IN THE SUPREME COURT OF FLORIDA

CASE NO.: 66,777

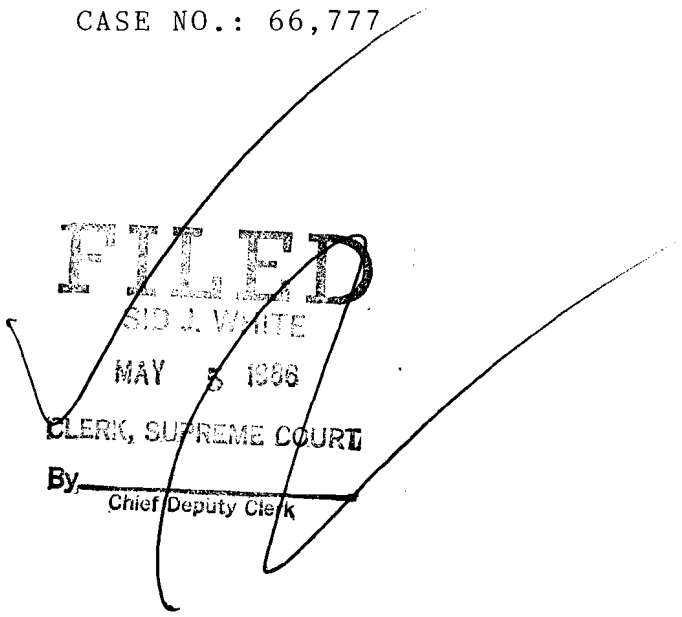
THE FLORIDA BAR,

Complainant,

-vs-

STEVEN F. JACKSON,

Respondent.



RESPONDENT'S BRIEF IN SUPPORT OF PETITION FOR REVIEW

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INTRODUCTION

The Respondent, STEVEN F. JACKSON, is a member of the Florida Bar and was the Respondent before the Referee. He will be referred to as the Respondent or as Mr. Jackson. The Complainant, the Florida Bar, was the Complainant before the Referee and will be referred to as The Bar or the Complainant.

References to the transcript of the hearing before the Referee will be designated by the symbol "T" followed by a page number in parentheses.

STATEMENT OF THE CASE AND OF THE FACTS

The factual background of this case began at a hearing held on February 27, 1984, in the District Court relating to the scheduling of a criminal trial, United States of America v. Jonathan Scott Baldwin, Etc., et al.,Case No.: 83-6046-CR-NCR. The District Court set trial for the week commencing April 16, 1984, and was not advised of any scheduling problems by Respondent other than a potential conflict with the first week of April. Mr. Jackson was representing one of the defendants, Howard Avery Jones, having been designated as a court-appointed attorney for said defendant.

The calendar call for the case was held on April 12, 1984. At the calendar call, the Court was advised that Mr. Jackson was ready for trial, but that he would be unavailable for trial on four days during the course of the trial because of the Jewish holiday of Passover. Respondent's brother, Jeffrey Jackson, a duly licensed attorney, appeared on behalf of Mr. Jackson at this calendar call, as Respondent was out-of-town engaged in another legal proceeding.

On April 16, 1984, the first day scheduled for the four-week trial, Mr. Jackson filed a written Motion for Stay of Proceedings for Tuesday and Wednesday of the first week and Monday and Tuesday of the second week of trial.

The Motion for Stay, premised upon Mr. Jackson's First Amendment right to the free exercise of his religion, further provided that if the trial were to proceed in his absence, his client would be prejudiced,and denied his right to counsel, also in violation of the Constitution.

Mr. Jackson told the Court that he was invoking his religious principles as set forth in the Old Testament, including the Jewish

Code of Law known as the Shulkan Aruch.

The Court denied Mr. Jackson's motion without leave to renew it again. Later that day, the Court made a suggestion that one of the other attorneys, who did not have a conflict, might represent defendant Jones in Respondent's stead, on the days he wished to be absent from trial for religious observance. Mr. Jackson felt that he could notadequately represent his client if this were done, and so advised his client. As such, the Court was advised that this solution, while appreciated as a suggestion, would not be acceptable.

The Court ordered Mr. Jackson to be present for trial, and warned that if he did not appear, that he would be in contempt of the order of the Court and subject to arrest by federal marshals.

Mr. Jackson stated to the Court:

> "The law says that no work, no manner of work shall be done on that day; and unless the Sages and Jewish rabbis have determined that a Court proceeding is not work, which to my best belief they have not, then I would be in violation of the Jewish law and a tradition which I have observed since childhood and with all due respect to the Court again, I don't feel that I should be compelled to do that. This is the United States of America. We have rights guaranteed under the Constitution which the Court isaware of. And I do not intend to let my rights be violated.
>
> Thank you."

Although some additional discussion on the matter ensued, the trial judge refused to change his mind and grant the requested interim continuance. On the following day, Mr. Jackson did not appear for trial. After being advised that Respondent was not present, the Court found that Mr. Jackson had committed contempt of court the <u>preceding</u> day, which was completed or ratified by his nonattendance the following day. The Judge noted for the record that Mr. Jackson was very deferential and even noted

> "I understand his deisre to follow his religion in his own way and I applaud that in some ways."

The Certificate of Contempt was issued, that day.

On April 19, 1984, the Court afforded Mr. Jackson the opportunity to explain his conduct prior to sentencing. The Certificate of Contempt had already been entered finding Mr. Jackson to have committed acts of criminal contempt.

Although Mr. Jackson again attempted to explain his very sincere reasons for taking the actions he did, and notwithstanding the fact that he had seven rabbis in court ready to testify on his behalf (whose testimony was not permitted as the Court stated it did not deem it necessary since Mr. Jackson's sincerity was not in question) the contempt was not vacated, and the Court fined Mr. Jackson the sum of $1,000.00.

Hearings were held before the Florida Bar Grievance Committee of the 17th Judicial Circuit in Fort Lauderdale, Florida on Grievances filed against Mr. Jackson. The Grievance Committee found probable cause.

On March 27, 1985 The Florida Bar filed a complaint against Mr. Jackson. It alleged that Mr. Jackson, in failing to obey the trial judge's order requiring him to appear ready for trial on those days which he had requested that the Court grant an interim continuance so that he could observe his religious holiday, violated various Disciplinary Rules of the Code of Professional Responsibility.

A final hearing was held before the Referee on November 20, 1985. No witnesses testified at the hearing for either side. The Referee had before him the pleadings, request for admissions, the transcript of the proceedings before the Grievance Committee, and partial transcripts of hearings before the Hon. Norman C. Roettger, Jr.

The Referee also considered the opinion of the Eleventh Circuit of September 17, 1985, affirming the contempt citation.

The Referee entered his report recommending that Mr. Jackson be found guilty and further recommending that Mr. Jackson be suspended from the practice of law for a period of four (4) months to run consecutive to the term imposed by a prior disciplinary action which is currently before this Court on review (Case No.: 65-432) and that the Respondent shall prove to the Florida Bar and the Board of Governors that he has rehabilitated himself significantly for reinstatement, and that he be publicly reprimanded.

The Board of Governors of the Florida Bar concurred with the Referee's Report and did not seek review.

Mr. Jackson's Petition for Review followed.

POINTS ON REVIEW

I

THE COMPLAINT MUST BE DISMISSED BECAUSE THE COMPLAINANT DID NOT SUSTAIN ITS BURDEN OF PROVING THE CHARGES BY CLEAR AND CONVINCING EVIDENCE.

II

THE DISCIPLINE RECOMMENDED BY THE REFEREE IS EXCESSIVE: THE MAXIMUM DISCIPLINE SHOULD BE A REPRIMAND.

SUMMARY OF ARGUMENT

POINT I

The Complaint should be dismissed because the Florida Bar did not sustain its burden of proof by proving the charges against Respondent by clear and convincing evidence. A unique situation is presented herein, where an attorney has been accused of various violations of the Disciplinary Rules, arising from his failing to obey a trial judge's order to appear in court on a major religious holiday. Respondent verily believed that said order was violative of his First Amendment rights. Respondent was offered an alternative solution by the judge, which he felt would not afford proper representation to his client. As such, Respondent would not consent to the suggestion of the court, even though it would have been personally beneficial.

Respondent had good faith reasons to test the validity of the trial court's order, in that personal irreparable harm would have occurred had Respondent waited to appeal after complying therewith. Further, his sincere belief that the subject order was not sufficient to pass constitutional muster, and his willingness to take the risk of challenging said order in the courts, should not give rise to treatment by the Florida Bar as is normally assigned to those who due to personal problems, or outright inexcusable neglect, fail to keep their professional obligations.

Respondent may have been incorrect in his assessment of the propriety of the court's order, or may by failing to have given more notice of the need for a continuance of the trial have been guilty of an oversight which would cause some inconvenience. However he should not be dealt with as he has been - in a manner that

fails to acknowledge the very unique circumstances presented; the highly emotional nature of the dilemma; and the overall conduct of the Respondent.

POINT II

The discipline recommended by the Referee is far too excessive and at most Respondent should be given a reprimand.

The standards set forth for establishing appropriate attorney discipline have not been satisfied in that the discipline suggested, to wit: a four month suspension, a reprimand, and reinstatment only by petition and proof of rehabilitation is far more punishment than that meted out to attorneys who have committed far greater breaches of discipline, often on a repetitive basis. Further, the conduct being punished is not of the usual sort that society must be protected from, nor is it necessary to deter the members of the Bar from committing like violations in that the circumstances of the underlying situation are so unique. Finally, although the Bar may impose additional or other measures to punish the conduct of Respondent, it is submitted that he has already been subjected to punishment, financial and otherwise, sufficient to have taught him a hard lesson, and substantial enough to deter like conduct in the future. While this might not ordinarily be a compelling argument to prevent the imposition of discipline by the Bar, the peculiar nature of the circumstances giving rise to the conduct of the Respondent, the personal dilemma faced by Respondent, his good faith belief that he was forced to test the validity of the court's order, and his otherwise unchallenged behavior would suggest that discipline is unwarranted. However, at most, a reprimand should be the maximum discipline imposed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the Summary of Argument and Table of Contents (as amended to reflect the insertion of the Summary of Argument) was furnished by mail to RICHARD B. LISS, ESQ. the Florida Bar, Galleria Professional Building, 915 Middle River Drive, Suite 602, Fort Lauderdale, Florida 33304 this 13 day of May, 1986.

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BY: _____
SANDRA M. SALTER JACKSON

ARGUMENT

I

THE COMPLAINT MUST BE DISMISSED BECAUSE THE COMPLAINANT DID NOT SUSTAIN ITS BURDEN OF PROVING THE CHARGES BY CLEAR AND CONVINCING EVIDENCE.

The law is well settled that the disciplining of attorneys requires proof of the charges by clear and convincing evidence. The Florida Bar v. Rayman, 238 So.2d 594 (Fla. 1970). It has certainly been recognized that this burden of proof, while not as stringent as that required in a criminal matter, surely mandates "something more than 'preponderance.'" Zachary v. State, 53 Fla. 94, 43 So. 925 (Fla. 1907).

With due respect, it is submitted that the instant matter presents a rather unique situation in which virtually no evidence was presented to the Referee by The Bar, to justify or support the very serious charges against the Respondent.

It is true that the circumstances which led to the charges, to wit: the contempt citation issued against the Respondent, Steven F. Jackson by United States District Judge Norman C. Roettger, Jr., were a matter of public record, and that partial transcripts of the proceedings before Judge Roettger were made available to the Referee. However, it is suggested that The Bar, in charging Mr. Jackson with numerous violations of the Disciplinary Rules of the Code of Professional Responsibility, had the duty to prove those charges by clear and convincing evidence, a burden which should require more than an offering of partial transcripts of proceedings which were held for purposes other than that of considering Respondent's fitness to practice law.

It is worthwhile to note that The Bar concedes "that you are not going to find any case on point where an attorney in this state, for religious reasons, was not able to proceed with the representation of a client." (T. 14). As such, there is no dispute between the Bar and Mr. Jackson that this case presents a unique situation for consideration, namely whether the evidence presented, consisting of a compilation of partial transcripts of district court proceedings, the opinion of the 11th Circuit Court Court of Appeals affirming the judgment of contempt against Respondent, and various cases which are totally inapposite to the instant situation, is sufficient to sustain the charges against Mr. Jackson.

Specifically, Respondent is charged with violating Disciplinary Rules 1-102(A)(1) (a lawyer shall not violate a disciplinary rule); 1-102 (A)(5) (a lawyer shall not engage in conduct that is prejudicial to the administration of justice; 1-102 (A)(6) (a lawyer shall not engage in any other conduct that adversely reflects on his fitness to practice law); 7-101 (A)(2) (a lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services); 7-101 (A)(3) (a lawyer shall not intentionally prejudice or damage his client during the course of the professional relationship); and 7-106 (A) (a lawyer shall not disregard a ruling of a tribunal made in the course of a proceeding) of the Code of Professional Responsibility and article XI, Rule 11.02 (2) violation of the Code of Professional Responsibility is a cause for discipline) of the Integration Rule of the Florida Bar.

It is respectfully submitted that Respondent's position throughout the proceedings both in the federal courts and before The Bar has been:

(a) that he, as a practicingmember of the Jewish faith, prior to the commencement of a trial in which he was court-appointed counsel for an indigent defendant, requested that the trial court grant an interim delay in the trial for the first two and last two days of the Passover holiday, so that he could follow the dictates of his religion forbidding work on certain days, and allowing him to attend religious services which are held on those days in accordance with his life-long practice;

(b) that the request, although made just prior to the commencement of trial was sincere, and that the delay in requesting the interim postponement was inadvertent, and not meant to show disrespect or otherwise inconvenience the trial court or any of the participants;

(c) that Respondent sincerely believed that the U.S. Constitution guaranteed that he should have the right to exercise his religious beliefs, even though for him to do so might cause some inconvenience, and that for the judge to order him to be present in court was a violation of his First Amendment rights.

While it is conceded by The Bar that there are no cases on point which it can offer in support of its charges, it should likewise be conceded that there are no similar cases to offer in support. Rather than accept this The Bar simply takes the position that when an attorney "finds himself in a position where he is unable to appear on behalf of a client during a proceeding, he is subject to discipline" (T.14) It then offers in support of this basic proposition several cases which involve situations in which the conduct of the attorneys can in no way be compared to that of Mr. Jackson in the instant case.

In The Florida Bar v. Larkin, 420 So.2d 1080 (Fla. 1982) the respondent was a chronic alcoholic, who, because of his condition,

(1) failed to appear in court without permission, (2) neglected various legal matters entrusted to him, and (3) failed to carry out contracts of employment with clients. In The Florida Bar v. Page, 419 So. 2d 332 (Fla.1982), the respondent accepted a fee to represent a client in a criminal matter, and immediately thereafter, "neither the client, his family, nor his friends were able to make any contact with respondent. Respondent did not attend when the client had to appear in court. Neither did he refund any of the money paid him as a fee." Page, supra at 332,333. In The Florida Bar v. Hoffer, 412 So. 2d 858 (Fla. 1982), an attorney failed to appear at a hearing without notifying the judge, nor his client. The referee therein also found, contrary to respondent's testimony "clear and convincing evidence that no agreement concerning respondent's failure to appear had been reached between respondent and the other counsel in the modification matter." In addition, the referee found that respondent had misrepresented that such an agreement existed by way of explanation as to his non-appearance to his client and her husband.

These three cases, present scenarios which are so factually dissimilar to that presented herein, as not to merit any comparison whatsoever. In the instant case, Respondent, a court-appointed attorney for an indigent defendant, had fully prepared for weeks in anticipation of a trial which was to last four to six weeks, sifting through cartons of discovery material, and otherwise engaging in long hours of pre-trial preparation, including written requests for voir dire and requests for proposed jury charges. Respondent was present in court at all times required for him to be there, with the exception that he did not appear on a religious holiday, the observance of

which forbids work pursuant to orthodox observance.

It is both ironic and unjust that Mr. Jackson, who, following the dictates of Canon 2 of the Code of Professional Responsibility by making legal services available to an indigent defendant (E.C. 2-25) is now faced with the same charges of misconduct as are levelled against attorneys who are alcoholics, thieves, perjurers and such, and who have repeatedly, without any color of justification, neglected or abandoned their clients.

The Bar even goes so far as to offer The Florida Bar v. Welch, 369 So. 2d 343 (Fla. 1979), in support of its charges against Respondent. In that case, the attorney simply left the courthouse to keep a bowling date, while a jury was deliberating on a verdict in his client's criminal case. The attorney did not request permission to leave from the court, nor did he leave a phone number or address where he might be reached. When the jury returned with its verdict respondent was no where to be found.

As in the other cases relied upon by The Bar, respondent in Welch was charged with the same violations under Canon 1, as is Respondent herein.

Again, it is respectfully argued that Respondent cannot be viewed or judged in the same light as the attorneys in the matters above-cited. The only similarity is that in each case, the attorney charged was not present in court on an occasion when he was scheduled to appear. However, if only "the bottom line" were to be considered, our entire system of jurisprudence would be in question, since concepts such as defenses of justification, or excusable neglect would have no place. Yet indeed they do exist as an integral part of the reasonableness of our judicial process, and when shown, have the effect of miti-

gation due to special facts or circumstances.

With all due respect, it is urged that an attorney's failure to appear in court, after literally begging the trial judge for an interim continuance so that he could observe a major religious holiday, where no showing of dishonesty, neglect in preparation or other failure was suggested or proven, cannot be likened or treated in the same manner as are situations where attorneys fail to appear due to inebriation, total disregard of their obligations or because they prefer to be at the bowling alley!

Moreover, as was repeatedly acknowledged throughout the proceedings, Respondent was at all times totally honest and respectful. He did not seek to avoid appearing in court by lying or misrepresenting the reasons for his request for an interim continuance. He was contrite and apologetic for his inadvertent oversight in not making the request earlier. He did not seek to grab at a solution which would solve his own problem, but which might be detrimental to his client. This was so, despite the fact that he knew his request for an interim delay would not be granted.

In fact this is what makes the charges against the Respondent under Canon 7 particularly unwarranted. Respondent, in trying to zealously represent his client, landed himself a contempt citation and these disciplinary proceedings, where the same could probably have been avoided with Respondent also being allowed to follow his religious beliefs and practices, had he been less zealous! This statement may appear incredible at first blush; however, a review of the transcript of proceedings before the Hon. Norman C. Roettger, Jr. on April 16, 1984, admitted into evidence by the Referee (T.4), would reveal that Judge Roettger made a suggestion which would have allowed the

trial to proceed in Respondent's absence, to wit: having another attorney represent Respondent's client, Mr. Howard A. Jones, in his Respondent's place, on those days when Respondent had to be away for religious observance.

THE COURT: Mr. Jones, I want to ask you a couple of questions. You heard the problem that Mr. Jackson has --

MR. JONES: Yes, sir.

THE COURT: -- in connection with his attendance. Would you have any problem if one of the other lawyers who did not represent a client who had a conflict with you filling in for Mr. Jackson on the days he wants to attend service?

MR JONES: No objection, Your Honor.

THE COURT: Why don't you talk about it with Mr. Jackson. We will see if we can resolve this thing without a problem. I want you to talk with him about it.

* * * * * * *

THE COURT: Mr. Jones, have you had a chance to talk to Mr. Jackson?

MR. JONES: Yes, Your Honor.

THE COURT: Mr. Jackson, have you had a chance to go over the matter with Mr. Jones?

MR. JACKSON: Yes, Your Honor.

In view of our conversation, Mr. Jones is going to inform the Court that he does object to having another attorney represent him since he feels,

and I have advised him, that I don't think I could adequately represent him unless I am present throughout the entire proceedings.

THE COURT: You can get a transcript of testimony, sir.

MR. JACKSON: Your Honor, I don't think that is adequate. I also don't have the ability to judge the demeanor of the witnesses or to be fully cognizant of what goes on in the courtroom by merely reading the transcript and I feel that my ability to represent him would be severely curtailed if I am not present throughout the entire proceedings, and Mr. Jones after conversation with me, feels that he is in accord with that position.

THE COURT: Very well.
I want you to know I figure I've gone the second mile at this point.

MR. JACKSON: Excuse me?

THE COURT: I want you to know I feel I've gone the second mile at that point.

MR. JACKSON: I appreciate what Your Honor has tried to do but I don't feel my client would be adequately represented by reading a transcript."

It should be obvious that if Respondent's concerns were only for himself and his own convenience, and thus in dereliction of his duty to zealously represent his client, he could have permitted the matter to be resolved in accordance with the court's suggestion, with which his client was initially agreeable. Respondent could have "had his cake..." without further antagonizing the court, remained

on the case, avoided the contempt and disciplinary proceedings, if only he were willing to go against his convictions that the suggestion would be adverse to the interests of his client.

At the time of this colloquy, Respondent had already been categorically denied his request for a continuance and had been told that a federal marshal might be dispatched to bring him to court if he did not appear. Yet his belief that substitute counsel could not adequately protect his client's rights, led him to refuse the court's suggestion, thus refusing to compromise the interests of his client, even in the face of grave personal risk to himself.

If anything, Respondent may have been too zealous for his own good, but certainly for him to stand accused of not being zealous enough is absurd. Respondent has been charged with intentionally failing to carry out a contract of employment and for intentionally prejudicing his client during the course of representation. In fact, Respondent did not fail to carry out his contract - quite to the contrary he was endeavoring to fully carry out his contract despite the court's suggesting that he permit someone else to carry out part of it. Ultimately, Respondent was removed from the case by Judge Roettger and replaced by another attorney. He did not seek to be removed but when he was, he offered any assistance he could give to the new attorney. He did not intentionally prejudice or damage his client, but rather, refused to allow a situation which would have given him the time off for religious observance, but which he believed would prejudice his client.

It is ardently submitted that the circumstances of the matter herein are sui generis and as such, this Honorable Court should give careful consideration to the very special facts and circumstances presented, as well as to the totality of the conduct of the Respondent.

Admittedly, the Respondent should have made his request for the interim continuance earlier than he did. However, as was stated in one case "(c)ertainly by becoming a member of the bar, a lawyer does not terminate his membership in the human race, nor does he surrender constitutional rights possessed by private citizens." Sandstrom v. State, 309 So.2d 17 (4th D.C.A. 1975) at 21.

Mr. Jackson may have made a mistake in not making a more timely request, but human beings do make mistakes. The reasons for his request, his unquestioned sincerity, honesty and forthrightness at all times, his attempts to protect his client's position, even when to be less vigilent would have certainly saved himself a great deal of heartache, should all be viewed as mitigating, and should preclude him from being treated in the same fashion as those attorneys whose conduct is typified in the previously mentioned Bar cases. Just as all persons who have caused the death of another human being are not dealt with in the same fashion by the courts, so all attorneys who do not appear on a given day for a scheduled court appearance, should not be dealt with in the same way by The Bar.

Finally, we come to the last charge, that of violating Disciplinary Rule 7-106(A). Said rule provides:

> "(A) A lawyer shall not disregard or advise his client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but he may take appropriate steps in good faith to test the validity of such a rule or ruling."

Once again, a careful examination of the decisions relative to Bar proceedings reveals no cases at all analogous to the instant one. However, an interesting case which examines the underlying issue, is Maness v. Meyers, 419 U.S. 449, 42 L. Ed. 2d 574, 95 S. Ct. 584 (1975). In that case the Supreme Court examined the actions of a

Texas attorney, who advised his client to disobey a court ruling to produce certain evidence, on the good faith belief that the order violated his client's Constitutional Fifth Amendment privilege against self-incrimination. The attorney was held in contempt by the Texas court.

Justice Burger, speaking for the Court, begins from the general premise, with which Respondent agrees, that

> "...orders and judgments of courts must be complied with promptly. If a person to whom a court directs an order believes that order is incorrect the remedy is to appeal... Maness, supra at 458.

While counsel may object to a ruling of the court

> "...once a court has ruled, counsel and others involved must abide by the ruling and comply with the court's orders." Maness, supra at 459.

Justice Burger notes that

> "(r)emedies for judicial error may be cumbersome, but the injury flowing from an error generally is not irreparable" (emphasis added) Maness, supra at 460.

However, an exception to the general principles enunciated above is created due to special circumstances.

> "When a court during trial orders a witness to reveal information, however, a different situation may be presented. Compliance could cause irreparable injury because appellate courts cannot always "unring the bell" once the information has been released. Subsequent appellate vindication does not necessarily have its ordinary consequence of totally repairing the error. In those situations we have indicated the person to whom such an order is directed has an alternative:
>
> > '(W)e have consistently held that the necessity for expedition in the administration of the criminal law justifies putting one who seeks to resist the production of desired information to a choice between compliance with a trial court's order to produce prior to any review of that order, and resistance to that order with the concomitant possibility of an adjudication of contempt if his claims are rejected on appeal." Maness, supra at 460

The Supreme Court went on to find that the petitioner/attorney

therein acted in good faith in advising his client to assert the Constitutional privilege against self incrimination, and thereby reversed the decision which held the attorney in contempt.

Mr. Jackson certainly does not argue that the Maness decision is "on all fours" with his own situation. Yet he does submit that an analogy can be properly drawn, which warrants consideration with respect to the disciplinary charges against him.

Respondent herein, throughout the proceedings before Judge Roettger, on appeal, and before The Bar, has asserted a sincere position that it was his good faith belief at the time the problem arose, that the court's order mandating him to appear at trial on the first two and last two days of Passover was in violation of his First Amendment guarantees. Obedience to the court's order would have caused irreparable harm to Respondent, not perhaps of the same nature as would result from compliance in a Maness situation, but in many ways equally significant, since Respondent would have been breaking religious laws which could not be unbroken once violated. He was placed in the emotional dilemma of having to choose between two paths, either of which would be painful to travel since choosing one would of necessity cause him to have to ignore the calling of the other.

Judge Roettger, at one point in the proceedings, stated to Respondent

> "If you're right, I certainly will assume that Jehovah will not hold it against you because you are doing matters under penal sanctions of the Court, sir."

While obviously Judge Roettger was clear as to whose authority was greater, and thus, to whom the greater allegiance must lie, Respondent sincerely was not! Accordingly, as a human being and as an attorney, he was duty bound, in good faith to test the ruling of the court.

The courts of this country have frequently considered the petitions of litigants who have sought to invoke the protection of the Bill of Rights.

For example, when a city charter contained a provision which set municipal elections on the Jewish holiday of Rosh Hashanah, the court held it to be invalid, ruling that each person is entitled to all constitutional rights, all at the same time. Detrimental alternatives were deemed no substitute for constitutional rights. Michaelson ex rel. Lewis v. Booth, 437 F. Supp. 439 (U.S.D.C.- R.I., 1977). Again in Church of God v. Amarillo Independent School District, 511 F. Supp. 46, affirmed 670 F. Supp. 46 (U.S.D.C., Tex.,1981) a school board's refusal to recognize absences for religious holidays was found to be invalid. The court in that case noted that the sincerity of the plaintiffs was shown by the fact that no student had ever attended school on those holidays, notwithstanding the penalties that were going to be received for their absence.

The courts have offered, relative to religious expression, that there exists a difference between belief and overt action. "...The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs...However, certain overt acts can be regulated and where they have...have invariably posed some substantial threat to public safety, peace or order..." Sherbert v. Verner, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963) at 1793. In Sherbert, the appellant was denied unemployment benefits because she had refused to be available for work on Saturdays (her Sabbath); the Court held the denial invalid.

The Court had previously warned in Thomas v. Collins, 323 U.S. 516, 65 S. Ct. 315, 89 L. Ed. 430 (1945) that "...only the gravest

abuses, endangering paramount interests, give occasion for permissible limitations...." Thomas, supra at 530.

To deal with problems of this nature, the Court created the "compelling state interest test." Its early espousal can be found in Harper v. Virginia Board of Education 383 U.S. 663, 86 S. Ct. 1079, 16 L. Ed. 169 (1966), wherein it was stated that the right to express beliefs may be restricted by the government only when it can be shown that (1) the restrictive regulation or practice services a compelling governmental interest, and (2) it is the least restrictive means by which that governmental interest can be effectively served.

It is germane to the instant case, to note the treatment applied to this dilemma in Smilow v. United States, 465 F. 2d 802 (C.A. 2d Cir., 1972). The defendant in that case, was summoned before the grand jury to testify, and refused to do so, citing as his reason a religious prohibition against being an "informant." Said defendant argued that Jewish law prohibited him from rendering such secular assistance.

The Second Circuit held that there was a paramount state interest in having the grand jury hear "every man's evidence," but nevertheless suggested

> "...If appellant had refused to appear because he had been summoned on a Jewish Holy Day, the considerations would be different... a postponement for a day or two would provide a feasible and sensible accomodation of individual and societal interests..." Smilow, supra at 804.

Thus, Respondent would submit that he had a sincere, good faith belief that it was his duty to test the constitutionality of Judge Roettger's order, which he verily believed was improper. He knew that by violating the order he would likely be held in contempt, and that if unsuccessful on appeal, that he would face fine or even imprisonment. In fact, this is precisely what did occur. Respondent

was held in contempt and given the maximum fine provided for by statute, to wit: $1,000.00. As in Maness, supra, Respondent had alternative choices. He could have obeyed the judge's order, thereby violating his own strongly held religious beliefs, and permitting an order to stand unchallenged until after "irreparable harm" had occurred. The other alternative was to disobey the order, thus preventing the harm from occurring, and allowing pre-compliance appellate review. The United States Supreme Court stated

> "Although it is clear that non-compliance risked both an immediate contempt citation and a final criminal contempt judgment against the witness, if, on appeal, petitioner's advice proved to be wrong, the issue here is whether petitioner, as counsel, can be penalized for good faith advice to claim the privilege." Maness, supra at 463.

It is respectfully submitted that the issue in the matter at hand is whether Respondent can be shown by clear and convincing evidence to have violated Disciplinary Rule 7-106 (A). As noted hereinabove, neither Judge Roettger, nor the Eleventh Circuit, nor in fact The Florida Bar have questioned Mr. Jackson's motives, nor his sincerity. The record reflects, and contains frequent acknowledgment of Respondent's courteous manner, respectful tone of voice and devout beliefs. In fact, at the hearing before the Referee, Bar Counsel stated "(t)he Florida Bar must respectfully submit that while concededly, Mr. Jackson believed in what he was doing, he was misguided" (T.25).

With the benefit of hindsight, and with time to cooly assess the situation, it must be admitted that perhaps there were other ways in which the Respondent's dilemma could have been resolved, including but not limited to following Judge Roettger's idea of having substitute counsel sit in for Respondent to represent his client in his stead. Surely this would have saved Mr. Jackson a great deal of grief

and other losses as well. Yet, at the time, under the extreme emotional pressures of the moment, without ample time to fully reflect on each and every aspect and ramification of the situation, Respondent did that which he felt had to be done on behalf of his client and in deference to his own beliefs.

Again, it must be stressed that not one scintilla of evidence has been produced to show that the failure to obey the ruling of the tribunal was done other than in the utmost sincere good faith that the order being disobeyed was an illegal one. Respondent may have been incorrect in this assessment, and it is clear that the Court of Appeals did not agree with his contentions. Yet even in upholding the contempt citation, the Court did acknowledge something which shows that Respondent was not totally off-base in his view that the order of Judge Roettger was questionable. The court stated

> "If the court, given adequate notice of appellant's religious convictions, had, nevertheless, scheduled trial for the first and last two days of Passover, we would be faced with a first amendment question." U.S. v. Baldwin, In re Steven Jackson, 770 F. 2d 1550 (11th Cir. 1985) at 1557.

Respondent verily believed that his admitted failure to give more notice should not deprive him of his First Amendment guarantees. Clearly, his belief was not accepted by the courts, and he must accept that the contempt citation and the penalties adjudged thereunder will stand. Yet the good faith belief in his obligation to test the ruling was the spirit which motivated his actions, and should preclude him from being found guilty of violating D.R. 7-106 (A) which contains a specific exception for just this kind of situation. It would be grossly unjust to discipline Mr. Jackson for his good faith attempt to challenge a ruling which he truly felt was violative of the Constitution, even though his determination might have been wrong, in the absence of any showing by The Bar that his motives were otherwise than have

been represented throughout all proceedings and hereinabove.

Accordingly, this Honorable Court must disapprove the Report of Referee and dismiss the complaint with prejudice.

II

THE DISCIPLINE RECOMMENDED BY THE REFEREE IS EXCESSIVE; THE MAXIMUM DISCIPLINE SHOULD BE A REPRIMAND.

While it has never been suggested, as erroneously stated in the Report of Referee, that The Bar cannot discipline Respondent for the reason that the District Court has already dealt with the matter, it is certainly clear that the prior discipline given by the court may be considered as a factor in determining what discipline, if any, should be given by The Bar.

This Court in State ex rel. Florida Bar v. Murrell, 74 So.2d 221 (Fla. 1954) enunciated various criteria which should be considered in meting out discipline to attorneys who have been proven guilty by clear and convincing evidence of having violated the Code of Professional Responsibility.

> "Discipline of an attorney may be effected by disbarment, suspension or censure, sometimes called reprimand, which may be public or private. By some well-reasoned cases the test for disbarment is conduct involving moral turpitude...the Courts tell us that disbarment is the extreme measure of discipline and should be resorted to only in cases where the lawyer demonstrates an attitude or course of conduct wholly inconsistent with approved professional standards. It must be clear that he is one who should never be at the bar, otherwise suspension is preferable. For isolated acts, censure, public or private, is more appropriate. Only for such single offenses as embezzlement, bribery of a juror or court official and the like should suspension or disbarment be imposed,...." Murrell, supra at 223. (emphasis added).

Discipline is intended to both protect the public and at the same time be fair to the attorney. The Florida Bar v. Pahules, 233

So. 2d 130 (Fla. 1970); The Florida Bar v. Lord, 433 So. 2d 983 (Fla. 1983); The Florida Bar v. Carter, 429 So. 2d 3 (Fla. 1983).

It has further been recognized that

> "...each case must be assessed individually, and in determining punishment we should consider the punishment imposed on other attorneys for similar misconduct." The Florida Bar v. Breed, 378 So. 2d 783 (Fla. 1979).

As previously stated, the instant matter is one which presents a highly unusual fact pattern, which a thorough review of decisional law reveals has no like precedent. It is unfortunate to note that the cases are legion, wherein attorneys have been charged with violating the same disciplinary rules as has Respondent herein; but the circumstances presented in those cases are so dissimilar as to render comparison, and thereby guidance, impossible.

The test for proper discipline of a member of the Florida Bar who has been found guilty of having committed unethical conduct, has been said to require satisfaction of three purposes:

> "First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty. Second, the judgment must be fair to respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations." The Florida Bar v. Lord, supra at 986, citing The Florida Bar v. Pahules, supra at 132. See also; State ex rel. The Florida Bar v. Murrell, supra at 227.

Applying this test to the instant situation, should make it apparent that the Recommendation as To Disciplinary Measures To Be Applied, contained in the Report of Referee, is totally excessive and as such, it must be vacated or modified. In the first place, it is obvious that the conduct of the Respondent, even if found by this Court to have been in breach of his ethical duties, was an isolated

incident, motivated by highly emotional and sincerely held personal religious beliefs. This was not a case where an attorney out-and-out lied to a judge in order to obtain a continuance, The Florida Bar v. Oxner, 431 So.2d 983 (Fla. 1983) (sixty day suspension ordered); or where an attorney made derogatory statements to a trial judge in a motion to recuse, and also placed clients' funds in a personal account, refusing to return them although demands were made for a period of over one year, The Florida Bar v. Carter, 410 So. 2d 920 (Fla. 1982) (public reprimand ordered); or where an attorney was found to have neglected to handle a legal matter entrusted to him in one instance, and to have committed conduct involving deceit, in another instance, The Florida Bar v. Guard, 448 So. 2d 981 (Fla. 1984) (public reprimand and probation ordered); or where an attorney was found guilty of (a) neglecting to withdraw from a case, yet failing to appear at a hearing without permission, resulting in a contempt citation, (b) failing to deliver to another client all funds to which she was entitled,and (c) committing conduct prejudicial to the administration of justice and adversely reflecting upon his fitness to practice law, in that he entered a default judgment on behalf of a client in an action after failing to respond to several requests from the out-of-state attorney representing the defendant to allow time for settlement negotiations or in the alternative, for in-state counsel to be retained. The Florida Bar v. McKenzie, 432 So.2d 566 (Fla. 1983) (public reprimand ordered covering all offenses).

While Respondent herein may have acted improvidently, clearly his conduct, when juxtaposed to the above examples of unethical behavior, does not amount to a scenario that the public must be protected from in the same fashion. Yet the punishment recommended by the Referee herein is far more severe than that given to any of the

attorneys in the above-cited disciplinary proceedings. The Referee's recommendation herein is unduly punitive for an isolated act of an attorney who has not been charged with neglecting his legal duties to a client, nor of failing to perform a required service, nor for deceit or other act involving moral turpitude, but whose only failure was to refuse to obey an order of the court which he at the time sincerely believed was in violation of his Constitutional rights. It would be wrong to deny the public the services of a qualified attorney under these circumstances.

The second factor to be considered for proper disciplining of an errant attorney is that the discipline must be fair to the respondent, sufficiently punishing a breach of ethics, yet encouraging reformation and rehabilitation. It is respectfully averred that the Referee's recommendation satisfies neither criterion.

It is certainly not fair for Mr. Jackson, who, as explained above, in good faith, and under extreme emotional conflict, elected to disobey an order of a trial judge which he believed violated his right to freely exercise his religious beliefs, to be deprived of his livelihood for a significant period, when attorneys who wilfully abandon or neglect their clients, who wrongfully withhold clients' funds, who lie to clients and judges, receive significantly less in the way of discipline. Again it should be remembered that had Respondent been willing to follow the suggestion of Judge Roettger, allowing his client to be represented in his absence by substitute counsel, neither the contempt proceeding, nor this disciplinary proceeding would have likely occurred. However, Respondent felt this solution, while good for him, would compromise his client, and so he advised the client, despite the jeopardy to his own personal interests.

The discipline recommended by the Referee, nor any discipline for that matter, is not required to encourage reformation and rehabilitation, since Respondent has certainly already learned his lesson by virtue of the discipline and consequences thereunder already suffered by him. Mr. Jackson has had his record blemished by a contempt conviction. He has been fined the sum of $1000.00. He was removed from representation in a case he very much wanted to participate in; which he spent weeks preparing for; which he has never been compensated for although a minimal amount was awarded to him; He has received no further court appointments although he has at all times been willing to accept them. He has incurred significant legal expenses and costs. He has received a great deal of adverse media publicity. He has suffered ill health in the nature of extreme hypertension and cardiac complications, which he has been advised is stress related, which was certainly exacerbated by the situation herein. As stated, Respondent does not argue that all of this precludes further punishment, if this Court determines it is warranted. He does believe that even if he is found to warrant discipline, that the recommendation is unduly punitive, particularly in the light of the losses he has already endured.

It is submitted that the Respondent has been deterred from the likelihood of ever committing similar conduct in the future.

The third criterion, that the judgment must be severe enough to deter others who might be prone to commit like violations seems to be met by overkill on the part of the Referee. In the first instance, the circumstances here are such that it is unlikely that others would be prone to commit a like violation. Secondly, the punishment is so severe as to be downright threatening to attorneys, as if to say

"don't get on the wrong side of a judge, or this will happen to you." While the recommended discipline might be appropriate to punish an attorney who repeatedly was disrespectful and violated court directives and procedures with impunity, it is suggested that one instance of disobeying a court order which Respondent, in good faith, believed was unconstitutional should not be dealt with by such extreme a measure as suspension. Nor is it necessary for the legal community to be deterred by the imposition of such harsh punishment. In this case, it is maintained, the legal community is already well aware of the contempt citation and fine assessed against Respondent by virtue of the significant media coverage of the events at the time they took place. It is noted that the matter was covered throughout the State, both in the print media and electronic media, and even was reported outside the state, as far away as California. Respondent would suggest that the members of The Bar are already acutely aware of the consequences of Respondent's actions, and would already be deterred from taking similar actions in view of the treatment already received by Respondent.

Finally, a word must be said regarding the Referee's comments regarding a prior disciplinary proceeding heard by said Referee. It is respectfully urged, that the prior proceeding, Case No.: 65,432 which is presently before this Honorable Court for review, must, upon the authorities cited in Respondent's Brief in Support of Petition for Review, his Reply Brief, and in his Citation of Additional Authority directing this Court's attention to its very recent decision State v. Jones, ____So. 2d ____, 11 F.L.W. 157, Case No. 66,965 (Fla. 4/10/86), result in a reduction of any discipline in that case to a private reprimand, at most.

Respondent has never before been subject to any discipline.

In this matter, as in the previous matter, the charges stem from factual circumstances which are most unusual, and Respondent's conduct, even if deficient, cannot be considered in "cold and calculating disregard for the proper function and administration of justice of the courts in their efficient, fair and orderly operation." The record in either case, nor in both together simply does not support this conclusion.

Thus, in the instant case, if this Court determines that it is necessary to impose someform of discipline, and if said discipline is to be cumulative, it is suggested that a public reprimand would be adequate and appropriate to accomplish all purposes and criteria for proper discipline. Respondent would note that it is not mandatory for discipline to be greater for a subsequent ethical violation, the rule being that

> "(i)n considering the appropriate discipline for an ethical violation, this Court considers past derelictions of responsibility and, where appropriate, increases the penalty." The Florida Bar v. Greenspahn, 396 So. 2d 182 (Fla. 1981) citing The Florida Bar v. Welch, 309 So. 2d 537 (Fla. 1975) (emphasis added)

It would seem, through the exercise of ordinary logic, that the inclusion of the words "where appropriate" means that it is not always appropriate for discipline to be greater for a subsequent offense. Naturally, if an attorney repeatedly commits the same or similar type of offense, it would seem reasonable to punish him more severely for later offenses. However, it is unreasonable to say that an attorney should automatically receive a greater punishment for a second violation than for the first without regard to the nature of the specific circumstances involved.

In the instant matter, Respondent is charged with a violation which is totally unrelated and dissimilar to the situation presented

in the prior case. As stated, that case is not yet finalized, but even if it were, it should have no effect upon the discipline imposed in this matter, since the two situations are so distinct as to mandate that they be treated in a totally independent manner.

Justice Terrell of this Honorable Court, speaking in State v. Murrell, supra, on the issue of attorney discipline, referred to an 1871 United States Supreme Court case, wherein it was stated

> "Admission as an attorney is not obtained without years of labor and study. The office which the party thus acquires becomes the source of great honor and emolument to its possessor. To most persons who enter the profession, it is the means of support to themselves and their families. To deprive one of an office of this character would often be to decree poverty to himself and destitution to his family." Bradley v. Fisher, 13 Wall 335, 80 U.S. 335, 20 L. Ed. 646 (1871) at 355

To remove Respondent from the ability to practice his profession for a period of four months, to run consecutive to the previously ordered discipline (suspension for three months) if upheld, and then for him to first have to petition for reinstatement, would not only be punishing Mr. Jackson far beyond what could possibly be considered reasonable under the circumstances, but would certainly gravely endanger the well-being of Respondent's wife and infant twin sons. Nor would such a penalty be at all consistent with the criteria for discipline enunciated by this Court and cited hereinabove.

For all of the foregoing reasons, it is urged that a reprimand should be the maximum discipline in this matter.

CONCLUSION

This Honorable Court must disapprove and vacate the Report of Referee, and dismiss the complaint with prejudice, or in the alternative, the Court must disapprove and vacate the Referee's recommended discipline and impose discipline no greater than that of a reprimand, together with such other and further relief as may be deemed just and proper in the circumstances.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail to RICHARD B. LISS, ESQ., The Florida Bar, Galleria Professional Building, 915 Middle River Drive, Suite 602, Fort Lauderdale, Florida 33304 this 2 day of May, 1986.

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