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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 has failed to sustain its burden of proving the charges against Respondent by clear and convincing evidence.

The Referee actually made no findings of fact which would sustain his ultimate decision finding Respondent guilty of all charges. His mere "adoption" of the background information set forth in the Eleventh Circuit Court of Appeals decision does not set forth the basis for his finding of guilt of the disciplinary charges levelled against Respondent, nor does it provide Respondent with a fair opportunity to refute those findings which may in the mind of the Referee exist.

Respondent has met his burden in showing that the Report of Referee is erroneous, unlawful and unjustified. He has shown that the circumstances giving rise to this proceeding were highly unusual, and motivated by a sincere belief at the time, that a constitutional violation existed.

Respondent has demonstrated that the cases relied upon by The Bar are inapposite to the instant matter, since in those cases the attorneys who failed to carry out all or a significant part of their professional duties, often repeatedly, did not advance any justification whatsoever for their actions. In this case, Respondent honestly believed that his single act of refusing to obey a trial judge's order which he believed was unconstitutional was not in dereliction of his duties as an attorney, but rather was required in order to test the validity of that order.

POINT II

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

Respondent has never before disobeyed any ruling of a judge or tribunal. He did so in this one instance because he believed the order was unconstitutional and was depriving him of his right to observe his religion.

Respondent has demonstrated that he has learned his lesson and would not again place himself in a position where his personal needs were placed before his professional duties.

Respondent has been honest and consistent in both his actions and his statements, and The Bar has unfairly characterized him as unfit to practice. His two isolated instances of alleged misconduct in a nine year period do not warrant the discipline recommended.

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 Bar argues that the findings of fact of the Referee enjoy a presumption of correctness which is almost sacrosanct, and that the Respondent has failed to advance any "cogent reasons for this Court to overturn" the Referee's findings of fact. It is respectfully averred that all the Referee did was to "adopt" the statement of the United States Court of Appeals of the Eleventh Circuit entitled "I. Background" contained in that court's opinion in United States v. Jonathan Scott Baldwin, et. al., in re Steven F. Jackson, Esq., 592 F. Supp. 149 (D.C. Fla. 1984).

Respondent certainly does not and has not questioned the underlying facts of the incident which gave rise to the instant disciplinary proceedings. In fact The Bar in its Answer Brief states that it "adopts Respondent's Statement of the Case."

Respondent would argue that while the Referee was free to accept and adopt the portion of the Court of Appeals opinion entitled "I. Background" as its basis for determining the underlying "facts" of the incident, there was also incumbent upon the Referee a duty to make factual findings with respect to the charges filed against the Respondent. This was not done. The Referee merely jumped from a verbatim repetition of the Court of Appeals findings as to background to a finding of guilt on all charges cited by The Bar, without reciting any findings of fact as they pertain to the charges of misconduct alleged.

It is submitted that the Referee failed to perform one of his required duties, to wit: to find those facts necessary to sustain the charges against the Respondent. A mere adoption of the Court of Appeals findings as to the background which led up to the trial judge's issuing of a Certificate of Contempt, does not necessarily amount to those findings of fact which are required to find Respondent guilty of a breach of the Canons of Ethics. This is so because the "charges" are quite different. In fact, no where in the opinion of the Referee does he state which facts, if any, are relied upon to support the charges leveled against the Respondent. As such, Respondent is in the position of not being able to advance his own arguments to refute the findings of fact which allegedly support the ultimate decision of the Referee, because he does not have the benefit of knowing what they were. Accordingly, the opinion should be overturned, in that Respondent does not have a fair opportunity to refute the findings of fact which purportedly support the ultimate finding of breach of the integration rules of the Florida Bar and the disciplinary rules of the Code of Professional Responsibility.

Moreover, it is submitted that Respondent has met his burden of demonstrating that the Report of Referee is erroneous, unlawful and unjustified. Respondent has shown that he was given a Order by the trial judge which he verily believed was violative of his rights under the United States Constitution. He further demonstrated that his refusal to obey said Order was in good faith, and that he had been given an alternative which would have been in his own best interests to avail himself of, but that he did not take such alternative because he believed that it would not be in the best interests of his client for him to do so. He likewise demonstrated that the cases relied upon by The Bar in support of the charges were so fac-

tually dissimilar to the instant matter as to offer no support at all.

The Bar's argument that if this Court were to accept Respondent's argument that The Bar has failed to sustain its burden would be to "eviscerate" the Code of Professional Responsibility and that said Code would "cease to have any meaning pertaining to an attorney's obligation to facilitate the orderly administration of justice, obey orders of a tribunal and faithfully represent his client" is an inane oversimplification of the circumstances presented. The Bar concedes that disciplinary cases must be determined upon the facts presented in each individual case. The Florida Bar v. Scott, 197 So.2d 518 (Fla. 1967). Yet it seeks, by citing various disciplinary actions whose facts and circumstances are totally dissimilar to the instant case, to justify discipline against this Respondent by citing similar discipline ordered against other respondents whose actions could not be fairly compared due to the total lack of any justification argued on their behalf.

The Bar would urge that the respondents in The Florida Bar v. Page, 419 So. 2d 332 (Fla. 1982); The Florida Bar v. Larkin, 420 So. 2d 1080 (Fla. 1982); The Florida Bar V. Hoffer, 412 So. 2d 858 (Fla. 1982); and The Florida Bar v. Welch, 369 So. 2d 343 (Fla. 1979) were somehow less blameworthy than Respondent herein since his "own neglectful handling of his calendar caused him to be dilatory in requesting leave of court to be excused for the religious observance." Thus it would seem that The Bar has more understanding for those attorneys who (1) vanish into thin air, abandoning their clients without any reason; (2) are chronic alcoholics; or (3) are ardent bowlers!

Respondent has readily admitted that he was tardy in making his request for an interim delay in the trial in which he was acting

as a defense counsel. However, he has equally maintained that his request, even though late, was a legitimate one and that his refusal to obey a court order which would have caused him to violate sincerely held religious beliefs, should not automatically subject him to charges of professional misconduct on the same or similar grounds as are utilized to discipline attorneys who without any justification or color of right fall short of their responsibilities to their clients.

Once again, it is submitted that The Bar's reliance on the Court of Appeals opinion to sustain its position in the instant matter is improper at best. The Bar's lengthy quotes from two Fifth Circuit Court of Appeals cases, United States v. Onu, 730 F.2d 253 (5th Cir. 1984) and United States v. Lespier, 558 F.2d 624 (1st Cir. 1977) which were referred to in the Eleventh Circuit opinion dealing with the contempt charge, are highly inappropriate herein, where (a) the circumstances were dissimilar and (b) the courts were not sitting as tribunals viewing ethical violations as herein.

Respondent's position, as argued in Point I of his Petition for Review is simply that The Bar has failed to sustain its burden of proving him guilty of the breaches of discipline charged in that in view of the unusual nature of the circumstances Respondent was justified in testing the trial judge's Order which he believed was violative of his First Amendment rights.

Respondent would aver that an attorney, as stated in many opinions, including Hirschkop v. Snead, 594 F.2d 356 (4th Cir. 1979) a case cited by The Florida Bar in its Answer Brief, does not lose rights enjoyed by other citizens merely because he is an attorney. Hirschkop was an attorney who brought suit to challenge a disciplinary rule adopted by the Supreme Court of Virginia which restricted a lawyer's right to comment about pending litigation. The quote cited

on page 19 of The Bar's Answer Brief was but a small extraction from an twenty-seven page opinion which dealt with lawyers' rights to comment about pending criminal trials.

It is improper if not outrageous for The Bar to extract language from an opinion which deals with a completely dissimilar situation, and to attempt to pass it off as relevant to the instant case without noting the context in which the quoted words were written.

Respondent would submit that although his actions might have yielded the finding of contempt, it does not automatically follow that he should be found guilty of breaching his ethical responsibilities as well. As argued in the Brief in Support of Petition for Review Respondent herein faced a situation similar to that which was found in Maness v. Meyers, 419 U.S. 449, 42 L. ED. 2d 574, 95 S. Ct. 584 (1975). The Supreme Court found therein that under certain circumstances a choice is presented between obeying an order and subsequently testing the same or refusing to obey said order, thereby risking a contempt citation if the test proves that the order should have been obeyed when given. Much is made of the element of good faith in making that test.

While Respondent does not argue that the Maness decision is controlling, it should certainly be considered, and The Bar's complete silence as to Respondent's argument on this point is deafening.

The Bar also ignores Respondent's argument that he refused to accept a suggestion made by the trial judge that alternate counsel be employed on the days when Respondent wished to observe his religious holiday, although said suggestion would more than likely have avoided a contempt citation and this disciplinary action. Rather The Bar seeks to blame Respondent for being well-prepared on his clients behalf when it states, on Page 19 of its Answer Brief "Re-

spondent's abandonment served to deprive his client of unique legal services that could only be provided by Respondent as evidenced by the extensive trial preparation undertaken...."

This is truly a "damned if you do, damned if you don't" situation. If Respondent had merely failed to appear without explanation he would likely be charged with abandoning his client and falling short of his responsibilities by failing to adequately and properly prepare his client's case. In this instance, he is charged with the same thing, and the implication is that his conduct is somehow more egregious because in fact he was so well prepared that his absence constitutes "a blatant act of professional nonfeasance."

In fact it should be noted that Respondent's client, one of nine defendants on trial in the subject case, was the only one to receive a "hung jury." This event occurred even without the representation of the Respondent, who in fact, had offered any assistance he could give to Jeffrey Miller, Esq., the attorney who replaced him as court-appointed counsel in the cause.

Finally The Bar would suggest that Respondent, in electing to refuse to obey a court order which he sincerely felt flew in the face of the First Amendment, simply sat at home and forgot about the fact that his client was on trial for a serious offense. His honest answers to the grievance committee members are cited as reasons to condemn him. Respondent stated to the grievance committee that at the time he felt that his non-appearance would halt the trial and that an ancillary proceeding would be held which "would not affect my representation of my client whatsoever." Respondent stated that "(t)hat's what I believe would have been the most prudent thing to do, because I think that's the only way my client's rights could have been adequately protected."

It should thus be clear that Respondent always was thinking of his client's rights, which was demonstrated not only by the previous quote, but also by his refusal to accept the trial judge's suggestion that alternate counsel be employed in Respondent's absence during the days of religious observance.

The Bar's closing paragraph as to Point I, found on page 23 of its Answer Brief, suggests that the Respondent did not even inquire as to what had transpired in his absence, although the quoted portions cited above do not support that conclusion. In fact, Respondent stated that as soon as he found out the trial was going on in his absence, he knew that substitute counsel had been appointed.

Respondent would argue that The Bar's position in a disciplinary action should be no different than a prosecutor's position in a criminal action. In short, the objective should not be merely to win, but to seek justice. It is averred that The Bar, in seeking to uphold the report of the Referee, is manipulating the facts and the law by extracting those portions of the record, and of judicial opinions which would seem to support the report. However, the record as a whole, when fairly and impartially examined does not support a finding of guilt of the charges alleged upon "clear and convincing evidence" as is required by The Florida Bar v. Rayman, 238 So. 2d 594 (Fla. 1970), and as such, the report of the Referee should be disapproved by this Honorable Court, and the Complaint dismissed with prejudice.

II

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

Once again, it must be stated that The Bar has failed to answer the arguments advanced by Respondent in his Brief in Support of Petition for Review. Respondent set forth in detail, his arguments as to why the discipline recommended in the Referee's report is excessive, by examining the criteria for determining proper discipline which has been adopted by this Court. In State ex. rel. Florida Bar v. Murrell, 74 So. 2d 221 (Fla. 1954) this Court noted that the more extreme methods of discipline, to wit: suspension or disbarment should be imposed "only for such single offenses as embezzlement, bribery of a juror or court officials and the like...." Yet The Bar herein is seeking to discipline the Respondent for the single offense of disobeying a Court order to appear for trial on a major religious holiday. There is no suggestion that Respondent had before disobeyed any order or ruling of a judge or tribunal in his nine years of practice. In fact, even in the instant situation, Judge Roettger himself noted that Respondent was polite and that "the speaking tones employed by Mr. Jackson and the court were conversational and voices were not raised throughout the various colloquies or rulings."

The Bar, by quoting excerpts out of context from the Grievance Committee hearing is attempting to show that Respondent has stubbornly refused to admit that in hindsight he should have obeyed the Court's order, and therefore a suspension is warranted. The test for determining appropriate discipline does not suggest that a respondent must beat his chest crying mea culpa, or else fact more severe discipline, only that a respondent should not put himself in the position of committing breaches of duty in the future. Respondent herein honestly stated that even with the benefit of hindsight

if "presented with the identical circumstances in this case before this judge for this client" he would have done the same thing. This is because Respondent really felt he had no other choice but to test a ruling which he believed was in deprivation of his First Amendment rights. Of course, at the time of the Grievance Committee hearing Respondent did not know the outcome of the appeal, and at that time he verily believed he would be successful on appeal. It is respectfully averred that the question posed to Respondent by the Grievance Committee member could not have been answered honestly in any other way than Respondent did at that time, because the outcome of the appeal would either have vindicated the actions of Respondent or served to show him that his views although well-motivated, were inappropriate. Since the entire matter, was to Respondent an issue which came down on the constitutionality of the trial judge's order, and since that issue had not been resolved at the time the Grievance Committee met, it should not be considered stubborn for Respondent to have refused to say that he would have done differently. In fact, it would have been the height of hypocrisy for Respondent to have said the expedient thing, to wit: something to the effect of admitting that he now had realized how wrong he was and would never, ever have done it again, while at the same time pursuing an appeal in the appellate courts and advancing arguments which challenged the trial judge's refusal to stay the proceedings for religious observance.

Once again, Respondent is in a "catch 22" situation. If he had uttered those words which the committee member apparently wanted to hear, he would likely be accused of improperly pursuing an appeal which could have no merit, if indeed Respondent knew his conduct was wrong. Having answered honestly, at a time when the outcome of the appeal was unknown, that he would have done the same thing again,

he is called stubborn and the implication is that his punishment should be more severe.

Certainly, based upon the criteria for discipline discussed at length in the Respondent's Brief in Support of Petition for Review, the important consideration should be whether the Respondent has learned a lesson from the subject incident, which would preclude him from committing like conduct in the future. Respondent has all throughout freely admitted that he knew his request for an interim stay was made late, and clearly he would not permit a circumstance to again arise where his personal needs would not be brought to a court's attention until so late a time as to create inconvenience. Indeed there is nothing in the lengthy quotations offered by The Bar in its Brief, to support the implication that Respondent would be inclined to ever commit a similar offense.

The Bar notes that Respondent was not present at the final hearing before the Referee. What it does not note is the reason for his absence. In fact, Respondent was engaged in representing a criminal defendant in a major felony charge in the Seventeenth Judicial Circuit. (T, page 8 and page 9, lines 1 - 4). That matter had been continued several times due to the fact that Respondent was seriously ill. The case was set for a date which would not have conflicted with the final hearing herein, but was rescheduled at the last minute by the trial judge, thereby creating a conflict. At this point The Bar, and the Referee were contacted and a request for a postponement of the final hearing for a few days was made. Said request was denied. As such, Respondent was placed in the position of having to choose between attending the final hearing, thus asking a trial judge to interrupt the trial of his client, or to continue to represent his client, thus making it impossible for him to attend

his final hearing. Respondent elected to remain in Broward to defend his client. These circumstances should indicate, both to The Bar and to this Court, that Respondent has learned that even the most pressing personal considerations must yield to one's professional responsibilities.

The Bar, and indeed the Referee, have made mention of Respondent's so-called "flexibility" in his religious practices. His statement that he took the SAT test on a Saturday is mentioned several times in The Bar's brief, as if his taking that examination seventeen years before the subject incident occurred, operates as a waiver for all times of his right to observe his holidays. In reviewing the record, there is no instance where Respondent indicated that he ever worked or engaged in other "secular" activities on holidays. Rather Respondent stated to the Grievance Committee

"The way I was brought up is that the holidays were given the most important emphasis and that's when the family went together to services."

It is respectfully submitted that neither The Bar, nor the Referee are in the position to judge Respondent's religious practices. If the Respondent had indicated that he took the SAT on a holiday or engaged in other work-related activities on holidays, then it would be reasonable to suggest that Respondent was flexible in his observance. Yet the Respondent did not so indicate, but rather stated that had always observed the holidays by refraining from work and other usual activities.

Respondent must again criticize The Bar's citing of factually dissimilar cases to justify the discipline ordered by the Referee. If anything is demonstrated by the citations of The Bar in its Brief and those offered in Respondent's Brief previously submitted, it is

that the underlying facts and circumstances leading to and surrounding the purported misconduct play a very important part in determining the appropriate discipline. If this were not so, it would seem that discipline is meted out in a very haphazard fashion, with serious sounding infractions only rating minor discipline and less serious sounding infractions warranting suspensions for significant periods. While the opinions do not always provide full recitations of the factual backgrounds of the matters, it must be assumed that the ultimate determinations of this Court are predicated upon full and careful consideration of the record in each individual case. This should particularly so when the misconduct charged, is, as herein, the product of unusual circumstances.

Accordingly, Respondent places great faith in this Court's careful review of the facts and circumstances presented in the instant situation, and of the emotional dilemma which Respondent faced at the time of his improvident action. Respondent would further hope that this Court ignore The Bar's attempt to usurp its function in treating the outcome of the Petition for Review in Case Number 65,432 as a fait accompli. Respondent verily believes that the Report of Referee in that case, should be overturned. However, until this Court rules in that case, it is unreasonable for either The Bar to argue, or for the Referee to rule, that discipline in this matter should be greater than that previously ordered. Further, there is no requirement for discipline to be cumulative in every instance, but merely "where appropriate." The Florida Bar v. Greenspahn, 396 So. 2d 182 (Fla. 1981) citing The Florida Bar v. Welch, 309 So. 2d 537 (Fla. 1975). The two instances of misconduct charged in the two matters involving Respondent are wholly unrelated, are

two isolated instances out of a nine year career, and cannot, when viewed fairly, create a picture of an attorney who is unfit to practice his profession. Respondent has categorically denied, and still denies the charges in Case 65,432. It is not appropriate to re-argue the positions set forth in Respondent's Briefs in Support of the Petition for Review in that case, except to say that The Bar demonstrated its ability in that case to advance cogent arguments for the recommendation of a private reprimand at one point, and then to vigorously defend the imposition by the Referee of a three month suspension where no new or different information was available or submitted to justify the change of heart. Now in the instant case an incident which was considered by a Grievance Committee and the Designated Reviewer to warrant only a private reprimand, is termed an "assault by Respondent on the sanctity of our legal system." Respondent would submit that if The Bar feels free to criticize his so-called "flexibility" in his religious practices, it should be equally concerned with its own flexibility as to expressing its views on the same set of facts, at different times and for different purposes.

Respondent must state that he resents The Bar's statement that he has a jaundiced view of professional responsibility. In fact, Respondent takes his professional responsibilities very seriously, and would suggest that the two isolated incidents which have resulted in the pending disciplinary actions cannot be viewed as indicating otherwise. It is noteworthy, that in the instant case, Respondent's client Howard Avery Jones, who as stated hereinabove, was subject to re-trial after the jury could not reach a determination with respect to him, contacted the Respondent and asked if the Respondent would represent him at the new trial. Respondent declined, explaining to

Mr. Jones that since his case would be re-tried before Judge Roettger, it might be better for him to secure other counsel, to avoid any possible prejudice by having Respondent as his attorney.

In sum, while Respondent may not be perfect, his dedication to his clients and to his profession has been demonstrated in many ways hereinabove and in his Brief in Support of Petition. The two isolated incidents giving rise to disciplinary proceedings surely cannot warrant the disparaging verbiage contained in The Bar's Brief nor can they justify suspension from practice, an obviously excessive measure of discipline.

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

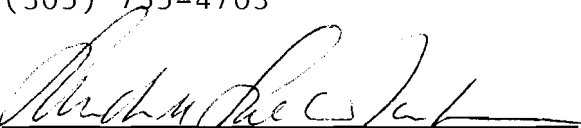
CONCLUSION

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 4 day of June, 1986.

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