IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

Supreme Court Case
No. 83,988

THE FLORIDA BAR,

Complainant,

vs.

GARY ALLYN BARCUS,

Respondent.
_____/

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

INITIAL BRIEF AND ANSWER BRIEF OF RESPONDENT, GARY BARCUS

JEPEWAY AND JEPEWAY, P.A.
407 Biscayne Building
19 West Flagler Street
Miami, Florida 33130
Tele.: (305)377-2356
Fla. Bar No. 113699

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PREFACE

The Referee took the unusual step of commencing his report with a commentary. The first sentence states that:

> "This case is not unlike the old adage or homily that 'no good deed goes unpunished.'..." (RR 1)

The Referee is correct.

SYMBOLS AND REFERENCES

The Respondent, Gary Barcus, adopts the Bar's symbols and references. The transcript of the hearing on December 6, 1995 will be referred to as Volume V.

STATEMENT OF THE CASE

The Bar's statement of the case is correct.

STATEMENT OF THE FACTS

The Referee found that the Complainant, Peter Mas: "...in testifying...was evasive as to money matters, he employed very selective memory in many aspects. In response to certain questions it became obvious he had no credibility whatsoever" (RR 1). Therefore, there will be little reference to his testimony.

The Respondent, Gary Barcus, is and at all times material, was a member of the Florida Bar and subject to the jurisdiction and disciplinary rules of this Court (RR 2).

In May 1989, Peter and Paula Mas retained Mr. Barcus to defend them in a lawsuit

brought against them by Mr. Mas's business partner, Michael Molina, and his wife, Mirna Molina, styled *Molina v. Mas, et al.* (T.35-I). In July, 1989, Peter Mas retained the Respondent to defend him in another lawsuit, *Dana Commercial Credit Corporation v. Autobohn Imported Auto Parts, Inc., Peter Mas, and Michael Molina* (RR 2). Mr. Barcus was also retained by Mr. Mas to file a counter-claim against Dana Commercial Credit Corporation for usury (RR 3).

Mr. Mas and Mr. Molina were partners in an automotive parts business, Autobohn Imported Auto Parts, which failed. The Molinas and the Mases had executed mortgages on their homes for a business loan from Florida International Bank. The loans went into default. The Molinas paid off the full amount of the mortgage and Florida International Bank assigned the mortgage to them. There were other claims in the lawsuit about monies owed from the business operations. The Molinas sued the Mases to foreclose on the mortgage. The Mases owed approximately $22,500.00 (T.54-56-III).

Jimmy List was also involved in the lawsuits. His business was Southern Imports Auto Parts. Mr. Mas sold the remaining assets of Autobohn to Mr. List for about $75,000.00. Mr. List paid for them on a periodic basis as he sold them (T.56-57-III). The Molinas sued Mr. List for the proceeds from the sale of the auto parts to him from Mr. Mas (T.57-III). Dana Commercial sued Mr. Mas, Mr. List, and Autobohn. Dana had leased a computer to Autobohn and when the business broke up neither Autobohn nor Mr. Mas or Mr. List paid Dana. That suit was consolidated with the Molina suit (T.57-58-III).

Mr. Barcus testified. He was employed with the law firm of Haley, Sinagra, and Perez in early 1986 (T.50-III). He did massive amounts of collections there (T.50-III). In

one year, he and another associate filed over six thousand law suits (T.50-III).

He eventually left and opened his own office (T.51-III). Denrich Leasing was a client. Denrich was the largest small ticket leasing company in the United States (T.51-III). He represented Denrich from 1988 through 1993 (T.52-III). He became very familiar with commercial leases and commercial equipment leases (T.52-III).

He met the Mases in the Spring of 1989 (T.52-III). He undertook their representation at that time (T.52-III).

Mr. Barcus' first meeting with Mr. Mas was in February or March of 1989 (T.68-69-III). It took seven hours (T.69-III). They reviewed all of the records and documents from the business (T.69-III). He did not charge Mr. Mas for those seven hours because, from the very outset, the Mases made it clear that they were in a desperate financial situation because of the business breakup with Mr. Molina (T.69-III). Mr. Mas told Mr. Barcus that he was not working. Mrs. Mas told him that she had a part time job for about ten hours a week (T.69-III).

Mr. Barcus and the Mases agreed upon a fee (T.69-70-III). He would defend the lawsuit brought by the Molinas at a rate of $125.00 an hour (T.70-III).

Then Dana Commercial sued Mr. Mas individually and Autobohn Imported Auto Parts (T.70-III). He represented Mr. Mas in the Dana case at the same hourly rate (T.70-71). He filed a counter-claim against Dana for the Mases asserting usury (T.71-III). The counter-claim was done on a contingency basis (T.71-III).

Mr. Mas was the most difficult client he has had (T.52-III). He was argumentative. He was bullheaded. He was hateful. He was mean. He did not take advice. One had to tell

him things over and over and over. He was demanding of time. He thought that he could call Mr. Barcus any time of the day, night, weekends, holidays, any time, to discuss whatever he wanted to discuss, involving his legal matter or anything else in his personal life (T.53-III). He was extremely hateful. He told Mr. Barcus on more than one occasion that he wanted to kill Mr. Molina (T.53-III). He did not follow instructions. He would not listen to advice. Mr. Barcus' office was in his home (T.8-III). Mr. Mas wanted to come to Mr. Barcus' home. He would arrive unannounced (T.53-III).

Mr. Mas called Mr. Barcus several times a day in certain streaks. Mr. Barcus had to put the answering machine on and monitor calls because he would call six times and want to talk about the same thing that they had discussed (T.53-III). It was not uncommon for him to call Mr. Barcus a minimum of three times a week and many times much more than that (T.54-III).

During Mr. Barcus' representation of the Mases, settlement proposals were made (T.58-III). The first was approximately in April, 1990 (T.58-III). Mr. and Mrs. Molina, Mr. and Mrs. Mas, their daughter, their attorneys and Mr. Barcus were present (T.59-III). The proposal was that Mr. and Mrs. Mas would agree to split the mortgage, it was about $45,000.00, and Mr. and Mrs. Mas would be responsible for $22,500.00 (T.59-III). It would come from Mr. List, from his payments on the auto parts that he had purchased from Mr. Mas (T.59-III). The money would be paid to the Molinas because they had paid off the note to Florida International Bank (T.59-III). The lawsuit would be dismissed and jurisdiction would be reserved in the event that Mr. List did not make the payments to the Molinas (T.60-III). If Mr. List had not made the payments the case would have been reopened (T.135-IV).

On re-direct, Mr. Barcus testified that if Mr. List had defaulted on his payments to the Molinas, the Mases would not have been in any worse position than they were (T.175-IV). In fact, they would have been in a better position. The stipulation would have included an admission by Mr. List that he was liable so that the Mases could obtain judgment by affidavit upon default (T.175-176-IV). The Mases would have been in fantastic shape (T.176-IV).

The Molinas agreed to it, Mr. List agreed to it, Mrs. Mas agreed to it but Mr. Mas rejected it (T.60-III).

Mr. Barcus advised Mr. Mas to accept the settlement (T.61-III). Mr. Mas said that Mr. Molina had not suffered enough. He hated Mr. Molina. He wanted to litigate. He wanted to get Mr. Molina. He wanted to rub his nose in it. He wanted to make him pay (T.61-62-III). He did not give Mr. Barcus one financially favorable reason for his refusal to settle (T.62-III).

There was another attempt at settlement on the same terms. Mr. Mas rejected it (T.62-III).

There were at least two mediations in the case (T.62-63-III).

The first mediation was in the summer of 1990. Mr. List, his attorney, the Molinas, their attorney, Mr. Mas and Mr. Barcus were there (T.63-III). Essentially the same proposal was made (T.63-III). Additionally, Dana was to be paid $7,500.00 by Jimmy List and Southern Auto Imports, Mr. List's firm (T.64-III). The Mases would not have paid anything out of pocket, except their half of the mediation cost (T.64-III). Everyone accepted this proposal but Mr. Mas (T.64-65).

The proposal was so favorable to the Mases that the mediator asked to speak to Mr.

Mas alone. He did (T.65-III). The mediator told Mr. Barcus that it was obvious that Mr. Mas did not want to settle. He had an ax to grind and he wanted to keep grinding it (T.66-III).

There was a second mediation in the spring of 1991 (T.66-III). Mr. List's attorney, the Molinas and their attorney, Dana's attorney, Mr. Mas and Mr. Barcus were present (T.67-III). The proposal essentially was the same. All were willing to sign except Mr. Mas (T.67-68-III).

Mr. Barcus repeatedly advised Mr. Mas to accept the proposal (T.66-III). Mr. Mas refused because he hated Mr. Molina (T.66-III).

The Mases' new counsel, Gary Gostel, obtained the same settlement after he took over their representation (T.50-II). The Mases paid Mr. Gostel a fee of $30,000.00 (T.49-II).

The Molina case was ready for trial but then it was consolidated with the Dana case (T.71-III).

In the Dana case, Mr. Barcus requested Dana's documents, propounded interrogatories, set their legal representative for deposition, subpoenaed the records of the Florida Department of Revenue to obtain an indication of what amount of the usurious conduct had occurred in Florida, and traveled to Michigan several times where he reviewed thousands of files (T.74-III).

Prior to July 18, 1990, Dana had taken Mr. Mas's deposition (T.75-III). He had instructed Mr. Mas not to answer some questions. The court ruled that he had to answer them (T.75). Dana's attorney noticed Mr. Mas's deposition for July 18, 1990 (T.75-III). Mr. Barcus made a mistake and noted the deposition for July 28, 1990 (T.76-III).

When Mr. Barcus learned that he had noted the wrong date for the deposition, he called Dana's attorney and apologized (T.76-77-III). He told him that he and Mr. Mas would come over for the deposition at his convenience (T.77-III). Dana's attorney refused. He said that he would re-notice it when he felt like it (T.77-III).

Mr. Mas went to Mr. Barcus' house. He wanted to go down to Dana's attorney's office for the deposition (T.77-III). They did (T.77-III). Dana's attorney said that he was not going to take the deposition then and that he would take it when he felt like it (T.78-III). He said that he was going to bring the matter before the judge (T.78-III).

Mr. Barcus called Dana's attorney and said that they were coming over (T.142-IV). He spoke directly to Dana's attorney (T.142-143-IV). Dana's attorney was expecting them (T.143-IV). They went there to show their good faith, their willingness to present Mr. Mas for deposition, and to apologize personally to Dana's attorney for Mr. Barcus' mistake in noting the date of the deposition (T.143-IV). He wanted Dana's attorney to take Mr. Mas's deposition at that time or to agree to a mutually convenient time to take it (T.143-IV). He informed the Molinas' attorneys that he was taking Mr. Mas to Dana's attorney's office for deposition (T.145-III).

Mr. Barcus repeatedly offered to reschedule the deposition (T.78-III). Dana's attorney refused (T.78-III). Dana's attorney re-noticed the deposition (T.78-III) for August 1, 1990 at 1:00 P.M. (T.78-79-III). Mr. Barcus received the notice one hour after the deposition was scheduled (T.79-III). He called Dana's attorney and offered to produce Mr. Mas yet again at an agreed time (T.79-III). Dana's attorney refused and said that he was going to take it before the judge (T.80-III).

Dana's attorney took Mr. Mas's deposition in September, 1990 (T.80-III).

Mr. Barcus was so furious at the attempt by Dana's attorney to discredit him and Mr. Mas that he set a deposition himself, called the other side and told them that Mr. Mas was there and would be available (T.81-III). They could take his deposition. He attempted to show good faith that they were not trying to deceive or obstruct discovery (T.81-III). No one appeared (T.81-III). They were informed by phone (T.81-III). Mr. Barcus spoke to them and their staff and delivered the notices to them (T.81-III).

The deposition he took of Mr. Mas was limited to the circumstances involving the method by which the documents from Michigan, the usury documents, were obtained. Dana's attorney wanted them precluded (T.81-82-III).

While Mr. Barcus represented the Mases, Mr. Mas was charged with a felony (T.81-III). Mr. Barcus advised him to obtain a competent, experienced criminal defense attorney to represent him (T.82-III). He suggested two (T.82-83-III). Mr. Mas was represented by the Public Defender (T.83-III). Mr. Mas entered a plea of *nolo contendre* (T.83-III). He agreed to make restitution of $7,500.00, at $280.00 a month to Dana (T.83-III).

Mr. Mas was in arrears in his payments to Dana (T.83-III). Mr. Mas asked Mr. Barcus to inform the State Attorney and his probation officer that he was representing Mr. Mas for free and that he did not have any money (T.84-III). Mr. Barcus went to court and explained to the prosecutor and to the probation officer that Mr. Mas was broke (T.84-III). At that juncture, Mr. Barcus was convinced that Mr. Mas was broke (T.85-III). It took approximately six hours (T.85-III).

Mr. Mas's probation was not revoked (T.85-III). He did not charge Mr. Mas anything

for his time (T.85-86-III). Mr. Mas did not thank him (T.86-III).

The Mases paid Mr. Barcus a total of approximately $5,400.00 (T.87-III). His total expenses were approximately $5,000.00 (T.87-III).

The Molinas obtained a partial summary judgment on liability in the foreclosure action on February 14, 1991 (RR 5). The Mases simply had not paid the money (T.87-88-III).

Mr. Barcus told Mr. Mas that he could not represent him effectively. He did not do appellate work (T.93-III). There was a thirty day period within which to file a notice of appeal (T.91-III). The judge had ruled only that they were liable on the note and, indeed, they were liable on the note (T.91-III). An appeal was without merit (T.92-III). Mr. Mas claimed to have setoffs and he very well may have had them, but Mr. Barcus told him that he had to obtain another attorney for appeal or file bankruptcy (T.91-III). Mr. Mas repeatedly had said that he was going to file bankruptcy (T.91-III).

Mr. Mas wanted to buy time. He said he would see a bankruptcy attorney but he did not want to hire another attorney for the appeal because he was broke (T.91-III).

He communicated with Mr. Mas during the thirty day period for the filing of the notice of appeal (T.93-III). He wanted to make sure that both the Mases understood the ramifications and import of the partial summary judgment on liability (T.93-III). He urged them, based on their representations to him, to file bankruptcy (T.93-III). He told them that they should seek the advice of a bankruptcy attorney (T.93-94-III). They would have a new beginning, get back to work, raise their child, and put an end to the constant aggravation of the lawsuit (T.94-III).

Mr. Barcus called Mr. Mas on the thirtieth day and told him that it was the final day (T.94-III). If he did not file the notice of appeal the Molinas' attorney was going to set down a hearing for summary judgment as to damages and foreclosure (T.94-III).

Mr. Mas told Mr. Barcus that he wanted to file bankruptcy. He had not yet contacted an appellate attorney. Mr. Mas asked Mr. Barcus to file a notice of appeal (T.94-III).

Mr. Barcus agreed to file the notice of appeal in order to obtain time for Mr. Mas to employ an appellate attorney or a bankruptcy attorney (T.95-III). On cross-examination, Mr. Barcus reiterated that he filed the notice of appeal at the Mases' request (T.151-IV). He filed a motion for extension of time at the Mases' request (T.151-IV). The intent was to leave the door open for another attorney to file the brief if the Mases did not file for bankruptcy (T.151-152-IV).

Bar's Exhibit 15 is a copy of the letter that he sent to Mr. and Mrs. Mas in May of 1991, after the notice of appeal had been filed, and after they had decided not to proceed with the appeal (T.101-III). They were going to file bankruptcy (T.101-III). It is dated May 16, 1991, which was the day he mailed it to the Mases (T.102-III). The letter was addressed to Peter and Paula Mas and concerned the appeal of the partial summary judgment. It stated:

> "This letter is to confirm that you will not be proceeding with the appeal of the partial summary judgment as you intend to file bankruptcy. You have decided against funding the additional necessary money to proceed to litigate the appeal. The preparation of the appeal record from the lower court would be necessary, which is an additional costs. The pendency of the appeal has given you a brief stay from the lower proceeding but you must seek bankruptcy protection quickly. Good luck."

Mr. Barcus had further communication with the Mases after they received this letter (T.178-IV). They desired that he continue to do the best that he could for them (T.178-IV).

He repeated, in nauseating detail, that the purpose of the filing of the notice of appeal was to buy them time (T.178-IV).

Mr. Barcus obtained an extension of time to file the brief (T.96-III). He told Mr. Mas (T.96-III). He told Mr. Mas that he was going to hamstring his eventual attorney if he wanted to prosecute the appeal because of the time limits (T.96-97-III). Mr. Barcus again explained the time deadlines for prosecuting an appeal to Mr. Mas (T.97-III). He told him that every day he waited he prejudiced his case (T.97-III). Mr. Mas said that he was going to file bankruptcy, he did not want to prosecute the appeal (T.97-III). Mr. Mas did not want to pay an attorney for an appeal (T.97-III).

Mr. Barcus received an order from the Third District directing him to file the brief within ten days or it would be dismissed (T.98-III). He informed Mr. Mas of the order (T.98-III). He did so as soon as he received it (T.98-III). Mr. Mas said that he was going to file bankruptcy (T.98-III). He assured Mr. Barcus that he would file bankruptcy (T.98-III).

Mr. Barcus received an order dismissing the appeal (T.98-III). He informed Mr. Mas that the appeal had been dismissed (T.98-III). He sent Mr. Mas a letter reminding him that he had said that he was going to file bankruptcy but he had not done so (T.99-III). Mr. Mas asked what the dismissal of the appeal did to the case (T.99). Mr. Barcus told him that there was a minimum period of about nineteen days before the Molinas could obtain a hearing on their foreclosure action (T.99-III).

He told Mr. Mas to retain another attorney (T.100-III). Mr. Mas asked him to continue representing him in the foreclosure (T.100-III). He said that he was going to file

bankruptcy and that the bankruptcy would intervene and that he could not afford to pay an attorney to represent him on the foreclosure (T.100-III). He was having a difficult time scraping together the money to employ a bankruptcy attorney (T.100-III). He assured Mr. Barcus that he was going to retain a bankruptcy attorney and place his financial house in order (T.100-III).

Mr. Barcus agreed to represent him at the hearing on the foreclosure because he felt sorry for the Mases (T.100-III). They had a child with cerebral palsy (T.101-III). Mrs. Mas was very frazzled as the result of the responsibilities of taking care of the disabled child and dealing with an irrational husband (T.101-III).

The Molinas obtained a final judgment of foreclosure on the Mases' house (T.102-III). Mr. Barcus did not receive notice of the hearing at which the final judgment was entered (T.102-III). Neither did the Mases (T.102-III). No hearing was held and no notice was sent to Mr. Barcus (RR.7).

Mr. Barcus received the order in the mail (T.102-III). He was furious (T.103-III). He called Mr. Mas and told him what had happened (T.103-III). Mr. Mas was furious (T.103-III).

Mr. Mas asked Mr. Barcus to mail him a copy of the order (T.104-III). Mr. Barcus refused. They had to meet in person (T.104-III).

Mr. Barcus met with Mr. Mas (T.104-III). Mr. Barcus told him that he had to move immediately to set the order aside and that he could not ignore this advice. It was imperative (T.104-105-III). He also spoke to Mrs. Mas and told her that they had to retain a bankruptcy attorney or go to another attorney and have the foreclosure order set aside (T.105-III). He

told them that they must take care of this immediately (T.105-III). Mr. Mas said that he would take care of it (T.105-III). Mr. Barcus explained to them that he would not represent them any further (T.107-III). He explained to them that he would not seek to have the order set aside (T.107-III). They agreed. They would see a bankruptcy attorney (T.107-III). They were going to contact a bankruptcy attorney immediately to file bankruptcy (T.105-106-III).

Mr. Barcus called the Mases to make sure they had scheduled an appointment with a bankruptcy attorney (T.106-III).

The Mases came to his house on September 12, 1991, in the evening (T.107-III). They arrived at approximately 7:00 P.M. (T.107-III). They did not have an appointment. They appeared unannounced (T.107-III). They brought their child (T.108-III). They were driving a very expensive dressed Chevrolet van with pen stripes and a lavish paint job and captain's chair (T.108-III). On the eve of filing bankruptcy, one does not make a purchase such as this (T.108-III).

The Mases said that they had been to see a bankruptcy attorney who had informed them that money would be required in advance, their credit cards would be controlled, their debts would be controlled, and a trustee would have control of their money and make their payments (T.109-III). When they spoke of the court control of their assets, Mr. Barcus realized that they had lied to him repeatedly about their financial condition (T.110-III).

Mr. Mas told Mr. Barcus that they were not eligible for bankruptcy because their assets exceeded their debts (T.110-III). Mr. Barcus knew that they had lied to him for years (T.110-III).

Late in the evening, after hours of discussion about what to do about bankruptcy and

after Mr. Barcus realized that the Mases had misrepresented their financial condition to him for years, Mrs. Mas said "we can pay you." (T.110-111-III). That hit Mr. Barcus like "a laser beam between the eyes" (T.110-111-III). If they could in fact employ counsel, they must do so immediately (T.111-III). They stayed until almost midnight, about five hours (T.111-III).

At the end of the meeting the Mases accepted that Mr. Barcus no longer would be representing them (T.117;179-180-III). He advised them to seek new counsel immediately (T.117-III). They said that they would do so (T.117;180-III).

Mr. Mas testified that when he and his wife left Mr. Barcus' home on September 12, 1991, there was no doubt that Mr. Barcus would no longer represent them (T.69;98-II). Mr. Barcus reiterated on re-direct that when the Mases left his house on September 12, 1991 they understood that he would take no further legal action for them (T.179-180-III). They were to obtain other counsel (T.180-III).

Mr. Mas admitted that Mr. Barcus' constant refrain was to obtain a bankruptcy attorney (T.65-II).

Gary Gostel, the Mases' new attorney, testified that he first spoke to the Mases the next day, September 13, 1991.

Mr. Barcus did not file a motion to withdraw. He assumed that there would be an orderly substitution of counsel. He sent one to Mr. Gostel but he did not sign it (T.172-IV).

Linda Wright testified. She is thirty-nine. She is a collection manager for Arrow Air (T.4-III). She has worked there for two years. Before that she was employed by Denrich Leasing for seven years in collections, as a collection supervisor, and as a customer service

supervisor. She has an Associate of Arts in Elementary Education and is working on her Bachelors Degree (T.5-III). After she receives her Bachelors Degree she intends to teach school in Dade County (T.6-III).

She met Mr. Barcus in 1988. They became romantically involved and they lived together for five years (T.6-III).

Mr. Barcus' office was in his home. She was there occasionally during the day when he was in his office (T.8-III).

She became aware of Mr. Mas in the first part of 1990. Mr. Barcus was representing him. She learned of his legal difficulties and about his daughter, who had medical difficulties (T.7-III). Mr. Mas a very difficult client and a very difficult individual (T.8-III).

Mr. Mas was always at Mr Barcus' home (T.9-III). It was nothing for her to come home and see Mr. Mas sitting in the easy chair, watching T.V., while Mr. Barcus cooked dinner for him (T.9-III). Mr. Mas became part of the furniture (T.10-III).

Mr. Mas called Mr. Barcus all the time. He called from sun up to sun down. He would call as late as midnight. Mr. Mas would call whenever he felt like it. He would talk for hours. It did not matter whether it was during business hours or in the middle of the night. Mr. Mas would either call or drop by. He dropped by at least a couple of times a week (T.10-III).

Mr. Mas and Mr. Barcus would discuss things. They would discuss the case. They would discuss life, Mr. Mas's life, his problems. They would discuss anything in front of her and with her. Mr. Mas would discuss things openly with her (T.10-11-III).

Mr. Mas would rehash a lot of things. He would go over them, especially when it

concerned Mr. Molina, because he hated Mr. Molina. He constantly talked about Mr. Molina and that he hated him or how angry he was with him. He said that he hated Mr. Molina all the time (T.11-III). Mr. Mas admitted that he hated the Molinas (T.150-151-III).

Mr. Barcus spent a lot of time with Mr. Mas, either on the phone, in person, or at the courthouse (T.11-12-III).

Mr. Barcus constantly expressed to her his concern for the Mases. Mr. Barcus is a very caring person and he felt sorry for the Mases. He felt sorry for Mr. Mas that so many bad things had happened to him. Mr. Barcus is the type that feels sorry for the poor soul. When the Mases brought in the baby, it just pulled at his heart strings because he felt very sorry for these people who had lost so much. They were having financial difficulties, neither of them was working, and they had a baby who was seriously ill (T.12-13-III).

The Mases constantly made protestations of poverty (T.13-III). They said that they could not work because they had to stay home to take care of the baby. They lost their business. They had no income. They lost everything. They were always crying poor, always (T.13-III).

Mr. Mas did not work during the time that she knew him. He did not have any physical ailment (T.13-III).

Mr. Mas sold Nu Skin. It is like Amway. She and Mr. Barcus bought a lot of Nu Skin from Mr. Mas because Mr. Barcus felt sorry for them. He would buy these things to help him because he had no other source of income (T.13-14-III).

Mrs. Mas is a registered nurse. She did not work during the time that Ms. Wright knew her. She gave up her job to stay home and take care of the baby (T.14-15-III).

Mr. Barcus did a lot of work on the Dana litigation. He did a lot of investigation into Dana (T.15-III). He went to Detroit to pull all the records on a number of leases (T.15-16-III). He paid for the trip himself. He paid for all the documents himself. All the research was done on his own time (T.15-III).

She heard Mr. Barcus and Mr. and Mrs. Mas discussing bankruptcy several times. She heard them in person in the house and in the office and over the phone (T.16-III).

Mr. Barcus told Mr. Mas that he had to file bankruptcy because he had many debts, he was not working and he could not pay the debts. Mr. Barcus told him several times that he had to file bankruptcy. He had to do something because he was not working. He needed the protection of the bankruptcy court (T.17-III).

Mr. Barcus kept telling Mr. Mas that he had to file bankruptcy, that he had to do something. One has to tell Mr. Mas the same thing many times. He told Mr. Mas that he did not do bankruptcy work. He told Mr. Mas that he had to find a lawyer that did bankruptcy. He could not just sit there (T.18-III). Mr. Barcus was emphatic about the bankruptcy (T.19-III).

Mr. Mas stalled. He went around the issue, skirting it. He did not want to address it (T.19-III).

She heard conversations between Mr. Barcus and Mr. Mas concerning the appeal. She heard them when Mr. Barcus and Mr. Mas were in the house and when Mr. Barcus spoke to Mr. Mas on the phone. She heard Mr. Barcus tell Mr. Mas that the appeal was just to buy him time and that he had to file bankruptcy (T.26-III). Mr. Barcus said he would not fund the appeal, and that Mr. Mas had to find another attorney (T.26-III). He told Mr. Mas that

he would have to obtain another attorney if he wanted to pursue the appeal (T.27-III). He told Mr. Mas that he was not going to follow through with the appeal. He was not able to represent him in the appeal. He was a sole practitioner. Mr. Barcus told that to Mr. Mas more than twice that she knows of. He left no doubt as to his intentions. Mr. Barcus usually does not leave any doubt about his intention (T.27-III).

Mr. Barcus became exasperated with Mr. Mas (T.27-28-III). Sometimes it would get a little heated (T.28-III). Mr. Barcus would say: "Peter, Peter, I told you you've to do this. You have to do that." "Peter, listen to me," was another phrase that she heard all the time because sometimes Mr. Mas would get carried away and he would not listen (T.28-III).

Linda Wright testified that when Mr. Barcus learned of the judgment of foreclosure against the Mases he was very shocked (T.28-III). He was very upset because it was not proper (T.29-III). He called Mr. Mas as soon as he learned of the judgment of foreclosure (T.29-III). He advised Mr. Mas to retain another attorney (T.29-III).

The Mases appeared at their home on September 12, 1991 unannounced, in the evening (T.29-III). They were in a very ugly mood. They were yelling and screaming. They had their baby with them and handled her very poorly (T.30-III). They were there for hours (T.31-III).

Mr. Barcus told the Mases that they had to obtain other counsel (T.31-III).

The Referee found that: "There is no question that his clients took advantage of the Respondent...Mr. Mas psychologically manipulated the Respondent...." (RR 1).

Stanford Blake testified. He has been a Circuit Judge since January 3, 1995 (T.86-I). Prior to that, he practiced law in Dade County (T.86-I).

Mr. Mas retained him in connection with a criminal matter. He filed a motion to set aside Mr. Mas's *nolo contendre* plea (T.87-I).

Mr. Mas indicated the Mr. Barcus had obtained certain documents and other papers that would have helped in demonstrating Mr. Mas's innocence (T.87-88-I).

He called Mr. Barcus on the phone. Mr. Barcus said there might be some conflict because Judge Ferro had disqualified him in the civil case (T.88-I). Mr. Blake said that he would subpoena Mr. Barcus and he could raise the issue before the judge hearing the criminal matter (T.88-89-I). Bar Exhibit 25 is a copy of the subpoena (T.89-I).

Mr. Mas's wife had just given birth to a baby who was afflicted with cerebral palsy (T.91-I). Mr. Mas was under a great deal of pressure (T.91-I).

Mr. Barcus did not produce the information (T.94-I).

Mr. Blake sent a letter to Mr. Barcus, returned receipt requested, about the information that he was to provide (T.94-I). Mr. Blake received a notice of locating documents (T.95-I). He never received the documents (T.96-I).

He was able to have the plea vacated (T.96-I).

He became aware that Mr. Barcus had filed an *ex parte* motion for partial charging lien (T.96-I). Mr. Barcus said that he had a lien and he was not turning over the documents (T.97-I). He did not receive a copy of the motion (T.97-I).

On cross-examination he repeated that he was successful in having the plea set aside (T.97-I). The State then dismissed the case (T.97-I). The record was sealed (T.97-I). He charged Mr. Mas a flat fee (T.98-I).

Mr. Barcus testified that Stanford Blake served a subpoena on Mr. Mas to produce

some records (T.123). He did not produce them because he was under a court order issued by Judge Ferro which held that he owed a duty of loyalty to Dana because he had been with a firm which had represented Dana (T.124-IV). The court order precluded him from surrendering the documents which Mr. Blake sought, which he explained to Mr. Blake (T.124-IV). He asked Mr. Blake and Mr. Gostel to take the matter up with the judge in the Molina-Mas lawsuit and either have it clarified or an exception made (T.124-IV). He also had a lien on the documents (T.124-IV). It was inchoate, unperfected at the time (T.124-IV).

Mr. Blake sought documents that were public record (T.125-IV). He wanted them in connection with his motion to vacate Mr. Mas's conviction (T.125-IV). Mr. Mas's conviction was vacated (T.125-IV). It was vacated without the use of those documents (T.125-IV). He spoke to the assistant state attorney on the case and informed him that he had a lien on the documents and that they were public record (T.125-IV). However, to assist him, he told him the contents of the three documents sought in the subpoena over the phone (T.125). Mr. Mas's conviction was vacated (T.125-IV). In retrospect, it would have been easier just to turn over the documents (T.125-IV).

Respondent's Exhibit A-5 is a letter from the Dana attorney dated May 18, 1990 (T.126-IV). He considered the contents of the letter when he did not turn the records over to Mr. Blake (T.126-IV).

Prior to obtaining the charging lien he had not attempted to attain one in Molina v. Mas for attorney's fees (T.127-IV).

He made requests of Mr. Mas for payment, particularly after the September 12, meeting (T.127-128-IV). No money was paid (T.128-IV). He told Mr. Mas that he should

be compensated for his time and costs in obtaining the documents which Mr. Blake sought in the subpoena (T.128-IV). That request also was denied (T.128-IV).

He moved for a lien because his time sheets indicated well over $30,000.00 in attorney time expended and he knew that he had been deceived by Mr. Mas, that he had obtained his services under false pretenses (T.128-IV). He wanted to be paid, at the minimum, for the documents they sought (T.128-IV). He reviewed the law on charging liens completely, both statutory and equitable liens (T.128-IV).

He filed the motion for a charging lien to protect his intellectual property rights (T.160-IV). He realized that Mr. Mas had duped him. He had been deceived by repeated misrepresentations as to their ability to pay (T.160-IV). He had expended well over $30,000.00 in time and the partial charging lien was for only $1,800.00, which was the minimum amount of time it took to locate the subpoenaed documents, if one knew exactly and precisely where they were (T.160-161-IV).

It was Mr. Blake's subpoena and the existence of Judge Ferro's order prohibiting him from turning over the records which prompted him to file the motion for charging lien (T.165-IV).

Judge Green entered an order granting the motion for partial charging lien (T.130-IV). He did not deceive her in any way (T.130-IV). He did not record it (T.179-IV).

Mr. Blake wrote to him saying that if he did not comply with the subpoena immediately, he was going to seek an order to show cause why he should not be held in contempt (T.131-IV). This was in May of that year (T.131-IV). Very soon thereafter he obtained the order granting the partial charging lien (T.131-IV).

Respondent's Exhibit A-6 is Mr. Mas's motion to set aside the partial charging lien and his response (T.131-IV). It was set aside and he was permitted to seek the imposition of another (T.179-IV).

Respondent's Exhibit 13 is a letter Mr. Mas wrote to Mr. Barcus. It stated that:

> "If you will return the documents as we requested and refund the $6,000.00 which we have paid you for this two and a half year nightmare, we assure you that we will take no action whatsoever against you."

Mr. Mas admitted that if Mr. Barcus had paid the money they would not have filed the Bar complaint (T.124-125-III).

He did not formally bill the Mases for time or costs that they had not paid. However, he made many verbal requests for payment (T.173-174). Mr. Mas had convinced him that they could not pay (T.174-IV).

Reverend David Manning testified as a character witness for Mr. Barcus.

He is a United Methodist Pastor (T.83-II). He is married and has two children (T.83-II). He has a Bachelor of Arts Degree from Florida Southern College and received his Masters Degree in Theology at Emory University (T.83-II). He has been a minister for seven years (T.83-II).

He served for three years at Coral Gables First United Methodist Church and then for four years at United Methodist Church in Fort Meade. He is there now (T.84-II). He is the Pastor (T.84-II). The church has three hundred and fifty members. He was the Associate Pastor at Coral Gables First Methodist Church. That church has about twenty eight hundred members. That is where he met Mr. Barcus (T.84-II). He and his wife met Mr. Barcus in 1988 (T.84-II). They know him well (T.84-85-II).

They were in a lot of different Bible studies with Mr. Barcus and saw his involvement in various out-reach activities of the church. Disciple Bible Study is one Bible study they were in together. That was over thirty six weeks on a weekly basis (T.85-II).

Mr. Barcus was also involved in the Stephen Ministry, which is a lay ministry. It is a care giving ministry between lay people. Mr. Barcus was involved in the training. It helped people who were bereaved or going through other crises. Mr. Barcus and those who are trained as Stephen Ministers would help a particular person in his or her time of crisis and be a support through listening and sharing common experiences (T.85-II).

Their friendship extended beyond the church. It is a real friendship that they continue to share. Mr. Barcus is a very special friend to him and his wife (T.86-II).

When he and his wife moved to Miami they did not know anyone. Mr. Barcus befriended them. He expressed interest in them on numerous occasions. He would come by and they would go out to dinner. They were not accustomed to someone being that friendly, particularly in a big city. He extended a lot of other courtesies to them (T.86-87-II).

Since they moved to Fort Meade they have stayed in touch with Mr. Barcus. Two years ago he drove up to Fort Meade from Miami and worshiped in the church one Sunday. That meant a lot to them (T.87-II).

When asked what type person Mr. Barcus is, Reverend Manning said that he can best describe Mr. Barcus is by quoting a passage from scripture, Micah, Chapter 6, Verse 8, which says in part, that:

> "What does the Lord require of you but to do justice, to love kindness and to walk humbly with the Lord your God." (T.87-88-II).

That very accurately describes Gary Barcus. He loves justice and that which is true and right (T.88-II). Reverend Manning said that with all his heart (T.88-II).

Mr. Barcus is very passionate and zealous for that which is true and right and good and just. He is unwavering in that. He loves kindness. He does kindness. He is very benevolent, very kind, very gracious and very generous. He walks humbly with God. His faith is very important to him. He saw that first hand. He honors and respects that (T.88-89-II).

Mr. Barcus is an honest man (T.89-II).

Alvah Chapman testified as a character witness for Mr. Barcus. He was Chairman and CEO of Knight-Ritter for fourteen years (T.71-72-II). Before that he was President of Knight-Ritter. Before that he was general manager of The Miami Herald and President of The Miami Herald (T.72-II).

He and Mr. Barcus are members of the same church, the First Methodist Church of Coral Gables, and members of the same Sunday School class (T.72-II). Sunday School is Bible study class for men and women. They study various books of the Bible, discuss what they mean to them in their everyday life and how they can use the Bible to help them live better lives (T.73-II).

He has known Mr. Barcus for six or seven years (T.73-II). He and Mr. Barcus did some things together in the church (T.73-II). They jointly conducted a Laymen's Day service in the church. They worked together and planned their presentation and spoke together in three different services (T.73-II).

Mr. Barcus is a fine person, a person of good character, a person of integrity, and a

person of strong spiritual commitment. He cares about his country, his fellow man, and himself (T.74-II). He is honest and reliable (T.74-II).

Michael J. Lewis testified. He is a systems specialist technician with Bell South (T.91-92-II). He handles the computers and the lines that serve them throughout a nine state region. He has been with Southern Bell and Bell South twenty-five years, all in Miami (T.92-II).

He knows Mr. Barcus. Mr. Barcus took over his representation in a law suit he had against Allstate Insurance Company for its failure to pay on a claim, a bad faith claim (T.92-93-III). It was resolved in his favor (T.93-II). He obtained $40,000.00. The original claim was $7,500.00 (T.93-II).

Mr. Barcus usually let him know what was going on by phone and then followed it up with a letter so that he always knew what was happening (T.93-94-II). Mr. Barcus always kept him informed (T.94-II). His work was very good (T.94-II).

He and Mr. Barcus are friends (T.94-II). Mr. Barcus is an honest straight-forward man. He can be overbearing at times. But that's Mr. Barcus. He is a self made man. He put himself through law school and he worked hard to do it.

Mr. Barcus is a very generous man. He treats everyone well. He is very affable. He gets along with everyone (T.95-II). If one goes to see him, one expects to be fed. When they go out to dinner, Mr. Barcus will try to pick up the tab. He has sent friends of his to discuss legal difficulties with Mr. Barcus. Mr. Barcus has helped them or referred them to someone who could help them. He has never charged them (T.95-II).

Mr. Barcus is an honest person. He is reliable. He is dependable (T.96-II).

The Referee found Mr. Barcus guilty on Counts I, II, and V, and not guilty on Counts III and IV (RR 8). He recommended that Mr. Barcus be suspended for thirty days to be followed by four months probation (RR 8). A special condition of the probation should be that he attend and successfully complete the Practice and Professional Enhancement Program (RR 8).

The Petitions for Review followed.

POINTS ON REVIEW

I

THE REFEREE ERRED IN FINDING MR. BARCUS GUILTY ON COUNT I.

II

THE REFEREE ERRED IN FINDING MR. BARCUS GUILTY ON COUNT II.

III

THE REFEREE ERRED IN FINDING MR. BARCUS GUILTY ON COUNT V.

IV

THE REFEREE CORRECTLY FOUND MR. BARCUS NOT GUILTY ON COUNT III.

V

THE REFEREE WAS CORRECT IN FINDING MR. BARCUS NOT GUILTY OF COUNT IV.

VI

THE MOST SEVERE PENALTY THAT CAN BE IMPOSED UPON MR. BARCUS, EVEN IF HE WERE GUILTY OF EVERY COUNT, IS A PUBLIC REPRIMAND.

SUMMARY OF THE ARGUMENT

I

Mr. Barcus did nothing unethical. He made a simple mistake in misnoting the date of a deposition. He received the notice of the rescheduled deposition an hour after it was to commence. He took Mr. Mas's deposition in an attempt to show good faith. Dana's attorney took Mr. Mas's deposition.

II

Mr. Barcus protected the Mases. He urged them to file bankruptcy or retain other counsel for the appeal. There was no evidence of either a clear abuse of the right of appeal or obvious bad faith.

III

Mr. Barcus contacted the Mases as soon as the *ex parte* judgment of mortgage foreclosure was received. He told them that he no longer would represent them and that they must employ new counsel. It is unfair even to accuse Mr. Barcus of not moving to set aside the mortgage foreclosure when he knew that the Mases' new attorney would do so.

IV

The Referee heard and evaluated the testimony. The Referee understood that the Mases had taken advantage of Mr. Barcus and had psychologically manipulated him. The Referee's findings are correct.

V

The Referee heard and evaluated the testimony. The Referee understood that the Mases had taken advantage of Mr. Barcus and had psychologically manipulated him. The Referee's findings are correct.

VI

The most severe discipline that can be imposed upon Mr. Barcus is a public reprimand.

ARGUMENT

I

THE REFEREE ERRED IN FINDING MR. BARCUS GUILTY ON COUNT I.

It is difficult, nay impossible, to discern how Mr. Barcus did anything *unethical.*

The Referee found that Mr. Mas's deposition was noticed by Dana's attorney for July 18, 1990 (RR 3). Mr. Barcus received the notice but wrote down the wrong date (RR 3). Mr. Barcus and Mr. Mas did not appear for the deposition. They did appear at Dana's attorney's office shortly thereafter and offered to make themselves available for deposition at that time. Their appearance was not pursuant to notice. Dana's attorney declined to take the deposition of Mr. Mas at that time (RR 4). Mr. Mas's deposition was renoticed by Dana's attorney for April 1, 1990 (RR 4). Mr. Barcus' unrefuted testimony was that he received the notice approximately one hour after the deposition was to take place (RR 4). Mr. Barcus failed to advise Mr. Mas of the notice (RR 4). Neither Mr. Barcus nor Mr. Mas appeared at the deposition rescheduled for August 1, 1990 (RR 4). Dana's attorneys filed a motion for sanctions against Mr. Mas because of his failure to appear for deposition. No sanctions were imposed (RR 4). Mr. Mas's failure to appear for deposition on July 18, 1990 was due solely to Mr. Barcus' failure to advise him of the correct date of the deposition (RR 4). Mr. Mas's failure to appear for the deposition on August 1, 1990 was the result of his and Mr. Barcus' being unaware of its scheduling (RR 5).

Mr. Barcus took the deposition of Mr. Mas on April 3, 1990 (RR 5). No other party or attorney was present (RR 5). On or about August 8, 1990 Mr. Barcus filed a notice of

deposition stating that the deposition of Mr. Mas would be taken on August 3, 1990 (RR 5). Mr. Barcus certified that a true and correct copy of the notice was sent to attorneys for the parties on August 8, 1990 (RR 5).

The Referee found Mr. Barcus guilty of violating Rules 4-1.3 (a lawyer shall act with reasonable diligence and promptness in representing a client) and 4-1.4(b) (a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation) of the Rules of Professional Conduct (RR 8).

How did Mr. Barcus fail to act with reasonable diligence and promptness? He made a simple mistake in noting the July 18, 1990 deposition. He received the notice of the August 1, 1990 deposition an hour *after* it was scheduled.

How did Mr. Barcus fail to explain any matter to the extent reasonably necessary to permit the client to make informed decisions about the representation? Granted, the taking of one's client deposition is unusual. But, how is it unethical?

Dana's attorney did take Mr. Mas's deposition in September, 1990 (T.80-III). No harm was done.

This is what happened:

Prior to July 18, 1990, Dana had taken Mr. Mas's deposition (T.75-III). Mr. Barcus had instructed Mr. Mas not to answer some questions. The court ruled that he had to answer them (T.75-III). Dana's attorney noticed Mr. Mas's deposition for July 18, 1990 (T.75-III). Mr. Barcus made a mistake and noted the deposition for July 28, 1990 (T.76-III).

When Mr. Barcus learned that he had noted the wrong date for the deposition, he called Dana's attorney and apologized (T.76-77-III). This was on July 19, 1990 (T.142-III).

He told him that he and Mr. Mas would come over for the deposition at his convenience (T.77-III). Dana's attorney refused. He said that he would renotice it when he felt like it (T.77-III).

Mr. Mas went to Mr. Barcus' house. He wanted to go down to Dana's attorney's office for the deposition (T.77-III). They did (T.77-III). Dana's attorney said that he was not going to take the deposition then and that he would take it when he felt like it (T.78-III). He said that he was going to bring the matter before the judge (T.78-III).

Mr. Barcus and Mr. Mas went to Dana's attorney's office on July 19, 1990 (T.142-III). They called and said that they were coming over (T.142-III). He spoke to Dana's attorney directly (T.142-143-III). Dana's attorney was expecting them (T.143-IV). They went there on the 19th to show their good faith and willingness to present Mr. Mas for deposition and to apologize personally to Dana's attorney for Mr. Barcus' mistake in noting the date of the deposition (T.143-III). Mr. Barcus wanted Dana's attorney to take Mr. Mas's deposition at that time or to agree to a mutually convenient time to take the deposition (T.143-III). He informed the Molinas' attorneys that he was taking Mr. Mas to Dana's attorney's office for deposition (T.145-III).

Mr. Barcus repeatedly offered to reschedule the deposition (T.78-III). Dana's attorney refused (T.78-III). Dana's attorney renoticed the deposition for August 1, 1990 at 1:00 P.M. (T.78-79-III). Mr. Barcus received the notice one hour after the deposition was scheduled (T.79-III). He called Dana's attorney and offered to produce Mr. Mas yet again at an agreed time (T.79-III). Dana's attorney refused and said that he was going to take it before the judge (T.80-III).

Dana's attorney took Mr. Mas's deposition in September, 1990 (T.80-III).

Mr. Barcus was so furious at Dana's attorney's attempt to discredit him and Mr. Mas that he set a deposition himself, called the other side, and told them that Mr. Mas was there and would be available (T.81-III). They could take his deposition. He attempted to show good faith that they were not trying to deceive or obstruct discovery (T.81-III). No one appeared (T.81-III). They were informed by phone (T.81-III). Mr. Barcus spoke to them and their staff and delivered the notices to them (T.81-III). The deposition he took of Mr. Mas was limited to the circumstances involving the method by which the documents from Michigan, the usury documents, were obtained. Dana's attorney wanted them precluded (T.81-82-III).

This Court must reverse the Referee's finding of guilt on Count I.

II

THE REFEREE ERRED IN FINDING MR. BARCUS GUILTY ON COUNT II.

Long ago this Court held that:

> "...In the absence of clear abuse of the right of appeal *and* obvious bad faith attorneys should not be censured for availing themselves of appellate review." (*The Florida Bar v. Neal*, 246 So.2d 104 (Fla. 1971))

Here, Mr. Barcus acted only in good faith, to protect the Mases' interests, and did not abuse the right of appeal.

The Molinas obtained a partial summary judgment on liability against the Mases (RR 5). Mr. Mas directed Mr. Barcus to appeal the order granting the Molinas' motion for summary judgment (RR 5).

Mr. Barcus told Mr. Mas that he could not represent him effectively (T.91-III). There was a thirty day period within which to file a notice of appeal (T.91-III). He told Mr. Mas that the judge had ruled only that they were liable on the note and, indeed, they were liable on the note (T.91-III). Mr. Barcus discussed the merits of the appeal with Mr. Mas (T.92-III). He told Mr. Mas that an appeal was without merit (T.92-III). There was no defense. There was clear liability (T.92-III). Mr. Mas claimed to have set offs and he very well may have had them, but Mr. Barcus told him that he had to obtain another attorney for an appeal or file bankruptcy (T.91-III). Mr. Mas repeatedly had said that he was going to file bankruptcy (T.91-III).

Mr. Mas wanted to buy time. He said that he would see a bankruptcy attorney but he did not want to hire another attorney for the appeal because he was broke (T.91-III).

Mr. Barcus told the Mases that he did not do appellate work (T.93-III). An appeal would require a separate fee agreement (T.93-III).

Mr. Barcus communicated with Mr. Mas during the thirty day period for the filing of the notice of appeal (T.93-III). He wanted to make sure that both the Mases understood the ramifications and import of the partial summary judgment on liability (T.93-III). He urged them, based on their representations to him, to file bankruptcy (T.93-III). He told them that they should seek the advice of a bankruptcy attorney (T.93-94-III). They would have a new beginning, get back to work, raise their child, and put an end to the constant aggravation of the lawsuit (T.94-III).

Mr. Barcus called Mr. Mas on the thirtieth day and told him that it was the final day (T.94-III). If he did not file the notice of appeal the Molinas' attorney was going to set down a hearing for summary judgment as to damages and foreclosure (T.94-III).

Mr. Mas told Mr. Barcus that he wanted to file bankruptcy. He had not yet contacted an appellate attorney. Mr. Mas asked Mr. Barcus to file a notice of appeal (T.94-III). Mr. Barcus made it clear to Mr. Mas that he would not represent him on the appeal (T.94-III). An appeal would require separate funding and a separate fee agreement (T.94-III). The record on appeal would have to be prepared and that was expensive. There were deadlines. A brief would have to be filed (T.95-III).

Mr. Barcus agreed to file the notice of appeal in order to obtain time for Mr. Mas to employ an appellate attorney or a bankruptcy attorney (T.95-III). On cross-examination, Mr. Barcus reiterated that he filed the notice of appeal at the request of the Mases (T.151-III). He filed a motion for extension of time at the request of the Mases (T.151-III). The intent

was to leave the door open for another attorney to file the brief if the Mases did not file bankruptcy (T.151-152-III).

Mr. Barcus obtained an extension of time to file the brief (T.96-III). He told Mr. Mas (T.96-III). He told Mr. Mas that he was going to hamstring his eventual attorney if he wanted to prosecute the appeal because of the time limits (T.96-97-III). Mr. Barcus again explained the time deadlines for prosecuting an appeal to Mr. Mas (T.97-III). He told him that every day he waited he prejudiced his case (T.97-III). Mr. Mas said that he was going to file bankruptcy. He did not want to prosecute the appeal (T.97-III). Mr. Mas did not want to pay an attorney for an appeal (T.97-III).

Mr. Barcus received an order from the Third District directing him to file a brief within ten days or the appeal would be dismissed (T.98-III). He informed Mr. Mas of the order as soon as he received it (T.98-III). Mr. Mas said that he was going to file bankruptcy (T.98-III). He assured Mr. Barcus that he would file bankruptcy (T.98-III).

The appeal was dismissed (RR 6).

Mr. Barcus did nothing wrong.

First, Mr. Mas had the absolute *right* to appeal the partial summary judgment. There was no *clear* abuse of the right of appeal.

Second, not only did Mr. Barcus not act in obvious bad faith, he acted in utmost good faith. His concern was the Mases. He sought to protect them. He filed the notice of appeal at their request (RR 5; T.151-III). The intent was to gain time so that they could employ other counsel for the appeal or file bankruptcy (T.95-III; 151-152-III). How can Mr. Barcus be faulted for that?

Third, no harm was done. The appeal was dismissed. The lawsuit proceeded.

This Court must reverse the Referee's findings of guilt on Count II.

III

THE REFEREE ERRED IN FINDING MR. BARCUS GUILTY ON COUNT V.

The Referee found that on September 3, 1991, prior to the Mases' dismissal of Mr. Barcus, a final judgment of mortgage foreclosure was entered against the Mases in the civil action providing for the foreclosure sale of their home on October 2, 1991 (RR 7). No hearing was held on the entry of the order, nor was any notice provided to Mr. Barcus (RR 7). Mr. Barcus failed to move for rehearing or to set aside or vacate the final judgment of foreclosure (RR 7). On September 12, 1991 Mr. Barcus informed Mr. Mas that he would need to retain new counsel to represent him in connection with the pending litigation (RR 7). The Mas's new counsel, Gary Gostel, filed a motion for stay pending review in the pending civil proceedings (RR 7). On or about October 1, 1991, an order was entered vacating the final judgment of mortgage foreclosure which states that the final judgment was signed by the Court in error (RR 7).

He found Mr. Mas guilty of violating Rule 4-1.3 (A lawyer shall act with reasonable diligence and promptness in representing a client.) The Referee is wrong.

The testimony is clear that the Mases and Mr. Barcus agreed that the Mases would obtain new counsel immediately after they learned of the entry of the final judgment of foreclosure.

Mr. Barcus learned of the entry of the final judgment of foreclosure when he received it in the mail (T.102-III).

Mr. Barcus and Mr. Mas discussed the situation. Mr. Barcus told Mr. Mas that he had

to move immediately to set the order aside. He could not ignore this. It was imperative (T.104-III). He also spoke to Mrs. Mas and told her that they had to retain a bankruptcy attorney or go to another attorney and have the foreclosure order set aside. He told them that they must take care of this immediately (T.105-III). Mr. Mas said that he would take care of it (T.105-III). *Mr. Barcus explained to them that he would not seek to have the order set aside* (T.107-III). *They agreed. They would see a bankruptcy attorney* (T.107-III).

Mr. Barcus called the Mases to make sure that they had scheduled an appointment with a bankruptcy attorney (T.106-III).

The Mases came to his house on September 12, 1991 in the evening (T.107-III). They arrived at approximately 7:00 P.M. They did not have an appointment. They appeared unannounced (T.107-III). They brought their child (T.108-III).

The Mases said that they had seen a bankruptcy attorney and that she had informed them that money would be required in advance, their credit cards would be controlled, their debts would be controlled, and a trustee would have control of their money and make their payments (T.109-III). When they spoke of court control of their assets, Mr. Barcus realized that they had lied to him repeatedly about their financial condition (T.110-III).

Mr. Mas told Mr. Barcus that they were not eligible for bankruptcy because their assets exceeded their debts (T.110-III). Mr. Barcus knew that they had lied to him for years (T.110-III).

Late in the evening, after hours of discussion about bankruptcy, and after Mr. Barcus realized that the Mases had misrepresented their financial condition to him for years, Mrs. Mas said "we can pay you" (T.110-111-III). That hit Mr. Barcus like "a laser beam between

the eyes" (T.110-111-III). Mr. Barcus told them that, if in fact they could employ counsel, they must do so immediately (T.111-III). They stayed until almost midnight, about five hours (T.111-III).

At the end of the meeting, the Mases again accepted that Mr. Barcus *no longer would be representing them* (T.117;179-180-III). *He advised them to seek new counsel immediately* (T.117-III). *They said that they would do so* (T.117;180-III).

Mr. Mas confirmed that *when he and his wife left Mr. Barcus' house that night, there was no doubt that Mr. Barcus no longer would represent them* (T.69;98-II). Mr. Barcus reiterated on re-direct that when the Mases left his house that night *they understood that he would take no further legal action for them* (T.179-180-III). *They were to obtain other counsel* (T.180-III).

Linda Wright testified that when Mr. Barcus learned of the judgment of foreclosure he called Mr. Mas immediately (T.29-III). He advised Mr. Mas to retain another attorney (T.29-III).

The Mases appeared at their home on September 12, 1991, unannounced, in the evening (T.29-III). They were in a very ugly mood (T.30-III). They were yelling and screaming (T.30-III). They had the baby with them and they handled her very poorly (T.30-III). They were there for hours (T.31-III).

Mr. Barcus told the Mases that they had to obtain other counsel (T.31-III).

Gary Gostel, the Mases' new attorney, testified that he first spoke to the Mases the next day, September 13, 1991 (T.30-I). Finally, finally, the Mases contacted and retained new counsel.

Thus, as soon as Mr. Barcus learned of the judgment of foreclosure he phoned Mr. Mas and told him he must seek other counsel. The Mases barged in a few days later. They knew that they had to obtain new counsel. They called Mr. Gostel the next day. He had the mortgage foreclosure set aside.

Mr. Barcus acted entirely properly.

This Court must reverse the Referee's finding of guilt on Count V.

IV

THE REFEREE CORRECTLY FOUND MR. BARCUS NOT GUILTY ON COUNT III.

The Referee incorporated his findings and recommendations made in open court on December 6, 1995 in his Report and Recommendation (RR 8). In those verbal findings he found that:

> "The whole question of the civil file, all of Count III -- there was so much confusion...
>
> * * * * *
>
> I am satisfied that there was no proof of any abuse or misuse or unresponsiveness to the rules." (T.8-V)

The Florida Bar must prove every element of its case by clear and convincing evidence. *The Florida Bar v. Rayman*, 238 So.2d 594 (Fla. 1970). The Referee makes findings of facts and resolves evidentiary conflicts. *The Florida Bar v. Niles*, 644 So.2d 504 (Fla. 1994). A referee's finding of fact carries a presumption of correctness. *The Florida Bar v. Vannier*, 498 So.2d 896 (Fla. 1986). Indeed:

> "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...." (*The Florida Bar v. Marable*, 645 So.2d 438, 442 (Fla. 1994))

The Bar quotes copiously from testimony. It concludes that the Referee reached the wrong decision. It blithely overlooks that the Referee heard and read the same testimony. "...the referee is in the better position to evaluate the demeanor and credibility of the witnesses...." *Ibid.* The Referee, after evaluating the testimony, found that: "...there was so

much confusion (T.8-V). He was: "...*satisfied* that there was no proof of any abuse or misuse or unresponsiveness to the rules." *Ibid.* The Referee was correct.

This Court must affirm the Referee's finding of not guilty on Count III.

V

THE REFEREE WAS CORRECT IN FINDING MR. BARCUS NOT GUILTY OF COUNT IV.

The principles of review are set forth in Point IV, *supra.*

Again, the Bar quotes copiously from the testimony. Again, it ignores that: "...the referee is in the better position to evaluate the demeanor and credibility of the witnesses...." *The Florida Bar v. Marable*, 645 So.2d 438, 442 (Fla. 1994).

The referee heard and evaluated the same testimony that the Bar quotes. He concluded:

> "As to the question of the lien, the procedure was improper. *I don't think there was any wrong motive toward it.* I just think that Mr. Barcus should be a little educated as to the ethics portion of the rules of the Florida Bar." (T.8-V) (Emphasis Added)

And:

> "As to Count IV, I am finding that there was no competent evidence that will support a charge.
>
> The facts themselves do not evidence a violation. There was no proof from the Bar as to that particular count." (T.9-V).

The Referee was correct.

This Court must affirm the Referee's finding of not guilty on Count IV.

VI

THE MOST SEVERE PENALTY THAT CAN BE IMPOSED UPON MR. BARCUS, EVEN IF HE WERE GUILTY OF EVERY COUNT, IS A PUBLIC REPRIMAND.

The Referee concluded, on the first page of his report, that:

> "This case is not unlike the adage or homily that 'no good deed goes unpunished.'...." (RR 1).

The record clearly establishes that Mr. Barcus' sole intent was to protect the Mases. The Mases' sole interest was self interest. They would not have filed the Bar complaint if Mr. Barcus had refunded the minuscule amount of money they had paid him. They are extortionists, along with their other innumerable shortcomings.

At *least*, the following mitigating circumstances are present:

1. Absence of a prior disciplinary record.

2. Absence of a dishonest or selfish motive.

3. Thorough and free disclosure to the Grievance Committee and Bar and cooperative attitude toward proceedings.

4. Character and reputation.

Moreover, the Referee made the highly unusual finding that:

> "There is no question that his clients took advantage of the Respondent. That Mr. Mas psychologically manipulated the Respondent...." (RR 1)

At worst, the most severe discipline that can be imposed upon Mr. Barcus is a public reprimand.

CONCLUSION

This Court must reverse the Referee's finding of guilt on Counts I, II, and V. It must affirm the findings of not guilty on Counts III and IV.

Even under the worst conceivable situation, the most severe discipline that can be imposed upon Mr. Barcus is a public reprimand.

JEPEWAY AND JEPEWAY, P.A.
407 Biscayne Building
19 West Flagler Street
Miami, Florida 33130
Tele.: (305)377-2356

By: L. M. Jepeway, Jr.
Louis M. Jepeway, Jr.
Fla. Bar No. 113699

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **Initial Brief and Answer Brief of Respondent, Gary Barcus** was mailed to **ARLENE K. SANKEL,** Bar Counsel, The Florida Bar, Rivergate Plaza, Suite M-100, 444 Brickell Avenue, Miami, Florida 33131 this 3rd day of July, 1996.

By: L. M. Jepeway, Jr.
Louis M. Jepeway, Jr.