IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant, CASE NO: 78,742

v.

EDWARD C. ROOD,

Respondent.

RESPONDENT'S REPLY BRIEF

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PRELIMINARY STATEMENT

The following abbreviations are used in this brief:

RR	=	Referee Report
T.	=	Transcript of Referee Trial
TFB Ex.	=	Exhibits at Referee Trial introduced by The Florida Bar
Resp. Ex.	=	Exhibits at Referee Trial introduced by Respondent
Ans. Br.	=	The Florida Bar's Answer Brief

REPLY TO THE FLORIDA BAR'S STATEMENT OF FACTS

In its statement of the facts and the case, the Bar refers to matters resulting from conclusions by the Referee which are contested issues. Furthermore, the acts and conduct of Edward B. Rood, many of which occurred subsequent to the relevant conduct of Respondent, are irrelevant to this review.

Accordingly, Respondent submits that the statement of facts set forth in his initial brief accurately and completely describes the circumstances before this Court for review.

ARGUMENT SUMMARY

This disciplinary proceeding concerns the review of a recommendation of the most severe discipline - disbarment. This discipline is excessive because the competent, relevant evidence does not clearly and convincingly prove the factual findings upon which the recommendations of guilt and discipline necessarily depend. The Bar attempts to support the findings and recommendations by relying upon events and facts which occurred subsequent to the dates at issue and which were the acts of Edward B. Rood - not Respondent.

The Bar also presents arguments which are contrary to its own pleading allegations and to the Referee's findings which it requests this Court to approve.

The cases cited as supportive of the recommended discipline are factually distinguishable and are not controlling. More importantly, the Bar sets forth factors which it contends require the recommended discipline, however, several such factors are merely duplications of others. Other factors, such as the cumulative nature of the events, are lacking in evidentiary support or were not found by the Referee.

Accordingly, the findings of fact, the recommendations of guilt and the recommended discipline should be rejected.

RESPONDENT'S REPLY TO THE FLORIDA BAR'S ARGUMENT NUMBER 1.

In it's answer brief, The Florida Bar argues that the record evidence clearly and convincingly supports the findings of fact and recommendations of guilt entered by the Referee. The findings of the Referee which are primarily at issue concerning the Lakeland property transfer include the following: "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" and "There was a lack of adequate consideration for transfer". [RR 5, 6].

In support of the first of these findings, the Bar cites the uncontested fact that Respondent owned an interest in several assets on the date of the transfer, September 20, 1987. [RR 2]. Then, the Bar cites certain evidence as proof of the insufficient value of these assets to satisfy the judgment. However, neither the Bar's evidence nor its argument support the conclusion that Respondent's assets were of insufficient value to satisfy the judgment.

The evidence introduced by the Bar was offered ostensibly to establish the value of Respondent's assets on the date of the transfer because this factor, the Bar argues, is circumstantial evidence of Respondent's intent on that date. The evidence however is relevant only to values subsequent to the transfer date. Specifically, the Bar's evidence indicated the value of the Shedrick mortgage ten (10) days after the transfer, [TFB Ex. 13];

the value of the Cornett mortgage on August 1, 1988, almost one year after the conveyance, [TFB Ex. 14]; and the value of the Lemon Street property in 1989. [T. 83, 84]. Therefore, the Referee's finding that Respondent had insufficient assets with which to satisfy the Michigan judgment at the time of the conveyance, is not supported by the evidence.

Conversely, the relevant record evidence clearly proves that on the date of the conveyance Respondent's assets had a fair market value significantly more than the judgment amount. As an example, Respondent's interest in the Lemon Street property alone had a fair market value of $225,000.00. [T. 233]. This evidence includes an uncontroverted appraisal determining the property's fair market value to be $450,000.00. [Resp. Ex. 1].

No authority has been cited by the Bar supporting its apparent position that the foreclosure sale price was the appropriate valuation to be considered by the Referee. The fact that a foreclosure action resulted in a forced sale price of only $62,001.00 in 1989 is not evidence of the property's market value on September 20, 1987 or of its value on any other date. Additionally, no evidence indicated that Respondent considered, or should have considered, the quick sale price in his determination of the reasonable value of his assets. Accordingly, both the record evidence and logic dictate a rejection of the finding that Respondent's assets were of insufficient value and a rejection of all recommendations of guilt based thereon.

Interestingly, the Bar's rationale for this Court to now

affirm the finding that there was inadequate consideration is that "There was no consideration for the transfer of the Lakeland property". [Ans. Br. 19]. This argument is of course, contrary to the finding of fact which the Bar seeks to have accepted by this Court to the effect that consideration existed for the transfer in the amount of $103,000.00. [RR 5].

This position is also contrary to the allegations of the Complaint wherein it was alleged that "de minimus" consideration existed for the transfer. Furthermore, this argument is inconsistent with all record evidence which proved that consideration did exist in the amount of $709,250.00, [TFB Ex. 1, pg. 124 - 126] or $165,387.24, [RR Ex. A - paragraphs 16, 17]. Therefore, under any view of the evidence, substantial consideration supported this transfer and the Bar's position is without merit.

The Bar also argues that the Referee's admission into evidence of the prior Polk County order was legally correct and did not confuse the issues at the trial of this case. The Bar states that the facts of the disciplinary proceeding were "virtually identical" to the civil case and that the issues were "substantially similar". [Ans. Br. 13]. Therefore, according to the Bar, the admissability of the prior decision was appropriate as it saved judicial time and provided a complete record of the underlying procedure. [Motion For Admission of Exhibits].

The law of this state is settled that the admission of a prior judicial decree in a subsequent proceeding is appropriate only when

the test of res adjudicata has been passed. Seaboard Coast Line R.R. v. Industrial Contracting Co., 260 So.2d 860 (Fla. 4th DCA 1972). In other words, only in circumstances where the proceedings involve the same parties, are predicated upon the same causes of action, and where the burden of proof in the two proceedings is the same, can the subsequent court consider the prior ruling. This general rule recognizes that only when the identical parties have an opportunity to fully litigate the exact issues, based upon the same burden of proof, does judicial economy and the preference to end litigation outweigh a parties right to a trial de novo.

Clearly the recognized principals of res adjudicata and collateral estoppel are not applicable to this proceeding. There is no identity of the parties between this proceeding and the prior civil action. There is also lacking the necessary identity of legal issues. Additionally, there has been no showing that the burden of proof necessary to establish the facts in this proceeding is equivalent to the burden required in the former civil action. The prior civil judgment has no independent relevance. Therefore it was legally inadmissable and its admission has resulted in confusion of the issues and erroneous findings.

The Bar also argues that Respondent's alleged fraudulent intent in transferring the property can be inferred from the conduct of Edward B. Rood, Sr. This argument is a non sequitor. The acts of Respondent's father, which occurred subsequent to the conveyance, have no probative value as to Respondent's intent. The record is devoid of any evidence that Respondent directed,

controlled or even knew of Rood, Sr.'s actions. Therefore, the Bar's argument does not support the conclusion of the Referee.

The Referee has recommended that Respondent be found guilty of knowingly making a false statement of material fact to a tribunal in violation of Rule 4-3.3(a)(1), and of committing a criminal act that reflects adversely on his honesty, trustworthiness or fitness as a lawyer in violation of Rule 4-8.4(b). The Bar suggests that these recommendations should be accepted based upon Respondent's affidavit which he signed in October, 1989.

Paragraphs 4 and 6 of Respondent's affidavit stated that he owned an interest in assets with values sufficient to satisfy the Michigan judgment. The Bar argues that this statement was false, and was known by Respondent to be false. Therefore, it is argued, the crime of perjury was committed and Rule 4-3.3(a)(1) violated.

No evidence has been cited nor does the record reflect evidence tending to prove Respondent intended to deceive or misrepresent any material fact to the Court. Furthermore, there is no evidence proving that Respondent knew that his assets were not of sufficient value with which to satisfy the judgment. Moreover, as has been previously discussed herein, there is insufficient record evidence to prove that Respondent's statements were in fact false. To the contrary, the information known to Respondent as of September 20, 1987, reasonably supported his belief that his assets had a fair market value in excess of the judgment amount. Therefore, the affidavit statements in paragraphs 4 and 6 do not support the recommendations of guilt.

In paragraph 8 of Respondent's affidavit, he stated that he "did not inform Edward B. Rood of the entry of a judgment at the time of the conveyance . . .". In support of the Referee's recommendation, the Bar argues that this statement was "obviously" made to establish that Rood, Sr. was a bona fide purchaser. [Ans. Br. 27]. The Bar suggests this to be "obvious", but no record evidence exist to prove such a conclusion. Respondent's statement actually reflects the uncontroverted fact that he did not inform his father of the judgment when he re-conveyed the property. The Bar's argument, and the Referee's conclusions, necessarily require an interpretation of the affidavit to have stated that Rood, Sr. did not know of the judgment. However, such a reading conflicts with the clear meaning of the unambiguous language set forth in Respondent's affidavit. Accordingly, the finding that the affidavit language in paragraph 8 was false is incorrect.

Furthermore, it is without question that The Florida Bar never proved that Respondent violated Florida Statute Section 837.02, Perjury In Official Proceeding. More importantly, the Referee failed to find that any criminal statute was violated. It is uncontroverted however, that Respondent was not criminally convicted or charged by any law enforcement agency of such a crime. Absent such an allegation and proof, this recommendation is erroneous.

The conflicts which exist between the allegations by The Florida Bar in its complaint, the evidence introduced to the Referee, the findings in the prior civil case, the findings of the

Referee, and the arguments now propounded by the Bar, clearly show that the findings of fact resulted from a confusion of the issues and a misunderstanding of the evidence. In view of such error, the Referee's findings and recommendations should be rejected.

RESPONDENT'S REPLY TO THE FLORIDA BAR'S ARGUMENT NUMBER 2.

The Florida Bar argues to this Court that disbarment is the appropriate discipline to be imposed against Respondent in this case. In support of this discipline, the Bar relies upon several factors which include: the commission of the crime of perjury; that Respondent knowingly permitted his father to submit a false affidavit; that Respondent engaged in a scheme or pattern of conduct; that the alleged conduct in this case "relates back" to Respondent's prior disciplinary case; the existence of a prior disciplinary record; and the cumulative nature of Respondent's conduct. An analysis of The Florida Bar's arguments for enhanced discipline clearly evidence the inappropriateness of disbarment and the necessity for this Court to impose a less severe discipline.

First, the Bar's reliance upon the factor that a crime was committed is misplaced because it is unsupported by the record and also because it is an inappropriate disciplinary consideration. As has been previously discussed herein, the recommendation by the Referee that Respondent violated Rule 4-3.3(a)(1) is unsupported by the record evidence or the findings. No evidence has been introduced proving or tending to prove that any statement by Respondent was false and was made with the knowledge of its falsity by Respondent. Absent clear and convincing evidence of both the falsity of statements and Respondent's knowledge thereof, the crime of perjury, as set forth in Florida Statute Section 837.02, has not been established. More importantly, the Bar assumes that the

Referee determined that this statute was violated. Clearly, the Referee Report does not indicate the violation of this or any other criminal statute.

Secondly, the Bar relies upon another factor which, even if proven, cannot serve as grounds for aggravating discipline. The Referee determined in his findings of fact that Respondent engaged in "A course of fraudulent conduct with respect to the conveyance of the Lakeland property". [RR 5]. Based upon this determination, which remains a contested issue, the Referee made recommendations that Respondent violated specific rules. The Referee then also cited this factor as an aggravating circumstance in recommending discipline. The Bar now attempts to bolster this recommendation by asserting Respondent's acts which occurred "Before his creditors could register and seek to enforce their Michigan Judgment in the State of Florida". [Ans. Br. 36].

No allegations were made and no findings have resulted concerning Respondent's actions subsequent to the conveyance of September 20, 1987. For The Florida Bar to now assert that subsequent acts constitute a pattern of misconduct is totally inappropriate.

Additionally, the Bar suggests that a pattern of conduct is established because the conduct at issue in this case "Relates back to the Respondent's misconduct in the case of The Florida Bar vs. Edward C. Rood, 569 So.2d 750 (Fla. 1990). [Ans. Br. 36]. The suggestion that a pattern has been established based upon a prior disciplinary proceeding is fundamentally unfair and is illogical.

No record evidence and no finding exist establishing any connection between the events resulting in the prior discipline of Respondent and the case at issue. This argument therefore is also meritless.

Moreover, a fact which is an essential element or inherent component of alleged misconduct is not appropriately also considered as an aggravating circumstance to enhance discipline. This Court has reached a similar conclusion when considering criminal sentencing sanctions. In State vs. Mischler, 488 So.2d 523 (Fla. 1986), this Court stated that "A court cannot use an inherent component of the crime in question to justify departure.". This rule, which is grounded upon issues of due process, also applies to the imposition of discipline. Clearly, it is fundamentally unfair for an inherent component of the allegations against Respondent to be used to enhance discipline. Therefore, the recommendation of guilt for a criminal act and the finding of a pattern of conduct should not be accepted as both inherent components necessary to recommendations of guilt and also approved as aggravating circumstances.

The Bar also attempts to enhance discipline by suggesting that Respondent engaged in a scheme of conduct involving his father, Edward B. Rood. Only in the Bar's answer brief has it been suggested that Respondent is in any way responsible for any actions of his father. Only in the answer brief is it suggested that any relevance exists between Rood, Sr.'s activities subsequent to the conveyance of September 20, 1987 and the appropriate discipline of Respondent. The Referee made no determinations that Respondent was

responsible for or knowingly caused any acts of Rood, Sr. Therefore, no such actions can logically serve to support the Bar's argument for disbarment.

It is also suggested that the recommended discipline should be ordered by this Court because Respondent has a prior disciplinary record which indicates cumulative misconduct. It is uncontested that Respondent has a prior disciplinary record. It is also undeniable that the facts giving rise to that prior disciplinary case began as long ago as August, 1980. The Florida Bar v. Edward C. Rood, 569 So.2d 750 (Fla. 1990).

However, in The Florida Bar v. Golden, 566 So.2d 1286 (Fla. 1990), this Court stated the rule of law concerning cumulative misconduct. There, this Court stated that "When misconduct occurs near in time to other offenses it may be considered cumulative, regardless of when discipline is imposed". In that case, the two circumstances of misconduct occurred in July/August 1985 and in April, 1986. The disciplinary proceedings occurred in February, 1988 and in June, 1989. Based on those facts, this Court held that the acts occurred sufficiently close to each other in time to be considered cumulative in nature. However, it should be noted that the Court ordered the discipline to be retroactive to the date of the first proceeding, approximately two years and nine months prior to its decision.

Here, the events over which the Bar seeks an enhanced discipline occurred as long as ten years ago. Furthermore, the prior disciplinary case was decided by this Court in 1990 and the

prior discipline became effective August 13, 1990. This significant time lapse between events is inconsistent with this Court's rule concerning the consideration of cumulative misconduct.

It should also be recognized that the Referee's determination of mitigating factors fails to acknowledge that which has been previously determined to exist or that which was clearly proven to the Referee. Specifically, as the Bar acknowledges, in addition to the mitigating factors found by the Referee, testimony was presented to this Referee by eight witnesses to the effect that Respondent has a good reputation within his legal community for truth and veracity. [Ans. Br. 35]. Furthermore, in The Florida Bar v. Edward C. Rood, id., this Court adopted findings that are appropriately considered in mitigation here. These include the facts that Respondent has an excellent character and reputation and has made substantial contributions to the legal and non-legal communities. (Rood, id. - pg. 751).

Finally, the case law relied upon by The Florida Bar does not require imposition of the recommended discipline in this case. Each case cited involves factual circumstances clearly distinguishable from that in this case. In Dodd v. The Florida Bar, 118 So.2d 17 (Fla. 1960), the respondent advised several persons, including his clients to give false testimony in two cases. There the facts were that the respondent knew of the false nature of the evidence.

In The Florida Bar v. Agar, 394 So.2d 405 (Fla. 1980), the respondent solicited the testimony of an individual and suggested

false testimony be provided to the court on behalf of his client. That respondent was charged with perjury and entered a plea to the crime of solicitation to commit perjury.

The respondent in The Florida Bar v. Ryder, 540 So.2d 121 (Fla. 1989), was criminally prosecuted for the crime of perjury. The respondent's knowledge and intent to provide false testimony was proven.

In this case, significant issues exists concerning Respondent's knowledge of the falsity of any statements made to the Court. Furthermore, and more significantly, significant questions remain as to whether the statements at issue by Respondent were actually false. Additionally, Respondent here was not charged or convicted of any crime. These factors clearly distinguish the circumstances here from those existing in the above cited cases. Furthermore, in each of the above cases, the respondent unquestionably actively participated in the solicitation and/or presentation of false testimony through others. No such similar fact exist in this case. Therefore, the cases cited by the Bar do not require an affirmation of the recommended discipline.

Should this Court determine that evidence and circumstances of this case require discipline, any discipline imposed should be retroactive to August 13, 1990, the date of the prior suspension. This Court has held that when the facts of a disciplinary matter occurred before a prior disciplinary order, the subsequent order is to be retroactive. The Florida Bar v. Nunn, 596 So.2d 1053 (Fla. 1992). To do otherwise, will unfairly punish Respondent by

imposing on him what is effectively now a suspension in excess of two years, based upon an order for only a one year suspension and then enhancing any discipline of this case due to the continuing suspension. Such discipline is inconsistent with the prior decisions of this Court and serves no purpose other than to unjustly punish Respondent.

In view of the significant factual issues; the lack of clear and convincing evidence indicating Respondent's knowing or intentional misconduct; the failure of the Referee to recognize all known mitigating factors; the duplication of circumstances as essential to the recommendations of guilt and also as aggravating factors; the recommended discipline of disbarment is inappropriate and excessive and should be rejected by this Court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail delivery this 17 day of December, 1992, to: Bonnie L. Mahon, Esquire, Assistant Staff Counsel, The Florida Bar, Tampa Airport, Marriott Hotel, Suite C-49, Tampa, Florida 33607.

Donald A. Smith, Jr.
DONALD A. SMITH, JR., ESQUIRE