IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

SHARON LEA KLEINFELD,

Respondent.

_____/

Supreme Court Case
No. 81,464

On Petition for Review

Initial Brief of Complainant

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INTRODUCTION

For the purposes of this brief, The Florida Bar will be referred to as "The Florida Bar", "the Bar" or "Florida Bar". Sharon Lea Kleinfeld will be referred to as "Respondent" or "Ms. Kleinfeld" or "Sharon Kleinfeld".

Abbreviations utilized in this Brief are as follows: "TR" will refer to the transcript of the final hearing held on September 22, 1993, October 6, 1993 and October 20, 1993. "TR.1" will refer to the transcript of the Referee recommendation as to discipline on October 22, 1993. The Report of Referee will be referred to as "A1" in that it is attached as the first document in the Appendix included with this brief. Petitioner's Third Affidavit in Support of Judicial Disqualification dated March 20, 1992 will be referred to as "A2" in that it is attached as the second document in the Appendix included with this brief.

STATEMENT OF THE CASE AND OF THE FACTS

On March 23, 1993, The Florida Bar filed its complaint charging Respondent with misconduct which arose from Respondent's representation of Thomas Freiheit during a trial before the Honorable Geoffrey Cohen, Broward Circuit Judge in January of 1992 and Respondent's filing of two false affidavits.

A final hearing was held before the Honorable Leonard Glick, Referee on September 22, 1993; October 6, 1993 and October 20, 1993. The Referee's recommendation of discipline was announced on October 22, 1993. The Florida Bar presented the Honorable Geoffrey Cohen, as its first witness. Judge Cohen has been a member of The Florida Bar for seventeen years and a Judge for nine years handling civil and criminal cases. (TR. 84,87) Judge Cohen presided over the trial of Thomas Freiheit versus Tamarac Lakes North Association which commenced on January 13, 1992 (TR 87-88) The Respondent represented Mr. Freiheit at trial. (TR. 88) The Pre-Trial Stipulation indicated Respondent's employer David Weiss, as the attorney of record. (TR. 91) Ms. Kleinfeld did appear at trial on January 13, 14, and 15, 1992 (TR. 88) The trial was to continue on January 16, 1992 at 10:00 a.m. and most likely conclude on that day (TR. 89)

On the morning of January 16, 1992, Judge Cohen was advised by his secretary that a number of telephone calls were received from Respondent's father, Sam Kleinfeld, stating that Respondent was ill at home or on the way to the hospital and could not appear in court that day. (TR. 94). Judge Cohen advised his secretary that she should tell Mr. Kleinfeld to travel to Respondent's home or to the

hospital and also to have Ms. Kleinfeld telephone the Judge's Chambers. (TR. 94) Mr. Kleinfeld refused to travel to either Respondent's home or to the hospital. Also, at this point Respondent never personally telephoned the court nor did any individual from Respondent's law firm telephone the court. (TR. 94, 97) Mr. Kleinfeld was later advised to tell his daughter that she was to present herself before the Court so Judge Cohen could observe her to determine whether "the illness" was feigned. (TR. 95) Judge Cohen had never in his career required the appearance of an attorney who called in sick. The Judge believed the Respondent was engaging in an artifice to secure a mistrial because Respondent was not prevailing in the trial. (TR. 106,107) The Respondent finally telephoned the Court at 2:05 p.m. and requested to meet with Judge Cohen to explain her absence earlier that day. When Judge Cohen arrived from a late lunch at 2:40 p.m. or 2:45 p.m. his secretary told him of Respondent's telephone call. He instructed his secretary to contact Ms. Kleinfeld and convey his order that she in fact appear before him that afternoon. Judge Cohen's secretary did call the Respondent and did advise her to appear in court at 4:00 p.m. (TR. 98) The Respondent agreed. (TR. 102) From 4:00 p.m. to 6:00 p.m. Judge Cohen, the attorney for the Defendant, the Court Reporter, the Bailiff and the Judge's secretary waited for Ms. Kleinfeld to arrive. (TR. 100) Prior to 4:00 p.m. the Respondent telephoned the Judge's secretary and advised she was waiting for a delivery and would arrive at 5:15 p.m. (TR. 102,103,104) At 4:55 p.m. the Respondent called and advised the Judge's secretary that she had just cashed a check in

order to take a taxi and would arrive at 5:45 p.m. (TR. 104) All parties previously mentioned waited until 6:00 p.m. for the Respondent, who was already three (3) hours late. Respondent did not arrive. (TR. 105) On the following morning the Judge's secretary found a message on their telephone answering machine supposedly called in on January 16, 1992 at 6:05 p.m. from the Respondent. The Respondent stated that she was twenty minutes from the courthouse on I-95 in bumper-to-bumper traffic and would be taking the Turnpike. (TR. 171) Judge Cohen remarked that that statement made absolutely no sense geographically since the Turnpike is many, many miles west of the courthouse and it would be illogical to take it as an alternative route. As a result of Respondent's failure to appear both for trial and later in the afternoon of January 16, 1992, Judge Cohen issued an Order to Show Cause for direct criminal contempt. (TR. 109) Respondent was to appear on February 7, 1992, in regard to that order. (TR. 110)

Mr. Freiheit's trial was set to continue on February 6, 1992 at 10:00 a.m. (TR. 108) On that day all parties were present for the continuation of the Freiheit trial, except for the Respondent. (TR. 111) At 10:15 a.m., Respondent's office telephoned the court to advise that Respondent was having car trouble and would arrive within fifteen (15) to twenty (20) minutes. (TR. 111-112) Sometime after 10:30 a.m. Respondent's father approached the bench and offered to represent Mr. Freiheit, since his daughter had not yet arrived. Respondent's father was not affiliated in any way with Respondent's law firm, nor had any familiarity with the file, and had never even spoken with Mr. Freiheit. (TR. 114) Judge Cohen

would not allow Mr. Kleinfeld to stand in for his daughter. (TR. 114) Brenda Harman, an attorney from Respondent's office approached the court and advised that she would appear on behalf of Mr. Freiheit, provided that Respondent's father assisted her. The court rejected the proposal. (TR. 115) Months later Brenda Harman, in an informal setting expressed gratitude to Judge Cohen for not forcing her to proceed to trial, since she was unprepared to do so. (TR. 118)

On February 6, 1992, at 10:46 a.m. as a result of Respondent's failure to appear for the second time to conclude the Freiheit case Judge Cohen dismissed the case with prejudice. (TR. 119) The Judge remained in the courtroom until 11:00 a.m. and Respondent had still not arrived. Respondent did not make any attempts to contact the Court any time during the day of February 6, 1992 (TR. 119,120). Consequently, a second Order to Show Cause for direct criminal contempt was issued for Respondent who was to appear on March 20, 1992. (TR. 121)

February 7, 1992, was the day Respondent was to appear as a result of her non-appearance on January 16, 1992 for trial and in the afternoon. (TR. 122) At 8:23 a.m. the Respondent had left a message for the Judge stating she had a hearing that day but was unsure of the time, in addition to requesting a continuance. A motion had not been filed by the Respondent. (TR. 123) The Judge directed his secretary to call Respondent and advise her that the request to continue was denied and Respondent must appear at 10:00 a.m. (TR. 123) The Judge expected Respondent to appear. (TR. 127) Respondent did not appear. (TR. 128) The Court then issued another

Order to Show Cause, as well as an Order of Arrest. Judge Cohen later learned that Respondent had filed a Motion for Arraignment, Motion for Jury Trial and Motion for Judicial Disqualification on that same day. (TR. 124) Respondent was ultimately arrested. (TR. 128)

Judge Cohen also testified in regard to two affidavits executed by the Respondent and filed with the courts in support of judicial disqualification. One affidavit stated that Judge Cohen made repeated references in and out of the presence of the jury to Ms. Kleinfeld as the relative of Morris Kleinfeld, a convicted murderer in Broward County. (TR. 129) Judge Cohen stated that Respondent's sworn assertions were a bold faced lie. (TR. 129) In reality, prior to the court reporter setting up and the jury entering Judge Cohen asked Respondent, in a jocular way, if she was related to Morris Kleinfeld. The Respondent looked at the Judge quizzically, as if she did not know who the individual was. (TR. 181) That was the only mention made throughout a three day trial. (TR. 130)

Judge Cohen then spoke about the Respondent's affidavit in which she stated:

> Prior to his withdrawal of Petitioner's defense, Attorney Richard Rosenbaum received a telephone call from Judge Cohen threatening to dismiss said attorney's cases, unrelated in his division, for the purpose of intimidating said attorney during his representation of the Petitioner.
>
> [Appendix 2, (TR. 132)]

Judge Cohen testified that the contents of the affidavit were untrue. He said:

> That's an incredible lie. ...I felt these were misrepresentations and fraud perpetrated by Ms. Kleinfeld to secure a particular purpose. What she sought to accomplish was to either disqualify myself or failing to do that, have the Fourth District Court of Appeal grant her petition for a writ of certiorari to not allow me to continue in this case. This was an artifice engaged to accomplish this purpose, in my view.
>
> (TR. 133)

The Florida Bar presented Patricia Clark as its second witness. Patricia Clark was Judge Cohen's judicial assistant from December 27, 1988 through May 21, 1993. (TR. 244) Ms. Clark attested to the events which transpired on January 16, 1992. Mr. Kleinfeld telephoned and stated that his daughter was ill and was unable to attend court. (TR. 245) Judge Cohen directed Ms. Clark to advise Mr. Kleinfeld that he was to tell his daughter she was required to appear at 10:00 a.m. Mr. Kleinfeld said his daughter was too ill and that Ms. Clark could call her at home. Ms. Clark called the Respondent at home at 9:00 a.m. and got her answering machine. (TR. 246,247) Ms. Clark left Respondent a message stating she had to appear at 10:00 a.m. for trial. At 10:00 a.m., Mr. Kleinfeld called Patricia Clark and advised that his daughter had received the message and would not appear. (TR. 247,248) Mr. Kleinfeld was advised by Patricia Clark, pursuant to the Judge's directive, to have Ms. Kleinfeld call the office within five (5) minutes. He said he would. Mr. Kleinfeld then called back saying he was unable to reach her. (TR. 248) Ms. Clark, pursuant to Judge Cohen's directive advised Mr. Kleinfeld to go to his daughter's home and drive her to court. Mr. Kleinfeld advised he did not know

which hospital Respondent went to and she was not home. (TR. 249) Ms. Kleinfeld called the Judge's Chambers at 2:05 p.m. and said she was too ill to come to court but would get into her car and go to court immediately if Judge Cohen requested her to do so. (TR. 251) Ms. Clark called Respondent and advised her that Judge Cohen did want the Respondent to appear in court at 4:00 p.m. on that day. The Respondent agreed. (TR. 252) At 3:50 p.m. Respondent called again and advised she was unable to drive and would endeavor to get transportation and try to be there by 5:00 p.m. (TR. 253) Respondent called again at 4:20 p.m. and advised she would definitely appear by 5:15 p.m. (TR. 254) At 4:55 p.m., Respondent telephoned again and said she had cashed a check, was on her way in a cab and would be there by 5:40 p.m. (TR. 255) Patricia Clark, Judge Cohen, Mr. Ginsburg, Jan McLauglin and the bailiff left at 6:00 p.m. Respondent never arrived. (TR. 256)

Patricia Clark also testified as to the events of February 6, 1992. At 10:15 a.m., Respondent's office left a message stating that Respondent had car trouble and would arrive within fifteen (15) to twenty (20) minutes. Ms. Clark remained in the office all day except for lunch. (TR. 262) Ms. Kleinfeld did not appear during any part of that day nor did she leave a note or telephone message. (TR. 262,263)

Patricia Clark attested to the events of February 7, 1992 as well. She retrieved a telephone message from the Respondent at 8:23 a.m. (TR. 264) Respondent stated that she thought she had a hearing, but did not know the time. She also asked for a continuance. Ms. Clark, pursuant to Judge Cohen's directive

telephoned the Respondent and advised that the hearing would not continued and Respondent was required to appear at 10:00 a.m. (TR. 265) She did not. (TR. 267)

Thomas Freiheit was the Bar's third witness. He retained Parillo, Weiss and O'Halloran to represent him in regard to injuries he sustained at his mother's condominium. (TR. 285) He stated that Judge Cohen treated him fairly and treated both Ms. Kleinfeld and her opposing counsel equally. (TR. 287) Mr. Freiheit did not recall Judge Cohen making any references to Ms. Kleinfeld, as the relative of Morris Kleinfeld. (TR. 287) Ms. Kleinfeld did not explain to Mr. Freiheit why she had not appeared on his behalf on January 16, 1992 or February 6, 1992. (TR. 289) Mr. Freiheit did not pursue his underlying case because he "gave up". He could not take any more time off from work and his mother was too old. (TR. 290)

The Bar's fourth witness was Richard Rosenbaum. He has been a member of The Florida Bar since 1984. Mr. Rosenbaum filed a Notice of Appearance on behalf of the Respondent with Judge Cohen on February 18, 1992. Mr. Rosenbaum gave testimony in regard to the affidavit sworn to by Respondent which stated that Judge Cohen had telephoned him and threatened him. He said he never received a telephone call from Judge Cohen and never told Ms. Kleinfeld or any person that he had received a threatening telephone call from Judge Cohen. (TR. 319-320) Mr. Rosenbaum drafted his own affidavit after he had seen statements attributed to him by the Respondent. He was quite upset. (TR. 353) He studied Ms. Kleinfeld's affidavit carefully enough to know that it was blatantly false. (TR. 356) He

also stated the following:

A Number one, it meant that Judge Cohen had contact with me that he never had.

Number two, it meant that I was, for lack of better work [sic], a wimp that would cave in to a judge to get off a case. That's not my style or my personality.

Number three, it upset me because it was after my representation and it would be an easy thing for Sharon to contact me and say, "I'm doing an affidavit. Let's talk about this," so that she could see if it had any merit whatsoever.

That is what was upsetting.

Additionally, since I continue to practice in Broward County and have cases with this judge, I felt that that impugned my integrity?

Q Did you also feel that it impugned the judge's integrity?

A I thought so. If a judge is calling someone to try to get them off a case, I think that that is wrong.

I'm not trying to put myself down, but I am no Roy Black and there is no reason for a judge to call me to get me off a case.

(TR. 363,364)
Questions were asked by Bar Counsel and Answered by Richard Rosenbaum)

The Bar then called Harvey Ginsburg. Mr. Ginsburg represented Tamarac Lakes North Association in the matter before Judge Cohen. He has been a member of The Florida Bar since 1987. Mr. Ginsburg was present during the entire trial. (TR. 373) He testified that Judge Cohen did not make repeated references in and out of the presence of the jury to Sharon Kleinfeld as the relative of Morris

Kleinfeld. He did recall one minimal reference prior to jury selection. Ms. Kleinfeld reacted as if she had not ever heard of Morris Kleinfeld. (TR. 374) Ms. Kleinfeld did not appear upset at the reference. Mr. Ginsburg did not feel that Ms. Kleinfeld was treated unfairly by Judge Cohen. (TR. 375) Mr. Ginsburg felt his client had been adversely affected by Respondent's failure to appear. (TR. 378) His client was forced to pay taxable costs in the neighborhood of three to four thousand dollars, transcript expenses, printing expenses, attorney travel time for oral argument on appeal and other related expenses. Mr. Ginsburg believed the total cost to his client was ten thousand dollars ($10,000.00). (TR. 380) Mr. Ginsburg stated the following:

> ...[T]here was an unnecessary expenditure of money which was caused exclusively by the necessity of an appeal brought on by the failure to appear by Sharon Kleinfeld.
>
> (TR. 383)

Jan McLaughlin testified as The Florida Bar's final witness in its case in chief. Ms. McLaughlin is the court reporter who was assigned to report the trial in Freiheit v. Tamarac Lakes in January of 1992. (TR. 406) Ms. McLaughlin did recall Judge Cohen's one reference to whether or not Ms. Kleinfeld was related to Morris Kleinfeld. It occurred just after she had arrived in the courtroom and was setting up. (TR. 407) There were no other references to Sharon Kleinfeld being the relative of Morris Kleinfeld. (TR. 408) Ms. McLaughlin electronically scanned the 700 pages of the Freiheit trial and found a reference to Respondent as "Mrs. Kleinfeld" twice.

The Respondent presented her case. Stephen Robbins, a police captain with the City of Miami Beach testified on behalf of the Respondent, who is his sister-in-law. (TR. 541) He testified that in a family gathering Respondent discussed references by Judge Cohen to her as the relative of Morris Kleinfeld. Respondent's father was also present. (TR. 543) He also discussed Respondent's statement that her attorney Richard Rosenbaum was contacted by Judge Cohen in an effort to get Mr. Rosenbaum to "cooperate" or Rosenbaum would find problems with his other client's cases. (TR. 544) Captain Robbins did not recall any details in regard to the purported relaying of the information from Mr. Rosenbaum to the Respondent. (TR. 546)

Scott Feder, an attorney was Respondent's next witness. They are childhood friends. (TR. 548) Mr. Feder does not doubt Respondent's truth and veracity. (TR. 553) Mr. Feder had no independent knowledge of the instant matter. (TR. 554)

The deposition of attorney Raquel Rodriguez was then admitted, in lieu of her live testimony. (TR. 557) Ms. Rodriguez and the Respondent are college friends. (TR. 559) Ms. Rodriguez had no familiarity with the complaint of The Florida Bar against Respondent. (TR. 562) She believes Respondent is a truthful and honest person. (TR. 564)

The deposition of Dr. Michael Rose, a psychiatrist, was admitted into evidence, in lieu of his live testimony. (TR. 569) Dr. Rose met with Ms. Kleinfeld one time on March 12, 1992 for thirty (30) minutes to forty-five (45) minutes to evaluate her. (TR. 571-573) Dr. Rose believed Ms. Kleinfeld was intact

neurologically and was not on opiates. (TR. 578)

Peter Swartz, Respondent's landlord then testified. (TR. 610) Mr. Swartz feels the Respondent is the most honest attorney he has ever met. (TR. 613)

David Weiss, of Parillo, Weiss and O'Halloran who is Respondent's former employer testified. (TR. 617) Respondent told Mr. Weiss that she did not appear in court on January 16, 1992 because she was not feeling well and could not get to court. (TR. 624) On February 6, 1992, the day the Freiheit trial was to resume the Respondent advised Mr. Weiss that her car had broken down. (TR. 627) Mr. Weiss offered Mr. Freiheit $25,000.00 because of the potential exposure to his firm. (TR. 630) The Respondent would not have contributed to that payment. (TR. 635)

Ms. Kleinfeld testified. She had been an attorney for eight (8) years and had tried between seventy-five (75) and one hundred (100) personal injury jury trials. (TR. 644,645) She testified that Judge Cohen asked about Morris Kleinfeld more than one time in a sarcastic way. (TR. 646) Respondent said Judge Cohen on several occasions called her "Mrs. Mor--- Kleinfeld" in a joking way and that he slurred it. (TR. 648, 649) Although Ms. Kleinfeld has made numerous objections in the 75 to 100 trials she participated in she did not make any objections on the record to Judge Cohen's purported remarks. (TR. 727) Respondent stated she was very sick on January 16, 1992 and called her father. (TR. 651) She asked him to the Judge's chambers, and she believed her office, but she was not certain about the request to call her office. (TR. 651) Respondent stated she called her physician Dr. Alexander, who

called in medication which was delivered to her hours later that day. (TR. 652) Bar Counsel asked Respondent why she had previously said Dr. Moises gave her an antibiotic. Ms. Kleinfeld said, "Did I say that? I probably did." and then explained because they both did. Dr. Alexander first and then Dr. Moises, the next day. (TR. 730) She did not know what type of medication Dr. Moises prescribed. (TR. 731) One was an antibiotic and the other was something for sleeping. (TR. 652) She did not keep the bottles, nor ask Dr. Alexander or the pharmacy for copies of records to support that she was in fact ill. (TR. 728) She slept for a couple of hours and then called Judge Cohen's chambers after hearing a message on her answering machine. (TR. 653) Ms. Kleinfeld said the Judge's secretary did not tell her that Judge Cohen had ordered her appearance. She said she would try to get to court. (TR. 655) She said she got into her car at rush hour and got stuck in traffic. She pulled over and called the court from a pay phone and left a message. (TR. 657) She did know where she got off or the exit but remembered using a telephone at a gas station. She could not remember any of the four corners. (TR. 733) She then went home. (TR. 657)

On February 6, 1992, the Respondent had a problem with her car. She called her secretary and told her to call the Judge and say she would be late. She ultimately arrived between 11:00 a.m. and 11:30 a.m. by taxi. (TR. 659) She did not keep a copy of a receipt or endeavor to obtain a copy of the taxi log. (TR. 735) Although her law firm would reimburse for a taxi ride Respondent could not produce an expense report or request for payment. (TR.

736) She went to the courtroom and no one was there. (TR. 666) She then went to the Judge's chambers and tapped on a glass window in the secretarial area. (TR. 667) Nobody came out, but Respondent thought she heard voices. (TR. 669) Respondent did not attempt to leave a note on the secretary's desk or on the adjoining secretary's desk. She did not tape a note to the Judge's door. (TR. 738,739) She did not telephone the Judge's chambers. (TR. 750) She called her office and then went home in a taxi. (TR. 670) Respondent at no point attempted to offer Judge Cohen an apology. (TR. 744)

On February 7, 1992, the date of Respondent's contempt hearing she prepared and couriered a Motion for Disqualification with one or more affidavits and a written request for arraignment. She believed she would be arraigned at another time and that a trial would take place thereafter. (TR. 672,673) Respondent believed that her Motion for Judicial Disqualification would be granted that morning. (TR. 675) The motion was not in fact granted on February 7, 1992. (TR. 679) After the order of arrest was issued the Respondent retained attorney Richard Rosenbaum. (TR. 681)

Respondent believed the affidavit regarding references by Judge Cohen to Morris Kleinfeld were true. (TR. 701) Inquiry was made of Ms. Kleinfeld in regard to the affidavit concerning Richard Rosenbaum. Respondent remembered Mr. Rosenbaum saying, "can you believe he is threatening to dismiss my cases?" (TR. 705) She thought Richard Rosenbaum had told her he received a telephone call. (TR. 707) When asked if Respondent had any idea why Richard Rosenbaum would testify under oath to the contrary, and lie, she

did not know. (TR. 722) Ms. Kleinfeld admitted that she had gone to the Broward County Courthouse computer and pulled up cases pending in Judge Cohen's division in which Mr. Rosenbaum represented Plaintiff's or Defendant's. She believed she had done that after Mr. Rosenbaum's purported conversation. (TR. 722) Ms. Kleinfeld believed her father, now deceased, was present when Mr. Rosenbaum made the purported statement. (TR.756,757) Respondent's exhibit seven (7) was an affidavit from Respondent's father which said that Mr. Rosenbaum's version of the events was untrue. Ms. Kleinfeld could not explain why the affidavit did not state that Mr. Kleinfeld was present when Richard Rosenbaum supposedly related Judge Cohen's telephone call to the two of them. (TR. 726)

The Florida Bar then presented the Honorable Thomas O'Connell as a rebuttal witness. (TR. 778) Judge O'Connell is now retired and was a judge since 1959. Ms. Kleinfeld appeared before Judge O'Connell in 1989. She noticed a hearing and then asked for a continuance of the same hearing. Judge O'Connell asked her why she would do that. She said she did not sign the Motion and it was not her signature. At a later time Respondent mentioned that David Weiss had signed her name. Judge O'Connell asked why she did not apprise the court earlier of what she discovered. She told the Judge it was not important and she had previously apologized. Judge O'Connell knew she had never apologized and became upset. (TR. 783) He stated:

A. Yes. I called her a worm.

Q. Why did you do that?

A. Because I considered her a worm.

Q. Why did you consider her a worm?

A. Because of the fact that she just wouldn't answer the question. I could never get a level answer out of her. It became difficult to set cases down with her because she would walk in or prance in at the last moment.

(TR. 783,784)
Questions were asked by Bar Counsel and answered by Judge O'Connell)

Judge O'Connell also attested in regard to an affidavit filed by the Respondent in Jean Moise Derivois vs. Safeway. Respondent represented one of the parties. The affidavit was already notarized and submitted without Respondent's signature. (TR. 790) In the same case pages of a transcript were switched to give the impression that Judge O'Connell had disqualified himself, when he had not. Respondent submitted that document. (TR. 793) The only reason Judge O'Connell did not refer the Respondent to The Florida Bar was because he was fond of Respondent's father and hoped Respondent would see the light and purge herself. Judge O'Connell did find Respondent in contempt and as a result she filed a Writ of Prohibition. (TR. 794) Judge O'Connell agreed not to enter an order of contempt and the writ of prohibition was withdrawn. (TR. 795) Judge O'Connell gave the following opinion as to Respondent's character for truth and honesty.

I think she is a liar. I fear that she is incapable of telling the truth. She will tell you anything to gain her purpose.

(TR. 795)
(Emphasis Added)

Judge O'Connell did not have a vendetta against the Respondent. He

hoped she would apologize and admit to wrongdoing. He would have welcomed that action, but she did not do so. Had Respondent not filed a writ of prohibition, Judge O'Connell would have held Respondent in contempt and have her put in jail. (TR. 844)

The Respondent presented the Honorable Joseph Nadler. He was a Judge from 1981 until 1992. (TR. 855) The Respondent appeared before him on many occasions. He found Respondent to be trustworthy. (TR. 855) Judge Nadler, when advised of the circumstances concerning the "Rosenbaum" affidavit said his opinion concerning Respondent being honest and trustworthy would not change since it is "subject to people's memories and is rather superficial." (TR. 859)

Judge Murray Goldman appeared on behalf of The Florida Bar. He has been a Circuit Court Judge for fourteen (14) years. (TR. 871) Judge Goldman gave the following testimony.

> Q Do you have an opinion as to whether or not Sharon Kleinfeld is a truthful and honest attorney?
>
> A Yes.
>
> Q. What is that opinion?
>
> A. She is not.
>
> Q. What do you base that opinion on, Your Honor?
>
> A. The experiences that I had with Ms. Kleinfeld when she appeared in my court.
>
> Q. How many times or how frequently did she appear in your courtroom?
>
> A. More times that I can count.
>
> Q. Can you identify for Judge

Glick the period of time that you can recall, let's say from what year to what year, that she appeared before you?

A. No, I cannot. It has not been for sometime now.

Q. Did she appear before you for many years?

A. A number of years.

Q. Can you identify for Judge Glick what particular items caused you to come to the conclusion that she is not truthful and honest?

A. The problems that we had -- and when I say we, I mean my office, my staff, the court reporter, the clerks, everybody who is involved in the courtroom -- would be that Ms. Kleinfeld would either show up very late with excuses that were not founded when we checked up on them or failed to show up all together.

When we tried to find out where she was or why she didn't show up, we got reasons that when we followed up were found not to be correct.

Q. Did that happen in more than one instance?

A. Yes.

Q. Can you specify the number of instances?

A. No, I can't, and I can't give you any specifics and say this case or that case. It was just a regular occurrence.

(TR. 872-874)
(Questions asked by Bar Counsel and answered by Judge Goldman)

Judge Goldman also stated that there were times that the Respondent did not show up for trial. (TR. 877) Judge Goldman did not consider overwork as an excuse for lying to a Court. (TR. 879)

The Referee made findings of guilt as to the failure to appear on February 6, 1992 and February 7, 1992, as well as to the rule violations in regard to the "Rosenbaum" affidavit. The Referee did not find guilt as to the failures to appear on January 16, 1992 or the "Morris Kleinfeld" affidavit. (TR. 975-995)

The Respondent then testified in mitigation. Respondent had no prior disciplinary history. (TR. 1000) Respondent claimed she assisted Mr. Freiheit's appellate lawyer. (TR. 1000) Respondent also claimed she cooperated with the Florida Bar's investigation. (TR. 1000) Testimony then established that Counsel for The Florida Bar refused to have any telephone communications with the Respondent because the Respondent had lied. (TR. 1000) The Florida Bar's May 7, 1992 letter to the Respondent was admitted into evidence as The Florida Bar Exhibit ten (10) in support thereof.

Peter Swartz testified again for the Respondent as a mitigation witness. The Respondent was handling several matters for Mr. Swartz and stated he would be prejudiced if she could not proceed with those cases. (TR. 1012)

The Referee made his finding of discipline on October 22, 1993 and issued his Report of Referee thereafter. (Appendix 1) The Referee recommended that Respondent be suspended for three years, with two years of probation and retake the Ethics portion of the Bar exam. The Bar seeks disbarment, and this appeal follows.

SUMMARY OF ARGUMENT

the Respondent failed to appear to conclude her client's trial and to appear when ordered by the Court. She did not appear on the date the trial resumed. The client's case was dismissed. The Respondent then submitted an affidavit in an effort to disqualify the Court. She stated that the Judge had telephoned her lawyer and threatened him. It was an outright lie. The Respondent has engaged in dishonest behavior throughout much of her career. The Referee imposed a three year suspension to be followed by probation. The Bar submits that the misconduct warrants disbarment.

POINT ON APPEAL

I

WHETHER DISBARMENT RATHER THAN A THREE YEAR SUSPENSION IS THE APPROPRIATE SANCTION?

ARGUMENT

DISBARMENT RATHER THAN A THREE YEAR SUSPENSION IS THE APPROPRIATE SANCTION.

It is well established that the Florida Supreme Court enjoys a broader scope of review over a Referee's recommendation for discipline than over a Referee's findings of fact in support of such discipline. The Florida Bar v. Anderson, 538 So. 2d 852 (Fla. 1989). The Court has also stated that disbarment should be reserved for the most serious cases. The Florida Bar v. Pahules, 233 So. 2d 130 (Fla. 1970). The findings of this Referee cry out one theme, Sharon Kleinfeld is not fit to hold the esteemed privilege to practice law.

Ms. Kleinfeld represented Thomas Freiheit in a rather mundane personal injury case. The course of events which ensued, and which were entirely attributable to the Respondent should make any lawyer feel ashamed. On the final day of trial Ms. Kleinfeld had her father call the court to say she was too ill to appear. One might ordinarily believe that such a representation would satisfy the trial judge and the case would be continued. The presiding Judge, a jurist since the 1980's did not believe her. In his entire judicial career he had never doubted the word of an attorney who claimed to be ill. (TR. 106) Although the Referee did not find Respondent guilty of rule violations as to that date, and the Bar does not seek to challenge that finding, the testimony of those involved must be considered. The Judge's secretary could not reach the Respondent at home. (TR. 247) The Respondent could not provide any evidence of a Doctor's visit, a bottle of medicine, a prescription, a copy of a receipt. (TR. 728) The testimony

concerning the medication she was on was inconsistent. First, she took one antibotic, and then another one. When asked for an explanation she said two doctors prescribed these medications. (TR. 652, 730, 731) Finally, the Respondent agrees to appear before the court. All parties wait until 6:00 p.m. She telephoned stating she was cashing a check for a taxi, then she is suddenly in her car and caught in traffic on I-95, exits to make a telephone call and takes the Turnpike. (TR. 171,255) The Respondent cannot identify the point of exit, the place of the telephone call, any identifying landmarks nor explain why she would get on a highway, the turnpike, which is miles west of the Broward County Courthouse. (TR. 657) Respondent's statement of events is implausible and unsupportable.

A reasonable person would surmise that given the fact that an Order to Show Cause had issued because of Ms. Kleinfeld's failures to appear on January 16, 1992 that herculean efforts would be made to appear on February 6, 1992, the date the trial was to resume. Instead, Ms. Kleinfeld once again does not show up. This time the court dismisses Mr. Freiheit's claim with prejudice. Respondent's excuse is that her car broke down and she took a taxi, which became lost. Car repair receipts are not produced, taxi receipts are not produced, an expense report for her alleged cost for the taxi is non existent and she cannot recall the name of the taxi company she called. (TR. 735,736) Respondent testified that she had driven to the Broward County Courthouse on at least fifteen (15) occasions and she simply was not paying attention when the driver became lost. (TR. 735,736) She then arrived at least an hour late and claimed no one responded to her at the Judge's office. (TR. 667) She leaves no note or telephone message. (TR. 738,739,750) The

Referee did not buy this story and found her guilty of all rule violations as to February 6, 1992. Now her actions directly impacted on the client and the court system. Everyone's time and energies were wasted. Three days of a jury trial went down the drain. Mr. Freiheit had to take an appeal of the dismissal. He did prevail but gave up on the legal system. His mother, who was involved in the lawsuit was too old and he simply could not take any more time off from work. (TR. 290) The Defendant had to defend the appeal and incur additional costs in the amount of ten thousand dollars ($10,000.00). (TR. 380) Simply because an insurance carrier paid those expenses does not excuse the result.

The Referee believed that Respondent's non appearance on February 6, 1992 was contrived. He stated:

> Another thing that compounds all of this, at least from my reading of her testimony before the Grievance Committee, even though it was controverted here -- unequivocally told whoever asked that question that she was no fool and didn't want to appear in front of Judge Cohen at the trial on February 6th, knowing how he felt about it or at least how she perceived that he felt about it.
>
> That to me is a clear indication that she, at least at 9:00 o'clock in the morning, didn't intend to be there. Something prompted her, I guess, to head up there at about 11:00 o'clock. I don't know what. But notwithstanding that, the client was definitely penalized to some degree.
>
> [Appendix 1, (TR. 984)]

In the Florida Bar v. Hoffer, 412 So. 2d 858 (Fla. 1982), the attorney was suspended for one year for his failure to appear at a hearing on his client's Petition to Modify a dissolution of

marriage order. Due to the attorney's absence and his failure to notify the Judge of the absence or to request a continuance, his client's petition was dismissed. Ms. Kleinfeld's failure to appear on February 6, 1992 is more egregious then Mr. Hoffer's in light of the events which occurred on January 16, 1992, namely Respondent's previous failures to appear. Rule 4.41(b) of the Florida Standards for Imposing Lawyer Sanctions states that disbarment is appropriate when:

> (b) a lawyer knowingly fails to perform services for a client and causes serious or potentially serious injury to a client.

In this case the Referee found that Ms. Kleinfeld, by virtue of her admission to the Grievance Committee, did not intend to appear on February 6, 1992. (TR. 984) Further, the client did suffer serious injury since his claim was dismissed.

On February 7, 1992, we arrive on the next event in the saga. Respondent failed to appear for her own contempt hearing. Her request for a continuance was denied and she remained absent. The result was that the Judge was compelled to issue an order of arrest, a disgrace in and of itself. An attorney is not permitted to ignore and refuse to follow a court order because they just do not feel like complying. The Florida Bar v. Rubin, 549 So. 2d 1000 (Fla. 1989) Failing to comply with a court order and failing to appear, warrants a one year suspension. The Florida Bar v. Mims, 501 So. 2d 596 (Fla. 1987). Rule 6.22 of the Florida Standards for Imposing Lawyer Sanctions provides the following:

> Suspension is appropriate when a lawyer knowingly violates a court order or rule, and causes injury or potential injury to

> a client or a party, or causes interference or potential interference with a legal proceeding.

This Court must keep in mind that a suspension would be appropriate for the one act of failing to comply with Judge Cohen's order to appear on February 7, 1992.

The events which followed are the most egregious portion of the misconduct and should convince this Honorable tribunal that Sharon Kleinfeld must be stricken from the roll of attorneys. Instead of begging Judge Cohen for forgiveness and groveling, this Respondent filed an affidavit in the Circuit Court and the Fourth District of Appeals in an effort to obtain Judge Cohen's qualification which contained the following in paragraph 6:

> 6. Prior to his withdrawal of Petitioner's defense, attorney Richard Rosenbaum received a telephone call from Judge Cohen threatening to dismiss said attorney's cases unrelated in his division for the purpose of intimidating said attorney during his representation of petitioner.
>
> (Appendix A2)

Respondent swore to the foregoing statement, under penalty of perjury. It is important to note the implication contained in that representation. It says in essence that a Circuit Court Judge threatened a lawyer for the sole purpose of pursuing a personal vendetta against Sharon Kleinfeld. Judge Cohen's statement at the final hearing sums it all up. "It's an incredible lie." (TR. 133) Richard Rosenbaum was outraged that he became embroiled in Respondent's delusion. Mr. Rosenbaum was unequivocal in his testimony. He never received a telephone call from either the Judge or anyone in the Judge's office and never told anyone he had. The following is the Referee's findings as to the affidavit:

> Other than the statement of the Respondent, there is absolutely no evidence that that actually took place. In fact, there is contradictory evidence from Judge Cohen, Judge Cohen's judicial assistant and the lawyer in question, Mr. Rosenbaum, that that phone call or a phone call of any type that would lead one to believe that that occurred never took place. There were adamant denials of it.
>
> The Court heard the testimony of Officer Robbins and heard the testimony through the affidavit and the Bar proceedings of Sam Kleinfeld, that supposedly that happened. There is no evidence that it came to him directly from the lips of Richard Rosenbaum. Perhaps it came from his daughter. I don't know how it came to him, but it came to him at a time earlier than the affidavit that he filed.
>
> It appears from the affidavit that he filed that it bothered him enough, at least according to his affidavit, and allegedly bothered the Respondent enough that they were incensed and outraged by it.
>
> I find it difficult to believe that if they were so incensed and outraged about that, that would not be part of the March 10th affidavit, wherein the Respondent makes that allegation. Why not join everybody who possibly heard it either in person or through the lips of the Respondent -- to join in that.
>
> If Mr. Sam Kleinfeld actually heard it, it would lead one to believe that he would join in on that affidavit.
>
> I find it very difficult to believe that it actually happened ...
>
> [Appendix 1, (TR. 992,993)]

This Court has held that false testimony in the judicial process deserves the harshest penalty. The Florida Bar v. Weinstein, 624 So. 2d 261 (Fla. 1993); The Florida Bar v. Rightmyer, 616 So. 2d 953 (Fla. 1993). Rule 6.11(a) of the Florida

Standard for Imposing Lawyer Sanctions states the following:

> Disbarment is appropriate when a lawyer:
>
> (a) with the intent to deceive the court, knowingly makes a false statement, or submits a false document.

Rule 5.11 (b) and (f) of the Florida Standards for Imposing Lawyer Sanctions provide that:

> Disbarment is appropriate when:
>
> (b) a lawyer engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft.
>
> (f) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

In The Florida Bar v. Gustafson, 555 So. 2d 853 (Fla. 1990), that attorney was involved in a scheme to defraud. Once the client discovered he had been victimized he reported the conduct to law enforcement authorities. The attorney then sued the victim for slander and misrepresentation. The victim counterclaimed for conversion and civil theft and was awarded treble damages. This Court stated that the filing of the lawsuit by the attorney who engaged in the misconduct "added insult to injury" and was aggravating. The filing of the false affidavit concerning Judge Cohen, after Respondent had failed to appear on three separate dates while representing Mr. Freiheit and then her own contempt hearing is quite similar to Mr. Gustafson's act.

Respondent's lie was not an innocuous one. It was to obtain the objective of Judge Cohen's disqualification, as evidenced by the affidavit's title, "Petitioner's Third Affidavit In Support of

Judicial Disqualification." It could be argued that Respondent's emotions ran away with her because of a particularly acrimonious situation. The Florida Bar proved, however, with it's rebuttal witnesses and witnesses in aggravation that Respondent has been lying and manipulating throughout most of her legal career. Ms. Kleinfeld was admitted to the Florida Bar in 1985. (TR. 643) Judge Thomas O'Connell, a jurist since 1959, testified in regard to Respondent's misstatements, submission of an unsigned notarized affidavit and misleading the court by switching pages of a transcript which occurred in 1989. He said Sharon Kleinfeld is a worm and will lie to obtain any objective. (TR. 783,784) Judge Murray Goldman testified that the Respondent regularly lied and failed to appear in court over many years. (TR. 872-874)

This court should also note that the Referee found the existence of the following aggravating circumstances:

> (c) a pattern of misconduct.
> (d) multiple offenses
> (g) refusal to acknowledge wrongful nature of conduct.

The Referee stated:

> As far as aggravating circumstances, I feel that there was somewhat of a pattern of misconduct in terms of numbers, if nothing else, of the times that the Respondent has shown incredibly poor judgment, if not out and out disregard for the judicial process, by her failures to appear and not rectifying the matters when they easily -- maybe not so easily, but could have been rectified.
>
> Also, that there was a refusal to acknowledge the wrongful nature of the conduct.
>
> Of course, it is her right to deny wrongful conduct, but I think in the course of the testimony and other matters that we have heard, the standard phrase, "I would have done things differently," is not the same thing as acknowledging a wrongful conduct.
>
> There have been multiple offenses and

> that has kind of dove-tailed in with the pattern of misconduct; that is, the number of times of failure to appear.
>
> (TR. 1-8)

This court has acknowledged that it would view cumulative misconduct in a graver light. The Florida Bar v. Newman, 513 So. 2d 656 (Fla. 1987).

The mitigating factors found by the Referee which are absence of a prior disciplinary history and absence of a dishonest or selfish motive, pale in comparison to the aggravating factors.[1] (TR. 1,9-10) Rule 9.32 (a)(b) Florida Standard for Imposing Lawyer Sanctions.

This court has stated that absent evidence casting doubt on a lawyer's culpability, such as evidence of mental or substance abuse problems, a lawyer is fully responsible for any misconduct. The Florida Bar v. Graham, 605 So. 2d 53 (Fla. 1992). The Respondent did not present any of the foregoing typical mitigation defenses. She presented Dr. Michael Rose who testified that she is "neurologically intact" and not on opiates. (TR. 578) She offered the Referee no excuse.

> ...[The] dignity of his profession, his integrity as a lawyer and his honor as a citizen require that he serve with candor, fidelity and sincerity. There is in fact, no vocation in life where moral character counts for so much or where it is subjected to more crucial tests by citizen and the public than is that of members of the bar. His client's life, liberty, property, reputation, the future

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[1]The Referee stated that "although it was never alleged a defense, that [Ms. Kleinfeld] was undergoing some form of emotional problem at the time of this event" (TR. 1, 10) The Referee however, did not specify the type of problem, any evidentiary support for the conclusion nor which event was affected by the problem.

> of his family, in fact all that is closest to him are often in his lawyer's keeping. The fidelity and candor with which he performs his trust, point up reasons that distinguish the legal profession from other businesses. Every lawyer who fails to withstand the test will subject the profession to merited criticism. Not only that, he will be likened to the proverbial rotten apple that taints the other apples in the barrel.
>
> State ex rel. Florida Bar v. Murrell, 74 So. 2d 221,224 (Fla. 1954)

The Respondent has not withstood the test and should be disbarred.

A P P E N D I X

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

SHARON LEA KLEINFELD,

Respondent.

_____/

Supreme Court Case
No. 81,464

On Petition for Review

Initial Brief of Complainant

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CONCLUSION

Based upon the foregoing reasons and citations of authority, The Florida Bar respectfully submits that the Referee erroneously imposed a three year suspension, and would urge this court to disbar the Respondent.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the Initial Brief of Complainant was forwarded Via Airborne Express to Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32399-1927 and a true and correct copy was forwarded Via Regular U.S. Mail to Nicholas R. Friedman, Attorney for Respondent, at 100 North Biscayne Boulevard, 30th Floor, Miami, Florida 33132 on this 1st day of April, 1994.

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A P P E N D I X

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