IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

GARY ALLYN BARCUS,

Respondent.

Supreme Court Case No. 83,988

The Florida Bar File No. 93-70,232(11G)

ANSWER BRIEF OF THE FLORIDA BAR

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TABLE OF CONTENTS

PAGE

Table of Authorities ii

Symbols and References iii

Statement of the Case 1

Statement of the Facts 1

Summary of the Argument 8

Argument 10

I. THE REFEREE PROPERLY FOUND RESPONDENT GUILTY AS TO COUNTS I, II AND V OF THE FLORIDA BAR'S COMPLAINT . 10

A. THE REFEREE PROPERLY FOUND RESPONDENT GUILTY AS TO COUNT I OF THE COMPLAINT 11

B. THE REFEREE PROPERLY FOUND RESPONDENT GUILTY AS TO COUNT II OF THE COMPLAINT 13

C. THE REFEREE PROPERLY FOUND RESPONDENT GUILTY AS TO COUNT V OF THE COMPLAINT 15

Conclusion 17

Certificate of Service 18

TABLE OF AUTHORITIES

CASES **PAGE**

The Florida Bar v. Hayden
583 So.2d 1016 (Fla. 1991) 11

The Florida Bar v. Marable
645 So.2d 438 (Fla. 1994) 10

The Florida Bar v. McClure
575 So.2d 176 (Fla. 1991) 11

The Florida Bar v. McKenzie
442 So.2d 934 (Fla. 1984) 11

The Florida Bar v. Pettie
424 So.2d 734 (Fla. 1983) 14

The Florida Bar v. Rue
643 So.2d 1080 (Fla. 1994) 11

The Florida Bar v. Vannier
498 So.2d 896 (Fla. 1986) 10

Rules Regulating The Florida Bar

RULES **PAGE**

Rule 4-1.3 . . . . 9, 12, 16

Rule 4-1.4(b) 12

Rule 4-8.4(d) 8, 15

SYMBOLS AND REFERENCES

For the purpose of this Answer Brief, The Florida Bar will be referred to as either The Florida Bar or the Bar. Respondent will be referred to as the Respondent. Witnesses may be referred to by their surnames only. Dana Commercial Credit Corporation may be referred to as Dana.

The transcript of the final hearing before the Referee consists of five volumes. The transcript of the September 14, 1995 proceedings will be referred to as Volume I. The transcript of the October 6, 1995 proceedings will be referred to as Volume II. The transcript of the November 7, 1995 proceedings will be referred to as Volume III. The transcript of the November 8, 1995 proceedings will be referred to as Volume IV. The transcript of the December 6, 1995 hearing will be referred to as Volume V. References to the transcripts of the final hearing will be set forth as TR. and page number, followed by either I, II, III, IV, or V denoting the volume.

References to the Report of Referee dated January 19, 1996 will be set forth as RR and page number.

STATEMENT OF THE CASE

The Florida Bar reiterates the Statement of the Case set forth in its Initial Brief.

STATEMENT OF THE FACTS

The Florida Bar reiterates its Statement of Facts as set forth in its Initial Brief and sets forth the following additional facts in response to statements contained in Respondent's Brief.

In April, 1989, the Respondent was retained to represent Mr. and Mrs. Peter Mas in connection with a lawsuit brought against them by Peter Mas' business partner, Michael Molina and his wife. (TR. 35, I). Subsequently, the Mases also sought the Respondent's representation in a lawsuit filed against them by Dana Commercial Credit Corporation.(TR. 36, I). The Respondent was also retained by the Mases to file a counter claim against Dana Commercial Credit Corporation. All three matters were subsequently consolidated into one action.

The litigation occurred as the result of a failed automotive parts business owned by Peter Mas and Michael Molina. In order to secure financing for their business, the partners took out a mortgage with Florida International Bank. The loan was secured by mortgages on the partners' respective homes. The Molinas

subsequently purchased the Mases' note and mortgage from Florida International Bank. The initial lawsuit by the Molinas against the Mases was a foreclosure suit on the Mas' mortgage with Florida International Bank. (TR. 55-56, III).

After the auto parts failed, Mas sold the remaining inventory to one Jimmy List for seventy-five thousand dollars ($75,000). List was the owner of Autobahn Imported Parts. The sales agreement between List and Mas provided for payments to Mas as the inventory was sold.(TR. 56-57, III).

The second lawsuit arose out of Dana Commercial Credit's computer inventory equipment lease to the auto parts business. Dana filed suit against Mas, Molina, List and the business after the partners defaulted on the terms of the lease. (TR. 57-58, III).

During the course of the civil litigation, two meditations were conducted in an attempt to produce a settlement between the parties. (TR. 62, III). The mediation produced a settlement agreement which would have provided for a split of the mortgage with the Mases portion being paid by Jimmy List. (TR. 43, II). The Mases, however, would have remained liable under the proposed settlement until List had paid their entire portion of the mortgage. (TR. 135, IV).

During the litigation, Peter Mas was deposed by Dana's attorney, Richard Stone. A second day of depositions was noticed for July 18, 1990. (RR 3). Neither Respondent nor Mas appeared. (TR. 39, I). After Mas failed to appear for the July 18th deposition, Stone sent Respondent a Second Re-Notice re-scheduling Peter Mas' deposition for August 1, 1990. (RR 4). Again, neither Mas nor Respondent appeared. Respondent's testimony at trial was that he misdiaried the first date and received late notice of the second. (TR. 77-80, III). Mas testified that he was not advised of either deposition date by Respondent. (TR. 39-40, I).

Subsequent to his twice failing to produce Mas for deposition, Respondent proceeded to depose his own client. (TR. 81, III). The deposition took place on Saturday, August 3, 1990. No one was present other than the Respondent, Peter Mas, and the court reporter. (TR. 40-41, I). Although the Respondent testified that he provided telephone notice to opposing counsel, the Notice of Deposition was not mailed until five days subsequent to the deposition taking place. (TR. 81, III).

On February 14, 1991, an Order on Motion for Partial Summary Judgment was entered by Judge Henry Ferro in favor of the Molinas in their lawsuit against the Mases. (RR 5). The effect of this order was to hold the Mases liable on the promissory note, but to

withhold execution pending completion of an accounting. A Notice of Appeal from the Order of Partial Summary Judgment was filed by Respondent on March 14, 1991. (RR 6).

The Referee concluded that the Respondent was directed to pursue the appeal by Mas and that Mas was advised by Respondent that the purpose of the appeal was to delay the foreclosure proceedings against the Mases and that further, Respondent would not actually pursue the appeal. (RR 6).

On April 19, 1991, Respondent filed a Motion for Extension of Time to File the Initial Brief on Appeal. (TR. 96, III). On July 31, 1991, an Order was entered by the Third District Court of Appeal stating that the appeal would be dismissed within ten days unless the court was informed that the matter was being diligently prosecuted. (RR 6). On August 9, 1991 , the Respondent filed a Notice of Diligent Prosecution. (RR 6). A brief was never filed and ultimately, on August 16, 1991, the appellate court dismissed the appeal on its own motion. (RR 6).

Peter Mas was charged with third degree grand theft in November of 1989. (TR. 67, I). The criminal charges stemmed from the same allegations contained in the Dana lawsuit. Mas was charged with theft of the Dana computer equipment. (TR. 68, I). Initially, Mas was represented by the public defender's office and

entered a plea of no contest to the charges against him. (TR. 68, I).

In 1992, after discovering new exculpatory evidence, Mas retained attorney Stanford Blake in an effort to set aside his plea and obtain a new trial or dismissal of the criminal charges. (TR. 87, I). In order to prepare for the case, Blake requested some of the documents in the Respondent's possession. (TR. 87-88, I). After being informed by Respondent that he (Respondent) might have a conflict in producing the requested records as Judge Ferro had previously disqualified him in the Mases' civil case due to conflict of interest, Blake subpoenaed the Respondent to appear before Judge Rodolfo Sorondo in order to determine if the requested documents could be turned over. (TR. 88-89, I). At that hearing, Judge Sorondo ordered the Respondent to provide the documents to Blake. Respondent, however, never surrendered the documents.

In May, 1992, Respondent filed an Ex Parte Motion for Partial Charging Lien in Mas' civil case. The Respondent sought an eighteen hundred dollar ($1800.00) partial charging lien for the attorney services provided in securing the information contained in those records subpoenaed by Blake in Mas' criminal case. The Respondent did not notice Mas, Blake, or the Mas' new attorney, Gary Gostel, of the motion. (TR. 26-27, 77, 97-I). On May 13,

1992, an Order Granting Motion for Partial Charging Lien was signed by Judge Melvia Green. Judge Green later vacated the entry of the charging lien.

On September 3, 1991, a Final Judgment of Foreclosure was entered in the Molina's foreclosure action against the Mases. The order provided for a foreclosure sale of the Mas' home on October 2, 1991. Shortly afterwards, the Respondent notified Mas of the court order. (TR. 107, III).

On September 12, 1991, the Respondent and the Mases met at the Respondent's home which also served as his office. The Respondent testified that at that meeting, he told Mr. and Mrs. Mas they should move immediately to have the Order set aside or consult with a bankruptcy attorney and further, that they would need to obtain other counsel as he would no longer be representing them. (TR. 106-107, III).

Subsequently, Mas retained attorney Gary Gostel who proceeded to file a Notice of Appeal from the foreclosure order and a Motion to Stay the foreclosure sale pending disposition of the appeal. (TR. 25, I). Shortly thereafter, Judge Ferro did vacate the foreclosure order stating that it had been signed in error. (TR. 25, I).

After hearing four days of testimony, the Referee concluded

that the Respondent was guilty of the allegations contained in Counts I, II and V of the Florida Bar's Complaint.

SUMMARY OF THE ARGUMENT

A Referee's findings of fact are presumed correct and will not be overturned unless there is insufficient evidence in the record to support those conclusions. If there is competent evidentiary support in the record for the Referee's findings, this Honorable Court will not substitute its own judgment for that of the referee. The party seeking to prove that the referee's findings are erroneous has the burden of demonstrating that there is no evidence in the record to support those findings or that the record evidence clearly contradicts the conclusions.

The Referee properly found the Respondent guilty of ethical violations with regard to Count I of the complaint. The evidence before the Referee was uncontroverted that Peter Mas did not appear at two scheduled depositions because the Respondent failed to properly notify him of the time and the place of the depositions. Moreover, the Respondent improperly deposed Mas himself in contravention of the Rules of Civil Procedure. As the Referee himself noted, there was no substantive dispute regarding the factual allegations in the complaint.

With regard to Count II, the Referee properly found that Respondent violated Rule 4-8.4(d) (A lawyer shall not engage in conduct prejudicial to the administration of justice) by filing a

Notice of Appeal with the Third District Court of Appeal solely for the purpose of delay and despite the fact that he was aware there was no factual basis for same. The Respondent also wrongfully filed a Notice of Diligent Prosecution with the Third District Court of Appeal as a "strategic ploy" even though he had no intention of pursuing the appeal.

Finally, the Referee properly found that the Respondent violated Rule 4-1.3 (diligence) with regard to Count V in that he failed to take any steps to vacate an improperly entered order of foreclosure against his client. The Respondent failed to take any action to protect the Mases from that foreclosure sale after the Molinas obtained the order ex parte. The Respondent's lack of diligence in handling this matter could have resulted in the loss of the Mas' home.

There is competent substantial evidence in the record to support the Referee's findings and conclusions and they should be upheld.

ARGUMENT

I. THE REFEREE PROPERLY FOUND RESPONDENT GUILTY AS TO COUNTS I, II AND V OF THE FLORIDA BAR'S COMPLAINT.

The basic principle regarding evidentiary rulings adhered to by this Court is set forth in The Florida Bar v. Marable, 645 So.2d 438 (Fla. 1994) in which this Court stated:

> In a disciplinary proceeding before a referee, the Bar has the burden of proving the allegations of misconduct by clear and convincing evidence. However, on review of a referee's findings of fact, this Court presumes the findings to be correct. A referee's findings of fact should be upheld unless clearly erroneous or lacking in evidentiary support. Because the referee is in the better position to evaluate the demeanor and credibility of the witnesses, the referee's findings of fact should be upheld if they are supported by competent, substantial evidence. On review, this Court neither reweighs the evidence in the record nor substitutes its judgment for that of the referee so long as there is competent, substantial evidence in the record to support the referee's findings. This is the standard of sufficiency of evidence that we will apply on review.

Clearly, a referee's findings of fact and recommendations carry a presumption of correctness. The Florida Bar v. Vannier, 498 So.2d 896 (Fla. 1986). The party seeking review of such findings and/or recommendations carries the burden of showing that they are clearly erroneous or lacking in evidentiary support. The

Florida Bar v. McClure, 575 So.2d 176 (Fla. 1991). Where a party contends that a referee's findings of fact and conclusions as to guilt (or innocence) are erroneous, that party must demonstrate that there is no evidence in the record to support those findings or that the record evidence clearly contradicts the conclusions made. The Florida Bar v. Rue, 643 So.2d 1080 (Fla. 1994). In the absence of such a showing, the referee's findings will be upheld. The Florida Bar v. Hayden, 583 So.2d 1016 (Fla. 1991); The Florida Bar v. McKenzie, 442 So.2d 934 (Fla. 1984).

A. THE REFEREE PROPERLY FOUND RESPONDENT GUILTY AS TO COUNT I OF THE COMPLAINT.

Count I of the Bar's complaint concerns the Respondent's failure to notify his client of duly noticed depositions scheduled in the Dana Commercial Credit lawsuit. The findings of fact with regard to this count of the complaint are essentially uncontroverted. (TR. 185, III).

During the Dana litigation, Peter Mas was deposed by Dana Commercial Credit Corporation's attorney, Richard Stone. The deposition was not concluded on the first day and a continuation was necessary. Stone scheduled the second deposition for July 18, 1990. Respondent was duly noticed of the deposition date. (RR 3). On July 18, 1990, neither the Respondent nor Peter Mas appeared for

the deposition. (RR 4). After Respondent and Mas failed to appear, the deposition was re-noticed for August 1, 1990. (RR 4). Again, neither Respondent nor Mas appeared. (TR. 39-40, I). Dana, through its attorney, Stone, then filed a motion for sanctions.

Subsequent to twice failing to produce his client for deposition, Respondent scheduled his own deposition of his client, Peter Mas. (TR. 40, 42, I; RR 5). Without any authority in the Rules of Civil Procedure to sustain such action, Respondent, Mas, and a court reporter appeared on Saturday, August 3, 1990, for the taking of Mas' deposition. (TR. 180, IV). Although the Respondent stated that he provided telephone notice to opposing counsel, written notice was not mailed to opposing counsel until five days after the deposition occurred. (TR. 149, IV). The Referee concluded that Respondent completely failed to live up to his ethical obligations or to follow the Rules of Civil Procedure with regard to the taking of his own client's deposition. (TR. 5, V). The Referee additionally noted that he was at a loss to understand what the Respondent hoped to accomplish by the tactic of taking his own client's deposition. (TR. 5, V).

The Referee properly concluded that Respondent's handling of his client's deposition violated Rule 4-1.3 (Diligence) and Rule 4-1.4(b) (Communication) of the Rules Regulating The Florida Bar. As

the Referee stated, the Respondent's failure to properly communicate with his client, Mas, was the foundation for the problems in Respondent's handling of Mas' case. (TR. 5, V). The record clearly shows that Respondent failed to advise Mas when he received the notices regarding the depositions. (TR. 39, I). The Respondent also shirked his responsibility to keep the Mases informed about the status of the case. Further, the Respondent failed to provide sufficient information for the Mases to make informed decisions regarding the representation. The Respondent's handling of the depositions constituted a "flagrant" violation of the disciplinary rules. (TR. 4, V). In light of the testimony and evidence, the Referee's findings of guilt with regard to Count I of the complaint should be upheld.

B. THE REFEREE PROPERLY FOUND RESPONDENT GUILTY AS TO COUNT II OF THE COMPLAINT.

Respondent was properly found guilty of rule violations with regard to Count II of the complaint. The findings in Count II pertain to Respondent's filing of an appeal with regard to a ruling adverse to the Mases.

The Molinas filed a Motion for Partial Summary Judgment in their foreclosure action against the Mases. On February 14, 1991, Judge Henry Ferro entered an order granting the Molinas' motion.

(RR 5). Thirty days after the order was entered, Respondent filed a Notice of Appeal from that order with the Third District Court of Appeal. (RR 6). After hearing the testimony and viewing the evidence, the Referee concluded that the Respondent proceeded with the filing of an appeal despite his awareness that same was legally and factually baseless. (TR. 151, 153-IV; TR. 91, 93-III). The Respondent never filed a brief nor made any attempt to diligently prosecute the appeal despite his filing of a Notice of Diligent Prosecution. (RR 6). On August 16, 1991, the Third District Court of Appeal, *sua sponte*, dismissed the appeal. (RR 6).

According to the Respondent's own testimony, the sole purpose for the filing of the Notice of Appeal was to delay execution of Judge Ferro's Order of February 14, 1991. The Respondent did not have any intention of pursuing an appeal despite the filing of the Notice of Appeal and the filing of the Notice of Diligent Prosecution. (TR. 151, 153, IV). As the Referee noted and the Respondent agreed, it is improper for an attorney to file an appeal when he is aware that no valid grounds for such exist. (TR. 193, IV).

Conduct prejudicial to justice is defined as conduct which undermines the legitimacy of the legal process. The Florida Bar v. Pettie, 424 So.2d 734, 737 (Fla. 1983). A meritless appeal whose

sole purpose is to delay execution of a legitimate order clearly undermines the purpose of the legal process. Respondent himself stated that the filing of the appeal was purely a manipulation of the legal process in order to provide the Mases with time to petition for bankruptcy. (TR. 91, III). The Referee properly concluded that Respondent's conduct violated Rule 4-8.4(d)(conduct prejudicial to the administration of justice) of the Rules of Professional Conduct.

C. THE REFEREE PROPERLY FOUND RESPONDENT GUILTY AS TO COUNT V OF THE COMPLAINT.

Count V of the Bar's complaint concerns Respondent's failure to take steps to vacate or set aside an improperly entered Final Order of Foreclosure against his clients, the Mases, which was entered by Judge Ferro on September 3, 1991. The testimony indicated that the motion was not scheduled for hearing. (TR. 103, III). Shortly after learning of its entry, Respondent notified the Mases of the order. He did not take any steps to have the order vacated or set aside despite the uncertainty surrounding its entry. (RR 7).

Shortly afterwards, the Mases retained substitute counsel, Gary Gostel. (TR. 12, I). In order to prevent the foreclosure sale, Gostel filed a Notion of Appeal from foreclosure order, along

with a motion to stay the sale pending the outcome of the appeal. (TR. 25, I). Subsequently, Judge Ferro vacated the foreclosure order stating that it had been entered in error. (RR 7).

The Referee properly concluded that Respondent was not diligent in protecting the interests of his client. The Respondent had an obligation to take steps to protect the Mases' interests and failed to do so. The Respondent's failure to take timely action could have resulted in the Mas' losing their home. The Referee properly determined that Respondent's actions violated Rule 4-1.3 (Diligence) of the Rules of Professional Conduct.

CONCLUSION

Unless shown to be clearly erroneous or lacking in evidentiary support, a referee's findings of fact and recommendations are presumed to be correct and should be upheld. The record is replete with competent substantial evidence in support of the Referee's findings of fact as they pertain to Counts I, II, and V and same should be upheld.

Respectfully submitted,

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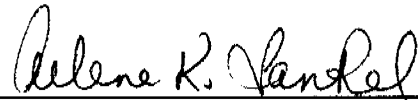
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the above and foregoing Answer Brief of The Florida Bar was sent via Airborne Express, airbill number 3369990326, to Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1927, and a true and correct copy was sent via certified mail, return receipt requested (P 142 731 807) to Louis M. Jepeway, Esquire, Attorney for Respondent, 19 West Flagler Street, Suite 407, Miami, Florida 33130, and via regular mail to John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399, on this 20th day of August, 1996.



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