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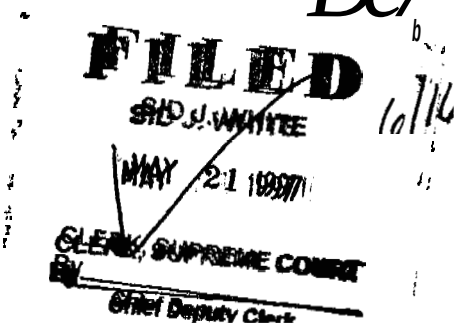

IN THE SUPREME COURT OF FLORIDA

CASE NO. 89,879

JULIETA ARTHUR,
APPELLANT

v.

FLORIDA BAR BOARD OF GOVERNORS,
APPELLEE.

ON APPEAL PURSUANT TO ART. V, SEC. 15, FL. CONST.
& 1-4.2(C), RULES REGULATING THE FLORIDA BAR

BRIEF FOR APPELLANT

Julieta Arthur, Esquire
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QUESTION PRESENTED

1. Can the Board of Governors deny a petition for placement on the active members list due to non-compliance with a referee's order for compulsory mental examination entered in a disciplinary proceeding under Florida Bar rule 3.7-13 when:

   A The attorney was the subject of a sham Baker Act 3-years and 7-months preceding placement on the inactive list and 2-years preceding active disciplinary proceeding.

   B The Bar staged a *sham* brawl and lied about Appellant's conduct during a non-videotaped grievance hearing (in its attempt to defeat the 2-years rehabilitation period)

   C. Both the Bar, the referee, and the Clerk of the Supreme Court had knowledge that Appellant discharged and continued to discharge, satisfactorily, her legal duties and responsibilities at the trial, appellate, and supreme court level

   D. The Clerk of the Supreme Court ruled that as of May 1996, (2-years and 10-months *after* the sham hospitalization) the Bar had not proven Appellant was incapable of discharging her legal duties and responsibilities

   E. Appellant was allowed to renew her active membership for 1996-97 membership year

   F. The discovery order compels Appellant to undergo a broad mental examination with a Bar psychologist/psychiatrist who will corroborate the Bar's allegation that Appellant does not possess the "mental capacity to practice law" wherein only the Board of Bar Examiners test "mental capacity to practice law" and Appellant has *not* been told, before her admission to the Bar, what constitute "mental capacity to practice law."

IN THE SUPREME COURT OF FLORIDA

JULIETA ARTHUR,
Appellant

CASE NO. 89,879

v.

FLORIDA BOARD OF GOVERNORS,
Appellee.

REQUEST FOR JUDICIAL NOTICE

Appellant hereby files this request for judicial notice of Supreme Court Case No. 86,007 (Florida Bar file No, 95-70,829 (11)), the disciplinary proceeding that is the subject of the referee's order.

Appellant petition to unseal the disciplinary file (order entered November 21, 1996) to facilitate review of this appeal.

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STATEMENT OF THE CASE

This appeal ensues from a disciplinary proceeding commenced under Florida Bar Rule 3-7.13; the placement of Appellant on the inactive members list on November 7, 1996, as sanction for discovery; and rejection of Appellant's petition for reinstatement by the Board of Governors due to non-compliance with a referee's order for discovery of mental examination[1] Appellant alleged various errors against both the referee's order and the Clerk's order adopting the referee's recommendation that Appellant be placed on the inactive list.

On January 31,1995 the Florida Bar o p e d a disciplinary file *against* Appellant under Rule 3-7.13 of the Rules of Discipline. Respondent answered the complaint by averring, among other things, that no proof that she is "incapable" of practicing law, as evidence by the cases she has handled exist and invited the Bar to review her cases (which are public) to confirm the untruthfulness of its allegation. On April 7, 1995, the Bar requested Appellant to voluntarily submit to a non-specified evaluation by the Florida Lawyers Assistant Program. When Appellant refused, the Bar, in a letter dated April 13,1995, stated the proceeding will be based on her (Appellant's) refusal to present herself for evaluation.

At *Appellant's* insistence, a grievance hearing was held on May 3,1995, and was attended to by Appellant and a judge (in violation of the judicial code of conduct) who was at the time, presiding over one of Appellant's *case.* Thereafter, on July 3,1995, the Bar tiled a petition with the Supreme Court for placement of Appellant on the inactive list. The petition alleged that in April of 1993, one "Honorable" Judge Newman entered an ex-parte Baker-Act order (on an

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1 The rejection letter was not issued by the Board of Governors. Rather, a letter was sent from opposing counsel who presented the petition to the Board and argued against reinstatement. Appellant was told she could not attend the Board's meeting nor obtain a copy of the minutes of the Board.

unverified petition) and describes alleged conduct by Appellant during the non-videotaped grievance hearing which the committee concluded was similar in nature to the behavior justifying the hospitalization in 1993. Appellant answered the petition asserting in part, the hospitalization was a sham, her conduct at the hearing was not as the committee described; that no proof had been established under the proper definitional requirement of the rule: inability to understand, evaluate, appraise, respond to, perform, meet some essential requirement, manage and carry on with reasonable discretion, a particular task required in some legal matter.

A series of referees (and Bar counsel) were appointed to hear the matter including Judge Schwartz, Gerstein, and Tobin. The Bar was represented by attorney Needleman, Chavies, Hendrix, Boggs, and Berry. Appellant represented and continues to represent herself in these proceedings.

The Clerk rejected the report of referee #3 and advised him Appellant could still be placed on the inactive list for non-compliance with an order for mental examination. Contained in the record was a motion for mental examination in which the Bar alleged Appellant's "mental capacity to practice law" was at issue. The Bar cited *case* law construing the dependency statute as basis for not complying with rule 1.360 of the Rules of Civil Procedure. Appellant Written response to this motion recites the Bar's failure to show how Appellant is incapable of discharging her legal duties; the Bar's failure to state the connection between Appellant's alleged incapability to practice law and her alleged mental *status;* non-compliance with the requirements of rule 1.360 of the Florida Rules of Civil Procedure; appropriateness of a psychologist to test *case* knowledge, legal skills and ability; non-testing of "mental capacity to practice law" by a psychologist/psychiatrist during admission to the Bar.

The referee's order for mental examination was entered on May 28, 1996 (and thereafter amended on June 30) Without a hearing and without complying with Rule 1.360 of Florida Rules of Civil Procedure. When Appellant did not comply with the unlawful order, the Bar filed a motion requesting the referee's immediate recommendation for placement on the inactive list or in

the alternative an order to show cause. Appellant *answered* the Bar's motion and argued (1) she had verbally, and in writing, asked for the recusal of the referee,, (2) no mental standard for attorneys is tested on bar exams, (3) availability of adequate protective measures to the public, which does not entail the unconstitutional invasion of Appellant's right to privacy, and (4) no showing by the Bar that *Appellant* had ineffective legal skills attributed to mental incapacity. In addition, Appellant argued for dismissal of the *case* and the referee's report due to constitutional violations.

Before receiving Appellant's answer *to* the Bar's motion, the referee (without a hearing to show cause) entered an order recommending that Appellant be placed on the inactive list. Thereafter, the Clerk approved the referee's recommendation. Appellant then filed a motion for rehearing/relief from the unlawful order, arguing : (1) the trial , appellate, and supreme court is familiar with Appellant's work product, (2) no connection between Appellant's mental health and her ability to perform was shown (3) Appellant's mental health is not "in controversy" (4) the Bar does not test " mental capacity to practice law" on bar examinations, *(5)* there was no compliance with constitutional requirements (6) it was a violation of due process to require Appellant to comply with and to enforce an unlawful order, (7) that Appellant will continue to practice in her chosen profession, which right is constitutionally protected.

The Clerk denied Appellant's motion for rehearing without explanation, and wrote Appellant was enjoined from *the* practice *of law* in Florida until she complies with the referee's order for mental examination. Thereafter, by motion from the Bar, the Clerk amended its order to make public the fact that Appellant was placed on the inactive list, and to keep confidential the reason and other portions of the file. In her response to the Bar's motion, Appellant inquired the number of signature required by the administrative section of the court to enter disciplinary rulings.

On January 3,1997 Appellant filed with the Board of Governors a petition to have her name reinstated on the active members list. Appellant argued for adherence by the Board to its

fiduciary duty of fair dealing; non-contravention of the law and the parties's contract: adherence to the constitution, the rules of civil procedure, rules proscribing bad faith litigation; failure to make showing—by clear and convincing proof—that Appellant is impeded from discharging her legal duties.

STATEMENT OF THE FACTS

Appellant is a 1991 graduate of the Ohio State University College of Law centennial class and was admitted to practice law in Florida on April 30, 1992. Since January 1994, the Florida Bar has impeded Appellant, a sole practitioner and single parent of two, from obtaining employment in a private firm by subjecting her to a series of protracted and meritless disciplinary proceedings[2] all of them which were dropped upon disposition of the latest disciplinary action. Even when Appellant began handling (pro-se) state-action matters, the Bar called, as a witness, a sitting judge who was then presiding in a matter being handled by Appellant. The committee's objective was to give the judge a copy of Appellant's sham mental health records and influence the judge decision on the case that was before him, in addition the appearance provided the judge with a forum for retaliating *against* Appellant since Appellant had filed a complaint against the judge. *Also,* bar counsel distributed a copy of the referee's report to an opposing attorney who was litigating a *case against* Appellant. During the course of *these* proceedings Appellant and her family have endured (and continue to endure) great financial hardship, had to forego and was denied employment, lost a great deal of income, benefits and improved lifestyle, impaired her credit, and *damaged* her professional reputation. The conduct of the Bar is malicious in that these proceedings were brought and litigated in bad faith.

In the matter under review, the grievance committee had little interest in reviewing Appellant's cases, though Appellant had lugged all her files with her to the hearing, and referred *to* them. No inspection of the files nor inquiry into Appellant's performance was conducted by *the* committee.[3] Just before the grievance hearing on May 3, 1995, Bar counsel staged a

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2 Because the rules require Appellant to notify potential employers of Bar investigations, *the* aftermath is the creation of a "lock-out."

3 The issues litigated in these *cases* include: Florida no fault divorce law, the putative wife, and alimony pendente lite; limitations on the applicability of shared parenting to un-wed parents; and a writing competition and an article on the bringing affordable legal services to the middle

confrontation with Appellant,.[4] so he could subsequently make comments on Appellant's conduct at the hearing. Also, the committee chairperson filed a false affidavit narrating the alleged substance of the non-videotaped hearing.

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class in the 21st century. At the grievance hearing Bar counsel argued that Appellant pro-bono and pro-se cases did not count. However, Appellant disagrees with this argument for the Bar can (and does) investigate and discipline lawyers for private misconduct.

4 The Bar had agreed to pay Appellant's cab fate to and from their office to attend the grievance hearing. When the driver, a timid Haitian male, requested payment of the fare, Bill Hendrix verbally attacked the driver, accusing him of charging too much. Mr. Hendrix got on the phone and called a company to inquire the distance to Appellant pick up point, asked the driver for his boss name and number and called the company, and just plainly harassed and belittled the driver. The other 12 members of the committee were sitting in an adjacent room with the doors open. Appellant objected to the treatment of the driver by Mr. Hendrix which at the time appeared to be a racial attack and Appellant suggested Mr. Hendrix could verify the charge by checking the meter, which was not running while the driver answered Mr. Hendrix questions and then waited patiently for him to get-off the phone.

SUMMARY OF ARGUMENT

The Florida Board of Governors erred in denying Appellant's petition for placement on the active members list for failure to comply with a referee's order for compulsory mental examination entered in a disciplinary proceeding under Bar rule 3-7.13. The order is inherently and as applied, in violation of Appellant's constitutional rights and *the* rules regulating the Florida Bar.

There was no basis for initiating and continuing a rule 3-7.13 disciplinary action, other than to impermissibly use the rule as a procedural weapon. The bar had given Appellant notice, before the grievance hearing was held, that it was going to request placement of Appellant on the inactive list for contempt, instead. The Bar had knowledge that Appellant was satisfactorily discharging her legal duties and responsibilities up until the time the Clerk of the Supreme Court determined the Bar had not proven Appellant was incapable of practicing law , which was past the two-years rehabilitation period. The disciplinary petition itself did not state a *cause* of action-acts, error, omission--demonstrating incapability to practice law, which is the reason why the Bar made *false* allegations about Appellant's conduct during the grievance hearing..

Even assuming arguendo the Bar could continue with the disciplinary action (in spite of *the* expiration of the rehabilitation period and the false allegation *concocted),* Appellant had just cause for not complying witb the referee's order because the order did not adhere to established constitutional requirements and rules regulating the Florida Bar (which must be adhered to by attorneys, lawyers on the grievance committee and those acting as referees, and judges). The rules do not list as a condition for continuing active membership, the taking of compulsory mental examination. And because Appellant was incorrectly taken-off the list, it would be unjust to invoke bar rule 1-3.2(b). Moreover, rule 1-3.2 is unconstitutional in implying it is an automatic grant of authority for ordering compulsory mental examinatian. Even *in* occupations where compulsory examination is properly authorized, it is *still* subject to constitutional limitations.

The referee's order was not in compliance with the constitution and with procedural requirements. *Also*, the Board of Bar Examiners does not test "mental capacity to practice law"(?) or if it does, it is adequately tested by the written competency examination that is exclusively administered by the Board and not a psychologist/psychiatrist. Thus, the Board should not have enforced the referee's order and reject Appellant's petition for reinstatement on the active members list. The *court* cannot punish non-compliance with orders lacking in precision and orders Appellant reasonably believes to be unlawful.

ARGUMENT

I. THE BOARD OF GOVERNORS ERRED IN DENYING APPELLANT'S PETITION FOR PLACEMENT ON THE ACTIVE MEMBERS LIST FOR FAILURE TO COMPLY WITH A REFEREE'S ORDER FOR COMPULSORY MENTAL EXAMINATION

The Florida Board of Governors is acting improper and *knows* that its action, in requiring Appellant (who was incorrectly taken-off the active members list) to comply with a referee's unlawful order for compulsory mental examination, is improper. The referee's order, inherently and as applied in this *case,* violates Appellant's constitutional rights and the rules regulating the Florida Bar. As the administrative body in charge with the responsibility of enforcing the rules of professional conduct, the Board must make *sure* that *all members* of the bar: bar counsel, lawyer members on the grievance committee and judges, comply with the terms and intent of the rules.[5]

A There was no just *cause* for bringing and continuing the disciplinary proceeding against Appellant.

First, it was more than two-years from the date of Appellant's sham hospitalization (July 13-16 1993) and the date (May 13, 1996) the Clerk of this court held the Bar had presented no evidence to support its petition. In addition, the Bar had clear and convincing evidence of rehabilitation. Appellant has always maintained, since the initial stage of the investigation, she is capable of discharging her legal duties and responsibilities. Since her admission to the Bar on April 30,1992, Appellant has satisfactorily discharged her legal duties and responsibilities in the trial, appellate, and supreme court and had provided the Bar with a list of the matters she had handled as early as during the investigatory *stage* of this proceeding. The list of matters handled

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5 "Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example." Justice Louis Dembitz Brandeis. *Olmstead v. United States*, 277 U.S. 438,485 (1928).

by Appellant and made aware to the Bar and this court, proves the Bar had early notice of evidence refuting its allegation. *Sarkady v. McGuire*, 113 So.2d 446 (Fla. 3 DCA 1959). Moreover, Appellant denied—in her answer to the petition—allegations of conduct exhibited during the grievance committee's non-videotaped hearing. This allegation was a mere attempt by the Bar to defeat the 2-years rehabilitation period.[6] Thus, the petition is a sham in that the Bar knew its allegation that Appellant was "incapable' of practicing law was untrue. *Pentecostal* Holiness Church. *Inc. v. Mauney*, 270 So.2d 762 (Fla. 4 DCA 1972).

Second, the petition itself is defective –for not stating a *cause* of action--in that it alleges, conclusively, without stating the facts—acts, errors, omission--committed by Appellant that renders her incapable of discharging her legal duties and responsibilities. Discovery cannot be used to cure a complaint that does not state a cause of action. Romans *v. Warm Mineral* Spring, Inc. 155 So.2d 163 (Fla. 2 DCA 1963).

In *summary*, because Appellant was satisfactorily discharging her legal duties and responsibilities within 2-years of the hospitalization (and continues to satisfactorily discharge said duties), the Bar should not have been advised nor should they have proceeded with the action and discovery. The referee should not have *entered* an order for production of cumulative evidence that requires an unnecessary invasion of Appellant's constitutional rights. The purpose of the rules can be subverted when they are invoked by opposing counsel as a procedural weapon,[7] which is the *case* here. The court should have stricken the petition for sham. The petition was a mere pretense set up in bad faith and without color of fact. *Sapienza v. Kasland*, *Inc.* 154 So.2d 204 (Fla. 3 DCA 1963). Thus, Appellant should not have been taken-off the active

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6 See *Hysler v. State*, 62 S.Ct. 688, 315 U.S 411,316 U.S.642, 86 L.Ed. 932 (1942) (If a state, by active conduct or the connivance of the prosecution obtains a conviction through the use of perjured testimony, it deprives the accused of due process).

7 4 (preamble) Rules Regulating The Florida Bar.

members list to begin with. The power to suspend an attorney should be exercised only in a clear case, for weighty reasons, and on clear proof. *Florida Bar v. Bass*, 106 So.2d 77 (Fla. 1958).

B. **Appellant had just *cause* for not complying with the discovery order for the order does not adhere to established constitutional requirements and rules of the Florida Bar.**

Neither Bar rule 3-7.13 nor the Bar's fee statement list as a condition for active membership, submission to compulsory mental examination. Appellant was automatically placed on the active members list upon passing her character investigation and competency examination. The competency examination is written, (exclusively) administered, and graded by the Board of Bar Examiners, not a psychologist nor psychiatrist. This examination adequately test (1) ability to analyze facts problem, (2) knowledge of fundamental principles of Florida *case* or statutory law of substantial importance, (3) knowledge of application of the law, and (4) abiity to reason logically. As stated earlier, the Clerk of this court held the Bar had presented no evidence of acts, errors, omission, attributed to mental illness (within the rehabilitation period, which has passed). It would be a violation of due process, the bar rules of ethics, and the supreme court rule barring subsequent disclosure,[8] to allow the Bar to file a merit less disciplinary action, not aver nor prove incapability during the rehabilitation period, to unjustly remove Appellant from the active members list and then invoke bar rule 1-3.2(b).[9]

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8 Art. 111 (B), sec. 3, Rules of the Supreme Court of Florida Relating to the Admission to the Bar (as amended thru March 14, 1996). Ifapplicable.

9 *See Ex-parte Messer*, 99 So. 330, 87 Fla. 92 (Fla. 1924) (The liberty of individuals protected by the state and federal constitution—herethe liberty to practice in one's profession of choice-- may not be interfered with under the *guise* of protecting the public by legislative action which is *arbitrary).*

Rule 1-3.2(b) itself is unconstitutional. This circuit has held that a zipper clause– a generalized management right clause giving an employer the right to make and apply rules and regulation for discipline -- is not, standing alone, an automatic grant of authority for compulsory examination. *City of Miami v. F.O.P Miami Lodge* 20,571 So.2d 1309 (Fla. 3 DCA 1989). The only occupations where courts have upheld compulsory testing as a condition of employment is employment involving the protection of the public safety (e.g. police officers, railroad employees, and custom agents). Police officers are *entrusted* with the lives of others. They carry guns and must make split-second decisions on matters of life and death. The same applies to railroad employees. Custom officers are entrusted with the duty of national security. Attorneys are not entrusted with the duty of ensuring the public *safety.* Attorneys deal with legal rights. Their adversarial role is clear indication they can only be concerned with the rights of those whom they represent as they cannot have divided loyalty.

Nevertheless, even when compulsory examination is properly authorized, it is still subject to the fourth amendment, due process, and privacy rights. *F.O.P. v. City of Miami*, 609 So.2d 31 (Fla. 1992). The bar rules also state that discovery of mental examination must comply with rule 1.360, Fla. R. Civ. P.[10] Moreover, administrative orders may not be inconsistent with the constitution. 2.220*(e)*, *Florida Rule of Judicial Administration*, *Wells v. State of Florida*, 654 So.2d 145,146 (Fla. 3 DCA 1995). Florida bar rules requires attorneys, lawyer members on the grievance committee and on the board of governors, referees that are judges, and judges to adhere to the constitution (state and federal).[11]

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10 Bar counsel mistakenly presented the referee with *case* law construing the dependency statute as basis for not complying with rule 1.360.

11 *All* members of the Bar shall comply with the terms and the intent of the rules of Professional Conduct. Bar rule 1-10.1. Violation of attorney oath to support the United States and Florida constitution is ground for disciplinary action. Florida Bar rule 3-4.7. The Board of Governors is charged with the responsibility of enforcing the rules of professional conduct and the rules of discipline. Florida Bar rule. 1-8.1.

Appellant continued to object that the referee's order was not in conformance with the rules of civil procedure and the constitution. *The* referee's order delegates to a psychologist selected by the Bar (not the Board of Bar Examiners), the authority to conduct broad mental testing and to come up with, post-hoc, a mental standard to practice law.[12] Evidentiary facts on Appellant's legal performance are not matters peculiarly within Appellant's knowledge, discoverable only through the aid of scientific evidence (rather than the usual bar competency examination). Appellant attempted to get the Board of Bar Examiners to meet with her to explain how they test, if they test at all, "mental capacity to practice law." Appellant has written to the Board on three occasions. And although the rules provides for meeting with the Board to discuss the policies and procedures of the exam and Appellant had correctly cited to the rule, the Board has chosen to ignore Appellant's request, which leads Appellant to conclude the Board does not test "mental capacity to practice law," aside from the criteria listed above, which were approved in advanced by this court.[13]

In summary, the referee's order does not comply with the requirements of the law. Sanctions cannot be imposed for request lacking in precision. *Garden-Aire Village Sea Haven, Inc. v. Decker*, 433 So.2d 676 (Fla. 4 DCA 1983). Courts have power to punish only violation of *lawful* orders. And a litigant cannot be punished for sincere belief in the invalidity of an order.

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12 Although the term mental capability to practice law was briefly referred to in a case cited by the Clerk, *Florida Bar v. Hughes*, 504 So.2d 751 (Fla. 1987), the opinion did not elaborate what qualities are expected and tested by the Board of Bar Examiners. Thus, the case cannot be used as precedent.

13 *See Williams v. United States*, 179 F.2d 644, *aff.* 71 S.Ct. 581, 341 U.S. 70, 95 L.Ed. 758 (Fla. 1950) (Due process requires that the law inform *in advance*, by a reasonable ascertainable standard what the offense shall be).

CONCLUSION

For all the foregoing reasons, Appellant request this court to order the Board of Governors to cease and desist from requiting submission to compulsory mental examination and to direct the Board to reinstate her name on the active members list. To order retroactive fees and costs for expenses incurred in defending these proceedings, including appellate fees; for retroactive restoration of all bar benefits and lost wages.

If the action required from the Board is not forthcoming Appellant request lifting of the court's injunction and pursuant to *Art.* 1, Sec. 6, Florida Constitution, an order against non-interference with Appellant's right to conduct a lawful business or engage in a lawful occupation on account of non-membership in the Florida Bar,

SERVICE OF PROCESS

I HEREBY CERTIFY that copy af the foregoing document was provided to The Florida Board of Governors, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300.

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May 6, 1997.