UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,	)	
	)	
Plaintiff.	)	
	)	
v.	)	Civil Action No. 78-322
	)	(Consolidated with
WILLIAM H. WEBSTER, Director, Federal Bureau of Investigation, et al.,	)	Civil Action No. 78-420)
	)	(Judge Smith)
	)	
Defendants.	)	

MEMORANDUM OF JAMES H. LESAR IN OPPOSITION TO DEFENDANTS' REQUEST FOR ATTORNEYS' FEES UNDER RULE 37, FEDERAL RULES OF CIVIL PROCEDURE

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28 May 1985

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UNITED STATES DISTRICT COURT
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In a final judgment dated 31 January 1984, this Court dismissed these consolidated actions because of plaintiff's failure to respond to certain discovery requests. In addition, the plaintiff, Mr. Weisberg, was ordered to pay the Government's attorneys' fees totalling $684.50 for work expended on a motion to compel; the plaintiff and his counsel, Mr. Lesar, were also ordered to pay $1,053.55 in attorneys' fees in connection with the Government's motion to dismiss.

The court of appeals, while affirming dismissal of the case on the merits, vacated and remanded as to the two awards of attorneys' fees. Specifically, this Court was directed to examine (1) the sufficiency of the Government's documentation under the standards set forth in National Ass'n of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319 (D.C. Cir. 1982), and (2) the "proper division of responsibility between lawyer and client for the conduct which led to the award

of expenses, with findings by the District Court which apportion their liability." Weisberg v. Webster, 749 F.2d 864, 874-75 (D.C. Cir. 1984).

On remand, the Government has renewed its request for fees and has submitted new documentation to support its claim as to the two previous awards. In addition, it seeks to recover an additional $8215 in fees for the time spent by its counsel in the court of appeals, with liability to be divided evenly between Mr. Weisberg and Mr. Lesar. The Government has also suggested that the award of $1,053.55 previously entered by this Court against Messrs. Weisberg and Lesar should be evenly divided between them.

In his memorandum to this Court, Mr. Weisberg will discuss why the Government's documentation does not satisfy the Concerned Veterans standard and why no award of attorneys' fees should be allowed. He will also explain why an award of attorneys' fees for time spent in the court of appeals is improper in any event. Mr. Lesar will not repeat those arguments here, but will make two additional arguments regarding his own liability for fees. First, if this Court should decide to award fees for time spent by the Government in the court of appeals, Mr. Lesar cannot be held liable because, apart from the fact that he and Mr. Weisberg jointly prevailed on the first issue that was remanded for consideration, he also prevailed in the court of appeals on the only issue he briefed and argued by himself, i.e., the issue of allocating costs. Second, and more generally, if this Court should

decide to make any award of attorneys' fees to the Government, Mr. Weisberg should be solely liable, since it was his decision -- and his decision alone -- not to respond to the Government's discovery requests. In Mr. Weisberg's view, discovery from the plaintiff was improper in this case, and he was willing to risk dismissal in order to press this claim on appeal. Mr. Lesar did counsel his client to answer the discovery requests, but his client's adamant position prevented Mr. Lesar from providing any answers. Since Mr. Lesar was thus powerless to act, he cannot be held personally liable for sanctions under Rule 37, Fed. R. Civ. P.

STATEMENT OF FACTS

On 4 February 1983 this Court granted the Government's motion to compel answers to the discovery requests that it had directed to Mr. Weisberg about why he believed there had been an inadequate search for certain records covered under his Freedom of Information Act ("FOIA") request.

On 21 February 1983, Mr. Lesar travelled to Mr. Weisberg's home and spent 4-1/2 hours talking with him about the case and about how to answer the Government's discovery requests. Mr. Lesar was hopeful that Mr. Weisberg would be able to provide answers in as much detail as was feasible. Affidavit of James H. Lesar ("Lesar Aff.") ¶ 4. At that session Mr. Weisberg strongly objected to filing any answer because of his belief that discovery from a plaintiff was not proper in this case, as a matter of principle. Faced with this resistance, Mr. Lesar nonetheless tried to persuade

his client to give him substantive replies. Id., ¶ 6.

Upon his return to his office, Mr. Lesar moved for a two week extension of time until March 1983. His motion, dated 22 February 1983, explained that he had conferred with Mr. Weisberg at the latter's home in Frederick, Maryland and that he intended "to complete a draft of the response to defendants' discovery by the end of this week and send it to his client," but that "a second draft may be necessary."

While preparing a substantive reply for Mr. Weisberg's review, Mr. Lesar telephoned his client and learned that Mr. Weisberg had reflected further on the matter and did not want to file any response that could be construed as complying with the Government's request in an FOIA case of this nature. Id., ¶ 8. He had provided detailed affidavits about how his poor health prevented his conducting the extensive review of his records as requested by the Government. In addition, he believed his administrative appeal letters had already given the Government all the information it was seeking through discovery. Because Mr. Lesar's client was taking such a firm position and because only the client had the necessary knowledge to prepare substantive answers, Mr. Lesar was left in a bind. Faced with this dilemma, on 8 March 1983 he ended up filing specific objections to the Government's discovery requests, acting on the belief that it is better for a lawyer to file something rather than nothing on his client's behalf. Id., ¶ 8.

On 15 March 1983 the Government moved for an order com-

pelling discovery and an award of attorneys' fees and costs under Rule 37(a)(4) against both Messrs. Weisberg and Lesar. This Court heard arguments on 8 April 1983 and asked Mr. Lesar why he had not filed any answers after seeking a two week extension to do so. Transcript of 8 April 1983 hearing at p. 40. Mr. Lesar explained the conflict with his client as follows:

> I requested a two-week extension of time because I needed to consult with Mr. Weisberg and to prepare an affidavit with him. I had consulted with him already. I felt that we would be submitting a draft response. That was my intention, to submit a draft response.
>
> Now, as it ultimately turned out, we did not file any answers to interrogatories. Instead we objected to all of them. This gets into an area of some tension between myself and Mr. Weisberg over what tack we should take.
>
> Ultimately Mr. Weisberg decided flatly that we should take the position that as a matter of principle, discovery is unwarranted -- discovery by the government is unwarranted in a case of this nature.

Id. at 40-41. Four days after the hearing, on 12 April 1983, Lesar submitted a separate affidavit executed by Weisberg, attempting to explain why he believed an inadequate search had been conducted by the Bureau.

By order dated 13 April 1983, this Court again ordered Weisberg to file responses to the Government's discovery requests within 30 days: the FBI was also allowed to submit an application for its expenses, including the attorneys' fees it had incurred in obtaining this order. Although the Government's motion to compel has sought expenses from both Messrs. Weisberg and Lesar, its fee application and draft order, filed

25 April 1983, changed position and requested an award of fees solely against Mr. Weisberg, not Mr. Lesar. This Court signed that proposed order on 28 April 1983, and it held Mr. Weisberg solely liable for $684.50. Thus, as to that amount, only Mr. Weisberg can be liable.

Throughout this entire period, Mr. Lesar was in an awkward and very vulnerable position. His client was the only person who could provide substantive responses to the Government's discovery requests, yet his client had instructed him not to answer them. Lesar Aff. ¶ 11. When he was telephoned by opposing counsel on 12 May 1983 (one day before responses were due), he explained that he would not be filing any response because of his client's firm position. Id., ¶ 12.

On 18 May 1983, the Government moved to dismiss these cases pursuant to Rule 37(b)(2)(C). Expenses and attorneys' fees incurred in filing the motion were also sought from both Messrs. Weisberg and Lesar pursuant to Rule 37(b). Mr. Lesar filed an opposition, and on 9 November 1983 the Court heard arguments from counsel on this and other pending motions. There was no discussion either orally or in the Government's papers about why expenses should be charged to Messrs. Weisberg and Lesar collectively. The only explanation as to why nothing had been filed came when Mr. Lesar told the Court that "Mr. Weisberg has taken an absolute position that discovery is not warranted on the search issue in a FOIA case and certainly in the circumstances presented here where there was no showing of need at all" (9 November 1983 tr. at 26).

The Court granted the Government's motion and dismissed the case in an order dated 18 November 1983. That order directed the Government to submit its fee application within ten days.

The Government's fee application, filed 2 December 1983, sought fees against both Messrs. Weinberg and Lesar, and on 21 December 1983 this Court signed an order holding them jointly liable for $1,053.55. A final judgment, as amended, was entered on 31 January 1984.

ARGUMENT

MR. LESAR IS NOT LIABLE FOR ANY ATTORNEYS' FEES OR COSTS, GIVEN HIS CLIENT'S DECISION TO OPPOSE DISCOVERY.

A. Mr. Lesar Is Not Liable for Attorneys' Fees on Appeal.

At the outset, and independently of the arguments made in Mr. Weisberg's memorandum on this point, a brief comment is necessary on the Government's request for attorneys' fees from Mr. Lesar for the appeal. Messrs. Weisberg and Lesar were represented by separate counsel in the court of appeals. Although Mr. Lesar joined Mr. Weisberg's argument for reversal on the dismissal issue and on the inadequacy of the Government's fee documentation, the only issue argued in Mr. Lesar's brief was that he should not be liable for any award of costs, or, alternatively, that the case should be remanded because there had been no explanation as to why he should be personally liable. The court of appeals granted his alternative request for relief and remanded the case. Thus, Mr. Lesar won on the only issue he briefed in the court of appeals, apart

from the Concerned Veterans issue jointly raised in Mr. Weisberg's brief. Under the circumstances, it is difficult, if not impossible to see how he an be held liable for any appellate costs under Rule 37, Fed. R. Civ. P. Cases which award appellate costs for defending a sanctions order require the appellee, at a minimum, to defend the judgment successfully in the court of appeals. See, e.g., Tamari v. Bache & Co. (Lebanon) S.A.L., 729 F.2d 469, 475 (7th Cir. 1984). Whatever this Court may decide about Mr. Weisberg's liability, if any, for costs on appeal, Mr. Lesar cannot be held accountable for such costs when his legal argument was not only "substantially justified" within the meaning of Rule 37, but was also successful in obtaining the relief he sought. Indeed, even if he were held liable for his share of the $1053.55 imposed jointly on him and Mr. Weisberg, his appeal was not only substantially justified, but was made necessary because the defendants did not adequately justify their basis for such costs from him the first time that the case was before this Court.

B. Mr. Lesar Is Not Liable For Any Fees or Costs.

1. Introduction.

Rule 37(b) sets forth a range of sanctions that may be imposed on a party who fails to obey an order to provide or permit discovery and allows a district judge to enter such orders "as are just." In addition to, or in lieu of, the specified sanctions, the court "shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by

the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust."

While Rule 37(b) allows a district court to award expenses against both a client and the lawyer, the court cannot do so indiscriminately, consistent with the due process considerations in the Rule's requirement that sanctions be imposed only if they "are just." See generally Societe Internationale v. Rogers, 357 U.S. 197 (1958). A district court must "distinguish between overzealous clients and overzealous counsel" in awarding expenses, Stillman v. Edmund Scientific Co., 522 F.2d 798, 800 (4th Cir. 1975), and our court of appeals has spoken of the need for "proportionality" in awarding sanctions against litigants and lawyers, in order to assure that clients are not punished for their lawyers' actions, or vice versa. Butler v. Pearson, 636 F.2d 526, 531 (D.C. Cir. 1980), citing Jackson v. Washington Monthly Co., 569 F.2d 119, 123-24 (D.C. Cir. 1977). See also Flaks v. Koegel, 504 F.2d 702 (2d Cir. 1974). When considered under these and other cases applying Rule 37, the facts of this case -- which indicate that Mr. Weisberg was solely responsible for opposing discovery -- lead to the conclusion that he, and not his lawyer, should be solely liable for any award of attorneys' fees and costs.

2. Mr. Lesar's Actions Do Not Merit Sanctions.

When the first order compelling discovery was issued in February 1983, Mr. Lesar met with his client and tried to draft a responsive document. Lesar Aff. ¶¶ 5, 6. However,

Mr. Weisberg declined to provide answers to the Government, both as a matter of principle and based on the facts here, i.e., his poor health and his belief that he had already provided responsive information to the FBI in his administrative appeal letters. Mr. Weisberg refused to change that position throughout the litigation, and Mr. Lesar so advised this Court at both the April and November 1983 hearings.

Weisberg's conduct put Mr. Lesar in an impossible position. Ethical Consideration 7-7, applicable to members of the District of Columbia Bar, states that the "authority to make decisions is exclusively that of the client, and, if made within the framework of the law, such decisions are binding on his lawyer." When a client declares an intention to disobey a discovery ruling (or any other ruling), the lawyer has an obligation to the client to make sure that the client decides on that course of conduct only after the client is aware of all relevant considerations. See Ethical Consideration 7-8. As for the lawyer's obligation to the court in such a situation, the 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." Disciplinary Rule 7-106(A).

Mr. Lesar more than satisfied these ethical obligations. He urged his client to answer the discovery requests and warned him of the consequences of non-compliance. Lesar Aff. ¶ 5. As a practical matter, though, Mr. Lesar could do

nothing to bring about actual compliance with the discovery orders once Mr. Weisberg decided not to comply. Mr. Weisberg was the only person with the requisite knowledge to answer the FBI's discovery requests, and Mr. Lesar could not act independently to comply with the Court's orders. Thus, it is not "just" within the meaning of Rule 37 to make Mr. Lesar pay for expenses which were beyond his control to prevent. His client had, as a matter of principle, taken a non-frivolous position which this Court had rejected, but which the client wanted to test in the court of appeals and was willing to risk a dismissal and an award of sanctions if that was the ultimate price to be paid. Surely, Mr. Lesar's conduct fell well within the bounds of DR 7-106(A), and thus it is unfair to assess attorneys' fees against him, as he was caught in the middle.

Imposing sanctions based on these facts will only serve to drive a wedge between clients and their lawyers whenever a client balks at answering a discovery request, and it may cause counsel to hold back for fear that they will have to reach into own pockets and pay their adversaries for their client's decision. Plainly, it is difficult for a lawyer to obey Canon 7 and "represent a client zealously" in that situation. We do not, of course, suggest that a lawyer may disregard well-established discovery norms with impunity, but our adversary system requires that courts err on the side of not sanctioning lawyers if they are expected to vigorously represent their clients.1/

1/ In making these statements, Mr. Lesar recognizes that deterrence, as well as punishment, are goals of Rule 37.
(footnote continued on next page)

Sanctions are also not to be imposed "when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of [the non-complying party]." Societe Internationale v. Rogers, supra, 357 U.S. at 212. Recognizing the applicability of these principles to a situation in which both client and lawyer may be liable, courts have generally attempted to apportion expenses depending on the extent to which the lawyer or the client each obstructed discovery, either intentionally or through negligence. And if the client is principally or entirely responsible for the default, courts have not hesitated to award expenses solely against the client, even when, as in this case, their counsel defends the client's actions in court.2/

An illustrative case is Humphreys Exterminating Co., Inc. v. Poulker, 62 F.R.D. 392 (D. Md. 1974). There, the defendants failed to answer interrogatories or provide

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(footnote continued)
See National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643 (1976). However, it is difficult to see how that goal would be achieved by awarding expenses against Mr. Lesar on these facts.

2/ In an analogous area, courts have not been reluctant to dismiss cases because of the lawyer's dilatory conduct or inadequate representation even if the client is not at fault, reasoning that clients are responsible for the lawyers they choose and that any derelictions by counsel are more appropriately the subject of a malpractice suit. See, e.g., Affanto v. Merrill Bros., 547 F.2d 138, 141 (1st Cir. 1977); Cine 42nd St. Theatre Corp. v. Allied Artists Pictures Corp., 602 F.2d 1062, 1068 (2d Cir. 1979). Cf. Huvat v. Royal Indemnity Co., 277 F. Supp. 769, 771 (E.D. Wis. 1967)(awarding expenses against client who was late for deposition and refused to answer certain questions, though not against lawyer who objected to questioning without basis.)

documents because they believed the materials sought were irrelevant to the case. While the court chastized counsel for non-compliance with discovery, it held that "an award ought to be made against the attorney only when it is clear that discovery was unjustifiably opposed principally at his instigation." Id. at 395. Since there had been no such showing, costs were awarded solely against the clients. Similarly, in Charron v. Meaux, 66 F.R.D. 64 (S.D.N.Y. 1975), sanctions were imposed solely on the defendants for frustrating plaintiffs' discovery, although their lawyer defended their conduct throughout. See also Crawford v. American Fed. of Gov't Employees, 576 F. Supp. 812, 815 (D.D.C. 1983).

Consistent with this approach, awards against attorneys have been imposed "only in specific instances of bad faith actions of the attorneys . . .." In re Air Crash Near Saigon, South Vietnam on April 4, 1975, 671 F.2d 564, 567 (D.C. Cir. 1982). Moreover, the reported cases assessing expenses against lawyers "have all involved a high degree of culpability," Crawford v. American Fed. of Gov't Employees, supra, 576 F. Supp. at 815, citing Comment, "Sanctions Imposed by Courts on Attorneys Who Abuse the Judicial Process," 44 U. Chi. L. Rev. 619, 631 (1978).

The Government's memorandum recognizes the difficult burden that it faces in seeking a fee award from Mr. Lesar, and it suggests as a standard that an attorney should be personally liable under Rule 37 if he "contributed significantly

to the pattern of delay and defiance in the litigation." Defendants' Supplemental Memorandum at p. 12, quoting Chesa Int'l Ltd. v. Fashion Associates, Inc., 425 F. Supp. 234, 238 (S.D.N.Y.), aff'd mem., 573 F.2d 1288 (2d Cir. 1977). Admittedly, there are situations in which sanctions have been imposed on a lawyer who "contributed significantly" to delay, but those situations involve egregious conduct far different from what Mr. Lesar did here. For example, fees have been awarded against a lawyer who consistently interrupts a deposition to instruct the client not to answer questions, and there is no non-frivolous privilege that can be asserted.3/ Similarly, fees have been awarded against the lawyer in situations where the client is not kept apprised of what must be produced and when.4/

Those cases involve situations that are light years away from the facts of this case. Mr. Lesar was told by his client not to give substantive answers to discovery requests. Mr. Lesar twice informed the Court of the tension between himself and his client. The client understood the consequences of his decision and was willing to risk dismissal and to litigate

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3/ See, e.g., Shapiro v. Freeman, 38 F.R.D. 308, 311-13 (S.D.N.Y. 1965); Braziller v. Lind, 32 F.R.D. 367, 368 (S.D.N.Y. 1963); Gibbs v. Blackwelder, 346 F.2d 943 (4th Cir. 1965); Wright v. Firestone Tire & Rubber Co., 93 F.R.D. 491, 493 (W.D. Ky. 1982).

4/ See Tamari v. Bache & Co. (Lebanon) S.A.L., supra, 729 F.2d at 474; Stanziale v. First National City Bank, 74 F.R.D. 557, 560 (S.D.N.Y. 1977); United Sheeplined Clothing Co. v. Artic Fur Cap Corp., 165 F. Supp. 193, 194 (S.D.N.Y. 1958); see also Butler v. Pearson, supra, 636 F.2d at 531.

about the need for discovery in the court of appeals. Under the circumstances, it cannot be said that Mr. Lesar "contributed significantly" to the delay. Sanctions were imposed not because he did something affirmative to delay the case, but because he did nothing, and the reason he did nothing is that he was powerless to act. When, as here, a lawyer has satisfied his duties under the Code for both his client and the court (see pp. 10-11, supra), he cannot be charged with sanctions based on his client's conduct. See Societe Internationale v. Rogers, supra, 357 U.S. at 212; see also Koller v. Richardson-Merrell, Inc., 737 F.2d 1038, 1056-57 (D.C. Cir.), cert. granted, 105 S. Ct. 290 (1984)(argued 26 February 1985), which held in an analogous situation that a lawyer cannot be disqualified in a given case based on vague concepts such as "violating his duty as an officer of the court" and is entitled to protection for advocacy that falls within the boundaries of the Code.

3. The Government's Arguments Are Unpersuasive.

When this case was first before the Court, there was not a word of explanation in any of the Government's Rule 37 motions or fee applications as to why Mr. Lesar should be liable for fees. When we pointed out this deficiency in the court of appeals, the Government advanced some arguments which did not persuade the court of appeals and which have apparently been abandoned in this round of the litigation.5/ In its

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5/ For example, the Government's appellate brief stated (at p. 44) that sanctions were proper because this

(footnote continued on next page)

most recent memorandum, the Government has come up with yet another argument to justify an award of sanctions. Specifically, Mr. Lesar is now charged (at p. 17) with "[c]ontinuing a defense which the Court had already rejected." In particular, it is argued that Mr. Lesar "was obstructing rather than expediting the litigation process" when he filed specific objections to discovery in March 1983 because "at this point,"

(footnote continued)
Court had "closely observed plaintiff's counsel's relations with plaintiff in this litigation for more than five years," implying that (1) Mr. Weisberg's refusal to provide answers was aided and abetted by Mr. Lesar, and (2) this refusal was somehow the last straw after five years of similar recalcitrance. This is factually incorrect. As the Court will recall, the case was dormant for nearly four years while the Government completed processing Mr. Weisberg's FOIA requests and then moved for partial summary juidgment in May 1982. While Mr. Weisberg did attend a status call in March 1979, his health did not permit him to attend any other ones. Thus, the first time this Court had an opportunity to notice the "relations" between Messrs. Weisberg and Lesar was at the April 1983 argument, when there was an obvious tension between them. And while the Court (like the litigants) regretted the time this case was taking, it also praised counsel for both sides for the cooperative and positive attitudes they took towards resolving differences. See 7 January 1981 tr. at p. 17; 17 February 1981 tr. at p. 6; 27 May 1981 tr. at p. 4.

Additionally, the government defended the award of sanctions (p. 46) on the ground that Mr. Lesar should have better controlled his client and was liable for forgetting his duties as an officer of the Court. While similar language crops up at one or two points in the Government's memorandum to this Court (see pp. 14, 17), it does not appear that these points are being advanced as reasons for imposing sanctions. Even if they were being advanced, they are legally deficient. As a practical matter, lawyers may frequently try to "control" their clients, but when, as here, the client, after proper counselling, refuses to be "controlled," sanctions on the lawyer are inappropriate. Moreover, to the extent that the government may still be arguing (at p. 15) that sanctions are proper because Mr. Lesar violated his "obligation as an officer of the Court," that point is rebutted by Koller, supra, which rejected a similar claim and emphasized a lawyer's right to rely on the Code in tricky ethical situations.

he had an opportunity "to avoid abusing the process of the court" (id. at p. 15). He is also castigated for opposing the motion to dismiss and for repeating Mr. Weisberg's position as to why discovery is not appropriate. Id.

This argument is simply grasping at straws and is not borne out by the facts. Mr. Lesar's decision to file objections in March 1983 cannot serve as a basis for imposing sanctions now for one simple reason: the fee application filed by the Government after that incident did not seek an award of fees from Mr. Lesar, but only from Mr. Weisberg. The Government is precluded now from seeking an award of fees based on that conduct after it lost the appeal taken by Mr. Lesar, especially since it did not consider Mr. Lesar's conduct to be sanctionable when it decided in April 1983 not to seek fees from him, after hearing his explanation in open court of the tension between himself and his client.

Moreover, Mr. Lesar's conduct from March until November was not such that sanctions against him would be appropriate. There was no change in the relationship between him and his client during this period, and nothing Mr. Lesar did or failed to do "contributed significantly" to any delay. Mr. Lesar explained his client's position to the Court and to opposing counsel whenever the occasion arose, and he surely cannot be faulted for filing a response to the Government's motion to dismiss or other motions which did nothing more than restate his client's position. Mr. Lesar was in a bind because of his client's adamance, and there was little else he could do. In those circumstances, courts have imposed sanctions solely on

the client, even when the lawyer continues to appear on the client's behalf. See pp. 12-14, supra.

The Government's arguments on this point should not obsure one crucial fact: Mr. Lesar was sanctioned not when he did something affirmative to obstruct discovery, but when, at the insistence of his client, he did nothing in response to the second discovery order. If a lawyer can be held personally liable in those circumstances, it will have a chilling effect on the practice of law and will severely strain the lawyer-client relations. When, as here, a lawyer and a client reach an impasse about answering discovery requests, there is very little a lawyer can do to produce answers, and he should not be penalized personally.

In the Government's view, a lawyer has only two options in this type of situation: (1) file nothing and face the risk of personal liability for sanctions, or (2) withdraw from the case. See Def. Supp. Memo. at p. 15. The first option is utterly inconsistent with Rule 37 and the supporting case-law discussed in this brief. The second option is a truly terrible suggestion, which will unduly complicate civil litigation and burden district judges with an avalanche of withdrawal motions. If the Government's position is adopted by this Court, one can reasonably expect that lawyers will rush to protect themselves by filing a withdrawal motion whenever a client flatly refuses to answer a question. The rule of law suggested by the Government would encourage lawyers to put their self-interest ahead of their clients' interest in ways

that could harm the attorney-client privilege. As the Koller court said in a related context: "The fundamental obligation of an attorney to his client -- the bedrock principle of the adversary system -- does not dissolve with the appearance of unfavorable evidence or even an allegation of fraud." 737 F.2d at 1056. When, as here, the client has taken an absolute position and is willing to risk dismissal and to take his chances in the court of appeals, his attorney should not be required to bail out of the case at the first sign of trouble in order to avoid being held personally liable for sanctions. There are doubtless many times when a client refuses to obey a discovery order, only to reconsider the matter after a judge has held the client personally liable under Rule 37. Even if, as in this case, a second discovery order is entered and disobeyed, that may argue for a heavier sanction against the client, but not against the lawyer, so long as the latter complies with his obligations under the Code.

In this case, Mr. Lesar told the Court of his difficulties with his client at the hearing on 8 April 1983; nothing changed between then and November, when the case was dismissed. If Mr. Lesar had withdrawn from the case in April, and Mr. Weisberg had litigated the case pro se from that point on, it is doubtful that the case would have proceeded any more expeditiously. In short, Mr. Lesar's continued presence in the case from March to November 1983 did not "contribute significantly" to any "pattern of delay and defiance" -- the Government's standard for assessing liability for fees under

Rule 37. Under the circumstances, an award of fees against Mr. Lesar would not be "just" within the meaning of that Rule.

CONCLUSION

For the foregoing reasons, if this Court should decide to make any award of attorneys' fees and costs in these cases, Mr. Lesar should not be liable for any such award.

Respectfully submitted,

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28 May 1985

CERTIFICATE OF SERVICE

I hereby certify that copies of this Memorandum, the Affidavit of James H. Lesar and proposed Order were served by first class mail, postage prepaid, this 28th day of May, 1985 upon Mark H. Lynch, American Civil Liberties Union Foundation, 122 Maryland Avenue, N.E., Washington, D.C. 20002 and Renee M. Wohlenhaus, Civil Division, Room 3334, U.S. Department of Justice, Washington, D.C. 20530.

Cornish F. Hitchcock

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 78-322
	)	(Judge Smith)
WILLIAM H. WEBSTER, Director, Federal Bureau of Investigation, et al.,	)	(Consolidated with Civil Action No. 78-420)
	)	
	)	
Defendants.	)	

AFFIDAVIT OF JAMES H. LESAR

James H. Lesar hereby declares and attests as follows:

1. My name is James H. Lesar. I am a member of the District of Columbia bar and the bar of this Court. I practice law at 918 F Street, N.W., Suite 509, in Washington, D.C., and I previously served as attorney for plaintiff Harold Weisberg in these consolidated actions. This affidavit is being submitted in support of my argument that I should not be held liable for any award of attorneys' fees under Rule 37, Fed. R. Civ. P., in this case.

2. On February 4, 1983, this Court denied Mr. Weisberg's motion for a protective order and directed him to respond to the Government's discovery requests within 20 days, i.e., by February 24, 1983. Those requests focused on Mr. Weisberg's contention that there had not been an adequate search for specific categories of records covered in his Freedom of Information Act ("FOIA") requests.

3. Upon receipt of this order, I made plans to confer with Mr. Weisberg at his home in Frederick, Maryland. The

reason for making such a trip is that Mr. Weisberg's ill health prevents him from travelling to Washington, D.C. I scheduled trips for February 11 and then for February 14, both of which had to be cancelled because of bad weather. I was finally able to schedule our conference for February 21, 1983.

4. On February 21, 1983, I travelled to Mr. Weisberg's house, and we talked for 4-1/2 hours about the case. I went there with the hope that we would be able to answer the Government's requests in as much detail as was feasible about the inadequacy of the FBI's search for the requested categories of records.

5. At that meeting, we talked about the order compelling a response and what Mr. Weisberg's response would be. At various points in the conversation, Mr. Weisberg vehemently expressed his disagreement with the Court's decison denying him a protective order, and he stated his preference for not filing any answers, as a matter of principle. He argued that because of his ill health and the burdensomeness of the FBI's discovery demands, it was physically impossible for him to comply with the discovery demands and that the FBI had no need for the discovery it was requesting. He asserted that he had already provided all or almost all of the necessary data in his administrative appeal letters and his affidavits filed with the Court. He pointed out that his administrative appeal letters alone filled two file drawers. In addition, he thought that discovery was not appropriate in an FOIA case, and particularly not in this case. I indicated, and Mr.

Weisberg understood, that sanctions could be imposed by the Court if he refused to answer, including dismissal of the case and an award of attorneys' fees. Indeed, the Government had already requested sanctions when filing its initial motion to compel on January 27, 1983, a request which this Court denied.

6. Despite Mr. Weisberg's considerable reluctance to proceed, I tried to persuade him to give me substantive replies to the Government's discovery requests. Specifically, I read each interrogatory to him, and he gave me oral answers to each one, which I wrote down on a legal pad. It was my intention, once I returned to my office, to use these notes in order to write up more extensive responses for Mr. Weisberg to review and revise, after which we would consult and prepare the final document.

7. I returned to my office the next day, February 22, 1983. At that time, I had only two days to file a response, and so I asked the Court for a two-week extension, until March 10, 1983, noting the weather-related delays and the fact that I had conferred with Mr. Weisberg the day before. I stated that I needed an extension in order "to complete a draft of the response to defendants' discovery by the end of this week and send it" to Mr. Weisberg. I added that two weeks would be necessary because of delays in using the mails and the fact that "a second draft may be necessary."

8. As I recall, after I had begun working on a substantive reply, I telephoned Mr. Weisberg to ask him about a specific point. He told me that he had thought the matter over

and that, as a matter of principle, he would not consent to filing any response that could be construed as complying with the discovery requests. I recall feeling in a bind, since I had always thought that such strategic decisions are to be made by the client, yet here, there was a possibility that sanctions could be imposed against me personally. Because I had always believed that it was better to file something rather than nothing, I decided to file specific objections to each discovery request on March 8, 1983, even though I did not want to go this route.

9. This Court held a hearing on April 8, 1983, on the Government's motion to compel and request for sanctions, at which time the Court asked me why I had asked for a two-week extension and then filed objections, rather than answers. As the transcript of that hearing indicates, I explained to the Court the conflict between me and my client as follows:

> I requested a two-week extension of time because I needed to consult with Mr. Weisberg and to prepare an affidavit with him. I had consulted with him already. I felt that we would be submitting a draft response. That was my intention, to submit a draft response.
>
> Now, as it ultimately turned out, we did not file any answers to interrogatories. Instead we objected to all of them. This gets into an area of some tension between myself and Mr. Weeisberg over what tack we should take.
>
> Ultimately Mr. Weisberg decided flatly that we should take the position that as a matter of principle, discovery is unwarranted -- discovery by the government is unwarranted in a case of this nature.

10. On April 13, 1983, the Court issued an order directing Mr. Weisberg to file responses within 30 days and allowing

the Government to submit an application for attorneys' fees, which it did. That application sought fees solely from Mr. Weisberg, and on April 28, 1983, the Court entered an order directing him to pay fees.

11. During this period, I felt in an awkward and very vulnerable position. It was clear from my conversations with Mr. Weisberg that he was unyielding in his refusal to give answers, consistent with his position that discovery was improper in this case. Moreover, only Mr. Weisberg had the substantive knowledge necessary in order to answer the discovery requests fully, and, given his instruction to me not to file a substantive response, I did not feel I could file something myself. At the same time, I was concerned about the possibility of sanctions being imposed against me as well as my client if I filed an unresponsive document.

12. On May 12, 1983 I received a telephone call from Henry LaHaie, the Government's lawyer, seeking my consent to a brief extension for his filing some data from the FBI's New Orleans field office. I consented, and Mr. LaHaie then asked if I would be filing answers to the Government's discovery requests, which were due the next day. I explained that we would not be filing a response, in light of Mr. Weisberg's unequivocal position that discovery was not appropriate.

13. Feeling helpless to do anything because of my client's position, and mindful of this Court's implicit criticism when I filed objections back in March, I decided to file nothing this time. The government promptly moved to

dismiss the suit, which we opposed. At the Court's hearing on this motion, held on November 9, 1983, I repeated the situation to the Court: "Mr. Weisberg has taken an absolute position that discovery is not warranted on the search issue in a FOIA case and certainly in the circumstances presented here where there was no showing of need at all."

14. Prior to filing this affidavit with the Court, my attorney gave a copy to Mr. Weisberg's present counsel with a request that it be given to Mr. Weisberg, and I understand that Mr. Weisberg has reviewed this affidavit.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed at Washington, D.C. this 29th day of May, 1985.

James H. Lesar

James H. Lesar

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG, Plaintiff, v. WILLIAM H. WEBSTER, Director, Federal Bureau of Investigation, et al., Defendants.	)	Civil Action No. 78-322 (Judge Smith) (Consolidated with Civil Action No. 78-420)

ORDER

Upon consideration of the Defendants' Supplemental Memorandum in Support of Award of Attorneys' Fees Pursuant to Rule 37, Fed. R. Civ. P., and the documentation in support thereof, the Memoranda of Harold Weisberg and James H. Lesar in opposition thereto and the documentation in support of that opposition, and the entire record of this case, it is this _____ day of _____, 1985,

ORDERED that the defendants' application for attorneys' fees and costs totalling $684.50 from plaintiff and the defendants' additional application for attorneys' fees and costs totalling $1,053.55 from plaintiff and from James H. Lesar be, and the same are hereby denied, and it is further

ORDERED that defendants' application for $8,215.00 in attorneys' fees for their time spent litigating these cases in the U.S. Court of Appeals for the District of Columbia Circuit be, and the same is hereby denied; and it is further

ORDERED that the Amended Judgment filed January 31, 1984 in these cases be, and the same is hereby further amended by

deleting everything in the second paragraph after the first line thereof, such that said second paragraph now reads: "It is Ordered and Adjudged that the plaintiff takes nothing."

John Lewis Smith, Jr.
United States District Judge