IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

JOSEPH M. GERSTEN,

Respondent.

Supreme Court Case No. 87,248

The Florida Bar File No. 95-71,604(11M)

On Petition for Review

ANSWER BRIEF OF COMPLAINANT

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PRELIMINARY STATEMENT

In this brief the Respondent below, Joseph Morris Gersten, will be referred to as either Respondent or Gersten and the Complainant below, The Florida Bar, will be referred to as the Bar.

References to the record below will be by referring to the specific pleading, motion, order or transcript,[1] and where appropriate, the date of the hearing, before whom the hearing was held, and the page number. For example, a reference to page 22 of the transcript of a hearing before Circuit Judge Amy N. Dean (Judge Dean) on March 18, 1993 would be referenced as follows: (Tr. dated March 18, 1993, Judge Dean at p. 22).

STATEMENT OF THE CASE

The Bar takes issue with Respondent's statement of the case which makes reference to the grievance committee's consideration of this matter. Respondent did not properly raise the issue

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[1] At page 9 of his initial brief Respondent intimates that there were no transcripts made a part of the record before the Referee. This is not accurate. The Bar filed several transcripts which are a part of this record, including transcripts of hearings before Judge Dean on March 17, 1993 and March 18, 1993, and before Judge Brown on October 1, 1993 and October 4, 1993. (Tr. dated July 16, 1996, Judge Goldstein, p. 15).

before the Referee,[2] nor did he raise any issue relating to the grievance committee in his petition for review. The Bar would further add that the Referee entered a Report of Referee on or about November 20, 1996 and that Respondent filed his petition for review on or about January 27, 1997. Since Respondent did not set out any factual background in his statement of facts, the Bar will do so below.

FACTUAL BACKGROUND

In the Spring of 1992, Respondent reported to the police that his automobile had been stolen. On August 11, 1992, as a part of the State's investigation relating to the stolen automobile, Respondent was subpoenaed to give a sworn statement to the Dade County State Attorney's Office. (Tr. dated March 18, 1993, Judge Dean, p. 22) Respondent, as the victim and witness, was granted use immunity by the State.

To avoid giving a sworn statement, Respondent sought

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[2] Respondent's answer to the Bar's complaint was devoid of any mention of the grievance committee's consideration of this matter. The only reference to the grievance committee in the record below was made by counsel for Respondent to the Referee during her discussion of pending discovery issues. Bar counsel briefly responded by correcting misstatements and by stating that the witnesses mentioned had nothing to do with the matter before the Referee. (Tr. dated July 16, 1996, Judge Goldstein, pp. 164-167)

judicial relief from Judge **Dean,** arguing essentially that he was not obligated to testify because the State Attorney's office was acting illegally, was conducting the investigation in bad faith to harm his political future and to deny Respondent his constitutional rights. (Tr. dated March 18, 1993, Judge **Dean,** pp. 33 and 34).

In **each** instance Judge Dean rejected Respondent's position and ordered Respondent to appear and give **a** sworn statement.[3] Finally, when Respondent refused to answer certain questions, he again appeared before Judge Dean, who ruled on each specific question asked, and directly and specifically ordered Respondent to answer certain questions. (Tr. dated March 18, 1993, Judge Dean, pp. 31 and 35).

In violation of the court's direct order, Respondent continued to refuse to answer the questions. On March 17, 1993, Judge Dean ordered Respondent to appear before the court and show cause as to why he should not be held in contempt.

On **March 18, 1993,** Judge Dean held yet another hearing, at which Respondent was again allowed to re-argue his personal

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[3] Respondent also filed two separate Petitions for Writ of Certiorari with the Third District Court of Appeal contesting Judge Dean's orders. Both were denied. (Tr. dated March 18, 1993, Judge Dean, p. 33).

beliefs as justification for refusing to obey the court's order to answer certain questions. The court again wholly rejected Respondent's position. (Tr. dated March 18, 1993, Judge Dean, pp. 124, et. seq).

After the hearing, Judge Dean found Respondent in contempt of court and entered March 18, 1993 order, holding Respondent in civil contempt of court. (Tr. dated March 18, 1993, Judge Dean, pp. 124, et. seq). By November 1995 Respondent had exhausted all litigation and appeals relating to the court's order of March 18, 1993 and said order had been upheld in all respects.[4]

On September 24, 1993, Circuit Court Judge Joel H. Brown (Judge Brown) ordered Respondent to return to jail by October 4, 1993.[5] (Tr. dated October 1, 1993, Judge Brown, p. 6 and TR. dated October 4, 1993, Judge Brown, pp. 2 and 3). Respondent failed to comply with the court's order to return to jail. As a

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[4] In September 1993 United States District Judge James Lawrence King dismissed Respondent's complaint for injunction against the State Attorney's office, which order was upheld on appeal in November 1995.

[5] On March 19, 1993 Respondent went to jail for approximately three (3) weeks. Respondent sought, and was granted, based on his health problems, an order by the Third District Court of Appeal releasing him from incarceration pending his appeal of the March 18, 1993 order.

result, on October 4, 1993, Judge Brown issued the court's Writ of Bodily Attachment for Respondent's arrest when he returned to Florida. Respondent has not returned to Florida.

SUMMARY OF THE ARGUMENT

Contrary to the assertion made in the initial brief, the Referee's findings, conclusions and recommendations and the Report of Referee were based on clear and convincing evidence, which included Judge Dean's order of contempt dated March 18, 1993; the transcripts of hearings relating to said order, dated March 17, 1993 and March 18, 1993; Judge Brown's Writ of Bodily Attachment dated October 4, 1993; the transcripts of hearings relating to said Writ, dated October 1, 1993 and October 4, 1993; and the parties' stipulations that by November 1995 Judge Dean's order had been upheld in all respects and that Respondent had never complied with Judge Dean's order.

The evidence showed that Respondent refused to obey a lawful order of a Circuit Court Judge, even after said order was totally upheld on appeal.

Because of the nature of Respondent's past, and ongoing, misconduct, his appeal should be summarily denied. He should not be allowed to petition the judicial system for assistance, while he contemptuously flaunts the lawful orders of that same system.

The Referee properly interpreted Rule 4-3.4(c) of the Rules of Professional Conduct (hereinafter Rule 4-3.4(c)) by applying the holdings and rationale set out in the case law discussing the previous Rule, DR 7-106(A). The Referee's interpretation of Rule 4-3.4(c) is the only one that heeds the warning of this Court in The Florida Bar v. Rubin, 549 so. 2d 1000 (Fla. 1989) that no attorney should be allowed to ignore and refuse to follow a court order based upon the attorney's personal belief in the invalidity of that order, because such conduct would court pandemonium and a breakdown of the judicial system.

Having properly interpreted Rule 4-3.4(c), the Referee, in his sound discretion, applied the Rule in a logical and fair manner to discovery and evidentiary issues by limiting Respondent to the discovery and presentation of relevant evidence.[6]

The Referee properly denied Respondent's motions to

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[6] For example, as to the sixteen (16) witnesses Respondent had subpoenaed for deposition, the Referee in an attempt to make a threshold determination of relevance, repeatedly asked for a proffer of the expected testimony of each witness. When no meaningful answers were provided it became apparent that Respondent was on a fishing expedition. The Referee correctly ruled that unless Respondent could make some showing of relevance as to a particular witness, no subpoena would be issued (Tr. dated July 16, 1996, Judge Goldstein, p. 169).

disqualify Bar Counsel and the Referee.

Finally, the Referee's recommendation for discipline is quite appropriate. The Referee properly considered the intent of the rule in question, the case law concerning discipline and the standards, including matters of aggravation and mitigation.

PROPOSITION I

RESPONDENT'S APPEAL SHOULD BE DENIED BECAUSE OF HIS REFUSAL TO PURGE HIMSELF OF CONTEMPT

Respondent's appeal should be denied because he has steadfastly refused, and continues to refuse, to obey the lawful orders of the Circuit Court of the Eleventh Judicial Circuit.

Respondent has never answered the questions that Judge Dean personally and directly ordered him to answer. Respondent stands in contempt of court for his past wrongful conduct and continues to knowingly and contemptuously disobey all orders of the Circuit Court. To avoid going back to jail, Respondent left Florida. To avoid personally participating in these proceedings by returning to Florida, where he knows he is subject to immediate arrest, Respondent has instead chosen to change his residence and record Bar address to a P.O. Box in Australia.[7] Respondent's conduct

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[7] Respondent has not fully complied with Rule 1-3.3 of the Rules of Discipline by failing to designate in writing his business telephone number and the physical

makes him a fugitive from justice.

The proposition urged by the Bar is that an attorney, who contemptuously continues to refuse to obey a lawful order issued by any state or federal court in Florida and departs the jurisdiction, with the effect being to avoid complying with the contempt order, should not thereafter be allowed to defend in any other proceeding in Florida, including a Bar matter and the instant appeal. Said attorney should first purge himself/herself of contempt by fully complying with the court's order.

The following cases support the proposition advanced by the Bar. Jaffe v. Snow, 610 So. 2d 482 (5th DCA 1992), held that a party in contempt is not entitled to a trial of his cause, out of which contempt arose, until he purges himself of contempt. Whiteside v. Whiteside, 468 So. 2d 407 (4th DCA 1985), stands for the proposition that a court may refuse to consider defenses until the defendant has purged herself of contempt by fully complying with the court's order. In Pasin v. Pasin, 517 So. 2d 742 (4th DCA 1988), the court held that a party is not entitled to maintain an appeal until he has purged himself of contempt. Garcia v. Metro-Dade Police Dept., 576 So. 2d 751 (3rd DCA 1991),

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location or street address of his principal place of employment.

states that a fugitive, in a civil forfeiture case, is not entitled to call upon the resources of the court for determination of his claim to the property being forfeited.

In summary, Respondent has knowingly refused to obey a court order; was held in contempt of court for his refusal; was given the opportunity to purge himself of contempt, but refused to do so; was incarcerated for contempt; was later released for **health reasons** and during his humanitarian release departed the court's jurisdiction to avoid reincarceration; and was ordered to return to jail but refused to comply, all the while demanding judicial assistance of the court.

Respondent has demonstrated his overt disrespect for the judicial system by refusing to comply with court orders and by removing himself from the jurisdiction. Respondent's absence has thwarted the orderly, effective administration of justice, and, **as such**, Respondent is not entitled to call upon its protections. Consequently, Respondent's appeal should be summarily denied.

PROPOSITION II

THE REFEREE'S FINDINGS ARE SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE

The burden before this Court is upon the Respondent who has petitioned for review of the report of referee. The Florida Bar

v. McLure, 575 So. 2d 176 (Fla. 1991). The report of referee is presumed to be correct and will be upheld unless clearly erroneous or lacking competent substantial evidence. The Florida Bar v. Winderman, 614 So. 2d 484 (Fla. 1993); The Florida Bar v. Smiley, 622 So. 2d 465 (Fla. 1993). Respondent has failed to meet his burden and has failed to overcome the presumption of correctness.

Respondent has failed to set forth any reasons which would support his assertion that the Referee's findings and conclusions are not supported by competent and substantial evidence. In fact, Respondent does quite the opposite. Respondent concedes that the Referee had before him the contempt order, the docket sheet reflecting entry of the contempt order and a writ of bodily attachment based upon Respondent's failure to comply with pending orders and Respondent's stipulations (Respondent's Amended Initial Brief at p.9). Respondent's own argument demonstrates that the Referee's report of referee was based on competent substantial evidence, not a lack thereof. In addition to the above, the Bar filed copies of transcripts of hearings related to Judge Dean's contempt order and Judge Brown's order, which are a part of the record herein. Orders, opinions and transcripts are sufficient evidence of the violations charged. The Florida Bar

v. Jackson, 494 So.2d 206, 209 (Fla. 1986).

Respondent adds that he was precluded from presenting any evidence in support of his defense of an open refusal based on an assertion that no valid obligation existed. This argument really pertains to another issue and does not demonstrate any inadequacy of evidence in regard to the Bar's case. Furthermore, no cite to the record was provided by the Respondent in support of this argument.

Respondent also adds that he was prevented from obtaining subpoenas for mitigation witnesses.' No citation to the record was provided. In addition, mitigation evidence could not demonstrate a lack of competent substantial evidence in the Bar's case in chief.

PROPOSITION III

RESPONDENT HAS FAILED TO ESTABLISH ANY ERROR IN REGARD TO DUE PROCESS

Respondent's argument is difficult to comprehend and equally difficult to reconstruct. No definition of due process is provided, and the nature of the violation of due process is not specified. No authority has been provided to support

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[8] The Bar will address the discovery issues in Proposition IV below.

Respondent's bare claim that any due process rights have been violated.

Respondent's argument relating to Rule 4-3.4(c) defies logic and common sense. Respondent's position, in essence, is that this Court cannot discipline him under Rule 4-3.4(c) so long as he openly refuses to obey Judge Dean's and Judge Brown's orders and continues to make a subjective assertion that no valid obligation exists.

Respondent's argument relating to error by the Referee is based upon the fact that the Bar relied upon cases decided under DR 7-106(A), in interpreting the predecessor to Rule 4-3.4(c). The prior rule pertained to same conduct as the current rule, namely the refusal to obey court orders.

Rule 4-3.4(c) provides:

> A lawyer shall not knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists.

Respondent claims his conduct[9] comes within the exception

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[9] Respondent's conduct includes a refusal to obey Judge Dean's and Judge Brown's orders, leaving Florida to avoid going back to jail, and a subjective assertion that said orders of the court were not valid obligations as to him.

language of Rule 4-3.4(c). In opposition to Respondent's position, the Bar urges that The Florida Bar v. Jackson, 494 So. 2d 206 (Fla. 1986) and The Florida Bar v. Rubin, 549 So. 2d 1000 (Fla. 1989) apply and should be followed in interpreting Rule 4-3.4(c).[10]

In Jackson, the attorney disobeyed valid order to appear in court. Jackson justified his conduct with the argument that he was relying upon his sincere belief that the order infringed upon his first amendment (religious) rights.[11] This Court rejected the argument and interpreted DR 7-106(A) to require that an attorney have a "reasonable belief" (as opposed to a sincere belief) that an order is invalid before the attorney may **ethically** disobey such order.[12]

In Rubin, the attorney refused to obey a valid court order to proceed to trial in a criminal case. Rubin justified his

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[10] Respondent and the Bar maintained the same positions and arguments before the Referee. The Referee agreed with the Bar and applied the holdings and rationale of these cases.

[11] The sincerity of Jackson's religious beliefs were never in question.

[12] As in the instant **case** the rule in question (DR 7-106(A) did not contain the specific term, "reasonable belief." The reasonable belief requirement was read into the rule.

conduct with the argument that he was relying upon his "personal belief" that the court order was invalid. This Court rejected this argument as well and in essence held that an attorney's 'personal belief" (as opposed to an objective belief) is not a 'reasonable belief" that a court order is invalid and therefore was insufficient to allow an attorney to **ethically** disobey such order.

In deciding both Jackson and Rubin this Court did not depend upon the good faith requirement of seeking an appellate decision explicitly contained in Rule 7-106(A) as the basis for the decisions. Both Jackson and Rubin, like Gersten, had appealed. The key question is identical in all three cases, namely whether after appellate rights are exhausted (which meets the 'good faith" requirement under DR 7-106(A)), could the attorney continue to refuse to comply with orders which had been fully affirmed. The answer this Court gave in Jackson and Rubin was in the negative. It should be the same in this matter.

It was proper for the Referee to consider DR 7-106(A) and the cases interpreting it in determining the proper application of Rule 4-3.4(c).[13] As this Court stated in Brown v. Griffin,

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[13] This is what the Referee refers to as in pari materia.

229 So. 2d 225 (Fla. 1969):

> [7] A statute should be construed in the light of the evil to be remedied and the remedy conceived by the legislative to cure that evil. Spencer v. McBride, 14 Fla. 403. In arriving at the legislative intent in amending the statute under consideration it **is appropriate to consider the prior judicial construction of the statute which was amended** as well as the practical operation of that statute before and after the amendment. (Emphasis Added, pp. 227-228.)

Whether the Referee correctly used term "in pari materia" as a part of his reasoning in making his recommendation is not crucial herein. What is crucial is whether the Referee has made the 'correct" recommendation. The innumerable cases supporting this principle are summed up in 3 Fla. Jur 2d, 'Appellate Review" Section 296, as follows:

> ...the ultimate question before the appellate court is whether the trial court has arrived at a correct conclusion. The process of reasoning by which the trial court reached its conclusion is not regarded as the controlling factor in entering a reversal or affirmance. The court will therefore affirm rather than reverse **a** judgment or decree if the result is correct, though the trial judge states erroneous reasons for reaching his decision. This is true even though the reasons advanced by the trial court are inapplicable to the case or otherwise erroneous, or insufficient, and even when the trial judge does not state in his order the reasons therefore.

If this Court adopts Respondent's argument as to the correct interpretation of Rule 4-3.4(c), an absurd result would be produced. Such an interpretation would mean that any attorney could disobey a court order as long as said attorney proclaimed disobedience of the order and made a subjective assertion that no valid obligation existed to obey the order. Having done this, under Respondent's theory, the attorney would not be subject to any disciplinary action under Rule 4-3.4(c). This was the circumstance with which this Court was concerned[14] in both Jackson and Rubin, which cases resulted in well reasoned decisions that a reasonable, objective (not personal) belief must always be required to allow an attorney to ethically disobey a court order.

Assuming, arguendo, that Respondent's contention is based

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[14] In Rubin, at p. 1003, this Court stated: ***"To countenance that course is to court pandemonium and a breakdown of the judicial system. As this Court recently noted, if an attorney doubts the validity of court orders, 'his option [is] to challenge them legally rather than to ignore them . . . [He is obligated to obey [court orders] until such time as they are properly and *successfully* challenged." ***The Fla. Bar v. Wishart***, 543 So.2d 1250, 1252 (Fla. 1989) (emphasis added). To hold otherwise would be to give any attorney claiming a sincere belief in the invalidity of an order carte blanche to disregard that order. See ***The Fla. Bar v. Jackson,*** 494 So.2d 206 (Fla. 1986). Such a situation would be intolerable."

upon a literal interpretation of the rule, the courts have held that such an interpretation should be rejected. No literal interpretation should be effectuated which leads to an unreasonable or ridiculous conclusion or to a purpose not contemplated by the rule. City of Boca Raton v. Gidney, 440 So 2d. 1277 (Fla. 1983); City of Ft. Lauderdale v. Descamps, 111 So 2d. 693 (Fla. 1959).[15]

Respondent's proposed interpretation of Rule 4-3.4(c) should be rejected for other reasons. If a reading of the letter of the rule would not actually be within the spirit of the rule or the intention of its makers, it should be rejected. Brotherhood Railway Trainmen v. Atlantic Coast Line, 362 F. 2d 649 (5th Circuit 1966), affirmed 385 U.S. 20, 87 S.Ct. 226, 17 L.Ed 2d 20 (1966). The reasonable interpretation of legislative intent should prevail, even if it is contrary to the rules of construction and the strict letter of the language. Ervin v. Peninsular Telephone Co., 53 so. 2d 647 (Fla. 1951); Smith v. Ryan, 39 So. 2d 281 (Fla. 1949). Policy is an appropriate guide to interpretation to ameliorate the seeming harshness of a

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[15] While the cases deal with statutory construction, the same principles would logically apply to rule interpretation. State v. Atlantic C L.R. Co., 47 So. 2d 969 (Fla. 1908).

literal interpretation of a rule or to qualify its apparent absolutes. Cox v. Roth, 348 U.S. 207, 75 S.Ct. 242, 99 L.Ed 2d 260 (1955).

Alternatively, the Bar would submit that the Referee's ruling is readily supported by an appropriate analysis of the rule. Note that the Respondent has not dealt with the meaning of the Rule from the standpoint of the important word "open" as in 'open refusal".

"Open" is defined in Black's Law Dictionary (first **as** a verb) as:

> To render accessible, visible, or available, to submit or subject to examination, inquiry or review, by the removal of restrictions or impediments.

It is also defined as an adjective:

> Patent, visible, apparent, notorious, not clandestine, not closed, settled, fixed or terminated.

Thus, Respondent's conduct was not, and is not, "open". He is a fugitive[16] and was not, and is not, accessible or available

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[16] The Bar's position is supported by Respondent's conduct. He **was** in jail for refusing to obey Judge Dean's orders (this would constitute an open refusal). During his incarceration Respondent was released because he was ill until such time as his state appeals were concluded. After Judge Dean's contempt order **was** affirmed, Respondent sought relief from the federal

and was unable to submit his views to examination or inquiry. Finally, once Respondent's appeals were exhausted and Judge Dean's orders were fully upheld, Respondent's continuing refusal to obey such order would not be an open refusal.

In summary, Respondent failed to demonstrate any error by the Referee in this matter.

PROPOSITION IV

RESPONDENT HAS FAILED TO DEMONSTRATE AN ABUSE OF DISCRETION BY THE REFEREE IN HIS RULINGS RELATING TO PROCEDURE AND DISCOVERY

The Bar's case before the Referee was simple. There were three issues for the Referee to consider: (1) Did Respondent fully comply with Judge Dean's lawful orders, as set out in the order of contempt dated March 18, 1993,[17] (2) if not, did such conduct constitute a violation of Rule 4-3.4(c) and (3) if so, what was the appropriate discipline for Respondent's misconduct.

The crux of the discovery issue raised by Respondent, both

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courts and Respondent was allowed to remain free while the matter was pending before the federal trial court. Around the time the federal case was dismissed Respondent departed the United States and has steadfastly refused and failed to return. The Bar asserts that such conduct makes Respondent a fugitive.

[17] Respondent conceded that he did not, and has not, fully complied with the orders set out in the March 18, 1993 order.

before the Referee and in this appeal, is that Respondent wanted to re-litigate his defenses to the contempt order of March 18, 1993.[18] The Referee ruled the defenses were not relevant. The premise underlying the Referee's ruling was that the order of contempt had been appealed by Respondent and upheld in all instances and therefore those same defenses should not be litigated again. Essentially the Referee considered the contempt order of March 18, 1993 the law of the case.

The Referee further reasoned that since the defenses were irrelevant, then any discovery relating to those defenses would also be irrelevant. Consequently, the Referee denied Respondent's request for subpoenas to be issued for production of documents from third parties[19] and for subpoenas to be issued for the

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[18] These defense included his assertion that he was not obligated to testify because the State Attorney's office, in concert with others, was acting illegal and was conducting the investigation in bad faith to harm his political future and to deny Respondent his constitutional rights.

[19] Through such subpoena Respondent was seeking from the Dade County State Attorney's office all records regarding Respondent, including the file in State v. Gersten, including all questions that the State Attorney's office sought for Respondent to answer at his sworn statement, the State's file in the two criminal cases, in which Respondent alleges he was a victim of auto theft, and all investigative files involving Respondent, and all communications between

taking of videotaped depositions duces tecum.[20]

Notwithstanding his ruling, the Referee still was willing to consider Respondent's requests for subpoenas for defense witnesses if Respondent could advise him of what the witness was going to say.[21]

Thus, the Referee gave Respondent the full opportunity to demonstrate why certain requested subpoenas should have been issued by merely showing potential relevancy (Tr. dated July 16, 1996, Judge Goldstein, p. 169). Respondent failed to demonstrate even potential relevancy, instead asserting that each witness's deposition had to be taken to find out if such witness would testify favorably for Respondent (Tr. dated July 16, 1996, Judge Goldstein at p. 159). The Referee properly ruled that such a

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the State Attorney's office and the Bar regarding Respondent.

[20] Respondent sought subpoenas for Janet Reno, the former State Attorney for Dade County, Katherine Fernandez Rundle, the current State Attorney for Dade County, several current or former Assistant State Attorneys, the two individuals who allegedly stole Respondent's car, Amy Dean, the Judge who issued the March 18, 1993 order holding Respondent in contempt, several of Respondent's former attorneys and an editor and attorney both employed by the Miami Herald.

[21] Respondent states essentially the same thing at p. 25 of his amended initial brief.

fishing expedition would not be allowed (Tr. dated July 16, 1996, Judge Goldstein at p. 162).

The Referee correctly denied Respondent's motion to compel production of documents because Respondent's requests were improper. For example, Respondent sought an order compelling the Bar to produce (1) a copy of the contempt order, which was attached to its complaint,[22] (2) copies of motions which the Respondent had prepared and filed himself and which, if the Bar even had in its possession, did not ever intend to use in its case, (3) all documents in the possession of the Bar obtained as a part of its investigation of Respondent and (4) all complaints against Respondent filed with the Bar.[23]

It would have been absurd for the Referee to order the Bar to produce to Respondent what was attached to its complaint and what Respondent had in his possession.

Respondent's motion to compel the Bar to produce "all

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[22] The Bar subsequently obtained and provided a certified copy of the same, exact order to Respondent.

[23] Though clearly not relevant in this matter, Respondent was advised that he could obtain the non-confidential portion of any such complaints by a request to the Bar's Miami office under Rule 1-14.1(d) of the Rules of Discipline.

documents" and 'all complaints"[24] was properly denied in that the Bar had previously provided Respondent with all the documents in its possession that constituted the 'public record" under Rule 3-7.1(b) of the Rules of Discipline.[25]

The Referee's rulings relating to the procedural issues such as discovery were well with the discretion allowed. See Orlowitz v. Orlowitx, 199 So. 2d 97 (Fla. 1967); Rojas v. Ryder Truck Rental. Inc., 641 So. 2d 855 (Fla. 1994); and Calderbank v. Cazares, 435 So. 2d 377 (Fla. 1983). Respondent has failed to demonstrate an abuse of discretion by the Referee.

PROPOSITION V

THE REFEREE DID NOT ERR BY DENYING THE SUGGESTION OF DISQUALIFICATION

Respondent has failed in his burden to demonstrate error by the Referee in denying Respondent's suggestion of disqualification. The, supra.

Respondent has cited no case, no statute, no rule, or any other form of authority to establish that the Referee erred in said ruling. Furthermore, the Respondent has not bothered to

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[24] This request also called for the production of documents that were irrelevant.

[25] The Bar also represented to the Referee that it had no "exculpatory" documents.

direct the court's attention to the specific acts or statements which allegedly provide a basis for recusal.[26] This bland generality is wholly insufficient to establish judicial error.

The principles concerning the proper disqualification of judges must include (1) a verified statement of the specific facts which indicate a bias or prejudice requiring disqualification and (2) the application must be timely made.[27] Fischer v. Knuck, 497 So. 2d 240, 242 (Fla. 1986); Livingston v. State, 441 So. 2d 1083, 1086-87 (Fla. 1983).

Although Respondent's brief does not specify the statements which created the alleged fears (of the Respondent who wasn't there), it is worth noting that a negative statement is not automatically a basis for disqualification. Statements related to rulings are not a proper basis for disqualification,

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[26] At page 28 of his amended initial brief Respondent states merely that "...the Referee made remarks that suggested his necessary recusal from this matter, based on bias against Respondent and/or in favor of the Complainant, The Florida Bar." and that 'the Referee made additional comments that supported the Respondent's belief that he would not obtain a fair and impartial hearing before this Referee."

[27] Respondent asserts, again at page 28 of his amended initial brief, that the Referee initially made biased remarks on March 25, 1996. Respondent further states that he did not file his suggestion of disqualification until April 24, 1996. This filing was not timely.

Claughton v. Clauahton, 452 So. 2d 1073 (3d DCA 1984), nor are pre-trial rulings. Richard v. Kaney, 490 So. 2d 1299 (5th DCA 1986). Recusal is not required absent evidence of undue bias, prejudice or sympathy which would threaten a party's right to a fair trial. Dragovich v. State, 492 So. 2d 350 (Fla. 1986).

PROPOSITION VI

THE REFEREE DID NOT ERR BY DENYING RESPONDENT'S MOTION TO DISQUALIFY BAR COUNSEL

Based upon convoluted logic and no authority, Respondent contends that the Referee erred in denying his motion to disqualify Bar counsel, because Bar counsel had prepared and signed answers to interrogatories.

Bar counsel explained to the Referee that he was not a fact witness, that he had no first hand knowledge of the facts of the case, and that all of the facts within his knowledge came through the Bar's investigation of the case. Bar counsel further explained that historically, when the Bar receives interrogatories the attorney assigned to the case answers the interrogatories, so as to provide Respondent with as much background factual information as possible about the Bar's case (Tr. dated May 20, 1996, Judge Goldstein at pp. 14-28).

The mere fact that the Bar's counsel is required to sign the

answers to interrogatories, however, does not ipso facto require his presence as a witness. Respondent has cited no case or rule which requires that an individual must testify solely because the individual signed answers to interrogatories on behalf of an entity such as the Bar. In fact, the applicable authority establishes that the Referee did not err by denying Respondent's motion for disqualification.

The claim that an attorney is a potential witness for his clients did not require disqualification in Cazares v. Church of Scientology, Inc., 429 So. 2d 348 (5th DCA 1983) petition denied 438 So. 2d 831 (5th DCA 1983) and later proceeding 444 So. 2d 442 (5th DCA 1984).

Since Bar counsel had absolutely no actual knowledge about the facts of the case, there was virtually no chance The only chance Bar counsel would have become a witness would have been if Respondent has not demonstrated here, nor did he demonstrate before the Referee, that there was any real possibility that Bar Counsel would be a witness. Furthermore, where there is a mere possibility that an attorney could be called as a witness, a lawyer need not withdraw as counsel. Allstate Insurance Co. v. English, 588 So. 2d 294 (2d DCA, 1991). A showing that the attorney's counsel would testify adverse to his client's interest

is also required. English, supra. Both Cazares and English are predicated upon the principle that an opposing party will not be permitted to use the weapon of disqualification based upon the totally speculative argument that counsel will also appear as a witness.

PROPOSITION VII

THE REFEREE DID NOT ERR IN REGARD TO SANCTIONS

Respondent refers to The Florida Bar v. Taylor, 648 So. 2d 709 (Fla. 1955) regarding an attorney who had been held in civil contempt and claims that Taylor should govern.

First, Respondent failed to present that argument below and therefore, it is waived. Jaffee v. Endurolight Time Awning Sales, 98 So. 2d 77 (Fla. 1957); Condrey v. Condrey, 92 So. 2d **423** (Fla. 1957); McGurn v. Scott, 596 So. 2d 1042 (Fla. 1992).

Second, the holding in Taylor is irrelevant to this appeal. The Court held that the failure to pay child support 'was more like a private civil matter" and would not result in sanctions pursuant to Rules 3-4.3 (committing an act that is unlawful and contrary to honesty and justice) and 4-8.4(a) and (d) (engaging in conduct that is prejudicial to justice).

Taylor did not involve a charge under Rule 4-3.4(c) which

specifically addresses disobedience of an obligation under the rules of a tribunal. No case holds that there is no punishment for violating that rule, which, of course, would be absurd.

Respondent has failed to comply with orders requiring him to testify regarding criminal cases. This case involves more than a private civil matter, and it is doubtful that the Taylor rule should apply to these circumstances, even under the rules which were utilized in that case.

Finally, Respondent, without explanation, states that the indefinite suspension "could exceed the time allowable for suspension pursuant to the Rule." However, Rule 3-5.1(d) provides for a definite period of suspension "or an indefinite period thereafter to be determined by the conditions imposed by the judgment." (Emphasis supplied) Therefore, no error has been demonstrated in that regard.

Suspension is warranted under the facts of this case. The Supreme Court has disbarred and jailed attorneys who have refused to comply with the terms of suspension orders. The Florida Bar v. Kelly, 601 So. 2d 564 (Fla. 1962) and The Florida Bar v. David M. Verizzo, 598 So. 2d 79 (Fla. 1992); 599 So. 2d 660 (Fla. 1992). See also The Florida Bar v. Carlson., 172 So. 2d 578 (Fla.

1965) (Thirty day jail sentence) and The Florida Bar v. Roberta, 161 So. 2d 211 (Fla. 1964) (Three months jail sentence).

CONCLUSION

Based upon the foregoing, the Referee's recommendation of a one year suspension subsequent to compliance with the pending orders should be approved by this Court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the forgoing was sent via regular mail to **Maria del Carmen Calzon,** Attorney for Respondent, 1050 Spring Garden Road, Miami, Florida 33136 and to **John T. Berry,** Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 this 28th day of April 1997.

BILLY J. HENDRIX
Bar Counsel
Florida Bar No. 849529
Suite M-100, Rivergate Plaza
444 Brickell Avenue
Miami, Florida 33131
(305) 377-4445

APPENDIX

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

The Florida Bar,

Complainant,

vs.

Joseph Morris Gersten,

Respondent.

Supreme Court Case No. **07,240**
The Florida Bar File No. **95-71,604(11M)**

REPORT OF REFEREE

I. **SUMMARY OF PROCEEDINGS:**

A. JURISDICTION AND VENUE

Pursuant to the Order of Appointment issued by the Supreme Court of Florida, dated March 6, 1996, a disciplinary proceeding was had pursuant to Chapter 3 of the Rules Regulating The Florida Bar, before the undesigned, duly appointed as Referee for the Supreme Court of Florida.

Venue in this cause was changed to Broward County by order of the Supreme Court, on application for change of venue by Respondent.

A Final Hearing was had on this cause on August 30, 1996. All of the pleadings, transcripts, notices, motions, orders and exhibits are forwarded with this report and constitute the record of this case.

B. APPEARANCES

The following attorneys appeared as counsel of record for the parties:

For The Florida Bar: Billy J. Hendrix, Esquire
The Florida Bar
Suite M-100, Rivergate Plaza
444 Brickell Avenue
Miami, Florida 33131

For the Respondent: Maria del Carmen Calzon, Esquire
Calzon, Gayoso & Gersten, P.A.
1050 spring Garden Road
Miami, Florida 33136

11. EVIDENCE BEFORE THE REFEREE:

In arriving at this Report and Recommendations, the following evidence was considered:

A. FROM THE FLORIDA BAR:

1. The Complaint

2. The Order rendered by Judge Amy N. Dean on 3/18/93

3. The Order rendered by Judge Joel Brown on 10/4/93

B. FROM THE RESPONDENT:

1. The Answer

C. STIPULATED FACTS:

1. The parties stipulated that the Order rendered by Judge Amy N. Dean on 3/18/93 was appealed, and that the Order was affirmed on appeal;

2. The parties stipulated that the Order rendered by Judge Amy N. Dean on 3/18/93 has not been overturned through any appellate process;

3. The parties stipulated that the Respondent has not complied with the express terms of the Order rendered by Judge Amy N. Dean on 3/18/93;

4. The parties stipulated that the Respondent has appealed said order through the courts of the State of Florida, and

has litigated issues relating to that order through federal litigation. The last order on appeal issued on or about November 1995 affirmed said order.

III. MISCONDUCT WITH WHICH THE RESPONDENT IS CHARGED

The Respondent is charged with one violation of Rule 4-3.4(c):

> A lawyer shall not knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists.

IV. FINDINGS OF FACT AS TO EACH ITEM OF MISCONDUCT OF WHICH THE RESPONDENT IS CHARGED:

After considering the evidence listed above, the stipulated facts, and the pleadings in this cause, the following findings of fact are made:

1. On or about March 18, 1993, Judge Dean entered an order holding Respondent in contempt of court for failure to answer the questions posed by the Office of the State Attorney, which questions Respondent was ordered to answer by Judge Dean.

2. Judge Dean further ordered that Respondent could purge himself of contempt by:

a. answering all questions previously ordered to be answered; and

b. by continuing his pre-filing statement in the Office of the State Attorney under the terms and conditions previously ordered in August of 1992.

3. Respondent had appealed the March 18, 1993 order, however, by the fall of 1995 all appeals had been exhausted and the order of March 18, 1993 had been upheld in all respects. From the

fall of 1995 through and including the present, Respondent had the ability and the opportunity to fully comply with the Circuit Court's orders and he knowingly and willfully refused to do so.

4. Judge Amy Dean's Order of March 18, 1993 is presumed correct, and is presumed to be based on a complete knowledge of the facts of the Respondent's case.

5. Judge Amy Dean's Order of March 18, 1993 has not been complied with by Respondent.

6. The Respondent has openly refused to comply with Judge Amy Dean's Order of March 18, 1993, based on an assertion that no valid obligation exists.

7. Respondent's appellate rights have been exhausted for approximately eight months, and Respondent still continues an open refusal based on an assertion that no valid obligation exists.

8. Respondent is in the country of Australia and has not returned to comply with Judge Dean's Order.

9. Respondent did knowingly disobey the Circuit Court's order and was, and is still in willful contempt of same, all as is above set forth.

v. CONCLUSIONS OF LAW:

Rule 4-3.4(c) of the Rules of Professional Responsibility, which provides that a lawyer shall not knowingly disobey an obligation under the rules of a tribunal expect for an open refusal based on an assertion that no valid obligation exists, must be read in pari materia with Rule 7.106(A) of the former Code of Professional Responsibility.

Rule 7.106(A) provides:

> 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 rule or ruling.

Further, the Court finds that The Florida Bar v. Rubin, 549 So.2d 1000, (Fla. 1989) is applicable to the interpretation of the present rule 4-3.4(c), in conjunction with the former rule 7.106(A).

Accordingly, it is the conclusion of law of this Referee that where Rule 4-3.4(c) states "except for an open refusal based on an assertion that no valid obligation exists," Rule 7.106(A) requires two things: (1) good faith; and (2) seeking redress to an appellate court.- As long as Respondent proceeded in the appellate process, and was awaiting a decision by any court, then he was complying with the exception of "an open refusal based on an assertion that no valid obligation exists," as contemplated by Rule 7.106(A). Once there were no further appeals taken seeking to overturn the validity of the order, then Respondent was under an absolute obligation to comply with that order.

Therefore, it is the conclusion of this Referee that Respondent is precluded from presently contending **that** he openly refuses to obey the order based on an assertion that no valid obligation existed.

VI. **RECOMMENDATION AS TO GUILT OR INNOCENCE ON MISCONDUCT CHARGED:**

Based on the stipulations, the evidence and the argument presented to this Court, it is this Referee's recommendation that

Respondent be found guilty of violating Rule 4-3.4(c) of the Rules of Professional Responsibility:

> A lawyer shall not knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists.

VII. RECOMMENDATION AS TO STANDARD FOR IMPOSING SANCTION:

Standard 6.22 of the Florida Standards for Imposing Lawyer Sanctions is the appropriate standard to be applied to Respondent's violation of Rule 4-3.4(c). Standard 6.22 provides:

> Suspension is appropriate when a lawyer knowingly violated 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.

VIII. MITIGATING AND AGGRAVATING FACTORS:

The preamble to Standard 6.2, Florida Standards for Imposing Lawyer Sanctions, states:

> Absent aggravating or mitigating circumstances, and upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving failure to . . . obey any obligation under the rules of a tribunal , . . .

The following aggravating and mitigating circumstances are found in this case:

A. Aggravating Factors

The only aggravating factor applicable to Respondent's misconduct is Standard 9.22(g) I Florida Standards for Imposing Lawyer Sanctions -- refusal to acknowledge wrongful nature of conduct. Respondent has not only refused to acknowledge the

wrongful nature of the conduct, but continues to refuse to comply with the Court Order,

B. Mitigating Factors

Respondent has asked for consideration of the following mitigating factors under Standard 9.22 of the Florida Standards for Imposing Lawyer Sanctions:

a. absence of a prior disciplinary record;

b. absence of a dishonest or selfish motive;

c. personal or emotional problems;

d. full and free disclosure to disciplinary board or cooperative attitude toward proceedings; and

e. character or reputation.

The Court finds that mitigating factors (b) and (c) are applicable but are not given much weight. The Court further finds that mitigating factors (a) and (e) are applicable and should be given great weight. The absence of a prior disciplinary record in light of the Respondent's twenty-one years of continuous practice of law needs to be considered. Similarly, the Respondent's public service of more than twenty years must be considered as a mitigating factor.

However, the Court finds that these mitigating factors are outweighed by the aggravating factor -- the refusal to acknowledge the wrongful nature of conduct -- in light of the Respondent's continuing refusal to comply with the Court order.

TX" **PERSONAL HISTORY AND PAST DISCIPLINARY RECORD;**

Age: 49

Dated Admitted to The Florida Bar: December 18, 1975

Prior disciplinary record: None

X. RECOMMENDED DISCIPLINE:

In light of the foregoing and after considering the aggravating and mitigating factors, as well as The Florida Bar's recommendation of disbarment, the Court finds that the misconduct does not rise to the level where disbarment is an appropriate sanction.

The Referee recommends that Respondent be suspended from the practice of law until he complies with the Court Order. However, as a sanction for the violation of Rule 4-3.4(c), Rules of Professional Responsibility, the Referee recommends that Respondent be suspended from the practice of law for one year after he complies with the Court Order.

XI. STATEMENT OF COSTS AND MANNER IN WHICH COSTS SHOULD BE TAXED:

I find the following costs were reasonably incurred by The Florida Bar.

Administrative fee	$ 750.00
Court Reporter's attendance and transcription of telephonic status conference on 7/12/96	95.67
Court Reporter's attendance and transcription of hearing before a Referee on 7/16/96	746.55
Court Reporter's attendance of status conference on 7/26/96	50.00

court Reporter's attendance and transcription of final hearing on 8/30/96	264.05
Staff Investigator's fee	980.37
Bar Counsel's costs	120.82
TOTAL:	$ 3,007.46

Dated this 31st day of October, 1996.

BARRY E. GOLDSTEIN
A TRUE COPY

BARRY E. GOLDSTEIN, Referee
Broward County Courthouse

Copies furnished to:
Billy J. Hendrix, Bar Counsel
Maria del Carmen Calzon, Attorney for Respondent
John T. Berry, Staff Counsel