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)

INITIAL BRIEF OF THE FLORIDA BAR

ARLENE K. SANKEL
Bar Counsel
Florida Bar No. 272981
The Florida Bar
444 Brickell Avenue
Suite M-100
Miami, Florida 33131
(305) 377-4445

JOHN T. BERRY
Staff Counsel
Florida Bar No. 217395
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399
(904) 561-5839

JOHN F. HARKNESS, JR.
Executive Director
Florida Bar No. 123390
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399
(904) 561-5600

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Rules Regulating The Florida Bar

RULES **PAGE**

Florida Standards for Imposing Lawyer Sanctions

SECTIONS **PAGE**

SYMBOLS AND REFERENCES

For the purpose of this Initial Brief on Appeal, The Florida Bar will be referred to as either TFB or the Bar. Respondent will be referred to as either Respondent, Gary Barcus, or Barcus. 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 four 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. References to the transcripts of the final hearing will be set forth as TR. and page number, followed by either I, II, III, or IV, denoting the volume.

References to The Florida Bar's exhibits at final hearing will be set forth as TFB Ex. and number. References to Respondent's exhibits at final hearing will be set forth as R Ex. and number. References to the Report of Referee dated January 19, 1996 will be set forth as RR and page number.

An index to the Appendix is included at the conclusion of this Brief.

STATEMENT OF THE CASE

Following a probable cause finding by Grievance Committee "G" of the Eleventh Judicial Circuit, The Florida Bar filed a five count Complaint against Gary Allyn Barcus on July 11, 1994. On August 11, 1994, Respondent filed his Answer, along with his Response to the Bar's Request for Admissions. The Honorable Martin Greenbaum was appointed Referee on July 21, 1994.

This matter ultimately proceeded to final hearing before the Referee on September 14, October 6, November 7, and November 8, 1995. The Referee found the Respondent guilty of misconduct as to Counts I, II, and V of the Complaint. As to Count I, Respondent was found guilty of violating Rule 4-1.3 (A lawyer shall act with reasonable diligence and promptness in representing a client) and Rule 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. As to Count II, Respondent was found guilty of violating Rule 4-8.4(d) (A lawyer shall not engage in conduct that is prejudicial to the administration of justice) of the Rules of Professional Conduct. As to Count V, Respondent was found guilty of violating Rule 4-1.3 (A lawyer shall act with reasonable diligence and promptness in representing a client) of the Rules of

Professional Conduct. The Referee found Respondent not guilty as to Counts III and IV of The Florida Bar's Complaint, concluding that the allegations contained in those counts were not supported by competent evidence.

The Referee recommended that Respondent be suspended for a period of thirty (30) days to be followed by four (4) months probation. As a special condition of probation, it was recommended that Respondent attend and successfully complete the Practice and Professional Enhancement Program offered by The Florida Bar.

STATEMENT OF THE FACTS

The Florida Bar's complaint in this cause stems from allegations of misconduct on the part of Respondent, Gary Allyn Barcus, as they pertain to his representation of his former clients, Peter and Paula Mas.

Respondent was initially retained to represent Mr. and Mrs. Mas in approximately April, 1989, in connection with a lawsuit brought against them by Peter Mas' business partner, Michael Molina, and his wife, Myrna Molina. (TR. 35 - I). A few months subsequent to the initial retainer, Mr. and Mrs. Mas retained Respondent to defend them in a lawsuit brought against them by Dana Commercial Credit Corporation. (TR. 36 - I). Peter Mas testified that he initially paid Respondent a $3500.00 retainer and later another $2500.00 in connection with these matters (TR. 35-36 - I). Respondent was also retained by the Mases to file a counter claim against Dana Commercial Credit Corporation. The fee agreement for this representation was on a contingency basis. (TR. 71 - III). In approximately March, 1990, all of the aforesaid civil litigation was consolidated by the court.

The basis of the litigation involving Peter and Paula Mas, Michael and Myrna Molina, Dana Commercial Credit Corporation, et al, is essentially as follows:

Mas and Molina were partners in an automotive parts business which ultimately failed. During the course of their partnership, Mas and Molina had signed a promissory note secured by mortgages on their respective homes. The financing was provided by Florida International Bank. The Molinas subsequently purchased the Mas' note and mortgage from Florida International Bank and proceeded to sue the Mases on the note and to foreclose on their mortgage. (TR. 55-56 - III).

Dana Commercial Credit had previously leased computer equipment to the failed auto parts business and they instituted a lawsuit against Mas, Molina, and the business based on their equipment lease. (TR. 57-58 - III).

AS TO COUNT I

In the course of the pending civil litigation, Peter Mas was deposed by Richard Stone, the attorney for Dana. The deposition was to be concluded at a later date. As evidenced by the Certificate of Service contained on the Re-Notice of Deposition Duces Tecum, on July 3, 1990, Stone mailed a Re-Notice to Respondent scheduling the completion of Mas' deposition for July 18, 1990. (Appendix A). On July 25, 1990, Stone sent Respondent a Second Re-Notice of Deposition Duces Tecum re-scheduling Peter Mas' deposition to August 1, 1990. (Appendix B). Peter Mas

testified that Respondent had not informed him of either scheduled deposition and that he had not appeared on either date. (TR. 39-40 - I). Respondent offered several reasons for his failure to advise and appear with his client for deposition, including among them illness, misdiaried dates, and receipt of a notice one hour subsequent to the commencement of the scheduled deposition. (TR. 77-80 - III). As a result of Mas' failure to appear, a Plaintiff's Motion for Sanctions Against Defendant Mas was filed by Stone on August 3, 1990. (Appendix C).

Subsequent to his twice failing to produce his client Mas for deposition, Respondent proceeded to depose his own client. (TR. 81 - III). Peter Mas was advised by Respondent to appear at the office of court reporter, John Blue, on Saturday, August 3, 1990. No one was present other than Respondent, Peter Mas, and the court reporter (TR. 40-41 - I). Respondent testified that he provided telephone notice to opposing counsel. He also testified that he delivered the notices to them. (TR. 81 - III).

The Notice of Deposition filed by Respondent indicates that Peter Mas' deposition would be taken on August 3, 1990 and that opposing counsel had been timely informed of said deposition by telephone. The Notice of Deposition, however, was not filed until August 8, 1990, to-wit: five days after Respondent had deposed his

own client. (Appendix D).

Not only did Respondent proceed to depose his own client and certify that written notice was provided five days after said deposition had occurred, but Respondent's conduct at the deposition was itself, at the very least, strange. Respondent himself stated that it was at Peter Mas' deposition that he made what "everyone refers to as the bizarre Dick Tracey speech...". (TR. 82 - III). A review of the transcript of that deposition reveals a dialogue by Respondent in which he analogizes his and the Mas' situation to that of Dick Tracey and the mob. Respondent additionally engages in a monologue on other issues associated with his representation of the Mases. (Appendix E).

With regard to Count I, the Referee recommended that Respondent be found guilty of violating Rule 4-1.3 (A lawyer shall act with reasonable diligence and promptness in representing a client) and Rule 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.

AS TO COUNT II

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. (Appendix F). 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 this Order of Partial Summary Judgment was filed by Respondent on March 14, 1991. (Appendix G).

Contradictory testimony was offered by Respondent and Mas as to the reasons for the filing of the appeal. Essentially, Mas testified that he believed the appeal would be pursued on its merits. (TR. 58 - I). Respondent, on the other hand, testified that he repeatedly told Mas he would not be filing a brief and that the Notice of Appeal was filed in order to give Mas time to consult with a bankruptcy attorney. In essence, to stall for time. (TR. 94-95 - III). The Referee concluded that Respondent was directed to pursue the appeal by Mas and that Mas was advised by Respondent that the reason for the appeal was to delay the foreclosure proceedings against the Mases and that Respondent would not be actually pursuing the appeal. (RR 6; Appendix H).

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 appellate court stating that the appeal would be dismissed within ten days unless the court was informed that the matter was being diligently prosecuted.

(Appendix I). According to the testimony of Gary Gostel, the attorney who represented the Mases subsequent to Respondent, a notice of diligent prosecution was filed by Respondent with the Third District Court of Appeals on August 9, 1991. (TR. 17 - I). Gostel also testified that he personally went to the Third District Court of Appeals on September 19, 1991 to review the appellate court file and that he took notes on what he observed in the court file. (TR. 17 - I). It was Respondent's recollection that his response to the clerk's order was to make another request for extension of time. (TR. 154 - IV). The Referee concluded that the August 9, 1991 filing by Respondent was in fact a notice of diligent prosecution. (RR 6; Appendix H). No brief was ever filed and ultimately, on August 16, 1991, the appellate court dismissed the appeal on its own motion. (Appendix J).

With regard to Count II of the Bar's complaint, the Referee concluded that Respondent filed the Notice of Appeal, Motion for Extension of Time to File Brief, and Notice of Diligent Prosecution for the sole purpose of delaying the foreclosure proceedings which would result from the trial court's previous order of February 14, 1991. (RR 6; Appendix H). As a result, the Referee recommended Respondent be found guilty of violating Rule 4-8.4(d) (A lawyer shall not engage in conduct that is prejudicial to the

administration of justice) of the Rules of Professional Conduct (RR 8; Appendix H).

AS TO COUNT III

In approximately November, 1989, Respondent was charged criminally with grand theft in the third degree in Dade County Circuit Court. The criminal charges arose from allegations related to the civil litigation. In essence, Peter Mas was charged with theft of the Dana lease equipment.

Initially, Respondent was represented by the public defender and entered a plea of no contest to the charges against him. (TR. 68 - I). Subsequently, in 1992, newly discovered evidence was acquired by Mas which resulted in his hiring 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). At the time Mas hired Blake, Respondent no longer represented him in the civil litigation.

Blake testified that during the course of his representation of Mas, Blake was in need of certain documents and papers which he understood to be in Respondent's possession as a result of Respondent's representation of the Mases in the civil litigation. (TR. 87-88 - I). After being informed by Respondent that he might have a conflict in producing the requested records as Judge Ferro

had disqualified Respondent in the Mas' civil case due to a conflict of interest, Blake issued a subpoena duces tecum for Respondent to appear before Judge Rodolfo Sorondo in Mas' criminal case on April 24, 1992. (TR. 88-89 - I; Appendix K).

Hearing before Judge Sorondo proceeded on April 24, 1992. Respondent and Blake appeared. A review of the April 24, 1992 transcript indicates that Respondent informed Judge Sorondo of Judge Ferro's disqualification order and also advised him that the information sought in Blake's subpoena was "either published or readily available". (Appendix L, p. 5). After hearing from Respondent and Blake and allowing the scope of the subpoena to be expanded, Judge Sorondo ruled that "The Subpoena Duces Tecum will issue and you will comply". (Appendix L, p. 6). Blake continued on to testify that despite Judge Sorondo's ruling, Respondent failed to ever produce the subpoenaed records and documents. (TR. 96 - I). This despite Blake's written request to Respondent that he comply with Judge Sorondo's order. (Appendix M).

Interestingly enough, in response to a question posed by the Referee, Respondent replied as follows:

> THE REFEREE: So when Judge Sorondo told you to comply with the subpoena, you said, I can't do that because Judge Ferro has forced me to withdraw from the civil case.

THE WITNESS: Yes.

THE REFEREE: You told him that, in those words?

THE WITNESS: I don't recall exactly, your Honor. I would have to see the transcript to see exactly what I said.

(TR. 187 - IV).

Review of the transcript before Judge Sorondo (Appendix L), reflects that Respondent did express to the court concerns about turning over the records subpoenaed by Blake in light of Judge Ferro's Order of disqualification in the Dana matter. A review of Judge Ferro's Order of March 14, 1991 reflects that Respondent was disqualified as the result of his previous employer's representation of Dana in a matter similar to the Mas' litigation. Judge Ferro concluded that as a result, Respondent had been introduced to Dana's litigation strategies and responses to frequently raised lease defenses. The Order indicates that Judge Ferro granted it based on his determination that such an Order was required to avoid the appearance of impropriety or the undermining of the loyalty and trust upon which the attorney-client relationship is based. (Appendix N). Nowhere in the Order is Respondent prohibited from turning over his client file or any other pertinent documents and records to Mas' new counsel, Mas, or

any other person. In short, Respondent's testimony on the last day of final hearing that Judge Ferro's Order "absolutely" prohibits him from turning over records is untrue. (TR. 159 - IV).

Based on the foregoing, The Florida Bar charged Respondent with violations of Rule 4-1.3 (A lawyer shall act with reasonable diligence and promptness in representing a client); Rule 4-1.16(d) (Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee that has not been earned...); and Rule 4-8.4(d) (A lawyer shall not engage in conduct that is prejudicial to the administration of justice) of the Rules of Professional Conduct. The Referee found there was not competent evidence to support the Bar's allegations against the Respondent as to Count III and recommended that he be found not guilty of the foregoing rule violations.

AS TO COUNT IV

In May, 1992, Respondent filed an Ex Parte Motion for Partial Charging Lien in Mas' civil case whereby Respondent sought an $1800.00 partial charging lien for the attorney services provided in obtaining those records which had been subpoenaed by Stanford

Blake in Mas' criminal case. (Appendix O). Review of the motion and accompanying Affidavit of Partial Attorney Time Expenditure reveal an absence of notice to Mas or either of his subsequent attorneys. In fact, Mas testified that Respondent did not copy him on the motion (TR. 77 - I), as did witness Stanford Blake (TR. 97 - I), and attorney Gary Gostel (TR. 26-27 - I). On May 13, 1992, an Order Granting Motion for Partial Charging Lien was signed by Judge Melvia Green. This Order further provided that Respondent would not be required to turn over the records subpoenaed by Stanford Blake until Mas paid Respondent $1800.00. (Appendix P).

Attorney Gostel subsequently moved to set aside the charging lien. (TR. 81 - I). On September 17, 1992, Respondent filed a response to Gostel's motion wherein he states as follows:

> "Mr. Barcus instructed his client at the time, Peter Mas, that he could not have access to the Dana records because of Judge Ferro's disqualification order."
>
> (Appendix Q, p. 2).

Respondent continued on to state:

> "Peter Mas nonetheless sought to seize these Dana records and to take, without compensation, from Mr. Barcus his legal research regarding Dana. Mr. Mas sought to do this through the circuit court in the criminal division through a subpoena by his attorney in criminal court."
>
> (Appendix Q, p. 2).

On September 17, 1992, hearing was held before Judge Melvia Green on the Mas' Motion for Relief From the Order Granting the Partial Charging Lien. A review of the transcript of that hearing indicates that the focus of the court's attention was on the reason why Respondent submitted the motion ex parte and not on Respondent's continuous references to the purported conflict between the disqualification order and the turning over of records. (Appendix R). Yet, interestingly enough, Respondent's motion for charging lien and the order he procured state that unless Mas pays Respondent, he need not surrender anything. No mention is made in the motion or order of any purported conflict. In any event, Judge Green concluded that "It never should have been entered" and vacated the entry of the charging lien. (Appendix R, p. 11; Appendix S).

As a result of the above described conduct, Respondent was charged with violations of Rule 4-1.16(d) (Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled...); Rule 4-3.3(a) (A lawyer shall not knowingly: (1) make a false statement of material fact or law to a tribunal; (2)

fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client; (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the layer to be directly adverse to the position of the client and not disclosed by opposing counsel...); Rule 4-3.3(b) (The duties stated in Rule 4-3.3(a) continue beyond the conclusion of the proceeding and apply even if compliance requires disclosure of information otherwise protected by Rule 4-1.6); and Rule 4-8.4(c) and (d) (A lawyer shall not: (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation; nor (d) engage in conduct that is prejudicial to the administration of justice) of the Rules of Professional Conduct. The Referee found there was no competent evidence to support the allegations against Respondent and recommended that he be found not guilty as to the rule violations set forth in Count IV of The Florida Bar's Complaint.

AS TO COUNT V

On September 3, 1991, a Final Judgment of Foreclosure was entered against the Mases in the Molina's foreclosure action. The judgment provided for a foreclosure sale of the Mas' home on October 2, 1991. (Appendix T). Respondent was not provided with notice of any hearing prior to the entry of the foreclosure order.

(TR. 102 - III).

Both Mas and Respondent testified that they met at Respondent's home which doubled as his office after the entry of the final judgment. Mas testified that it was at that meeting that Respondent first informed him of the existence of the judgment and his lack of notice. (TR. 71-73 - I). Although Barcus testified that he informed Mas of the judgment by telephone just prior to their meeting, his testimony was not inconsistent with Mas as to the circumstances surrounding its entry. (TR. 102,104 - III). Barcus further stated that he told Mr. and Mrs. Mas they should move immediately to have the judgment set aside or to consult with a bankruptcy attorney. He further stated that he advised them they would need to obtain other counsel as he would no longer be representing them. (TR. 106-107 - III).

Peter Mas testified that at that meeting Respondent informed him that he did not want to represent him any longer and that he should file for bankruptcy. He further stated that Respondent offered no other suggestion with regard to stopping the imminent foreclosure of Mas' home. (TR. 75 - I).

Respondent subsequently retained attorney Gary Gostel who proceeded to file a Notice of Appeal from the foreclosure order, as well as a Motion to Stay the foreclosure sale pending disposition

of the appeal. (TR. 25 - I). Gostel testified that Judge Ferro vacated the foreclosure order stating that it had been signed in error. (TR. 25 - I).

The Referee found that Respondent's actions with regard to the foregoing constituted a violation of Rule 4-1.3 (A lawyer shall act with reasonable diligence and promptness in representing a client) of the Rules of Professional Conduct.

SUMMARY OF ARGUMENT

A referee's findings of fact and recommendations carry a presumption of correctness and will be upheld unless shown to be clearly erroneous or lacking in evidentiary support. However, where a party can demonstrate that the record clearly contradicts the conclusions made or that there is no evidence in the record to support particular findings, a referee's findings may be reversed.

Examination of the record in the instant case indicates that the Referee was clearly erroneous in concluding that no competent evidence was presented to support the allegations contained in Counts III and IV of The Florida Bar's Complaint. The testimony of the witnesses, as well as the documentary evidence presented, clearly indicate that the Bar proved by clear and convincing evidence that Respondent failed to comply with a subpoena duces tecum issued by Stanford Blake despite being ordered to so comply by Judge Rodolfo Sorondo. The evidence further shows by a clear and convincing standard that Respondent filed an ex parte Motion for Partial Charging Lien without notice to his former client or the client's new attorneys and then proceeded to secure the entry of an Order granting said motion without notice to the necessary and interested parties.

As a result of Respondent's misconduct, the appropriate

disciplinary sanction is a six month suspension, followed by a four month probationary period, a special condition of which is successful completion of a Practice and Professional Enhancement Program.

ARGUMENT

I. THE REFEREE ERRED IN FINDING THERE WAS NO COMPETENT EVIDENCE TO SUPPORT THE ALLEGATIONS CONTAINED IN COUNT III OF THE FLORIDA BAR'S COMPLAINT.

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 the 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).

Paragraph thirty-one (31) of the Report of Referee states as follows:

> As to Count III, I find there was no competent evidence to support the allegations against the Respondent.
>
> (RR 6; Appendix H).

As a result of that finding, the Referee recommended that Respondent be found not guilty of violation of any of the Rules of Professional Conduct set forth in Count III of the Bar's Complaint. (RR 8; Appendix H). The Florida Bar will show that the Referee's findings and recommendations in this regard are erroneous and contradicted by the record evidence.

Count III of The Florida Bar's Complaint alleges Respondent's failure to comply with a subpoena duces tecum requiring the production of documents and records and his further failure to comply with Judge Rodolfo Sorondo's order requiring that he comply with the subsequently expanded subpoena requirements.

As previously set forth in the Statement of Facts, Peter Mas was charged with third degree grand theft in November, 1989 with regard to his alleged theft of the Dana lease equipment. Initially represented by the public defender's office, Mas pled no contest to the criminal charges. (TR. 68 - I). When he subsequently became aware of new exonerating evidence in 1992, Mas retained attorney Stanford Blake to attempt to set aside the plea and obtain a new trial or dismissal of the criminal charges. (TR. 87 - I).

At final hearing before the Referee, Blake testified that he needed certain documents and papers which were in Respondent's possession as a result of Respondent's prior representation of Mas

in the civil proceedings. (TR. 87-88 - I). Upon being informed by Respondent that he might have a conflict in producing the requested documents as he had been disqualified by Judge Ferro in the civil case due to conflict of interest, Blake issued a subpoena duces tecum to Respondent requiring him to appear before Judge Rodolfo Sorondo in Mas' criminal case on April 24, 1992. (TR. 88-89 - I; Appendix K).

Review of the transcript of the April 24, 1992 hearing indicates that Respondent informed Judge Sorondo of Judge Ferro's disqualification order and stated that the documents sought by Blake up to that point were public record. (Appendix L, p. 5). Further review of the April 24, 1992 transcript discloses the following discussion:

> MR. BLAKE: The bottom line is this, while Mr. Barcus may have been conflicted out, there was never an order to the Court saying "nor can you turn over your file or documents to the former clients," which is not the case.
>
> THE COURT: They are his files. Your distinction escapes me. They are his files.
>
> MR. BARCUS: According to Judge Ferro they are DANA's files.
>
> MR. BLAKE: That's not in the order.
>
> MR. BARCUS: I don't have the order here today. I'd be happy to provide the order.

> THE COURT: Rather than that, and I appreciate you being here, but rather than that, why don't you just issue or petition the Court, issue a Subpoena Duces Tecum or ---
>
> MR. BLAKE: That's what I did today. I did that because I asked that those items be provided.
>
> (Appendix L, p. 6).

Interestingly enough, but perhaps not so surprisingly, a review of Judge Ferro's March 14, 1991 order disqualifying Barcus from representing Mas in the civil matter indicates that it neither prohibits Respondent from turning over his file or documents to Peter Mas, nor states that the files are Dana's files as expressed by Respondent. (Appendix N).

The court continued on to state that "The Subpoena Duces Tecum will issue and you will comply". (Appendix L, p. 7). The following then ensued:

> MR. BLAKE: May I amend my subpoena to say, "give us the civil file belonging to my client's declaratory action," after ruling by the Court to see what he has to do because he's still confused.
>
> Nevertheless, I would ask that included in that, since I've had difficulties trying to obtain that, that we receive the civil file when Mr. Barcus represented Mr. Mas. That's in his possession.
>
> THE COURT: Before I rule on that, briefly tell me the nature of the need, why you need it in this particular case.

MR. BARCUS: Briefly, Judge, Mr. Mas, who, back a little over two years ago had pled no contest to a certain grand theft, the allegation being that he sold something that he didn't own to another party.

Subsequently, just a couple of months ago, he found out through other people and through some of these items that everyone should have been put on notice. He's made the representation that he did not have the right to and the State's main witness, which is what they based their case upon, was obviously lying through all these other documents they were providing and the witnesses we found.

THE COURT: And you will seek to prove that the State's witness is not being truthful?

MR. BLAKE: Right. At the time he entered the plea he had a child born with cerebral palsy.

THE COURT: I will allow you to amend the Subpoena Duces Tecum.

MR. BARCUS: I turned over all the civil files to Gary Castil (phonetic), who represents Mr. Mas in the civil action.

MR. BLAKE: Mr. Castil told me things to the contrary.

That's the ruling by the Court then?

THE COURT: That's the ruling. Thank you for coming, Mr. Barcus.

(Appendix L, p. 8-9).

Clearly, it was Judge Sorondo's ruling that Respondent was to produce to Blake the items set forth in the subpoena duces tecum,

as well as Mas' civil file. That Respondent understood he was under order by Judge Sorondo to produce the items indicated by Blake is evidenced by the following exchange between Respondent and Bar counsel.

> BY MS. SANKEL:
>
> Q. This is your Exhibit B, Mr. Barcus (handing).
>
> Can you tell me wherein there you are prohibited from producing the documents that Stan Blake subpoenaed?
>
> A. Sure. Read the cases cited herein. It talks repeatedly about duty of loyalty. That's 565 So.2d 417 in Brent vs. Smathers; 529 So.2d at 1267 -- These cases are very clear. They're whipping posts about duty of loyalty to the client.
>
> I also attended the hearing and in the hearing, Dana's new lawyers -- Dana fired Richard Stone of Howard, Brawner & Lovett and hired Holland & Knight who were very adamant about the secrecy of the documents, particularly since Mr. Stone had turned over all of the records which Haley, Sinagra & Perez had to Mr. Stone and then Mr. Stone had turned those records, all of them, over to me.
>
> So Dana knew that there had been a complete and total waiver of what other attorney-client privilege they might have otherwise enjoyed.
>
> It wasn't inadvertent. Mr. Stone produced them to himself. He wrote down in hand the case numbers and made a list. It wasn't a clerical error. It wasn't misshipped

fax.

Mr. Stone physically gave us all the boxes of the records based on the litigation from Haley, Sinagra & Perez, which is a complete and total waiver. So they knew that their usury scheme was about to be unveiled and that's why they were adamant about not turning over the records.

Q. But that order doesn't prohibit you from turning over any documents, does it?

A. Yes, it does, absolutely, absolutely. And if it doesn't --

Q. I thought you told us that the documents Stan Blake wanted were public record documents.

A. Right, and that's what I argued to Judge Ferro. "Your Honor, I got these out of public record."

Remember before when I said I thought Judge Ferro was unqualified? That's the reason why --

Q. So you're telling me you say that this order prohibited you from producing --

A. Yes.

Q. -- public record documents --

A. Yes.

Q. -- despite Judge Sorondo's order?

A. Yes, yes, and I also asked Mr. Blake and Mr. Gostel if they would please kindly -- repeatedly I asked them, if you disagree with this, since you now represent Mr. Mas, the

> onus is now on you -- not on me -- to please get a clarification order.
>
> Believe me, Mrs. Sankel, no lawyer in the United States would be more delighted than to have this pair of handcuffs, this order which ties my hands (indicating) and prevents me from going against these usurers, than me.
>
> I would be dancing down Flagler Street if in this proceeding, Judge Greenbaum would say this order is set aside.
>
> (TR. 158-160 - IV).

Despite Judge Sorondo's April 24, 1992 ruling to the contrary, Respondent continued to state that Judge Ferro's ruling a year earlier prohibited him from surrendering the subpoenaed records. This despite the fact that Judge Ferro's order contains no such language.

Blake testified before the Referee that he subsequently wrote Respondent with regard to the subpoenaed documents. (TR. 94-95 - I). The contents of that letter confirms Blake's testimony that Respondent did not produce the requested file and documents. (Appendix M). Blake did state that he received a notice of locating documents from Respondent, but that no documents were attached. (TR. 96 - I). Although he never did receive the documents from Respondent, Blake was ultimately successful in getting Mas' plea set aside and the charges nolle prossed. (TR. 96

- I).

It is The Florida Bar's burden to prove its case by clear and convincing evidence. The Florida Bar v. Rayman, 238 So.2d 594 (Fla. 1970). Clearly, it is the referee's responsibility to render factual findings and resolve evidentiary conflicts. The Florida Bar v. Niles, 644 So.2d 504 (Fla. 1994). It is not the burden of this Honorable court, upon a petition for review, to reweigh the evidence nor to substitute its judgment for that of the Referee "so long as there is competent evidence in the record to support the referee's findings". The Florida Bar v. Marable, 645 So.2d 438,442 (Fla. 1994).

As evidenced by the foregoing, it is the position of The Florida Bar that the referee's findings with regard to Count III of the Bar's Complaint are clearly erroneous and inconsistent with the evidence presented. Where findings of fact are clearly erroneous or lacking in evidentiary support, they should be overturned. The Florida Bar v. Carter, 410 So.2d 920 (Fla. 1982). The Florida Bar has proven by clear and convincing evidence the allegations set forth in Count III of its complaint and the Referee's findings and recommendations should be reversed. Accordingly, it is respectfully submitted that Respondent should be found guilty of the following rule violations: Rule 4-1.3 (A lawyer shall act with

reasonable diligence and promptness in representing a client); Rule 4-1.16(d) (Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled...); and Rule 4-8.4(d) (A lawyer shall not engage in conduct that is prejudicial to the administration of justice) of the Rules of Professional Conduct.

II. THE REFEREE ERRED IN FINDING THERE WAS NO COMPETENT EVIDENCE TO SUPPORT THE ALLEGATIONS CONTAINED IN COUNT IV OF THE FLORIDA BAR'S COMPLAINT.

As stated previously in Point I on appeal, a referee's findings of fact and recommendations carry a presumption of correctness and will be upheld unless clearly erroneous or lacking in evidentiary support. Vannier, McClure, Hayden, and McKenzie, supra. When a party contends that a referee's findings of fact and conclusions as to guilt (or innocence) are erroneous, the moving 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. Rue, infra.

Count IV of The Florida Bar's complaint contains allegations regarding Respondent's filing of an Ex Parte Motion for Partial Charging Lien. The Referee found there was no competent evidence to support those allegations against Respondent and recommended that he be found not guilty of the rule violations set forth in that portion of the Bar's Complaint. (RR 7,8; Appendix H). It is the Bar's position that the Referee's findings and recommendations in this regard are clearly erroneous and that the Bar's allegations are substantiated by clear and convincing evidence contained in the record.

Review of TFB Ex. 17 (Appendix O) indicates that in May, 1992, subsequent to both termination of Barcus' representation of Mas and Blake's subpoena, Respondent filed an Ex Parte Motion for Partial Charging Lien in Mas' civil case whereby he sought an $1800.00 partial charging lien for services rendered in obtaining those specific records which were subpoenaed by Blake in Mas' criminal case. Further review of the motion reflects an absence of notice to either Mas, Blake, or Gostel. The lack of notice was confirmed by Mas (TR. 77 - Volume I), Blake (TR. 97 - Volume I), and Gostel (TR. 26-27 - Volume I) during their testimony. On May 13, 1992, an Order Granting Motion for Partial Charging Lien was signed by Judge Melvia Green. (Appendix P). Said Order provided specifically that Respondent would not be required to turn over the records subpoenaed by Stanford Blake in the criminal case until Mas paid Respondent $1800.00.

When asked by Bar Counsel whether Blake's subpoena prompted the filing of his ex parte motion for partial charging lien, the following exchange occurred:

> Q. Was it Stan Blake's subpoena that prompted you to file this ex-parte motion for charging lien?
>
> A. Yes, and also the existence of Judge Henry Ferro's Court order, which held those documents to be privileged.

I even mentioned that to Judge Sorondo that Dana wasn't brought into the proceedings to be heard. It was kind of a back door effort to get through the Criminal Court, what they should have done through the Civil Court, I believe.

Q. (Handing) I just handed you Florida Bar's Exhibit 18, which is the order granting the motion for partial charging lien.

Can you tell us how it was that you got the Judge to sign that order? Did you notice the matter for hearing?

A. No, I couldn't.

Q. Did you bring the order personally before Judge Green?

A. Yes.

Q. Can you tell us the circumstances leading up to that, please?

A. I had tried to get an earlier hearing with Judge Green, but for two or three weeks prior to that, she was out of town either a judicial conference or at some type of meeting of professional obligation.

Upon her return, I sought her out due to the exigency of the short notice subpoena issued by Mr. Blake and presented her with an affidavit of reasonable attorney's fees, my affidavit of time expended.

She asked me about the time. I told her that I actually had expended far more time than was involved. I mentioned that there had been a subpoena, that I wanted to preserve my property rights.

I would have preferred, frankly, to have noticed it. If Mr. Blake would have given me the usual 30 days of subpoena on a document production notice ahead of time, it would have been very easy for me to set this hearing with Judge Green in an orderly fashion, but the only way to respond to the dry gulch issue of the subpoena was to do it this way.

(TR. 165-166, Volume IV).

Respondent responded as follows to inquiries by Bar counsel regarding the reasons for his proceeding ex parte:

Q. Why didn't you give notice of the motion for ex-parte charging lien or notice of the fact that you were going before Judge Green to get the order signed to Peter Mas or Gary Gostel or Stan Blake?

A. As I said to you a moment ago -- and as I say now and may have to continue saying -- there wasn't time. There was not time --

Q. There wasn't time to send a copy of your motion to Peter Mas, Gary Gostel or Stan Blake?

A. Correct. If Mr. Blake had issued the subpoena and given me 30 days to do the properly orderly fashion --

THE REFEREE: There is no question on the floor at this point.

THE WITNESS: All right.

BY MS. SANKEL:

Q. Did it ever occur to you that it was improper for you to be going before Judge Green to get the order signed without noticing

any of these people?

A. Well, I reviewed all of the Florida Jurisprudence on attorneys' fees and charging liens. I have a copy in my briefcase if you'd like to see it. It's only about 60 to 70 pages, and it talks about the statutory lien rights.

This wasn't something that I did willingly. I did this in a considered fashion. I read the cases.

For the most part, you're right. They do want to have an orderly process. They do want to have notice. They want to have an orderly consideration. They want to have witnesses. They want to do it in a way that does not offend traditional notions of fair play, but they also say that in exigent circumstances, an equity take place.

Believe me, if somebody came into my home and tried to take $1800.00, I would resist. And I viewed this obtaining of the documents through artifice just that, as a taking.

Q. Mr. Barcus, I cannot understand what the nexus is --

A. I said --

Q. -- between your getting that charging lien --

MR JEPEWAY: I object to her --

THE REFEREE: Don't get personal, ma'am. Rephrase your question.

BY MS. SANKEL:

Q. Can you explain to us, please, what

the nexus is between your obtaining that charging lien and that subpoena to produce those documents which you felt were privileged?

A. The charging lien is for services performed.

Q. If I understand you correctly, you just explained to us that you felt the urgency of the situation necessitated your going forward on a charging lien without giving notice to these other person. Is that correct --

A. Yes.

Q. -- or did I misunderstand?

What did you feel was the urgency?

A. Complying with Judge Sorondo's subpoena. I felt it was very important not to delay it. I took care of it at the first available time.

Q. Mr. Barcus, please, if you'll just answer the question.

A. I am just answering the questions, ma'am.

(TR. 167-169 - Volume IV).

Interestingly enough, Respondent's own testimony indicates that he sought the charging lien without notice to Mas or either of Mas' attorneys due to time exigencies created by Blake's subpoena. As evidenced by the foregoing, Respondent never explained the connection between his obtaining the charging lien and his

obligations pursuant to the subpoena and Judge Sorrondo's Order. Initially, Respondent testified that Judge Ferro's disqualification order prevented him from producing the records (although no such restriction is contained in the order) and then he concluded that Blake's subpoena warranted his proceeding without noticing Mas, Blake, or Gostel of either the ex parte motion or order. Despite repeated requests by Bar counsel to explain the nexus between the subpoena and ex parte motion, Respondent was unable to adequately do so.

Upon learning of the entry of the order granting Respondent's Motion for Charging Lien, Mas' new attorney, Gary Gostel, moved to have the order set aside. (TR. 81 - Volume I). A hearing was held before Judge Green on said motion on September 17, 1992. After hearing from the parties, Judge Green concluded that "It never should have been entered" and vacated the entry of the charging lien. (Appendix R, p. 11; Appendix S). Interestingly enough, Respondent's motion for charging lien and the order he procured state that unless Mas pays Respondent, he need not surrender anything. No mention is made in either the motions or order of any purported conflict.

The Florida Bar satisfied its burden of proving the allegations contained in Count IV of its Complaint by clear and

convincing evidence. Rayman, infra. The Referee's finding that there was no competent evidence to support those allegations is clearly erroneous. The evidence is overwhelming and essentially unrefuted that Respondent proceeded without notice to Mas and his attorneys. The Referee's findings and conclusions with regard to Count IV should be reversed.

Based on the foregoing, it is respectfully submitted that Respondent should be found guilty of violating Rules 4-1.16(d) (Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and ...); Rule 4-3.3(a) (A lawyer shall not knowingly: (1) make a false statement of material fact or law to a tribunal; (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client; (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the layer to be directly adverse to the position of the client and not disclosed by opposing counsel; or ...); Rule 4-3.3(b) (The duties stated in Rule 4-3.3(a) continue beyond the conclusion of the proceeding and apply even if compliance requires disclosure of

information otherwise protected by Rule 4-1.6); and Rule 4-8.4(c) and (d) (A lawyer shall not: (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation; nor (d) engage in conduct that is prejudicial to the administration of justice) of the Rules of Professional Conduct.

III. THE REFEREE ERRED IN NOT RECOMMENDING THAT RESPONDENT RECEIVE A SIX MONTH SUSPENSION TO BE FOLLOWED BY A PROBATIONARY PERIOD AND SUCCESSFUL COMPLETION OF A PRACTICE AND PROFESSIONAL ENHANCEMENT PROGRAM.

The scope of this Court's review is broader when reviewing recommendations of discipline than when reviewing findings of fact. The Florida Bar v. Niles, 644 So.2d 504 (Fla. 1994). The reason being that this Court has ultimate responsibility for ordering appropriate disciplinary sanctions. The Florida Bar v. Pearce, 631 So.2d 1092 (Fla. 1994).

Florida Standards for Imposing Lawyer Sanctions, Section 4.42(a) provides that suspension is appropriate when a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client. Section 7.2 of the Standards provides that suspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system. Based on Respondent's actions and their impact on his clients, the foregoing standards indicate that suspension is an appropriate sanction for Respondent's misconduct.

In The Florida Bar v. Broida, 574 So.2d 83 (Fla. 1991), the Respondent received a one year suspension as the result of misrepresenting facts to the court and engaging in a continuing

pattern of ex parte communications with the court. A review of the facts of this case indicate that Respondent was the plaintiff in a legal malpractice case. During the pendency of that action, she argued two ex parte motions before the presiding judge without serving the defendant's attorney with either a copy of the motion or notice of the hearing. The Respondent was additionally found to have engaged in misrepresentation to the court and other misconduct. In recommending a one year suspension, the Referee found Respondent guilty of violating numerous Bar rules.

While the multitude of Broida's rule violations may exceed that of the Respondent sub judice, they do share a common thread. Barcus, like Broida, engaged in an ex parte communication with the court which resulted in the entry of an inappropriate order. In this regard, Barcus' ex parte communication may have had even more severe impact that Broida's because Barcus' actions had an immediate and negative effect on his former client. Additionally, Broida was found to have engaged in conduct prejudicial to the administration of justice, as has Barcus.

In The Florida Bar v. Mims, 501 So.2d 596 (Fla. 1987), the respondent received a one year suspension as the result of his failure to comply with court orders, failure to appear at a scheduled pre-trial conference, and neglect of a legal matter.

While the misconduct in the Mims case is not precisely like that in the matter sub judice, the finding of neglect is similar.

In The Florida Bar v. Witt, 626 So.2d 1358 (Fla. 1993), the respondent was suspended for ninety-one days with a requirement for reinstatement being his passing of the ethics portion of the Bar examination. This disciplinary sanction was invoked as a result of respondent's engaging in a pattern of neglect with regard to client representation. Although in the instant case, Barcus' inaction and misconduct was confined to a single client rather than multiple clients, the pattern of Respondent's lack of diligence and failure to communicate is apparent on multiple occasions throughout the representation.

A six month suspension was ordered in The Florida Bar v. Schilling, 486 So.2d 551 (Fla. 1986), where the respondent was found to have failed to diligently pursue two client matters and had a prior disciplinary history. In The Florida Bar v. Patterson, 530 So.2d 285 (Fla. 1988), the respondent received a one year suspension as the result of his neglect of a client matter, incompetency, failure to communicate, and failure to return documents or unearned fees in a timely manner. Respondent was additionally required to take and pass The Florida Bar examination.

Lawyer discipline must satisfy a three-fold purpose. It must

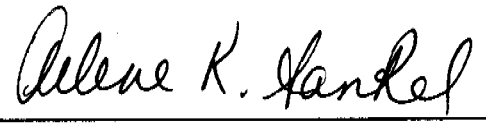
be fair to society, fair to the attorney, and yet severe enough to deter other attorneys from similar misconduct. The Florida Bar v. Pahules, 233 So.2d 130 (Fla. 1970).

The Respondent in the instant case has engaged in a myriad of misconduct. The fact that the misconduct emanated from one particular client makes it no less egregious. At the very least, Respondent failed to proceed diligently, failed to communicate, and engaged in conduct prejudicial to the administration of justice. Should this Court conclude that the Referee's findings of fact with regard to Counts III and IV were erroneous, Respondent may also be found to have engaged in additional instances of lack of diligence and conduct prejudicial to the administration of justice, as well as failure to protect a client's interests upon termination of representation, making false statements and/or failing to disclose material facts to a tribunal, and engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.

In light of the foregoing, a six month suspension followed by a probationary period of four months, a special condition of which is successful completion of a Practice and Professional Enhancement Program, is the appropriate disciplinary sanction.

CONCLUSION

In accordance with the authority and argument set forth herein, The Florida Bar respectfully requests that this Honorable Court reject the Referee's findings of fact with regard to Counts III and IV of the Complaint and find Respondent guilty of the rule violations set forth therein. Additionally, The Florida Bar respectfully requests that this Honorable Court suspend Respondent for a period of six months, to be followed by a probationary period of four months, a special condition of which be that Respondent attend and successfully complete a Professional Practice and Enhancement program.



ARLENE K. SANKEL, Bar Counsel
Florida Bar No. 272981
The Florida Bar
444 Brickell Ave., Ste M-100
Miami, Florida 33131
(305) 377-4445

JOHN T. BERRY, Staff Counsel
Florida Bar No. 217395
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399

JOHN F. HARKNESS, JR.
Executive Director
Florida Bar No. 123390
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the above and foregoing Initial Brief of The Florida Bar was sent via Airborne Express, airbill number 3369992522, 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 142 731 506) to Louis M. Jepeway, Jr., 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 30th day of April, 1996.

Arlene K. Sankel

ARLENE K. SANKEL, Bar Counsel

INDEX TO APPENDIX

Q. Response to Peter Mas' Motion to Set Aside Lien (TFB Ex. 19).

R. Transcript of September 17, 1992 proceedings. (TFB Ex. 20).

S. Order Granting Mas' Motion for Relief from Order Granting Partial Charging Lien (TFB Ex. 21).

T. Final Judgment of Foreclosure dated September 3, 1991 (TFB Ex. 16).