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IN THE SUPREME COURT OF FLORIDA

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CASE NO. 87,248

JOSEPH MORRIS GERSTEN,

Petitioner,

-vs-

THE FLORIDA BAR,

Respondent.

APPEAL FROM THE REPORT OF REFEREE
IN A DISCIPLINARY PROCEEDTNG

AMENDED INITIAL BRIEF OF PETITIONER

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APPEAL FROM THE REPORT OF REFEREE
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INTRODUCTION

Pursuant to Rules Regulating The Florida Bar, Joseph Morris Gersten, respectfully petitions this Court for review of the report of Referee in this matter issued on or about November 20, 1996, and all orders of the Referee entered previously to the issuance of the report of the Referee, and his brief follows.

This Court has jurisdiction to review all orders of the Referee in this cause pursuant to Rule 3-7.7 of the rules regulating The Florida Bar. Further, this Court has authority to enter orders in reference to the disqualification of a referee pursuant to Rules 3-3.1 and 3-7.7(e) of the rules

regulating The Florida Bar, as well as to issue extraordinary writs in attorney disciplinary proceedings pursuant to Fla. Bar Integr. Rule, art XI, Rule 11.-09(5).[1]

The parties shall be referred to as they stood below. The Petitioner, Joseph M. Gersten, shall be referred to as "Mr. Gersten" or "Respondent," and the Respondent, The Florida Bar, shall be referred to as the "Florida Bar" or "Petitioner." The record on appeal is denoted by the letter "R."

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[1] See also The Florida Bar v. Rubin, 362 So.2d 12 (Fla. 1978); Ciravolo v. The Florida Bar, 361 So. 2d 121 (Fla. 1978); The Florida Bar v. McCain , 330 So, 2d 712 (Fla. 1976); Murrell v. The Florida Bar, 122 So. 2d 169 (Fla. 1960).

STATEMENT OF THE FACTS AND THE CASE

On January 18, 1994, Grievance Committee 11 M began proceedings and took testimony in the matter of The Florida Bar v. Joseph M. Gersten , Case No. 92-71,435 (11M) (hereinafter "the 1994 proceedings"). During these proceedings, The Florida Bar set forth the case herein against Mr. Gersten based on allegations that he had violated a court order, the same court order which forms the basis of The Florida Bar's complaint herein: a civil order of contempt compelling him to testify in a case in which he had been the victim of a crime.

During the proceedings in 1994 and thereafter, Mr. Gersten presented evidence to the Grievance Committee, and participated in the questioning of the only witness presented against him, an assistant state attorney. As part of the 1994 proceedings, Mr. Gersten sought the issuance of subpoenas for various witnesses on his behalf, The grievance committee chairman requested a detailed proffer of the relevancy of the testimony sought. Mr. Gersten provided the proffer of the testimony sought from the witnesses and the relevancy of their testimony.

The relevancy of these witnesses' testimony was grounded on Mr. Gersten's defense that any failure to comply with the court order was a result of an open refusal based on an assertion of right. Mr. Gersten presented his defense, arguing that the order in question had been obtained by the State Attorney's Office in bad faith and for political motives. [2] Further, Mr. Gersten argued that the prosecution by The Florida Bar of this matter amounted to a violation of the doctrine enunciated in

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[2] At the time of the facts giving rise to this issue, Mr. Gersten held the elected position of Dade County Commissioner, was then engaged in a campaign for reelection, and was predicted to be the next mayor of Dade County.

Murrell v. Florida Bar, 122 So, 2d 169 (Fla. 1980), that is, that The Florida Bar was being improperly used by the State Attorney's Office, the actual party prosecuting the matter, for its own political persecution of Mr. Gersten.

Mr. Gersten 's request for subpoenas was granted. At the hearing when the testimony of the witnesses was to take place, the State Attorney's Office sought an order of protection against having to testify. Thereafter, The Florida Bar's committee suspended the proceedings, pending resolution of the appellate process reviewing the order giving rise to the investigation.

In 1995, The Florida Bar Committee 11M again took up the matter for review. When Mr. Gersten attempted to continue with the proceedings as previously described, The Florida Bar informed him (1) that not only were the previous proceedings not being "continued," but (2) that this matter had a new case number, 95-71604(11M), (3) was not related to the 1994 proceedings, (4) that in this 1995 case, Mr. Gersten would not be permitted to present live testimony, and (5) that the Committee would proceed to a "paper hearing." The Florida Bar refused to allow the new committee members to review the transcripts and testimony previously elicited in 1994. (See transcript of July 16, 1996 p. 164-166)

On January 19, 1996, The Florida Bar filed the Complaint which forms the basis of these proceedings. (R. 1)

Mr. Gersten then propounded discovery requests on January 23, 1996: Notice of Production from Third Parties (R. 3); Respondent's First Request for Admissions (R. 4); Respondent's First Set of Interrogatories (R. 5); Respondent's First Request for Production (R. 6).

The Florida Bar filed Objections to Notice of Production from Third Parties (R. 7). And,

when The Florida Bar filed its Response to the First Request for Production, it objected to every single request. (R. 14). Respondent filed a motion to compel production, (R. 16) and gave notice of taking depositions of sixteen witnesses, (R. 17).

On February 28, 1996, The Florida Bar filed an untimely "Amended Response to Respondent's First Request for Production," wherein it provided further objections to the production sought, (R. 19), and concomitantly a "Motion for Protective Order" to prevent Mr. Gersten from taking depositions of third parties (R. 20).

Mr. Gersten sought to compel The Florida Bar to answer the propounded interrogatories on March 4, 1996. (R. 28) On March 5, 1996, The Florida Bar served its untimely answers to the interrogatories, propounded by Respondent on January 23, 1996. (R. 23).

On March 11, 1996, The Florida Bar filed its "Response to Respondents Motion to Compel," admitting that the interrogatories had been overlooked, (R. 21) and arguing that the Motion to Compel was moot, because the interrogatories had been answered. The answers to the interrogatories consisted of objections to nine of the eleven interrogatories.

Based on the answers to the interrogatories filed by The Florida Bar, Mr. Gersten filed a Verified Motion to Disqualify Billy J. Hendrix as Attorney for Complainant. The motion was heard on May 20, 1996, and was denied by an Order dated May 20, 1996.

On April 30, 1996, Mr. Gersten filed a Verified Suggestion of Disqualification of the Referee. The suggestion of disqualification was denied on May 20, 1996. On July 11, 1996, Mr. Gersten filed a Motion for Review in this Court, which he incorporates herein.

The Florida Bar sought to limit Mr. Gersten's ability to present defenses, filing its "Motion

for Order Prohibiting the Presentation of Respondent’s Defenses.”

SUMMARY OF THE ARGUMENT

The Referee's findings and conclusions are not supported by competent and substantial evidence where the only "evidence" admitted by The Florida Bar was the Order of Civil Contempt which forms the basis of the Florida Bar Complaint, and the civil order of contempt does not constitute a per se violation of the Rules.

The Referee denied the Respondent substantive and procedural due process by limiting the Respondent's availability of defenses only to those defenses available under a superseded rule, and not allowing the Respondent to present evidence that his conduct fell within the exception specifically enumerated in the rule in effect at the time of the alleged conduct which is the basis of the complaint.

The Referee denied the Respondent due process by denying him discovery rights afforded all other litigants under the Rules, and by denying him notice of the rule under which he was being sanctioned, and by denying him proper notice of hearings and proceedings,

The Referee erred in denying the Respondent's motion to disqualify the attorney for The Florida Bar where the attorney signed the answers to the interrogatories under oath based on his knowledge of the facts, and thus, became a witness in the proceedings.

The Referee committed error in denying the Respondent's suggestion of disqualification of the Referee because the suggestion was legally sufficient.

The recommendation of the Referee regarding sanctions is erroneous because The Florida Bar's present disciplinary rules do not grant authority to discipline an attorney for civil contempt, and because the sanction recommended violates the rules governing the application of sanctions.

ARGUMENT

In a referee trial of prosecution for professional misconduct, the Bar has the burden of proving its accusations by clear and convincing evidence. The Florida Bar v. Niles, 644 So.2d 504 (Fla. 1994); The Florida Bar v. Rayman, 238 So.2d 594 (Fla. 1970); The Florida Bar v. Hooper, 509 So.2d 289 (Fla. 1987).

Generally, the referee's findings should not be overturned unless clearly erroneous or lacking in evidentiary support The Florida Bar v. Wagner, 212 So.2d 770 (Fla. 1968); The Florida Bar v. Neely, 502 So.2d 1237 (Fla. 1987).

Although the responsibility for findings facts and resolving conflicts in the evidence is placed with the referee, see The Florida Bar v. Bajoczy, 558 So.2d 1022 (Fla. 1990); The Florida Bar v. Hoffer, 383 So.2d 639 (Fla. 1980), where the record is devoid of competent and substantial evidence to support the referee's finding, or where the evidence is insufficient to support conclusions, the findings and conclusions of the referee must be overturned. See, e.g., The Florida Bar v. Catalano, 644 So.2d 86 (Fla. 1994); The Florida Bar v. Bariton, 583 So.2d 334 (Fla. 1991).

However, the standard of review of the referee's recommendations for discipline is broader than the scope of review for findings of fact because it is the responsibility of the Supreme Court to order the appropriate sanction. The Florida Bar v. Berman, 659 So.2d 1049 (Fla. 1995); The Florida Bar v. Niles, 644 So.2d 504, (Fla. 1994). While a referee's recommendation for **attorney** discipline is persuasive, it is ultimately the Supreme Court's task to determine the appropriate sanction, The Florida Bar v. Reed, 644 So.2d 1355 (Fla. 1994).

I.

THE REFEREE'S FINDINGS AND CONCLUSIONS ARE NOT SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE

The Florida Bar Complaint charged Mr. Gersten with violating Rule 4-3.4 (c) of the Rules of Professional Conduct:

> 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.

At the hearing before the Referee, no testimony was taken[3], and no transcripts were admitted. The only "evidence" before the Referee, and now before this Court are the stipulations of counsel as follows: (1) There had been an order of civil contempt entered against Mr. Gersten; (2) Mr. Gersten had not complied with the terms of the order, and that the non-compliance was an open refusal based on an assertion that no valid obligation exits; and (3) No appellate Court has overturned the contempt order,

The only evidence admitted by The Florida Bar was the Order of Civil Contempt, the docket sheet showing the entry of that order, and a Writ of Bodily Attachment for failure to comply with the Order.

Mr. Gersten was precluded from presenting any evidence in support of his defense of an open refusal based on an assertion that no valid obligation exists. Mr. Gersten was precluded from obtaining subpoenas for the testimony of witnesses to show mitigation.

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[3] The only testimony taken in the proceedings was the testimony of the investigator for The Florida Bar regarding the investigative costs.

Although generally, the Supreme Court's review of the referee's findings of fact is not in the nature of a trial de novo, see The Florida Bar v. Niles, 644 So.2d 504 (Fla. 1994), under these facts where the only evidence the referee considered was the order, the review by this Court should be on a de novo basis, since this Court is in the same position as the Referee to evaluate that evidence.

Based on the foregoing, there is no competent and substantial evidence to support the Referee's findings that Mr. Gersten violated the Rule with which he was charged in the Florida Bar Complaint,

TI.

THE REFEREE DENIED THE RESPONDENT SUBSTANTIVE AND PROCEDURAL DUE PROCESS AND COMMITTED ERRORS OF LAW BY LIMITING THE RESPONDENT'S AVAILABILITY OF DEFENSES

The Referee's conclusion of law that Mr. Gersten was precluded from contending that any violation of an order was "an open refusal based on an assertion that no valid obligation existed" is incorrect as a matter of law, in that the Referee based this conclusion on an interpretation of a former rule of the Florida Bar -- Rule 7-106(A) -- and cases under that former rule.

The Florida Bar Complaint charged Mr. Gersten with violating Rule 4-3.4 (c) of the Rules of Professional Conduct:

> 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,

From the initial hearing, the referee had difficulty accepting the language of the Rule:

> Just common sense, how could the defense defend or how can the Defendant defend an order that they're violating and come here and say,"We are not violating it?"

> Doesn't that put the Respondent in the driver's seat? Not only in this case, but in every case. I disagree with it.

(Transcript of March 25, 1996, p. 56-62).

On July 16, 1996, the Referee heard argument of counsel, regarding Mr. Gersten's ability to present evidence to show his open refusal based on an assertion that no valid obligation exists. The Florida Bar argued two cases: The Florida Bar v. Jackson, 494 So. 2d 206) and The Florida Bar v. Rubin, 549 So. 2d 1000, (Fla. 1989).

Both cases cited by The Florida Bar were decided under a different disciplinary rule not in effect at the time of the alleged misconduct:

> MR. HENDRIX: This is under the old disciplinary rule. The intent of the rule is the same, and that is that you cannot knowingly violate an order of the court. In the old rule, it talks about good faith. In the new rule, it talks about something a little different.
>
> MS. CALZON: Your Honor, this case, Jackson, first of all, operated under a different rule, different proceedings, different language. The importance of the different language is that under the old rule, the person had to take affirmative steps -- the person asserting this had to take appropriate steps to test the validity of the rule or the ruling. The new rule under which the Florida Bar operates and under which this complaint was filed does not put a burden on the Respondent to take any steps to test such a thing. What the new language states is simply, "Except for an open refusal based on an assertion of right." Nowhere does it say, as the old rule did, that he may have to take steps to test the validity of it.
>
> THE REFEREE: Here is my concern. In the Rubin case, they discussed a violation of Rule 7.106(A), a disciplinary rule -- but that's been done away with.
>
> MR. HENDRIX: That is the predecessor, Your Honor, to this rule. The rules have been changed, but not done away with. That is the predecessor to this rule that we are here on today.

MS. CALZON : It's a different rule, Your Honor.

MR. HENDRIX: Of course, its different. It's been amended. But it's the predecessor or it's the same idea.
MS. CALZON : Maybe it's the same idea, Your Honor, but rules operate in language and if the language is changed, therefore, the operation of the rule is changed.

THE REFEREE: Could it be that the Bar has charged under the wrong rule and perhaps knowingly disobeyed an obligation under the rule of a tribunal might mean something else and perhaps there is another rule in the that says you shall not disobey an order of the court? . . .
MS. CALZON : 1 am proceeding under the rule that they charged.

MR. HENDRIX: The rule that is cited in Rubin is a predecessor to this rule. This is the same intent and the same rule. Common sense would dictate that the Supreme Court would not think anything differently of attorneys refusing to obey court orders today than they did under the old rules in this Rubin case.
MS CALZON: In that case, they wouldn't have changed the language, Your Honor. The previous language specifically talked about a person taking steps to challenge the validity. The new rule says nothing about that. I don't think the Supreme Court changes wording and changes rules without having an intent for that change. Obviously, they took that provision away that said you have to take steps to challenge the validity of the ruling and they didn't intend for that to any longer -- they intended that not to be the rule.

(Transcript of July 16, 1996 p. 25-46).

The referee then ruled:

THE REFEREE: I am going to interpret this the only way that common sense would allow me to interpret it. In order to do so, I would have to read Disciplinary Rule 7-106(A), even though I know it doesn't exist anymore in pari materia. My interpretation is going to be that where the rule says except for an open refusal based on an assertion that no valid obligation exists that would require two things. One, good faith, and two, seeking redress to an appellate court. If I didn't interpret it that way, we would be coming -- not coming, but

exactly what the Supreme Court said in the Florida Bar versus Rubin, 549 So. 2d 1000 at Page 1003:

> "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 a court order, his option is to challenge them legally, rather than ignore them."

Like I said, this has to be read in pari materia. It has to be interpreted. That's my interpretation.

(Transcript of July 16, 1996, p. 45-46)

It is a violation of due process to be adjudged of violating a rule not in effect when the alleged conduct took place. The rule used by the Referee to find that Mr. Gersten's conduct is violative of the Rules Regulating the Florida Bar is a rule under the Code of Professional Responsibility, which was superseded by the adoption of the Rules Regulating the Florida Bar. Florida Bar re Rules Regulating the Florida Bar, 494 So.2d 977 (Fla. 1986).

While in some circumstances the rules in the old Code were adopted into the new Rules verbatim, many of the new Rules were significantly altered, as in Rule 7.106(A). The Referee committed error by stating that he was reading both rules "in pari material' and ignoring the explicit exception written into the rule allegedly violated.

In Holly v. Auld, 450 So.2d 2 17 (Fla. 1984), this Court held that statutory construction and interpretation are available to courts where statutes are ambiguously worded:

> When the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction.

Further, the doctrine of "in pari materia"was improperly applied by the Referee. When different provisions of a statute, or several statutes, relate to an entity or a common concept, courts

interpret the different provisions or statutes together, to understand the complete scheme for which the various provisions were instituted. Here, the Referee joined two different rules, one of which was superseded and is no longer in effect, in order to arrive at an interpretation that validated his idea of what is correct. This is not the purpose or concept underlying the doctrine of "in pari materia." If it were the intent of this Court to retain provisions of the previous rule, this Court would have done so. See Sanders v. Howell, 73 Fla. 563, 74 So. 802 (1917).

In The Florida Bar v. Trinkle, 580 So.2d 157 (Fla. 1991), an attorney could not be found guilty of violating a rule of professional conduct which was not enacted until after the alleged misconduct occurred. Mr. Gersten cannot be found guilty of violating a rule of professional conduct that had been superseded, and of which violation he had not even been put on notice

Finally, The Florida Bar's argument that Mr. Gersten must be punished for his failure to comply with the Court Order is fallacious. Mr. Gersten has already been punished. He was jailed for his contempt. However objectionable the Florida Bar attorney views civil contempt, the Florida Bar is limited in its discipline of attorneys by the express language of the rules promulgated by this Court

Even under the previous rule, this Court enunciated the proper standard for determining whether a violation of a rule occurred:

> The question before us is not whether Rubin was legally obligated to obey the court order. That matter has been decided adversely to him by the courts and he has been properly sanctioned for his refusal. Rather the question is whether he was ethically required to obey. We are concerned here with whether he violated the Code, not with whether he violated the law.

The Florida Bar v. Rubin, 549 So.2d at 1001-1002.

III.

THE REFEREE COMMITTED ERROR BY LIMITING THE RESPONDENT'S ABILITY TO PRESENT DEFENSES

In its motion in support of its contention that Respondent is barred from presenting his defenses based on the fugitive from justice doctrine, The Florida Bar cited Jaffe v. Snow, 610 So. 2d 482 (5th DCA 1992) for the proposition 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.

Jaffe v. Snow involved an attempt to enforce a large money judgment obtained in Canada against a bonding company. Jaffe was charged with 28 felony criminal counts of organized crime violations in Florida, and while on bond, fled to Canada. After failing to appear for trial, he was then also charged with the charge of failure to appear, a felony. The bonding company apprehended Jaffe and returned him to Florida to stand trial. Jaffe 's wife sued the bonding company for wrongful kidnaping of her husband when the bonding company apprehended Jaffe and returned him to Florida, and she obtained a Canadian money judgment against the bonding company. She then sued in Florida to enforce the money judgment obtained in Canada.

The court ruled that enforcement of the money judgment offended the public policy of the State of Florida and sense of moral justice and declined to recognize or enforce that judgment. In reasoning why the judgment offended the public policy of the State, the court explained that Jaffe was a fugitive from justice because he had twice "jumped bond" from Florida jurisdiction, and there were pending criminal charges against him.

Thus, the court held that under a number of circumstances, a party may be precluded from

access to the courts by virtue of being a fugitive criminal defendant, by failure to comply with a discovery order in the case being litigated or appealed, by criminal conduct, or by litigating claims derivating from the fugitive or criminal conduct. This principle is called the fugitive from justice doctrine.

Respondent has: (1) not been charged with any criminal charges whatsoever; (2) no criminal charges pending against him; (3) not had any limitation placed on his travel; (4) no bond placed against him; (5) not failed to comply with any discovery order in this case; (6) not escaped from any confinement; (7) not had any arrest warrant issued against him. Thus, Respondent is not a criminal defendant. Contrary to the insinuations of The Florida Bar, Respondent is, not a fugitive and has not been charged with any crime. Accordingly, Jaffe v. Snow, 610 So. 2d at 482, is inapplicable herein to prevent Mr. Gersten from presenting his defenses or to subject him to summary disbarment.

The federal fugitive from justice doctrine, first enunciated in Molinaro v. New Jersey, 396 U.S. 365, 90 S.Ct. 498, 24 L.Ed. 2d 586 (1970), provided that an escape from custody disentitled a defendant from the right to call upon the resources of the court for determination of his claims.

Respondent has not escaped from custody. At the time Respondent left the jurisdiction, he was under no restriction of his travel or residence.

The federal fugitive from justice doctrine was expanded in United States v. One Lot of U.S. Currency totaling $506,537.00, 628 F. Supp 1473 (S.D. Fla. 1986), which addressed the doctrine's application in civil forfeiture cases, holding that a criminal defendant could not defend a forfeiture claim while being fugitive from the jurisdiction. In the instant case, there is no forfeiture proceeding against Respondent.

In State v. Gurican, 576 So. 2d 709 (Fla. 1991), the Florida Supreme Court held that, as a matter of policy, appellate courts of this state shall dismiss the appeal of a convicted defendant not yet sentenced who flees the jurisdiction before filing a notice of appeal and who fails to return and timely file that appeal unless the defendant can establish that the absence was legally justified. Respondent is not a criminal defendant, has not been convicted of any crime, was not awaiting sentencing, and is neither a fugitive nor a person to whom the fugitive from justice doctrine applies.

In Garcia v. Metro-J&de Police, 576 So. 2d 751 (Fla. 3d DCA 1991), the court adopted the federal fugitive from justice doctrine into state law, "only as it related to civil forfeiture actions that arise out of criminal charges." Garcia v. Metro-Dade Police Department, 576 So. 2d at 752. In Garcia a criminal defendant charged with trafficking in cocaine, and who failed to appear for his criminal court trial, sought to litigate the forfeiture of $10,000 seized when he was arrested.

The court again found that where a criminal defendant flees the jurisdiction to avoid criminal prosecution, the criminal defendant forfeits the right to litigate the forfeiture of assets related to the crime. In the instant case, Respondent is not a criminal defendant, there has been no criminal conduct alleged to have been committed by him, there have been no assets seized related to crimes, or otherwise.

Accordingly, Garcia v. Metro-Dade Police, 576 So. 2d 751 (Fla. 3d DCA 1991), is inapplicable herein to prevent Respondent from presenting his defenses or to subject him to summary disbarment.

The Referee nevertheless limited Mr. Gersten 's ability to present defenses by limiting what Mr. Gersten could raise as a defense, and totally precluded him from raising the defense provided

in the very rule he was charged with violating.

The Referee explained:

> My feeling is that a defense to this would be, one, that the order was not valid, or, two, that there was an appeal and the Appellate Court said that it wasn't valid and reversed it. Those would be the defenses.
>
> MS. CALZON : Then we don't need a trial, Your Honor.
> THE REFEREE: Well then we don't. To me, those would be defenses.
> MS. CALZON : I understand, but if that is the Court's ruling, we don't need a trial.
>
> THE REFEREE: Another defense would be that Mr. Gersten complies with the court order.

(Transcript of July 16, p. 123)

IV.

THE PROCEDURAL RULINGS OF THE REFEREE VIOLATED MR. GERSTEN'S PROCEDURAL DUE PROCESS UNDER THE UNITED STATES AND FLORIDA CONSTITUTIONS

The Referee's conclusions of law were further based on procedural errors that impinge on the Petitioner's due process rights under the United States and Florida Constitutions:

A.

DENIAL OF DISCOVERY RIGHTS

Tmmediately upon being served with the Complaint in this cause, Mr. Gersten began aggressively seeking to obtain the discovery granted him by the Rules of Civil Procedure. Rule 3-7.6 of the Rules Regulating The Florida Bar provides:

> (e)(1) Administrative in Character. A disciplinary proceeding is

> neither civil nor criminal but is a quasijudicial administrative proceeding. The Florida Rules of Civil Procedure apply except as otherwise nrovided in this rule. (2) Discover-v. Discoverv shall be tne partieso the pn accc accordance with the Florida Rules of Civil Procedure. [Emphasis added]

Rule 1.280 of the Florida Rules of Civil Procedure provides:

> (a) Discovery Methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property for inspection and other purposes; physical and mental examinations, and requests for admissions. Unless the court orders otherwise and under subdivision (c) of this rule, the frequency of use of these methods is not limited, except as provided in rule 1.200 and rule 1.340.

In each and every instance, The Florida Bar blocked, violated, or ignored each of Mr. Gersten 's proper requests for discovery, under the Rules of Civil Procedure.

I

REQUEST FOR PRODUCTION

In his request for production pursuant to Rule 1.350 of the Florida Rules of Civil Procedure, served upon The Florida Bar on January 23, 1996, Mr. Gersten sought the production of documents in the possession of The Florida Bar that related to the issues raised by the Complaint, e.g.., the orders, motions, or other documents relating to the order of contempt that is the subject matter of the complaint against Mr. Gersten. On February 20, 1996, The Florida Bar objected to each and every request, and produced absolutely no documents whatsoever.

The Florida Bar's objections to production of these documents were that: (1) Mr. Gersten already had a copy and therefore the request constituted harassment; or (2) the requests were vague,

overbroad, irrelevant and immaterial (sic), privileged, or protected by work product.

The Florida Bar's objections were insufficient as a matter of law and violated the provisions of the Florida Rules of Civil Procedure. All of the items requested were directly relevant to these proceedings: the order which was allegedly violated by Mr. Gersten and constituted the basis for the complaint, motions for relief which the complaint itself referenced, documents obtained from third parties as part of The Florida Bar's investigation of Mr. Gersten, which formed the basis of the complaint, the actual complaints against Mr. Gersten which formed the basis of the proceedings. By their very nature, and by their reference in the complaint, the documents were relevant.[4]

The Florida Bar's argument that Mr. Gersten was already in possession of the documents being sought and thus the request constituted harassment is flawed. Assuming, arguendo, that Mr. Gersten was actually in possession of the documents in question, The Florida Rules of Civil Procedure do not restrict discovery to documents not in the possession of the party making the request. First, The Florida Bar's argument assumes that The Florida Bar somehow is aware of the exact documents in the possession of Mr. Gersten, and that, this would preclude Mr. Gersten from verification that the documents in the possession of The Florida Bar are the same documents.

Further, The Florida Bar dismisses the fact that Mr. Gersten has lived in Australia for a number of years and does not have possession of the documents which The Florida Bar assumes he does. Additionally, The Florida Bar throughout these proceedings made references to undersigned counsel being present when things took place in Mr. Gersten's cases. In fact, undersigned counsel

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[4] The assertion of immateriality is not addressed, as under Florida law materiality is incorporated into the definition of relevancy. Thus, the double assertion is redundant.

was not present and did not represent Mr. Gersten when the Order of Contempt was entered.

Finally, the argument that the documents sought are privileged and constitute work product is also facially implausible. Since the request is directed to documents "obtained," the documents are not those made by The Florida Bar, and thus are not work product, and are not subject to privilege. By virtue of the documents having been revealed to The Florida Bar, a third party, the documents have lost all possible privilege.

Additionally, The Florida Bar did not provide a listing of the specific documents and a description of the privilege being claimed for each document.

By the motion seeking protection from production, The Florida Bar expressly admitted the existence of the documents sought. Nevertheless, after Mr. Gersten moved to compel production, The Florida Bar, on February 28, 1996, filed a response to the motion to compel, for the first time, stating that some of the documents sought did not exist. Further, it argued that in order to obtain some of the documents, Mr. Gersten would have to make a public records request:

> Assuming arguendo that the request is relevant and that such files exists, this request would impermissibly include all pending confidential files, the confidential portions of pending files and the confidential portions of closed files.

The request made was for the complaint filed against Mr. Gersten , not for "files." Further, The Florida Bar produced neither complaints, nor non-confidential portions of any file.

Also on February 28, 1996, The Florida Bar filed an amended response to the request by raising additional, albeit, untimely, objections to the request. The new objections were that the items being sought were "confidential and not subject to disclosure."

2

PRODUCTION FROM THIRD PARTIES

Pursuant to Rule 1.350 of the Rules of Civil Procedure, Mr. Gersten sought production of documents from third parties and served the appropriate notice on The Florida Bar. Not content with blocking Mr. Gersten from discovering any of the documents necessary to his defense, The Florida Bar filed objections to the notice of production from third parties to prevent Mr. Gersten from obtaining the documents.

Mr. Gersten sought to obtain documents in the possession of the Dade County State Attorney's Office in the case giving rise to the complaint, and all documents obtained by The Florida Bar from the Dade County State Attorney's Office, The Florida Bar objected to such production and no production was had.

3

DEPOSITION OF WITNESSES

Pursuant to Florida Rules of Civil Procedure and in an effort to investigate the claims made by The Florida Bar, Mr. Gersten served upon The Florida Bar a Notice of Taking Deposition Duces Tecum of 16 witnesses. Not only had The Florida Bar prevented Mr. Gersten from obtaining discovery directly from The Florida Bar, and prevented Mr. Gersten from obtaining documents from third parties, but The Florida Bar filed its Motion for Protective Order to prevent Mr. Gersten from obtaining the testimony of other witnesses.

The motion stated the basis for The Florida Bar's motion for protective order:

> Upon information and belief, none of the proposed deponents have

> factual information or evidence that are relevant to the subject matter or would arguably lead to admissible evidence relevant to the subject matter of the litigation, (R. 20)

The Florida Bar argued that the witnesses who were State Attorneys, Judges, Dade County attorneys and employees of The Miami Herald, and others which The Florida Bar admitted "[we]re not known to [the] undersigned" Bar Counsel, had no relevant testimony. (R. 20) However, many of these individuals were the same witnesses The Florida Bar Committee had agreed to subpoena in the 1994 proceeding. One of the witnesses sought to be deposed by Mr. Gersten was the witness called by The Florida Bar, itself, to testify against Mr. Gersten in the 1994 proceeding.

These witnesses either participated in the proceedings leading up to the Order of Contempt, which forms the basis of the complaint, and/or were witnesses to Mr. Gersten 's conduct after the Order of Contempt had been entered, that is, Mr. Gersten 's open refusal based upon an assertion of right.

Further, it is unclear how The Florida Bar is able to assert that all persons given notice to be deposed have no relevant or admissible evidence, as The Florida Bar admits that several of the persons listed are not even known to The Florida Bar.

South Florida Blood Service. Inc. v. Rasmussen ,467 So. 2d 798 (Fla. 3d DCA 1985), the sole case upon which The Florida Bar based its motion, actually supports Mr. Gersten 's attempts to compel production:

> Florida Rule of Civil Procedure 1.280 allows for discovery of any matter not privileged that is relevant to the subject matter of the action.

South Florida Blood Service, Inc. v. Rasmussen ,467 So. 2d at 801,

The proposition for which The Florida Bar cites the case is inapplicable herein. In South Florida Blood Service. Inc. v. Rassmussen , 467 So. 2d at 798, the court balanced the privacy interest of blood donors against the right of discovery of the names and addresses of blood donors, for purposes of proving aggravation of an automobile victim's injuries by reason of contracting AIDS from the donated blood. In holding that the interests of the blood donors outweighed the discovery rights of the litigant, the court held that for purposes of assessing the discovery request of the names of the blood donors, one or more of whom was suspected of transmitting AIDS to the victim, the zone of privacy enjoyed by blood donors under the State and Federal Constitutions encompassed interests of avoiding disclosure of personal matters concerning sexual practices, drug use, and medical histories, considering as well the social ostracism associated with AIDS, and that such privacy interests, combined with the public interest in the free flow of donated blood, essential to maintaining voluntary blood donor systems, outweighed the interest of discovering the names and addresses of the donors.

In the instant case, The Florida Bar was not seeking to protect anyone's identity. Rather, The Florida Bar sought to prevent Mr. Gersten from obtaining the testimony of persons whose identities are known, and whose factual testimony is essential to Mr. Gersten 's defense.

Finally, unless The Florida Bar was representing the individual deponents, it had no standing or authority to seek such a protective order. The Florida Bar could have, but did not, seek an order in limine to prevent the admission of certain testimony. By seeking a blanket protective order for individuals it did not represent, The Florida Bar deprived Mr. Gersten of the ability to investigate the charges it brought against him.

The Referee denied Mr. Gersten's request to issue subpoenas unless Mr. Gersten would provide the Referee with a proffer regarding the substance of each person's testimony

Further, the referee even denied Mr. Gersten the ability to depose the Complainant:

> 1 am going to find for the Florida Bar. I find that this action is akin to a criminal action. It is not a criminal action. However, it is akin to it, and that the defense should not be able to take -- As long as the allegations are all based on public record, there is no right to take depositions of any member of the Florida Bar.

(Transcript of May 20, 1996, p. 41).

4

INTERROGATORIES

On January 23, 1996, interrogatories pursuant to Rule 1.340 of the Florida Rules of Civil Procedure were served upon The Florida Bar. Mr. Gersten filed a motion to compel answers to the interrogatories, no response to the interrogatories having been received as of March 4, 1996.

On March 5, 1996, The Florida Bar filed its untimely answers to the interrogatories, objecting to nine of the eleven interrogatories.

On March 11, 1996, The Florida Bar filed a response to the motion to compel, in which it argued that the motion to compel was moot:

> The Florida Bar requests that the Respondent's Motion to Compel be denied since The Bar's Answers to Interrogatories have been served on Respondent, since [sic] the issue is moot.

Putting aside the Bar's lack of candor with the court by failing to tell the Court that it was objecting to the majority of the interrogatories, its argument that the motion to compel should be denied is unsound.

A motion to compel is the proper vehicle by which one party can require another party to provide discovery which has been improperly, e.g., untimely, objected to.

> In the case before us, American Funding did not respond to the request for production and Hutto moved to compel production. The trial court chose not to impose the sanctions authorized by Rule 1.380(d) but granted Hutto's motion to compel since no timely objections to the request for production had been made In the instant case, we cannot hold that the trial court abused its discretion by granting Hutto's motion to compel after American Funding failed to respond to Hutto's request for production within the time limits imposed by Rule I .350(b).

American Funding, Limited v. Hill, 402 So. 2d 1369 (Fla. 1st DCA 198 1).

B

FAILURE TO PROVIDE TIMELY NOTICE

The transcript is rife with instances, at each and every hearing, when Mr. Gersten was advised by the Referee and/or The Florida Bar that certain issues would be discussed, or that a status hearing would be conducted, only to learn when next before the Referee, that his attorney was required to argue motions not scheduled.

> Your Honor, again, I was not aware that we would be considering any of the motions other than scheduling them, so I didn't bring my case law, my rules or anything else to argue the motion. I don't believe Mr. Hendrix is prepared to argue the motion either, We are kind of at a loss, What I was told is that this was going to be a status conference to schedule the motions, so I am not really prepared to proceed on any of the motions.

(Transcript of May 20, 1996, p. 8)

Further, time and again, counsel for Mr. Gersten complained to the Referee about The Florida Bar's last-minute faxing of motions, documents, case law, or, indeed, handing them to counsel as

she walked into the courtroom without notice and an ability to prepare.

> The Florida Bar had not filed their responses to some of these motions that are supposed to be heard today, and they didn't file those answers until the 10th in the afternoon. Additionally, yesterday afternoon, after I was already up here in Tallahassee -- on the way here -- they have filed additional responses and motions that I obtained by fax this morning here. Because of the shortness of time, I'm not prepared to respond to their motions. I have not had an opportunity to look at the case law. This hearing was set with two days' notice.

(Transcript of July 12, 1996, p. 3-5).

V

THE REFEREE COMMITTED ERROR BY DENYING MR. GERSTEN'S VERIFIED MOTION TO DISQUALIFY BILLY J. HENDRIX

On March 12, 1996, Mr. Gersten filed a Verified Motion to Disqualify Billy J. Hendrix as Attorney for Complainant. The basis for the motion was Rule 4-3.7 of the Rules Regulating The Florida Bar which prohibits the appearance of an attorney in litigation as both witness and attorney.

The interrogatories propounded by Mr. Gersten were answered and executed by Billy J. Hendrix, on behalf of The Florida Bar. Florida Rule of Civil Procedure 1.340 provides that interrogatories must be answered either "(1) by the party to whom the interrogatories are directed, or (2) if that party is a public or private corporation or partnership or association or governmental agency, by any officer or agent, who shall furnish the information available to that party."

By application of the Rule, Mr. Hendrix's answers under oath, make Mr. Hendrix, who is not a party, either an officer or an agent of the party. Florida Rule of Civil Procedure 1.340 further provides for the use of the answers to the interrogatories for purposes of impeaching the party, if

such answers are admissible under the rules of evidence. Since it was Mr. Hendrix who under oath answered as an agent for the party, made himself available to testify.

Thus, Rule 4-3.7 required the disqualification of Mr. Hendrix. Since The Florida Bar has a number of attorneys available in its Miami office, no prejudice was shown,

VI.

THE REFEREE ERRED AS A MATTER OF LAW
WHEN HE DENIED THE VERIFIED SUGGESTION OF
DISQUALIFICATION AS LEGALLY INSUFFICIENT

The Referee denied Petitioner's "Verified Suggestion of Disqualification of the Hon. Barry E. Goldstein " by Order dated May 20, 1996, finding that it was legally insufficient,

On March 25, 1996, a status hearing was conducted by the Honorable Barry E. Goldstein, the Referee appointed by The Florida Supreme Court, to preside over this matter.

At that hearing, the Referee made remarks that suggested his necessary recusal from this matter, based on bias against the Respondent and/or in favor of the Complainant, The Florida Bar. On or about April 24, 1996, the Petitioner filed a Verified Suggestion of Disqualification of the Honorable Barry E. Goldstein .

For the hearing on May 20, 1996, undersigned counsel and The Florida Bar's counsel received notice to appear for a status conference. Instead, undersigned was required to argue motions for which she was not prepared.

Further, during that hearing, the Referee made additional comments that supported the Respondent's belief that he would not obtain a fair and impartial hearing before this referee.

On July 11, 1996, Respondent filed a Motion for Review of Order and/or Order of

Disqualification of the Referee with this Court, seeking an interlocutory review of the denial of this motion. On July 12, 1996 this Court issued an order denying the Motion, but allowing Petitioner to renew said Motion at the conclusion of the proceedings. Petitioner renews his Motion,

VII.

THE REFEREE'S RECOMMENDATION REGARDING SANCTIONS IS ERRONEOUS AS A MATTER OF LAW

The Referee made the following recommendation for sanctions:

> [A]s a sanction for failing to follow the Court order, he should be suspended for one year after he complies with the Court order. So in effect, the period of suspension will be controlled by him.

However, the Referee also provided:

> I am going to recommend to the Supreme Court that the appropriate discipline is that Mr. Gersten be suspended from the practice of law until he complies with the Court order and as an appropriate sanction -- no, that is not, in effect, a sanction, That is just a requirement to comply, with the Court order.

Thus, the Referee's recommendation is simply another Order to compel Mr. Gersten, and not a sanction for any wrongdoing. Further, the indefinite nature of the recommendation violates the provisions of the Rules governing the Florida Bar, since the suspension recommended could exceed the time allowable for suspension pursuant to the Rules.

Further, the order which forms the basis for The Florida Bar complaint against Mr. Gersten is a civil order of contempt. In The Florida Bar v. Taylor, 648 So.2d 709 (Fla. 1995), the Florida Bar sought review of disciplinary proceedings involving an attorney who had been held in civil contempt, The Referee had recommended that no disciplinary action be taken. The Florida Bar argued that the

Referee's legal conclusions were erroneous because the respondent was held in contempt of court, which the Bar contended was distinct from civil matters not subject to discipline

In approving the Referee's recommendation that no sanction be entered, this Court explained:

> Notably, this Court will not hesitate to discipline attorneys, under Rule Regulating The Florida Bar 4-8.4 (obstruction of justice) who are held in criminal contempt of court or who have clearly committed a dishonest or fraudulent act. . . , What distinguishes these cases from the instant case, however, is that the contempt at issue in all but Langston was criminal contempt, while the contempt at issue in the present case is civil contempt . . although there was no direct finding of criminal contempt in Langston, there was a specific finding of fraudulent and dishonest conduct,

The Florida Bar v. Taylor, 648 So.2d at 710-711 (Fla. 1995)

By seeking punishment for Mr. Gersten for a violation grounded on a civil contempt order, The Florida Bar fails to recognize that while "criminal contempt involves conduct that is calculated to embarass, hinder, or obstruct the administration of justice and is used to vindicate the authority of a court and to punish the offending participant," civil contempt is not punitive in nature and "is used to coerce an offending party into complying with a court order rather than punish the offending party for a failure to comply with a court order." Florida Bar v. Taylor, 648 So.2d at 710, fn2.

There was no criminal contempt in Mr. Gersten's case. The Referee made no finding of fraudulent or dishonest conduct. Accordingly, as in Taylor, this Court must "find that our present disciplinary rules do not grant us the authority to discipline an attorney for the failure to meet a civil obligation . absent a finding of fraudulent or dishonest conduct." Florida Bar v. Taylor, 648 So.2d at 711

CONCLUSION

The Florida Bar sought to prevent Respondent from presenting his defenses to The Florida Bar's Complaint. There is no basis in law or fact, and no procedure under the Constitution of the State of Florida, the United States Constitution, the Florida Rules of Civil Procedure, the Florida Rules of Criminal Procedure, the Florida Rules of Juvenile Procedure, the Florida Rules of Judicial Administration, the Florida Rules of Appellate Procedure, the Florida Supreme Court Manual of Internal Operating Procedures, the Florida Code of Judicial Conduct, the Federal Rules of Procedure, the Rules regulating The Florida Bar, or any other rule, regulation, statute, or case law allowing such procedure.

The Florida Bar sought to have Respondent summarily disbarred without the opportunity to be tried for the alleged violations and without having an opportunity to present his defenses to The Florida Bar's Complaint. There is no basis in law or fact, and no procedure under the Constitution of the State of Florida, the United States Constitution, the Florida Rules of Civil Procedure, the Florida Rules of Criminal Procedure, the Florida Rules of Juvenile Procedure, the Florida Rules of Judicial Administration, the Florida Rules of Appellate Procedure, the Florida Supreme Court Manual of Internal Operating Procedures, the Florida Code of Judicial Conduct, the Federal Rules of Procedure, the Rules regulating The Florida Bar, or any other rule, regulation, statute, or case law allowing such procedure.

Further, the procedures imposed upon Respondent in this matter are contrary to the protections afforded Respondent by the constitution of the State of Florida, the United States Constitution, due process requirements of statute, case law, and, even, The Florida Bar's own rules,

regulations, and procedures.

Not only has The Florida Bar taken the position that it is above the requirements of the Florida Rules of Civil Procedure, the Florida Rules of Evidence, and even its own regulations, but it even takes the position that Mr. Gersten is exempt from every constitutional protection granted every other citizen of these United States and the State of Florida. The Florida Bar would take away Respondent's livelihood without even the barest compliance with constitutional protections, including due process and the most basic rights afforded all citizens, -- access to the courts and the right to present defenses on one's own behalf

Respectfully submitted,

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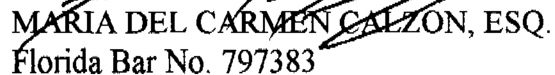

BY: ______________________
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 23rd day of March, 1997, to:

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