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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,  
Complainant,

CASE NO: 78,742

v.

EDWARD C. ROOD,  
Respondent.

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RESPONDENT'S INITIAL BRIEF

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PRELIMINARY STATEMENT

The following abbreviations are used in this brief:

RR	=	Referee Report
T.	=	Transcript of the Referee Trial
TFB Ex.	=	Exhibits at Referee Trial introduced by The Florida Bar
Resp. Ex.	=	Exhibits at Referee Trial introduced by Respondent
RR Ex. A	=	Exhibit A attached to Referee Report

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**STATEMENT OF THE CASE**

This is a disciplinary proceeding conducted pursuant to Rule 3-7.6, Rules Regulating The Florida Bar. The jurisdiction of this Court is pursuant to Article V, Section 15 of the Florida Constitution.

This referee proceeding began when a Complaint was filed with this Court by The Florida Bar on October 10, 1991. The Bar also filed a Complaint against Edward B. Rood, Respondent's father. The cases were consolidated for trial before the Referee.

Prior to the trial, The Florida Bar filed a Motion For Admission of Exhibits on January 8, 1992. The motion requested the Referee to rule that certain documents were admissible as evidence in the trial of this case. The documents included the trial transcript, exhibits, and pre-trial stipulations of a civil non-jury trial held in 1990 and styled Alverson v. Rood, case number GC-G-89-900, Polk County, Florida. These offered documents also included the Amended Final Judgment resulting from the trial of that case, dated August 27, 1990. [TFB Ex. 1 - 4]. The Bar offered these documents in lieu of live testimony, in the interest of judicial economy, and to provide the Referee with a complete record of the underlying procedures because of an identity of facts and issues. [Motion For Admission of Exhibits].

Respondent objected to the admissability of the Polk County trial transcript and the amended judgment on the grounds that these documents were not relevant to the facts or issues to be

determined by this Referee. Respondent further objected that any probative value was substantially outweighed by the danger of unfair prejudice and confusion of the issues and therefore the documents were inadmissible pursuant to Florida Statute Section 90.403. [Edward C. Rood's Response To Motion For Admission of Exhibits].

The Referee entered an Order on Motion For Admission of Exhibits on January 16, 1992 in which he found the documents to be relevant and granted the motion.

On January 21, 1992, the Referee conducted a trial of this case. Only the Respondent and Edward B. Rood testified before the Referee. The only additional evidence presented by the Bar was documentary evidence.

Written closing arguments were filed by The Florida Bar on February 7, 1992 and by Respondent on February 17, 1992. By a memorandum dated April 22, 1992, the Referee advised the parties of his intent to recommend that Respondent was guilty of violating Rules of Professional Conduct. Thereafter, the Referee considered argument of counsel for the parties concerning the appropriate discipline to be recommended.

The Referee entered his Report on July 15, 1992. Respondent then timely filed a Petition For Review. On September 2, 1992 Respondent filed a Motion for Extension of Time to file Initial Brief and that motion was granted by this Court.

### STATEMENT OF FACTS

On September 20, 1987, Respondent executed a deed which conveyed a parcel of real property to his father, Edward B. Rood. That deed was recorded in the public records on October 8, 1987. [TFB Ex. 2.4]. This property had been originally conveyed by Edward B. Rood to Respondent in 1974 as a conditional gift. [T. 186, 187, 217]. The condition attached to the gift was that if Respondent was unable to financially manage the property then it was to be reconveyed to Edward B. Rood. [T. 187]. At the time of the reconveyance, Respondent was unable to maintain the property taxes and there was an impending foreclosure on the property. [T. 226, 228].

On the day following the conveyance, Respondent owned or had an interest in non-exempt assets which included a condominium in Tampa, a lot on Lemon Street in Tampa, a mortgage from Shedrick and a mortgage from Cornett. [T. 236]. Respondent also owned additional assets with his wife which were subject to the claim of creditors. These assets included three automobiles and a boat. [T. 253].

The Referee considered in his findings of fact only the assets owned by Respondent with someone other than his wife and concluded the value to be approximately \$103,000.00. [RR 5]. The actual value of these assets on the date of the conveyance, September 20, 1987, was approximately \$250,000.00. [T. 233 and Resp. Ex. 1]. The automobiles and boats had an additional



undivided value of approximately \$60,000.00. [T. 254].

On November 6, 1986, a Michigan jury returned a verdict in a federal trial against Respondent and another party. The verdict found damages in the amount of \$196,000.00 jointly against the defendants. [TFB Ex. 2.1]. The document reflecting the jury verdict was entitled "Judgment In A Civil Case". The trial judge granted a partial motion for judgment notwithstanding the verdict. The verdict was then appealed by the plaintiffs and defendants and the original judgment was reinstated on January 26, 1989 and subsequently domesticated in the State of Florida. It was recorded in Polk County,, Florida on April 7, 1989. [RR Ex. A and TFB Ex. 3].

On March 28, 1989, the creditors/plaintiffs from the Michigan case filed a civil action against Respondent in Polk County, Florida. The cause of action was a complaint for a creditor's bill and requested that the deed from Respondent to Edward B. Rood be voided so that the creditors could execute pursuant to their judgment which was domesticated after January 26, 1989, but not recorded in Polk County until April 7, 1989.

During the course of the Polk County civil litigation, the plaintiff filed a Motion For Summary Judgment. On October 30, 1989 Respondent's attorney filed an affidavit in opposition to that motion. [TFB Ex. 8]. The affidavit had been prepared by Respondent's attorney and then reviewed and signed by Respondent. [T. 245].

The Polk County case was tried by the judge. The judge

ruled in favor of the plaintiffs and held that the conveyance was void pursuant to Florida Statute Section 726.01. An Amended Judgment was entered on August 27, 1990. [TFB Ex. 10 and RR Ex. A].

The dates set forth above were not at issue in this proceeding. Also, those portions of the Referee Report finding the fact of the reconveyance of the Lakeland property, the conditional nature of the original conveyance to Respondent, the date of the conveyance as September 20, 1987, Respondent's ownership of assets which were non-exempt from creditors, the existence of the Polk County civil cause of action, and the affidavit by Respondent in opposition to Summary Judgment, are not disputed.

However, significant disputes do exist concerning numerous other findings and conclusions by the Referee, which include but are not limited to, the nature of Respondent's non-exempt assets; the valuation on September 20, 1987 of Respondent's non-exempt assets; the consideration for the Lakeland transfer; Respondent's intent on the date of the Lakeland conveyance; and Respondent's knowledge and intent at the time of his affidavit in opposition to Summary Judgment.

### ARGUMENT SUMMARY

The Referee has made findings of fact, findings of aggravation and mitigation, a recommendation of guilt, and a recommendation of discipline. These are based upon the record evidence of this case and of Supreme Court case number 78,413, the reinstatement proceeding of Edward C. Rood. [RR 7].

Several of the Referee's findings of fact are clearly erroneous and are not supported by clear and convincing record evidence. Instead, the factual findings are the result of a misunderstanding of the issues and of unfounded conclusions drawn from the circumstantial evidence.

Included within the evidence considered by the Referee where the trial transcripts of a civil action in Polk County, styled Alverson v. Rood. Additionally, the Referee considered the Amended Final Judgment of the trial judge resulting from that prior civil case. [RR 6]. This documentation was received in evidence over the objections of Respondent as to relevancy, because the potential prejudice to the outcome of this proceeding outweighed the probative value, and because the documentation created confusion as to the issues to be determined by the Referee.

The direct testimony and relevant documentation admitted at the Referee trial, other than that resulting from the prior civil case, does not clearly and convincingly prove the facts as found by the Referee. Therefore, the findings result in part, if not

in whole, from a consideration of the prior civil judgment. Because that civil action involved different parties, different legal issues, different evidence, and a different burden of proof, it cannot, by law or logic, be a relevant basis for any decision in a disciplinary proceeding. Furthermore, because the Bar offered that documentation as evidence of its material allegations and because the Referee relied upon it, such inadmissible documentation cannot be viewed as harmless.

Ironically, certain findings of fact by the Referee are contrary to the parallel findings of fact by the trial judge in the civil case. Despite this fact, the conclusions of law reached by the two trial judges are effectively the same. Additionally, the Referee's findings of fact are contrary to the essential factual allegations of the Bar's Complaint. Still, the Referee's legal conclusions mirrored those by the civil judge and those alleged by the Bar. This consistency of the Referee's legal conclusions, based upon substantial inconsistencies in the findings of fact, indicates the confusion which existed at the trial of this case and the resulting error.

Additionally, the Referee failed to consider specific mitigating factors which were proven by clear and convincing evidence both in the trial of this proceeding and in the reinstatement case of Respondent. On the other hand, the Referee found numerous factors of aggravation which are erroneous and not supported by record evidence.

Accordingly, the entire proceeding has been substantially

prejudiced by the introduction of otherwise irrelevant and inadmissible documents. This documentation has resulted in confusion of the issues, erroneous findings of fact and erroneous legal conclusions. Therefore, the findings of fact and the recommendations of guilt should be rejected.

Furthermore, the recommended discipline should also be rejected. Any discipline which may be ordered should take into consideration the mitigation and the absence of proven aggravation. Additionally, the result of these proceedings against Respondent has been to cause his continued suspension for in excess of two years. Accordingly, the recommended discipline is excessive and serves no purpose other than punishment.

**THE REFEREE'S FINDINGS OF FACT AND RECOMMENDATIONS OF GUILT ARE CLEARLY ERRONEOUS AND UNSUPPORTED BY CLEAR AND CONVINCING, COMPETENT EVIDENCE.**

The Referee has filed a Report which sets forth specific findings of fact upon which he relies in recommending that Respondent be found guilty of violating Rules Regulating The Florida Bar. Additionally, in view of his findings and legal conclusions, the Referee has recommended the ultimate disciplinary sanction of disbarment.

Each of the factual determinations by the Referee is essential and necessary to both the recommendations of guilt and the recommendation of discipline. However, several findings should not be accepted by this Court because they are clearly erroneous and have not been proven by clear and convincing evidence. Additionally, these findings should be rejected because they are inconsistent with the essential factual allegations of the Bar's complaint which it was required to prove in its capacity as Complainant. The Florida Bar v. Scott, 566 So.2d 765 (Fla. 1990). Furthermore, several of the essential facts found by the Referee are in direct conflict with the documentary evidence offered by the Bar and considered by the Referee. These errors and conflicts require not only a rejection of specific findings but also require this Court to reject the Referee's recommendations of guilt and discipline.

First, in reviewing the Referee's Report, this Court should consider whether the findings are supported by clear and

convincing record evidence. If not, the findings should be rejected. [Florida Standards For Imposing Lawyer Sanctions Section 1.3 and The Florida Bar v. Rayman, 238 So.2d 594 (Fla. 1970)]. A review of the record evidence relevant to the contested facts shows a lack of evidence for several findings.

First, the Referee concluded that "At the time of the conveyance of the Lakeland property, E. C. Rood did not have sufficient non-exempt assets to satisfy the Michigan judgment". [RR 5]. This finding is critical to all other determinations and recommendations of the Referee. However, the record evidence proves that in fact Respondent did own non-exempt assets, on the date of the conveyance, sufficient to satisfy the Michigan judgment.

The date of the conveyance of the Lakeland property from Respondent to his father, Edward B. Rood, was September 20, 1987. [TFB Ex. 2.4]. As of that date, Respondent owned the following non-exempt assets: the Shedrick mortgage; the Cornett mortgage; an interest in a condominium; and a one-half interest in property located on Lemon Street in Tampa. [RR 2 and T. 236]. In concluding that the value of these assets was insufficient to satisfy the judgment, the Referee relied upon two values which were inconsistent with the evidence. Specifically, the Referee found the value of the condominium to be only \$3,000.00. This valuation was based upon the price paid at a forced creditors sale subsequent to the date of conveyance. [T. 259]. This valuation has no relevance to either the market value of the

asset or to its value as of September 20, 1987.

More importantly, the valuation placed on the Lemon Street property by the Referee was only \$62,001.00. [RR 5]. But, this was only the amount paid at a public auction as a result of Respondent's creditor's levy. [T. 274]. Therefore, this valuation has no relationship to the issue of the property value as of September 20, 1987. Furthermore, the valuation at a forced creditor's sale is not evidence of market value or, more importantly, of Respondent's understanding of its value.

Conversely, the record evidence clearly proves that on September 20, 1987, Respondent's interest in Lemon Street had a value in excess of \$225,000.00. A 1985 appraisal proved the value of the entire parcel to be \$450,000.00. [Resp. Ex. 1]. Also, the uncontroverted testimony proved that no change had occurred between the appraisal date and the date of the questioned conveyance. [T. 239, 240]. Therefore, the competent and expert evidence of the appraisal supports a finding that Respondent's interest in that asset alone, on the date of the conveyance, was worth in excess of \$200,000.00.

Additionally, the testimony of Edward B. Rood corroborated this valuation. He testified that an offer of \$440,000.00 per acre had been made for his adjacent Lemon Street property in late 1987 or early 1988. He also testified that this offer was rejected as insufficient. [T. 268 -272]. No evidence was introduced contrary to this testimony. Therefore, the Referee's finding as to the value of the Lemon Street property, on



September 20, 1987, is clearly erroneous.

Additionally, the Referee failed to consider that Respondent owned three automobiles and a boat which were also not protected from creditor's claims. The fair market value of these assets on the date of the questioned conveyance was approximately \$60,000.00. [T. 254].

In view of the true value of the Lemon Street property on the date of the conveyance, and with the additional valuation of the automobiles and boat, the record evidence proves that Respondent owned non-exempt assets worth in excess of \$255,000.00. The Michigan verdict/judgment was for \$196,000.00 and was jointly against Respondent and his co-defendant. [RR 5 and T. 2.1]. Therefore, Respondent's assets were in fact sufficient on September 20, 1987 to satisfy the total principle judgment amount, even without contribution by the co-debtor.

The Referee also found there to be "[A] lack of adequate consideration for [the] transfer". [RR 6]. This too is unsupported by the record evidence. The Florida Bar even concedes in its written closing argument that the consideration paid for the Lakeland property by Edward B. Rood "ranged from a minimum of \$164,000.00 to \$709,000.00". This range of substantial consideration is inconsistent with the Referee's finding.

Additionally, the evidence proves that the actual consideration for the conveyance was \$709,250.00. [TFB Ex. 1, pgs. 121 - 126 and T. 187 - 189]. Although the Referee

accurately found that no actual money was paid by Edward B. Rood to Respondent contemporaneously with this transfer, this factor is not determinative of consideration.

Moreover, no evidence or authority was offered to establish what consideration would have been "adequate". However, in considering factors to void a conveyance, this Court has recognized the lack of consideration as relevant. Cleveland Trust Company v. Foster, 93 So.2d 112 (Fla. 1957). But, the adequacy or inadequacy of consideration has not been recognized as relevant. Conversely, the clear record evidence proves that under any interpretation of the facts, substantial consideration existed for the transfer. This conclusion then is also an error.

In addition to the lack of clear and convincing evidence, the Referee's essential findings are in conflict with the Bar's allegations and arguments. In its Complaint, The Florida Bar alleges that when Respondent conveyed the Lakeland property he disposed of his "Only substantive and/or non-exempt asset". This was not proven and is clearly in conflict with the Referee's findings. It is also clearly contrary to the record evidence indicating Respondent's other non-exempt assets to be worth approximately \$255,000.00. The Bar sought no amendment of its pleadings to conform with the evidence. Therefore, as the pleadings were finalized, an essential allegation was not proven.

Also in conflict with the allegations of the Bar and with the Referee's findings, is the finding contained in the civil judgment. The civil judge found Respondent to be "insolvent" at

the time of the transfer because his only remaining assets were held jointly with his wife. [TFB Ex. 10 and RR Ex. A]. This conclusion is contrary to all the evidence, yet the Referee concluded that all findings of the civil court were proven by clear and convincing evidence. [RR 6].

Most importantly, the Referee found that Respondent's conveyance of the Lakeland property was the result of a course of fraudulent conduct. Several factors are enumerated by the Referee which he considered as circumstantial evidence of Respondent's intent as it existed on September 20, 1987. [RR 6]. He considered the close relationship between Respondent (the judgment debtor) and his father (the transferee) and the pendency of litigation. He also considered what he determined to be a lack of adequate consideration for the transfer and Respondent's lack of non-exempt assets after the transfer.

It should be noted that these factors, while arguably relevant to a civil cause of action pursuant to Florida Statute 726.01, are not determinative of the necessary intent at issue in this case. Rule 4-8.4(c) provides that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation. The clear and unambiguous language of this rule requires proof that Respondent's intent, on the date of the conveyance, was to defraud his creditors. Intent, for disciplinary matters, is defined as the conscious objective or purpose to accomplish a particular result. [Florida Standards For Imposing Lawyer Sanctions: Black Letter Rules].

The Florida Bar recognized its burden of proving intent to defraud as shown by its argument to the Referee concerning the relevancy of its Exhibit 13. There the Bar stated "[N]eedless to say, the Bar has got to prove the intent of Mr. Rood with respect to that judgment and whether or not he intended to defraud these creditors." [T. 30].

Therefore, regardless of the sufficiency of the record evidence to support the Referee's factual findings, the legal conclusion that Respondent engaged in a fraudulent course of conduct, as proscribed by Rule 4-8.4(c), was not proven by clear evidence.

The erroneous consideration of the factors enumerated by the Referee result from the Bar's insistence that Florida Statute Section 726.01, and the case law interpreting that statute, equate to evidence of the intentional conduct proscribed by Bar disciplinary rules. This position is logically and legally meritless. In fact, no legal authority was cited by the Bar equating the civil remedy of voiding a conveyance with the intent to defraud or other prohibited conduct. In fact, the remedy provided by this statute applies regardless of the actual motives of the debtor, when the effect of the conveyance is to delay or hinder a creditor's collection efforts. In Re Steel, 79 B.R. 503 (M.D. Fla. 1987). Therefore, proof of factors relevant to Florida Statute Section 726.01 are not, in any way, proof of dishonest or fraudulent conduct.

Finally, it should be noted that both the prior civil trial

and the Referee proceeding failed to include any evidence to the effect that the conveyance of September 20, 1987 resulted in any delay or hinderance of collection efforts. The record is clear, on the other hand, that Dr. Alverson had no legally enforceable Florida judgment until either January 26, 1989 or April 7, 1989. [TFB Ex. 10 and T. 199].

Conversely, Respondent's intent at the time of the conveyance, and his actual purpose for the conveyance was clearly proven by the uncontroverted testimony. Respondent testified 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 upon his inability to continue managing the property in view of unpaid taxes and impending foreclosure. [T. 225 - 227]. In fact, neither Respondent nor Edward B. Rood even considered the Michigan Alverson v. Rood verdict as relevant to the reconveyance. [T. 213, 214]. In September of 1987, Respondent had the understanding that he should not worry because the Michigan case would be won on appeal or the insurance company would settle with the defendants. [T. 214].

This Court has consistently held that circumstantial evidence must be of sufficient quality and quantity to eliminate other reasonable inferences which are just as consistent with the evidence. [See: Kendle v. Viera, 321 So.2d 572 (Fla. 2d DCA 1975) and Vessel v. State, 487 So.2d 1134 (3d DCA 1986)]. Here, the circumstantial evidence considered by the Referee is just as consistent with a transfer pursuant to an impending foreclosure

as it is with a transfer to avoid this creditor. Therefore, this legal conclusion should be rejected as it is not supported by the circumstantial evidence.

Therefore, within the record evidence presented by The Florida Bar, there are material inconsistencies. This is significant because it indicates the uncertainty and confusion of the Bar's allegations and of the issues to be determined by the Referee. Now, in retrospect, the confusion created and the prejudice resulting from the introduction of The Florida Bar's exhibits 1 and 4 can clearly be identified.

In his report, the Referee quotes paragraphs 4, 6 and 8 as contained in the affidavit filed by Respondent in the Polk County Alverson v. Rood case. Paragraphs 4 and 6 contain Respondent's statements concerning his valuation of his non-exempt assets at the time of the Lakeland conveyance. Paragraph 8 states that Respondent "did not inform Edward B. Rood of the entry of the judgment at the time of the conveyance of the subject property . . .".

No allegation in the Complaint alleged any impropriety or inaccuracy with paragraphs 4 and 6 of the affidavit. However, the Bar injected these additional allegations into the trial proceedings without notice to Respondent. To allow the admissibility of such allegations which are relevant to no facts set forth in the Complaint, is fundamentally unfair to Respondent and deprives him of his right to be noticed of the particular acts for which discipline is sought and his right to due process.

[Rule 3-7.6(g), Rules of Discipline and Article I, Section 9, Florida Constitution].

In addition to this procedural violation, the findings of the Referee relevant to these two paragraphs should also be rejected because they are clearly erroneous and lacking in evidentiary support. The Florida Bar v. Scott, 566 So.2d 765 (Fla. 1990). As has been previously discussed, the record contains proof of the significant value of Respondent's non-exempt assets on September 20, 1987. Clearly, under no interpretation of the evidence, has it been proven that Respondent knowingly misstated that his assets were sufficient to satisfy the judgment on September 20, 1987. The circumstantial evidence is in fact consistent with Respondent's good faith belief that his assets were of sufficient value to satisfy the judgment. Therefore, a conclusion that paragraphs 4 and 6 contain false statements is clearly error.

Paragraph 8 was alleged by the Bar and was properly at issue. The Bar however failed to prove by clear and convincing evidence that the content of that statement was known to be false, as required by Rules 4-3.3(a)(1) and 4-3.3(a)(4). It is suggested that this error results from the confusion created by the Bar's case. This confusion began with the Complaint allegation that the affidavit stated "He had not informed his father of the Judgment . . . and that his father did not become aware of the existence of the Michigan Judgment until some time substantially after the conveyance".

Of course, that allegation was a misstatement of fact. The affidavit stated that Respondent did not inform Edward B. Rood of the entry of judgment at the time of the conveyance and that it was not until sometime substantially after the conveyance that the existence of a judgment was even discussed with Edward B. Rood. [TFB Ex. 8]. The Bar confuses the issue of entry of the judgment with knowledge of the verdict. It also confuses the issue of when Edward B. Rood became aware of the judgment with the different issue of when he and his son discussed it.

It is accurate that Respondent had advised his father of the jury's verdict prior to the conveyance. [T. 144]. So, if the affidavit had stated that Respondent had not informed Edward B. Rood that a jury verdict had occurred, the evidence may support the finding. However, Respondent testified that on September 20, 1987 he did not know that a judgment had been entered. [T. 215]. He also testified that it was sometime after the conveyance that he discussed the judgment with his father, Edward B. Rood. [T. 248]. The testimony of Edward B. Rood confirmed the accuracy and truthfulness of these facts. He testified that he learned of a judgment being entered in 1988. [T. 144 - 147]. Therefore, Respondent's affidavit was, and is today, correct and truthful.

Finally, the Referee's recommendation that Respondent violated Rule 4-8.4(b) is clearly erroneous. No criminal statute was alleged as having been violated. No criminal conviction occurred nor was Respondent even criminally charged! No evidence of a criminal intent was introduced! There is no evidence of



criminal conduct of any description and this recommendation should be rejected as clearly lacking any basis.

Accordingly, because of the lack of clear evidence proving the allegations by the Bar and because of the conflicting and inconsistent factual findings, the Referee's findings of fact should be rejected. As a result of the erroneous findings, the recommended violations are also improper and should be rejected by this Court.

THE REFEREE'S RECOMMENDATION OF DISCIPLINE IS EXCESSIVE AND UNJUSTIFIED BASED UPON THE ERRONEOUS FINDINGS OF FACT; THE LACK OF AGGRAVATION; THE EXISTENCE OF MITIGATION AND THE PURPOSES TO BE SERVED BY DISCIPLINE.

The Referee has recommended that Respondent be disbarred. As has been discussed, this recommendation is based upon findings of fact which are unsupported by the evidence and recommendations of guilt which are erroneous. However, should this Court determine that discipline is appropriate, the Referee's recommendation should be rejected and the following facts should be considered.

The purpose of a proceeding such as this is not to punish a respondent. DeBoch v. State, 512 So.2d 164 (Fla. 1987) and The Florida Bar v. Thompson, 271 So.2d 758 (Fla. 1972). Instead, disciplinary proceedings are intended to be fair to the public and to the accused attorney. The Florida Bar v. Pahules, 233 So.2d 130 (Fla. 1970) and The Florida Bar v. Thompson, 271 So.2d 758 (Fla. 1972). To be fair to the public, the discipline should serve to protect it from unethical conduct while not denying it the services of a qualified lawyer. (Pahules, id.). In being fair to the respondent the discipline should deter similar conduct by others but also encourage rehabilitation by the respondent. (Pahules, id.).

Here, the recommended discipline is neither fair to the public nor Respondent. It clearly denies the public the services of Respondent, who is a qualified attorney as he is board certified by The Florida Bar and is certified by the Association

of Trial Lawyers of America. [T. 211 and See: The Florida Bar v. Edward C. Rood, 569 So.2d 750 (Fla. 1990) (Justice McDonald dissent) and The Florida Bar v. Edward C. Rood, Supreme Court Case 78,413 - T. 151]. The discipline is also unfair to Respondent because it discourages reformation and rehabilitation by removing Respondent from the roles of membership in the Bar despite what now equates to a continuing suspension in excess of two (2) years. [Rood, id.].

The discipline of disbarment is the extreme measure and it should never be imposed when any punishment (discipline) less severe will accomplish the desired end. The Florida Bar v. Murrell, 74 So.2d 221 (Fla. 1954). Here, under any view of the circumstances of this case, the conduct does not require disbarment and a less severe discipline will serve the desired end.

The record fails to support the conclusion that Respondent engaged in any pattern of conduct. In fact, the circumstances at issue occurred in September, 1987 and October, 1989 and there is no logical connection between the two distinct events of the conveyance and Respondent's affidavit which creates a pattern.

Likewise, the finding of a dishonest motive is contrary to the direct evidence and unsupported by the circumstantial evidence. Respondent testified, without contest, that his motivating purpose for the conveyance was to avoid imminent foreclosure on the property and to respect the obligation owed his father. [T. 226]. He also testified that had he desired to

be devious, he could have allowed the bank to take the property and his father could have purchased it at foreclosure sale. [T. 244]. But, he never considered being devious and was doing everything to preserve the property in his name. [T. 244, 234]. This clearly proves a complete lack of a dishonest, selfish or fraudulent motive.

Additionally, the evidence relevant to the affidavit is also inconsistent with any improper motive. Respondent testified that at no time was the affidavit intended to mislead the judge or any other person. [T. 246]. The affidavit paragraph alleged by the Bar, paragraph 8, was never even in issue before the civil court and therefore no motive for making a false statement existed. [T. 246].

Therefore, as to both circumstances at issue here, no dishonest or selfish motive has been proven. Therefore, disbarment is not appropriate.

The Referee also found as aggravation that Respondent was experienced in the practice of law. This factor, although factually correct, is inapplicable. Nothing here resulted from or was connected to Respondent's practice of law or actions as an attorney. Both alleged acts involved Respondent only as a non-lawyer property owner and party to a legal action. Conversely, the fact that no attorney/client relationship was involved and that no client suffered damages or potential injury serves to mitigate against the need for severe discipline.

The conclusion that Respondent is indifferent to making

restitution is also misplaced. To the contrary, Respondent clearly attempted to cooperate with the collection efforts of the creditor by disclosing his assets and by offering to tender all his non-exempt assets. [T. 248]. The creditor however refused these offers and "wanted blood" from Respondent. [T. 249]. More importantly, the creditor acquired substantial assets from Respondent. However, no evidence was offered to explain why the creditor failed to perfect its ultimate ownership of the Lakeland property after its successful litigation. No evidence was offered establishing why the creditor failed to bid its judgment value at the sale of the Lemon Street property and allowed its purchase at below its real value.

Importantly, no evidence exist to prove that Respondent, now has, or has had ,the financial means to make restitution. To the contrary, the trial evidence proves that all of Respondent's assets were sold to pay debts or were acquired by Respondent's creditors. These facts are totally inconsistent with a conclusion that Respondent has an indifference to restitution, particularly in view of the refusal of the creditor to provide Respondent with a satisfaction of the judgment after offering all his assets! [T. 248, 249].

Equally significant is the fact that no legal authority exist requiring this Court to impose the discipline recommended by this Referee. This proceeding is a matter of this Court's original jurisdiction and no presumption of correctness attaches to a Referee's recommendations of guilt or discipline.

The facts and circumstances of this case, as proven by clear and convincing evidence, do not justify any discipline because the necessary element of intentional misconduct is absent. Clearly, the circumstantial evidence does not prove that on the date of the conveyance Respondent intended to defraud any creditors. The subsequent acts relied upon by the Bar and found by the Referee, cannot logically prove such an intent. Furthermore, even the facts as found by the Referee do not require the severe discipline recommended.

It should also be considered that no known holding of this Court has imposed the discipline of disbarment under circumstances where an attorney had also been denied reinstatement and effectively prohibited from practicing law. This factor significantly mitigates against the need for an order of disbarment. Respondent has now effectively been suspended for in excess of two (2) years and he continues to be unable to practice law during the pendency of this case. This results from the initiation of the Referee proceeding by the Bar subsequent to Respondent's Petition For Reinstatement and the resulting Referee decisions in both cases on July 15, 1992. This mitigating factor, plus consideration of Respondent's qualifications as an attorney, and his contributions to society and family require the imposition of discipline significantly less harsh than recommended.

Accordingly, the Referee's recommendation of discipline should be rejected as serving no purpose other than to punish

Respondent. This Court should only consider the imposition of discipline after consideration of the lack of aggravation, the mitigation, the need to be fair to Respondent as well as the public, and the substantial sanction which has resulted from the denial of Respondent's Petition For Reinstatement.

### CONCLUSION

A recommendation of guilt has been made by the Referee against Respondent based upon circumstantial evidence only. The circumstances proved by the competent record evidence fails to prove clearly and convincingly that Respondent intended to defraud his creditors by the land conveyance of September 20, 1987. The circumstances also fail to prove that Respondent submitted an affidavit to a court which was both false and intended to mislead. Moreover, the circumstances proven by the evidence do not exclude the reasonable conclusion that Respondent's acts occurred for legitimate purposes and in good faith. Therefore, the necessary intent has not been proven.

Only as a result of the Referee considering other factors, having no evidentiary value to the issues of Respondent's intent as of September 20, 1987, did recommendations of guilt occur. The confusion of issues and the prejudice to Respondent which resulted from the admission of a prior civil transcript and judgment cannot be ignored.

Based upon the procedural circumstances of Respondent's cases, he has been denied his ability to practice law. He has now suffered an additional year of suspension which is unjustified.

Based upon the totality of the circumstances of these proceedings and in view of the discipline which has effectively resulted, the recommended legal conclusions and discipline should be rejected.



C E R T I F I C A T E O F S E R V I C E

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail delivery this 30~~th~~ day of October, 1992, to: Bonnie L. Mahon, Esquire, Assistant Staff Counsel, The Florida Bar, Tampa Airport, Marriott Hotel, Suite C-49, Tampa, Florida 33607.

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