #17).

At the time of the Final Hearing in this cause, Respondent had paid only $65,001 on the Michigan judgment. (RR, Section II).

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). (RR, Section III). The Referee in his report found that Judge Bentley's findings in the amended judgment on the Polk County Alverson v. Rood case were based on clear and convincing evidence and as a result thereof he made the amended judgment part of his report.

On March 16, 17 and 18, 1992, the Referee in the instant case held a Final Hearing in Supreme Court Case #78,795 which was styled In re: Petition For Reinstatement of Edward C. Rood. In said case,

Respondent was seeking to be reinstated to the practice of law after being suspended for one year in the case of The Florida Bar v. Rood, 569 So. 2d. 750 (Fla. 1990) for engaging in fraudulent conduct which was the same conduct which resulted in the judgment against Respondent in the Michigan Alverson v. Rood case. The Referee made the record in Respondent's reinstatement case part of the record in the instant case and visa versa. (DTR, pp.2-3).

On June 12, 1992, a hearing on discipline was held. On July 15, 1992, the Referee issued his Report wherein he recommended that Respondent be disbarred from the practice of law in Florida.

The Respondent filed his Petition For Review with this court. On or about October 30, 1992, Respondent filed his Initial Brief. This brief is filed as an Answer to Respondent's Initial Brief.

SUMMARY OF THE ARGUMENT

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

The Referee found, based on all of the facts and circumstances in this case, that Respondent and his father engaged in a course of fraudulent conduct with respect to the conveyance of the Lakeland Property; that they both lied when they testified in affidavits that at the time of the transfer of the Lakeland Property E.B. Rood was unaware of the Michigan judgment; and that Respondent lied in his affidavit when he stated that at the time of the transfer of the Lakeland Property he had sufficient non-exempt assets to satisfy the Michigan judgment. The Respondent denied engaging in the acts set forth above. However, the Referee found the Respondent's testimony totally unworthy of belief and rejected the same. The Referee's rejection of the Respondent's testimony was justified in light of Respondent's propensity to lie in financial statements to banks and sworn documents and also based on the numerous contradictory and evasive statements made by the Respondent in the instant case, the Michigan Alverson v. Rood case, the Polk County Alverson v. Rood case and Respondent's prior disciplinary case.

The Referee's findings of fact are presumed to be correct and

it is the Respondent's burden to demonstrate that the Report of Referee is erroneous, unlawful or unjustified. The Respondent has failed to rebut the presumption of correctness. The facts in this case, taken as a whole, clearly support not only the Referee's findings of fact, but also his recommendations of guilt and thus the same should be upheld.

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

The Respondent also challenges the Referee's recommended discipline as being too severe. It is the Bar's position that the Referee's recommended discipline of disbarment is appropriate. According to case law and Florida's Standards for Imposing Lawyer Sanctions, disbarment is the only appropriate discipline for the Respondent's pattern and course of misconduct.

The Florida Bar requests this Court to approve the Referee's findings of fact, recommendations of guilt, and the aggravating factors considered by the Referee. In addition, the Bar respectfully requests this Court to approve the Referee's recommended discipline, and disbar the Respondent from the practice of law in the State of Florida.

ARGUMENT

I. THE REFEREE'S FINDINGS OF FACT AND RECOMMENDATIONS OF GUILT ARE SUPPORTED BY CLEAR AND CONVINCING EVIDENCE AND SHOULD BE UPHELD.

The Respondent challenges the Referee's findings of fact as being unsupported by clear and convincing evidence. A Referee's findings of fact should be upheld unless clearly erroneous or lacking in evidentiary support since the Referee had an opportunity to personally observe the demeanor of the witnesses and to assess their credibility. The Florida Bar v. Stalnaker, 485 So. 2d. 815 (Fla. 1986). In this case, the Referee found that the Respondent and Rood, Sr. were not credible or believable witnesses and specifically found that they both lied when they testified that at the time of the transfer of the Lakeland Property, Rood, Sr. was unaware of the Michigan Judgment. (RR, Section II).

Respondent argues in his Argument Summary, but not in his Argument, that the Referee erred when he admitted into evidence, over objection, the Amended Judgment, the trial transcripts and exhibits from the Polk County Alverson v. Rood case. Respondent apparently claims that said documents were not relevant to the facts or issues in this case and that the probative value of the documents was outweighed by the danger of unfair prejudice to Respondent.

The facts in the instant case were virtually identical to the facts of the Polk County Alverson v. Rood case. In addition, the issue in both cases were substantially similar. The issue in the Polk County Alverson v. Rood case was whether or not Rood, Jr.

fraudulently conveyed the Lakeland Property to his father. The issue in this case was whether Respondent engaged in conduct involving dishonesty, fraud, deceit or misrepresentation. There was and is no evidence that the challenged documents caused a confusion of the issues or prejudiced Respondent.

Respondent also claims that some of the Referee's findings were inconsistent with Judge Bentley's findings in the Amended Final Judgment from the Polk County Alverson v. Rood case. A review of the Report of Referee and Judge Bentley's Amended Final Judgment establishes that the same are consistent.

The Respondent challenges the Referee's finding that "at the time of the conveyance, E.C. Rood did not have sufficient non-exempt assets to satisfy the Michigan judgment", on the grounds that the record evidence establishes otherwise. On the contrary, there was clear and convincing evidence to support the Referee's finding.

On September 19, 1987, the Respondent owned the following non-exempt assets:

1. The Lakeland Property;

2. A 1/2 interest in a parcel of real property on Lemon Street in Tampa;

3. A mortgage and note on property in Tampa owned by Shedrick;

4. A 1/2 interest in a mortgage on property in Gainesville, Florida, owned by D.E. Cornett; and

5. A 1/3 interest in a condominium in Tampa.

(RR, Section II; TRI, p.70).

The Respondent deeded the Lakeland Property to Rood, Sr. on September 20, 1987. Ten days later, on September 30, 1987, Respondent sold the Shedrick mortgage to Chrysler Financial for $15,500. (RI, TFB Exhibit #13). On August 1, 1988, Respondent sold his 1/2 interest in the Cornett mortgage to his brother, Clay Rood, for $22,500. (RI, TFB Exhibit #14). The Respondent's 1/2 interest in the Lemon Street property was sold at a public sale to Respondent's brother, Clay B. Rood, for $62,001. (TRI, pp.84-85). Respondent's 1/3 interest in the condominium in Tampa was sold to one of Respondent's partners in the property for $3,000. (TRI, p.87) The foregoing establishes that after Respondent conveyed the Lakeland Property to Rood, Sr., the value of Respondent's non-exempt assets totalled approximately $103,000.00. Since the principal amount of the Michigan judgment was $196,000 as of November 6, 1986, excluding costs, attorneys fees and interest, the record clearly supports the Referee's finding that after the Respondent transferred the Lakeland Property to Rood, Sr., Respondent did not have sufficient assets to satisfy the Michigan judgment.

The Respondent challenges the Referee's finding that the value of Respondent's interest in the condominium in Tampa was $3,000. The condominium in Tampa had a value of approximately $45,000 (RI, TFB Exhibit #22, p.7), but was encumbered by a $32,000 note and mortgage on November 24, 1986 (18 days after the Michigan judgment) and repayment of the principal was modified and extended on several

occasions with the last being November 24, 1989. (RI, TFB Exhibit #17). Since Respondent only owned a 1/3 interest in the condominium, his equity was worth no more than $4,300. However, a buyer was only willing to pay $3,000. The Referee's valuation was supported by clear and convincing evidence and was not clearly erroneous.

The Respondent also challenges the Referee's finding that the value of Respondent's interest in the Lemon Street property was $62,001 which was the amount that Respondent's brother, Clay Rood, paid at a public sale, to purchase Respondent's interest in the property. The Respondent claims that the record evidence clearly established that Respondent's 1/2 interest in the property was worth at least $225,000 on September 20, 1987. The record evidence which Respondent relies on to support his claim is a 1985 appraisal of the entire parcel rather than Respondent's 1/2 interest and gives the fair market value rather than the "quick sale" or "public sale" value.

The 1985 appraisal relied on by Respondent was prepared at a time when Respondent and his brother placed the Lemon Street property for sale. Respondent testified during a deposition in October, 1988 and at the Final Hearing that the property could not be sold because it was located in the airport runway zoning district. After the unsuccessful efforts to sell the property, Respondent believed that the entire parcel was worth less than $200,000 (TR 1, pp.66-70). The Respondent's testimony during the Final Hearing clearly established that in 1987, Respondent believed

that his 1/2 interest in the Lemon Street property was worth less than $100,000. In addition, on June 19, 1989, Respondent encumbered the Lemon Street property with a mortgage in the amount of $24,230.57 which was security for a note dated April 16, 1986. (RI, TFB Exhibit #18). The Referee's finding that Respondent's 1/2 interest in the Lemon Street property had a value of $62,000 was not clearly erroneous based on the Respondent's testimony, during the Final Hearing in this cause and during a deposition in October, 1988 and based on the amount that Clay Rood paid to buy Respondent's 1/2 interest in the property.

The Respondent also claims that the Referee erred by failing to consider as additional non-exempt assets, which could have been collected by judgment creditors, certain motor vehicles and a boat owned jointly by him and his wife. The Respondent contends that on September 20, 1987 these additional assets had a fair market value of approximately $60,000. A financial statement prepared by Respondent on March 27, 1987 (R, TFB Exhibit #2.3(4)) indicated that Respondent owned a 1985 Cris Craft boat that had a value of approximately $25,000 and was encumbered by a loan with a balance due of $25,000 leaving Respondent no equity in the boat. The same financial statement indicated that Respondent owned three automobiles worth approximately $56,000, but encumbered by loans with a total balance due of $40,000. This means that in September 1987, the Respondent's total equity in the four vehicles described above was only $17,000. Even if the automobiles and boat were included as non-exempt assets owned by Respondent on September 20,

1987, the total value of Respondent's assets would have been $103,000 plus $17,000 or $120,000. $120,000 was not sufficient to satisfy the Michigan judgment of $196,000 plus costs, attorney fees and interest.

Furthermore, Respondent's argument that the Referee should have considered his boat and three automobiles as non-exempt assets subject to creditors' claims is contrary to his testimony in the Polk County Alverson v. Rood case wherein he testified as follows in response to questions propounded by Alverson's attorney:

> Q. and then you stated that you had about $82,000 worth of cars and boats and those were owned in you and your wife's names jointly, correct?
>
> A. Correct.
>
> Q. There's no way that a creditor of yours alone could go after that property, could they?
>
> A. Correct.
> (RI, TFB Exhibit #1, p.79).

Respondent conceded that these assets were uncollectible and therefore not part of his estate for collection by his creditors.

The Bar proved by clear and convincing evidence that after Respondent transferred the Lakeland Property to Rood, Sr., the value of his non-exempt assets totalled only a maximum of $103,000 which was insufficient to satisfy the Michigan judgment. The Referee's finding regarding the same is supported by the record and should be upheld.

Respondent challenges the Referee's finding that there was a lack of adequate consideration for the transfer. Respondent claims that the finding is unsupported by the record. Respondent also

claims that the actual consideration for the transfer was $709,250.00. Respondent further claims that the Bar conceded in its closing argument that the consideration paid for the Lakeland Property by Rood, Sr., ranged from a minimum of $164,000 to $709,000.00. The Respondent's claims and contentions are inaccurate and unsupported by the record. It was and is the Bar's position that there was no consideration for the transfer of the Lakeland Property from Respondent to Rood, Sr.

Respondent concedes in his Initial Brief that no actual money was paid by Rood, Sr. to Respondent contemporaneous with the transfer of the Lakeland Property. However, Respondent argues that this factor is not determinative of consideration. He contends that consideration for the transfer consisted of various funds contributed to the property by Rood, Sr. or attributable to Rood, Sr. for the period covering from 1974, when the property was purchased, through the time of the transfer.

Rood, Sr. testified during the trial in the Polk County Alverson v. Rood case that his consideration in 1987 for the Lakeland Property consisted of the following:

A.	1974 Initial Investment	$ 157,500
B.	Return on initial investment	204,750
C.	Initial bargain obtained $280,000 157,00 122,000	122,000
D.	Payment of principal on Rood Jr.'s Southeast Bank Loan	175,000
E.	Interest and attorney's fees on Southeast Loan	16,000
F.	Payment of 98 Property taxes for 1985 - 1987	24,000
G.	Taxes for two other years	

(approximately)	10,000
	$ 709,250

(RI, TFB Exhibit #1, p.124-126)

Rood, Sr.'s testimony was without merit and was contradicted and refuted by the record in this case. It is undisputed that the June, 1974 conveyance of the Lakeland Property from the Barbers to Respondent was a gift from Rood, Sr. to Respondent who paid no consideration for the property. Respondent contends that the gift was conditional in that Rood, Sr. could demand return of the property if Respondent mismanaged it. Despite the alleged condition, and despite the fact that, since at least 1982, Respondent had been unable to pay either the taxes on the property, or the principal of $175,000 due on a Southeast Bank mortgage (which encumbered the Lakeland Property), there was never any demand made by Rood, Sr. upon Respondent to return the property until after the judgment in the Michigan Alverson v. Rood case was rendered in November, 1986. Rood, Sr. had paid all of the mortgage payments on the $175,000 Southeast Bank loan which was incurred in 1981 (RI, TFB Exhibit #1, p.75) and most of the Lakeland Property taxes since 1982. (RI, TFB Exhibit #1, p.127).

In addition, Rood, Sr. testified that if Respondent had sold the property in 1985, his son could have kept the entire proceeds and would not have owed Rood, Sr. anything. (RI, TFB Exhibit #1, pp.126-127).

Further, Respondent's testimony in the Polk County Alverson v. Rood case, with respect to his father's consideration for the

Lakeland Property in September, 1987 was in conflict with Rood, Sr.'s testimony. Respondent testified that his father's consideration for the Lakeland Property consisted of Rood, Sr.'s payment of the balance (as of January, 1987) owed on Respondent's Southeast Bank loan including interest and attorney fees in the approximate amount of $140,000; $24,000 due for the 1985 through 1987 taxes on the Lakeland Property; and $75,000 in attorney fees to attorney Hugh Smith for representation in a criminal matter involving Respondent in 1986. (RI, Bar Exhibit #1, p.37-45). According to Respondent's testimony, the total consideration paid by Rood, Sr. for the Lakeland Property in September, 1987 was $239,000. However, Rood, Sr. testified during the Final Hearing in this cause that he did not consider the $75,000 in attorney fees which he paid to Hugh Smith as consideration for the Lakeland Property; thus, if any consideration was paid, the maximum indirect consideration paid by Rood, Sr. to Respondent for the Lakeland Property in September, 1987 was $164,000. This sum was not adequate consideration for the property in light of the property's fair market value or "public sale" value in September, 1987. (See RI, TFB Exhibit 2.9 and TFB Exhibit #2.15).

In March, 1987, Respondent, in a financial statement which he provided to a bank, (RI, TFB Exhibit #2.3(5)) claimed that the Lakeland Property was valued at 1.9 million dollars. On November 4, 1987, Rood, Sr. submitted a loan offering sheet to First Florida Bank (RI, TFB Exhibit #2.7) wherein he claimed that the Lakeland Property had a value of 1.9 million dollars. In addition, on March

31, 1989, Rood, Sr. entered into an Option to Purchase Real Estate with Walter J. Wright (RI, TFB Exhibit #2.8) with respect to the Lakeland Property. The purchase price for the property was 1.7 million dollars. The Florida Bar introduced into evidence an appraisal by Curtis Wheeler regarding the "quick sale" value of the Lakeland Property in September, 1987. (RI, TFB Exhibit #2.15). Mr. Wheeler's appraisal established that in 1987 the Lakeland Property had a "quick sale" value of between $989,400 and $1,154,300. In addition, Mr. Wheeler testified that the Lakeland Property had a fair market value of $1,450,000 (RI, TFB Exhibit #1, p.140 and TFB Exhibit #2.9). Even if, in 1987, the Lakeland Property had a value of $989,400, Rood Sr.'s maximum consideration of $164,000 was not adequate for the Lakeland Property.

Respondent argues that the Bar failed to offer evidence or authority to establish what consideration would have been "adequate". Such was not an issue since the Bar proved and Respondent conceded that no consideration was paid by Rood, Sr. to Respondent at the time of the transfer.

Respondent challenges the Referee's finding that Respondent's conveyance of the Lakeland Property was the result of a course of fraudulent conduct. The Referee's finding was based on all of the evidence in this case including the fact that Respondent transferred, sold or encumbered all of his non-exempt assets before the plaintiffs in the Michigan Alverson v. Rood case could register their judgment in Florida and seek to enforce the same.

The Respondent claims that the uncontroverted testimony in

this case by himself and Rood, Sr. proves that his purpose and objective in conveying the Lakeland Property back to his father was in recognition of the original conditional gift and was based on his inability to continue managing the property in view of unpaid taxes and an impending foreclosure. The Respondent's claim is contrary to the evidence.

First, there was no documentary evidence to substantiate Respondent's claim that the Lakeland Property was a conditional gift from Rood, Sr. Second, on September 20, 1987, there was no threat of a foreclosure action in regard to the Lakeland Property since Respondent had owned the property free and clear of encumbrances for approximately nine months. (TRI, p.251). Third, all property taxes had been paid nine months earlier, in January, 1987. (RI, TFB Exhibit #10, p.7). Fourth, the Referee found the Respondent and Rood, Sr.'s testimony to be unworthy of belief. (RR, Section II).

Whether or not a conveyance is fraudulent depends on the facts and circumstances of each case. Stelle v. Dennis, 140 So. 194. The circumstantial evidence in this case conclusively shows that Respondent and Rood, Sr. had fraudulently intended to deprive Dr. Alverson and PICO of Respondent's assets when Respondent conveyed the Lakeland Property to Rood, Sr.

In Cleveland Trust Company v. Foster, 93 So. 2d 112, 114 (Fla. 1957), the court set forth several facts and circumstances which have long been considered indicia of badges of fraud. Among these are:

1. Close relationship between the judgment debtor and the transferee;

2. Lack of adequate consideration for the transfer;

3. Debtor's inability to pay after the transfer;

4. Transfer of the debtor's entire estate;

5. Secrecy or concealment of the transaction;

6. Pendency or threat of litigation at the time of the transfer; and

7. Reservation of benefits, control or dominion over the property of the debtor.

"Although the badges of fraud may be inconclusive to establish fraud when considered separately, if they exist in combination, they may by their number and joint consideration be sufficient to constitute conclusive proof of fraud." Acquafreddia, 26 B.R. 909 at 913 (1983).

The Florida Bar proved by clear and convincing evidence 5 of the 7 indicia or badges of fraud, those being 1, 2, 3, 4 and 6 above. The Bar has previously set forth the record evidence which establishes 2, 3, 4, and 6 above.

Respondent did not dispute, and in fact testified, that he and Rood, Sr., prior to and since 1987, have had a close personal and business relationship. (TRI, p.211).

The Florida Bar concedes that Respondent did not conceal the transfer of the Lakeland Property in 1987. In order to successfully defraud the judgment creditors, the Respondent could not conceal the September, 1987 transaction as the transfer had to

be of record from Respondent to Rood, Sr.

In addition to the foregoing, the Bar established by clear and convincing evidence that Respondent encumbered, sold, or transferred all of his non-exempt assets before the plaintiffs in the Michigan Alverson v. Rood case could domesticate and enforce their judgment under Federal law and rules. (RR, Section II; TRI, p.701; RI, TFB Exhibit #17 and 18).

Respondent's intent to defraud his creditors can also be inferred from Rood, Sr.'s conduct after the transfer of the Lakeland Property.

On November 4, 1987 (less than two months after the fraudulent transfer), Rood, Sr. applied for and obtained a $500,000 to $1,000,000 line of credit from First Florida Bank. Rood, Sr. gave the bank as security for the line of credit, a first mortgage on the Lakeland Property. (RI, TFB Exhibit #2.7). In addition, on January 4, 1988, Rood, Sr. further encumbered the Lakeland Property by agreeing to assume a $100,000 debt of Respondent's to First Florida Bank. The obligation was secured by a second mortgage on the Lakeland Property. Then, after Respondent's judgment creditors sought and succeeded in having the conveyance of the Lakeland Property set aside as fraudulent, Rood, Sr. stopped making payments on the line of credit from First Florida Bank. As a result thereof, the Bank instituted foreclosure proceedings which led to a public sale of the Lakeland Property. The Bank purchased the property at the public sale for the sum owed by Rood, Sr. (RR, Section II; TRI, p.92).

During the Final Hearing in this cause, held on January 21, 1992, the Respondent and Rood, Sr. were asked about the ultimate disposition of the Lakeland Property. Respondent testified as follows in response to questions asked by Bar Counsel:

> Q. Isn't it true, Mr. Rood, Sr., bought it back after the foreclosure sale?
> A. I don't believe that's happened yet. The property is still registered in the Bank's name . . .
> Q. The Bank owns the property?
> A. The Bank owns the property.
> Q. Your father is seeking to buy that property back from the bank?
> A. That's something he's considering.
> (TRI, pp.91, 93).

In addition, Rood, Sr., in Respondent's presence testified as follows in response to questions propounded by Bar Counsel:

> Q. Is it a fact that you are negotiating now to purchase that property back for yourself?
> A. Well, lets phrase it, the truth is, I owe First Florida $550,000 because of this line of credit. So I'm paying them off. That's my duty to pay them off and I am. I've paid with in a few dollars of that already.
> (TRI, pp.169, 170).

After the Final Hearing, but prior to the discipline hearing in this cause, Bar Counsel discovered and introduced into evidence a quit claim deed which reflected that on November 4, 1991 (three months prior to the Final Hearing), First Florida Bank conveyed the Lakeland Property to Rood, Sr. in exchange for $564,299. (DTR, p.2; RI, Discipline Exhibit #1). It is obvious that Rood, Sr. never recorded the deed so that neither Bar Counsel nor the Referee would become aware of the fact that he again holds title to the Lakeland Property.

Respondent's intent to defraud his creditors can also be

inferred from his fraudulent and illegal conduct in the Polk County Alverson v. Rood case. Respondent represented himself in said matter. (TRI, pp.60-61).

In October, 1989, Respondent and Rood, Sr. each executed separate affidavits opposing a motion for partial summary judgment. These affidavits were submitted to Judge Bentley in the Polk County Alverson v. Rood case.

Paragraph 8 of Rood, Sr.'s affidavit stated:

> "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 Edward C. Rood, Jr. to Edward B. Rood. Edward B. Rood first became aware of the Judgment sometime later after the conveyance". (RI, TFB Exhibit #12).

Paragraph 8 of Respondent's affidavit stated:

> "That the Affiant did not inform Edward B. Rood of the entry of the judgment at the time of the conveyance of the subject property and that it was not until sometime substantially after the conveyance that the existence of a judgment was even discussed with Edward B. Rood." (RI, TFB Exhibit #8)

Respondent and Rood, Sr. obviously inserted the foregoing paragraphs in their affidavits in an effort to establish that Rood, Sr. was a bona fide purchaser at the time Respondent transferred or conveyed the Lakeland Property to Rood, Sr.

The evidence in this case established by a clear and convincing standard that the foregoing statements contained in Respondent's and Rood, Sr.'s affidavits were false and that Respondent was aware of the same at the time the affidavits were executed and submitted to the court.

The evidence in this case showed that in December, 1986, Respondent was tried in Tampa on certain criminal charges. Respondent was acquitted of those charges, and Rood, Sr. served as co-counsel at the trial. During the course of the trial, the State of Florida attempted to bring into evidence a certified copy of the judgment from the Michigan Alverson v. Rood case. Rood, Sr. vehemently argued before the court against the proffering into evidence of the judgment. (RI, TFB Exhibit #9, pp.13-16).

Respondent's affidavit at paragraph 4 and 6 also states:

> "That Edward C. Rood, Jr. owns an interest in real property, in fee simple, which has sufficient value to satisfy the Subject Judgment and as to which levy of execution can be made thereon, but levy of execution has never been made on said property...
> That at the time of the transfer of the Subject Property from Edward C. Rood, Jr. to Edward B. Rood, Edward C. Rood, Jr. owned nonexempt assets which were sufficient to satisfy the Subject Judgment". (RI, TFB Exhibit #8).

As previously argued and established by the record in this case, these statements were also false and Respondent knew they were false at the time he executed the Affidavit and filed it with the Court.

The Referee recommended that Respondent be found guilty of violating Rule 4-8.4(b) Rules of Professional Conduct (a lawyer shall not commit a criminal act that reflects adversely on the lawyers honesty, trustworthiness or fitness as a lawyer in other respects). Respondent challenges the Referee's recommendation as erroneous, on the grounds that no criminal statute was alleged by the Bar as having been violated.

The Bar alleged in its Complaint that Respondent knowingly executed and submitted a false affidavit to the court. An intentional false swearing constitutes perjury, a third degree felony under Florida criminal statutes. The commission of the crime of perjury is an act that adversely reflects on a lawyer's honesty, trustworthiness, and fitness as a lawyer. The Referee's recommendation was supported by clear and convincing evidence, it was justified, and it should be upheld.

Based on the foregoing, all of the Referee's findings of fact and recommendations of guilt are supported by clear and convincing evidence and should be upheld.

II THE REFEREE'S RECOMMENDATION OF DISCIPLINE IS APPROPRIATE BASED ON HIS FINDINGS OF FACTS, SUBSTANTIAL AGGRAVATION, AND MINIMAL MITIGATION.

The Referee recommended that Respondent be disbarred. Respondent argues that the recommendation is excessive based on erroneous findings of fact; a lack of aggravation; the existence of mitigation; and the purposes to be served by discipline.

As established in Argument I, the Referee's Findings of Facts are supported by clear and convincing evidence; thus contrary to Respondent's argument, the recommended discipline is appropriate.

In the instant case, the Referee found, based on clear and convincing evidence, that Respondent engaged in a course of fraudulent conduct in the conveyance of the Lakeland Property to Rood, Sr. to prevent his creditors from obtaining the same. In addition, the Referee found that during the course of the Polk County Alverson v. Rood case, which involved the 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. (RR, Section II). The Referee recommended that Respondent be disbarred from the practice of law.

The Referee's recommendation of disbarment is appropriate for Respondent's misconduct, and is in accordance with case law involving similar misconduct.

In Dodd v. The Florida Bar, 118 So. 2d. 17 (Fla. 1960), Dodd was found to have urged and advised several persons, including his client, to give false testimony in a personal injury action. This

Court disbarred Mr. Dodd from the practice of law, notwithstanding the fact that Mr. Dodd had no prior disciplinary record. In ruling for disbarment, this Court stated that "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." id at p.19.

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 deliberation, knowing elicitation or concealment of false testimony. Id. at 406.

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 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 instant case is similar to, yet more serious than, the misconduct of Dodd, Agar, O'Malley and 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. (RR, Sections II and III). Like Dodd and Agar, Respondent knowingly permitted his father to submit a false affidavit to the court. (RR, Section II). Respondent committed perjury and knowingly permitted his father to commit perjury for his own pecuniary gain in that, if it was deemed by the Court that Respondent's father was a bonafide purchaser of the Lakeland Property for value, based on Respondent's and his father's affidavits, then the creditors of Respondent would be defeated in their attempt to set aside the conveyance of the Lakeland Property to Rood, Sr.

In addition to committing the crime of perjury, Respondent also engaged in a scheme to defraud his creditors of an asset they could have levied upon. Shortly after Respondent fraudulently conveyed the Lakeland Property to his father, Rood, Sr. gave First Florida Bank a mortgage on the property in return for a line of credit up to one (1) million dollars. (RR, Section II; R, TFB Exhibit #2.7). In furtherance of Respondent's scheme to defraud his creditors, Respondent's father intentionally stopped making the mortgage payments on the property and permitted the bank to pursue to conclusion a foreclosure action. Then, after the Bank purchased

the property from the United States marshal, the Respondent's father, Rood, Sr., purchased the property back from the bank. Rood, Sr.'s actions eliminated the rights of Respondent's creditors to levy on the property. (TRI, pp.91 and 166-168).

Also, unlike Dodd, Respondent had a prior disciplinary record.

Contrary to O'Malley, the Referee did not find substantial mitigating circumstances for Respondent's misconduct. In this case, 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 creditors as did O'Malley. Instead, as set forth above, the Respondent, with his father's assistance, 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 extensive experience in the practice of law, having practiced for approximately 16 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 Respondent's reinstatement hearing before the Referee (see In re: Petition For Reinstatement of Edward C. Rood, Supreme Court Case No. 78,413), six (6) well established attorneys testified that Respondent has a bad reputation for truthfulness and veracity. (TRII, pp.317-310, 392-398, 425, 432-443, 528, 547-548). The Respondent called eight witnesses to testify in regard to his

reputation in the community for truthfulness and veracity. The Respondent's witnesses testified that Respondent had a good reputation for truth and veracity. However, on cross examination, six out of eight of Respondent's character witnesses, stated that their opinion could or would change if the Bar proved that Respondent knowingly and intentionally submitted a false affidavit to a court, false financial statements to a bank, and fraudulently conveyed property. (TRII, pp.23-25, 36, 37, 72, 87-90, 105-107, 136).

In the fraudulent conveyance case, the Referee did find mitigating factors which included that Respondent is a good husband and father and that he made substantial contributions to the legal and non-legal communities including committee work on Bar organizations, scout leader for Boy Scouts, coach and director of Little League, church related contributions and being a candidate for political office. (RR, Section V). These mitigating factors do not reach the magnitude of the mitigating factors found in O'Malley. Further, unlike O'Malley, 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, refusal to acknowledge wrongful nature of conduct, prior disciplinary offense, and indifference to making restitution. (RR, Section V). The Respondent in his initial brief challenges all of the aggravating factors found by the Referee except for prior disciplinary offense and indifference to making restitution.

Respondent claims there was no evidence of a pattern of misconduct by Respondent. The evidence in this case showed that Respondent knowingly and intentionally submitted several financial statements to banks which contain false information, i.e., that Respondent was not a party to a lawsuit when in fact he was a defendant in the Michigan Alverson v. Rood case (see RI, TFB Exhibit #2.3(3), 2.3(5) and 2.3(6)); Respondent knowingly and intentionally submitted a false affidavit to a court in the Polk County Alverson v. Rood case; and that Respondent defrauded his creditors, Alverson and PICO, by transferring, selling, or encumbering all of his non-exempt assets before his creditors could register and seek to enforce their Michigan Judgment in The State of Florida. (RR, Section II). These acts constitute dishonest, deceitful and fraudulent conduct. Respondent's pattern of misconduct also relates back to the Respondent's misconduct in the case of The Florida Bar v. Rood, 569 So. 2d. 750 (Fla. 1990) wherein Respondent was found to have engaged in a course of fraudulent conduct in an effort to conceal an exculpatory memorandum in a medical malpractice case from Dr. Alverson and others. In addition, Respondent was found to have knowingly prepared or caused to be prepared, false answers to interrogatories which were filed with the court. (RII, TFB Exhibit #23). The record clearly supports the Referee's finding of a pattern of misconduct.

Respondent challenges the Referee's finding, as an aggravating factor, that Respondent had a dishonest or selfish motive. The

record is replete with evidence to support said aggravating factor. As previously argued, the record clearly established that subsequent to the entry of the judgment in the Michigan Alverson v. Rood case, but prior to the judgment's domestication in Florida, Respondent sought to dispose of, or encumber, all of his non-exempt assets so that his creditors could not levy on the same. In addition, the evidence showed that Respondent knowingly and intentionally submitted a false affidavit to Judge Bentley in the Polk County Alverson v. Rood case in an effort to defeat the plaintiff's Motion for Partial Summary Judgment by attempting to establish that his father was a bonafide purchaser of the Lakeland Property.

Respondent argues that his motivating purpose for the conveyance was to avoid imminent foreclosure of the property and to respect the obligation owed his father. The evidence in this case does not support Respondent's contention. At the time of the conveyance in September, 1987, the Lakeland Property was free of encumbrances. (TRI, p.251). In January, 1987 (nine months prior to the conveyance), Respondent, with the assistance of his mother and father, satisfied in full, the note and mortgage which had encumbered the property. Respondent also argues that if he had wanted to be devious, he could have allowed the bank to take the property and his father could have purchased it at a foreclosure sale. Interestingly, that is exactly what happened after Respondent conveyed the property to his father and his father encumbered the property with a substantial mortgage which he

ultimately defaulted on. (TRI, pp.60, 61, 166-168). The aggravating factor of a "dishonest or selfish motive" is justified and should be upheld.

Respondent also challenges the aggravating factor of "substantial experience in the practice of law". Respondent claims that this aggravating factor is inapplicable to the instant case since Respondent's misconduct was unconnected to his practice of law or actions as an attorney. Respondent's position is contrary to the evidence. Respondent represented himself as an attorney in the Polk County Alverson v. Rood case (TRI, pp.60-61) wherein Respondent knowingly prepared and submitted a false affidavit to a court. Notwithstanding the foregoing, Respondent had practiced law for approximately 16 years at the time of his fraudulent and criminal misconduct and thus he knew or should have known better than to intentionally defraud creditors and submit a false affidavit to a court.

Respondent challenges the aggravating factor of "indifference to making restitution". Respondent claims that he tendered all of his non-exempt assets to his creditors. When Alverson and PICO registered their judgment in Florida in early 1989 after all appeals were concluded, Respondent had already conveyed, sold, or encumbered all of his non-exempt assets. The only assets which Respondent's creditors could levy on were Respondent's 1/2 interest in the Lemon Street property and his 1/3 interest in a condominium. Those assets were sold by Alverson and PICO for a total of $65,000. If the Respondent had not conveyed the Lakeland Property to Rood,

Sr. or, if Rood, Sr. had not encumbered the property, after the conveyance, with a mortgage that acted as security for a line of credit for $500,000 to $1,000,000, the Michigan Judgment could easily have been satisfied in full. The aggravating factor of "indifference to making restitution" is justified and should be upheld.

Like Dodd, Agar and Ryder, and in accordance with O'Malley, Respondent should be disbarred from the practice of law for his egregious misconduct in this case especially in light of the substantial aggravation and minimal mitigation.

This Court's ruling in the case of The Florida Bar v. Rood, 569 So. 2d. 750 (Fla. 1990) also supports the Referee's recommended discipline of disbarment. The Respondent's misconduct in said case is strikingly similar to his misconduct in the instant case.

In the prior disciplinary case, Respondent was found to have engaged in fraudulent conduct by concealing an exculpatory memorandum from Dr. Alverson in a medical malpractice case pursued by Respondent on behalf of his clients, the Nances. In addition, Respondent was found to have engaged in fraudulent conduct by preparing or causing to be prepared in two separate lawsuits, false answers to interrogatories and by submitting the false answers to interrogatories to a court and to an opposing counsel. This Court suspended Respondent from the practice of law for one year. The Court held that although Respondent's misconduct was serious and reprehensible, it did not merit disbarment due, in large part, to the isolated nature of the transaction, and due especially to

Respondent's lack of disciplinary problems in the lengthy period since the incident came to light. Id. at p.753.

It's the Bar's position that if this Court had been aware of Respondent's additional fraudulent and criminal misconduct that is the subject of this case, the Court would have disbarred Respondent in the case of The Florida Bar v. Rood, 569 So. 2d. 750. When the Bar's prior disciplinary case against Respondent was pending at the grievance committee level, Respondent fraudulently conveyed the Lakeland Property to Rood, Sr. Then, after the Referee in Respondent's prior disciplinary case issued his Report of Referee in July, 1989, recommending that Respondent be found guilty of violating five Rules of the Former Florida Bar Code of Professional Responsibility including DR 1-102(A)(4), for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, Respondent engaged in further fraudulent and criminal misconduct by knowingly and intentionally submitting a false affidavit to a court in the Polk County Alverson v. Rood case.

The Florida Bar could find only one discipline case that dealt with an attorneys involvement in the fraudulent conveyance of property. In The Florida Bar v. Scott, 566 So. 2d. 765 (Fla. 1990) Stanley Lowe, a close personal friend of Scott, conveyed three pieces of property to Scott to avoid creditors. Scott was to return the property to Lowe, upon request. Lowe died before he could request return of the property. Thereafter, Respondent claimed ownership to Lowe's three properties and he advised Lowe's sons that their father had left no assets with which to open an

estate. Subsequently, Lowe's sons learned of the existence of the properties and filed suit to recover them. This court found Scott guilty of violating Rule 1-102(A)(4), 1-102(A)(5) and 1-10(A)(6) of the Code of Professional Responsibility and suspended him from the practice of law for 91 days.

Respondent's misconduct in this case is more serious than Scott's misconduct. In this case, Respondent engaged in a pattern of misconduct to defraud his creditors of his assets; his fraudulent conveyance of assets occurred at a time when the Bar was prosecuting Respondent for fraudulent conduct as outlined in Rood, 569 So. 2d. 750; and he knowingly submitted and, knowingly permitted his father to submit, a false affidavit to a court. Disbarment is appropriate for Respondent's misconduct.

Respondent's misconduct in the instant case constitutes cumulative misconduct to his misconduct in The Florida Bar v. Rood, 569 So. 2d. 750. (see The Florida Bar v. Golden, 566 So. 2d. 1286 (Fla. 1990); The Florida Bar v. Adler, 589 So. 2d. 899 (Fla. 1991); and The Florida Bar v. Greenspahn, 386 So. 2d. 523 (Fla. 1980)). In The Florida Bar v. Vernell, 374 So. 2d. 473 (Fla. 1979) this Court stated that it deals more severely with cumulative misconduct than with isolated misconduct. In light of this Court's ruling in Respondent's prior discipline case and Respondent's cumulative and strikingly similar misconduct in the instant case, Respondent should be disbarred from the practice of law.

The Referee's recommended discipline of disbarment is also in accordance with Florida's Standard 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

(f) a lawyer engages in any other intentional conduct involving dishonest, 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 instant case is directly on point with Standards 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 Statements, 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 instant case falls directly on point with Standard 6.11.

> **Standard 8.0 through 8.1 provides in part, as follows:**
>
> **8.0 Prior Discipline Orders.** 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 prior discipline.
>
> 8.1 Disbarment is appropriate when a lawyer: (b) has been suspended for the same or similar misconduct, and intentionally engages in further similar acts of misconduct.

Respondent's intentional misconduct in this case is similar to his misconduct in Rood, 569 So. 2d. 750 wherein Respondent was suspended for one year. Accordingly, disbarment is 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 two (2) mitigating factors. Neither of the mitigating factors found by the Referee are included as mitigating factors in Standard 9.32.

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 set forth factors which may be considered in aggravation. As previously set forth, the Referee found six (6) aggravating factors in the instant case. All six (6) of the aggravating factors are set forth in Standard 9.22.

The aggravating factors clearly outweigh the mitigating factors found by the Referee, thus, disbarment is the appropriate discipline for the offenses committed by Respondent.

Respondent argues that disbarment is inappropriate for his misconduct in light of the purposes for attorney discipline. This Court has recognized three purposes of attorney discipline which are as follows:

> First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty. Second, the judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations.

The Florida Bar v. Pahules, 233 So. 2d. 130, 132 (Fla. 1970) See also, The Florida Bar v. McShirley, 573 So. 2d. 807, 808 (Fla. 1991).

Respondent argues that disbarring him is not fair to society in that the same denies the public the services of a qualified lawyer. Disbarment is fair to society in that it protects society from an unethical attorney. The public has a right to expect that a lawyer is honest. In addition, society has a right to expect a lawyer's representation to be truthful. Further, our system depends on the integrity, honesty and moral soundness of a lawyer. (see The Florida Bar v. Golden, 544 So. 2d. 1003, 1004 (Fla. 1989) (Chief Justice Ehrlich dissent)). Respondent's misconduct and lack of credibility in the instant case and in his prior disciplinary case clearly establishes that Respondent is not ethically or morally qualified to be an attorney in this state.

Respondent argues that disbarment is not fair to him in that it discourages his reformation and rehabilitation. The evidence in this case established that Respondent cannot be rehabilitated due to his lack of ethics and morals. The evidence in this case established that Respondent knowingly and intentionally submitted a false affidavit to a court after the Referee in his prior disciplinary case issued a scathing Report of Referee in July, 1989 wherein he commented on Respondent's total lack of credibility and recommended that Respondent be found guilty of conduct involving dishonesty, fraud, deceit or misrepresentation; conduct that adversely reflected on his fitness to practice law; concealing or knowingly failing to disclose that which he was required by law to

reveal; concealing or knowingly failing to disclose that which he was required by law to reveal; participating in the creating or preservation of false evidence; and suppressing evidence that he was obligated to reveal. (RII, TFB Exhibit #15). If Respondent was capable of rehabilitating himself, certainly he would have sought to lead an exemplary life subsequent to July, 1989. Such was not the case as evidenced by his false affidavit of October, 1989 and his false and incredible testimony during the Final Hearing in the instant case and in his reinstatement case wherein Respondent falsely testified under oath that the Michigan Judgment was satisfied in full. (TRII, p.185).

In O'Malley, 540 So. 2d. at 1162, this court stated "Our system of justice depends for its existence on the truthfulness of its officers. When a lawyer testifies falsely under oath, he defeats the very purpose of legal inquiry. Such misconduct is grounds for disbarment".

Disbarment is the only appropriate discipline for Respondent's serious breach of ethics since anything less would not be fair to the public, the Bench or the Bar.

CONCLUSION

Disbarment is the only appropriate discipline for Respondent's cumulative misconduct in this case in that his misconduct demonstrates his unfitness to be a practicing lawyer in this State.

WHEREFORE, The Florida Bar respectfully requests this court to uphold the Referee's findings of fact, recommendations of guilt, aggravating factors, and recommended discipline and disbar Respondent Edward C. Rood, Jr., from the practice of law. In addition, The Bar requests this Court to require the Respondent to satisfy in full, all judgments stemming from the Alverson v. Rood cases, prior to any reapplication for admission or reinstatement to The Florida Bar. Further, The Bar requests this Court to require Respondent to pay the costs incurred by The Florida Bar in this case.

Respectfully submitted,

Joseph A. Corsmeier
Assistant Staff Counsel
The Florida Bar
Suite C-49
Tampa Airport, Marriott Hotel
Tampa, Florida 33607
(813) 875-9821
Attorney No. 492582

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

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a copy of the foregoing Amended Answer Brief of The Florida Bar has been sent by U.S. Mail, to Donald Smith, Jr., Counsel for the Respondent, Smith & Tozian, P.A., 109 North Brush Street, Suite 150, Tampa, Florida 33602; and 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

BONNIE L. MAHON