

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 84-5058, 5201

HAROLD WEISBERG,
Plaintiff-Appellant,

JAMES H. LESAR,

Appellant,

v.

WILLIAM H. WEBSTER, Director,
Federal Bureau of Investigation, et al.,
Defendants-Appellees.

Nos. 84-5059, 5202

HAROLD WEISBERG,
Plaintiff-Appellant,

JAMES H. LESAR,

Appellant,

v.

FEDERAL BUREAU OF INVESTIGATION, et al.,
Defendants-Appellees.

Appeal from the United States District
Court for the District of Columbia

BRIEF FOR APPELLANT JAMES H. LESAR

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Original filed: 17 May 1984

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No. 84-5059
No. 84-5202

CERTIFICATE REQUIRED BY RULE 8(c)
OF THE GENERAL RULES OF THIS COURT

The undersigned, counsel of record for appellant James H. Lesar, certifies that the following persons or parties appeared below or have an interest in these cases:

Harold Weisberg (plaintiff-appellant)

James H. Lesar (appellant)

William H. Webster (defendant-appellee)

Federal Bureau of Investigation (defendant-appellee)

Attorney General of the United States (defendant-appellee)

U.S. Department of Justice (defendant-appellee)

These representations are made in order that Judges of this Court, inter alia, may evaluate possible disqualification or recusal.

Corwin F. Hitchcock
Corwin F. Hitchcock
Attorney of Record for
Appellant James H. Lesar

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BRIEF FOR APPELLANT JAMES H. LESAR

This brief is filed on behalf of James Lesar, the lawyer

who represented the plaintiff, Harold Weisberg, in the pro-

ceedings below. The district court not only dismissed these

cases because the plaintiff refused to obey certain discovery

orders, but also directed both Lesar and his client to pay

certain attorneys' fees and costs to the government under Rule
37 of the Federal Rules of Civil Procedure. This brief adopts
the legal arguments made by Weisberg in his brief, but raises

1/ These cases have not been before this Court or any other court under the same or a similar title. Other Freedom of Information Act cases that Weisberg has litigated in this Court involve records other than the ones at issue here.

Appellant Harold Weisberg was the plaintiff in both of these Freedom of Information Act cases. Appellant James H. Lesar was his attorney in the litigation below. Appellee William H. Webster is director of appellee Federal Bureau of Investigation (FBI), and they were defendants in both cases below, as were appellees Attorney General of the United States and the U.S. Department of Justice. In this brief, the defendant-appellees will be referred to collectively as "appellees".

REFERENCES TO PARTIES AND RULINGS

should be held jointly liable? relative culpabilities, if any, or to specify why the lawyer (2) the district court failed to inquire into their for resisting discovery, and (1) the record indicated that the client was responsible for resisting discovery when:

and the client with attorneys' fees and costs for resisting Did the district court err in charging both the lawyer

QUESTION PRESENTED

one additional issue on which Lesar's interests conflict with Weisberg's: If this Court should uphold an award of expenses to the government, Lesar contends that, based on the record in this case, only Weisberg should be liable for their payment.

On 27 October 1982 the district court denied the FBI's

1. The FBI Seeks Discovery from Weisberg.

These actions were brought in 1978 under the Freedom of Information Act, 5 U.S.C. § 552, to compel disclosure of certain FBI records concerning the assassination of President Kennedy. While Lesar relies on appellant Weisberg's statement of the case, a brief recitation of the pertinent facts as they pertain to Lesar's conduct is appropriate.

STATEMENT OF THE CASE

An addendum to this brief sets forth the text of the pertinent statutory materials.

STATUTORY MATERIALS

On 23 January 1984, Weisberg appealed an order of the United States District Court for the District of Columbia (Hon. John Lewis Smith, J.), filed 23 November 1983, which dismissed these actions pursuant to Rule 37, Federal Rules of Civil Procedure, and directed defendants to submit an application for their attorneys' fees and costs in prosecuting the dismissal motion (Nos. 84-5058 and 84-5059). On 30 March 1984, Weisberg and Lesar appealed from the amended judgment, filed by Judge Smith on 31 January 1984, which dismissed the cases and awarded attorneys' fees against them, as well as from the 16 February 1984 order denying their motion to vacate or alter that amended judgment (Nos. 84-5201 and 84-5202).

lectively as the "FBI" or the "Bureau."

motion for partial summary judgment, which claimed that the FBI had conducted an adequate search for the records Weisberg had requested. Docket Entry ("D.E.") 40. The court's accompanying memorandum spelled out 12 disputed factual issues, taken from the 14 issues in plaintiff's amended Rule 1-9(h) statement. Id.

In December 1982, Weisberg and the FBI served interrogatories and requests for production on each other. D.E. 41-42. The FBI's discovery requests sought to elicit information on why Weisberg believed that the Bureau's search for specific records was inadequate, based on what he knew from FBI records already released to him. D.E. 41, 41A.

On 17 January 1983, Weisberg moved for a protective order. He argued that there was no need for an agency to take discovery from a plaintiff in an FOIA case and particularly not in the present situation, where the FBI already had whatever information Weisberg could provide in the form of his administrative appeals and affidavits. D.E. 45, Memorandum at 2-3. He argued in addition that requiring him to answer discovery requests was a burden, given his poor health, and that the discovery was designed to harass him. Id. at 3.

The FBI responded that it was merely trying "to get plaintiff to articulate precisely the bases for his complaints about the adequacy of the FBI's search so that it could resolve those complaints." D.E. 50, Memorandum at 2. The Bureau also asked the district court to award it expenses against both Weisberg and Lesar, pursuant to Rule 37(a)(4),

The FBI responded on 15 March 1983 by moving for an order compelling discovery, arguing that plaintiff was seeking to re-litigate issues foreclosed by the denial of his motion for a protective order. D.E. 58. The FBI again sought an award of attorneys' fees and costs under Rule 37(a)(4) against both

3. Second Order Compelling Discovery and Sanctions Imposed on Weisberg.

discovery requests was an impossibility. Id. health was so poor that attempting to respond to the FBI's issue, plaintiff filed a 14 page affidavit detailing why his unnecessary, since the Bureau had the pertinent documents at 57. In addition to arguing that discovery was irrelevant and FBI's interrogatories and document production requests. D.E.

On 8 March 1983, objections were filed to each of the but that "a second draft may be necessary." D.E. 54 ¶ 4.

discovery by the end of this week and send it to his client," tended "to complete a draft of the response to defendants' at the latter's home in Frederick, Maryland and that he in- sion of time. He explained that he had conferred with Weisberg Before that deadline arrived, Lesar moved for an exten- denied. D.E. 51.

days. The government's request for an award of expenses was him to respond to the government's discovery requests within 20 denying Weisberg's motion for a protective order and directing On 4 February 1983, the district court issued an order

2. The First Order Compelling Discovery.

Weisberg's motion for a protective order. Federal Rules of Civil Procedure, for the time spent opposing

Weisberg and Lesar. Id. Weisberg argued in response that he had complied with the court's order by properly objecting to each interrogatory and production request and by providing a detailed affidavit, not challenged by the FBI, attesting to the impossibility of his providing discovery. D.E. 63.

The district court heard arguments on the government's motion to compel and for expenses, as well as a pending discovery motion from Weisberg, on 8 April 1983. Judge Smith asked Lesar why there had been no compliance with the 4 February 1983 order compelling discovery, especially after Lesar had sought an extension of time, representing that he needed to consult with Weisberg about preparing a responsive affidavit (8 April 1983 transcript ("tr.") at 40, D.E. 96A).

Significantly for this appeal, Mr. Lesar explained: 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 -- of 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. D.E. 67.

By order dated 13 April 1983, the district court again ordered Weisberg to file responses to the Bureau's discovery requests within 30 days, and the FBI was instructed to submit an application for expenses, including attorneys' fees, incurred in obtaining the Order compelling plaintiff to answer interrogatories and produce documents. D.E. 68. Although the FBI's motion to compel had sought expenses from both Weisberg and Lesar, its fee application and draft order named only Weisberg, D.E. 72, and Judge Smith's order, filed 28 April 1983, directed only Weisberg to pay the FBI's expenses. D.E. 74.

4. Rule 37 Dismissal.

On 18 May 1983, when Weisberg had still not filed a timely response to the FBI's discovery request, the FBI moved to dismiss these cases pursuant to Rule 37(b)(2)(C), Federal Rules of Civil Procedure. D.E. 81. Expenses and attorneys' fees incurred in filing the motion were also sought from both Weisberg and Lesar pursuant to Rule 37(b). Id. The FBI's accompanying memorandum stated that the FBI's counsel spoke with Lesar several days earlier and was told that Weisberg was not going to comply because of his position that the FOIA precludes an agency from seeking discovery against plaintiffs on the search issue. D.E. 81, Memorandum at 2.

Lesar filed a memorandum opposing dismissal, arguing that total dismissal as to all claims -- including the ultimate legal issue of whether any FOIA exemptions applied -- was too severe when the discovery dispute involved only a threshold issue, namely, the adequacy of the search (D.E. 86, Memorandum

both. D.E. 97.

whether fees would be assessed against Weisberg, Lesar or fee application within ten days, once again without specifying litigation analyzed. The order directed the FBI to submit its not named in the memorandum opinion, nor is his conduct in this the focus of the opinion is on Weisberg's conduct. Lesar is award of attorneys' fees against Lesar, his lawyer. Indeed, explain why the conduct of Weisberg, the client, merited an where in its accompanying four-page memorandum did the court the cases in an order filed 23 November 1983. D.E. 98. No-

The district court granted the FBI's motion and dismissed

need at all." (9 November 1983 tr. at 26).

the circumstances presented here where there was no showing of ranted on the search issue in a FOIA case and certainly in berg has taken an absolute position that discovery is not war-

filed came when Lesar repeated at the hearing that "Mr. Weis- lawyer and client. The only discussion of why nothing had been the district court inquire into the relative culpability of should be charged to Weisberg and Lesar collectively, nor did cussion either orally or in the FBI's papers about why expenses counsel on this and other pending motions. There was no dis-

On 9 November 1983 the district court heard arguments from

pared by Weisberg.

court, and he later submitted four additional affidavits pre- by Weisberg, which addressed various factual issues before the at 4-5). Lesar simultaneously filed three affidavits prepared

pay the reasonable expenses, including attorney's fees, caused
ling to obey the order or the attorney advising him or both to
specified sanctions, the court "shall require the party fail-

orders "as are just." In addition to, or in lieu of, the
permit discovery and allows a district judge to enter such
imposed on a party who fails to obey an order to provide or
Rule 37(b) sets forth a range of sanctions that may be

THE DISTRICT COURT ERRED IN AWARDING ATTORNEYS'
FEES AND COSTS AGAINST WEISBERG'S LAWYER.

ARGUMENT

court's denial of their motion to vacate or alter it.
ly appeals from the amended judgment and from the district
1984. On 30 March 1984, Weisberg and Lesar both noticed time-
judgment and to stay the judgment were denied on 14 February
expenses. Timely motions to vacate or alter this amended
while only Weisberg remained liable for the earlier award of
and Lesar jointly liable for this second award of expenses,
January 1984 entered an "amended judgment" that held Weisberg
tion to amend the judgment, D.E. 104, the district court on 31
two awards of expenses. D.E. 103. In response to an FBI mo-
January 1984, but this order held only Weisberg liable for the
trict court entered a final judgment in favor of the FBI on 10
run against both Weisberg and Lesar. D.E. 99, 101A. The dis-
order, signed by the court on 21 December 1983, made the award
of assessing expenses against Lesar, even though its proposed
The FBI's fee application did not address the propriety

5. Sanctions Imposed on Weisberg and Lesar.

While Rule 37(b) allows a district court to award expenses against both a client and the lawyer, the court can not do

A. Lesar's Conduct Did Not Warrant Imposition of Sanctions on Him.

on Lesar.

against Weisberg, the district court improperly imposed them

On the facts of this case, even if sanctions were proper

(1982); Delims v. Powell, 566 F.2d 231, 235 (D.C. Cir. 1977).

Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 707

Inc., 427 U.S. 639, 642 (1976); Insurance Corp. of Ireland,

National Hockey League v. Metropolitan Hockey Club,

court must decide whether the district court abused its dis-

In reviewing the imposition of sanctions, an appellate

1020 (1978).

Inc., 561 F.2d 494, 505 (4th Cir. 1977), cert. denied, 434 U.S.

467 n.12 (D.C. Cir. 1975); Wilson v. Volkswagen of America,

17, 17-18 (D.C. Cir. 1958); Smith v. Schlesinger, 513 F.2d 462,

facilitate judicial review. Von der Heydt v. Rogers, 251 F.2d

district court's conclusions are also required, in order to

tions are in fact imposed, written findings setting forth the

Express, Inc. v. Piper, 447 U.S. 752, 767 (1980). If sanc-

Slaughter, 548 F.2d 770, 773 (8th Cir. 1977); see also Roadway

ing and an exploration of less drastic alternatives. Edgar v.

sanction of dismissal, "fundamental fairness" requires a hear-

Before sanctions are imposed, especially the ultimate

award of expenses unjust."

substantially justified or that other circumstances make an

by the failure, unless the court finds that the failure was

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 Internati-
onale v. Rogers, 357 U.S. 197 (1958). It is important for a district court to "distinguish between overzealous clients and overzealous counsel" in awarding expenses, Edmund Scientific Co., 522 F.2d 798, 800 (4th Cir. 1975). Indeed, this Court has spoken of the need for "proportionality" in meting out 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 (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). It is therefore necessary to evaluate Lesar's conduct and culpability against these standards, based on the record before the district court.

When the first order compelling discovery was issued in February 1983, Lesar met with his client and tried to draft a responsive document. However, Weisberg declined to provide answers or documents to the FBI both as a matter of principle and also based on the facts here, as he had already provided what information he had to the FBI. Weisberg refused to budge from that position throughout the litigation, and Lesar advised the district court of these facts at both the April and November 1983 hearings.

Weisberg's conduct put Lesar in an impossible position. Ethical Consideration 7-7, applicable to members of the Dis-

tribut 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 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).

Lesar complied with these requirements and counseled Weisberg to answer the discovery request (see 8 April 1983 tr. at 40-41; D.E. 54). As a practical matter, though, he could do nothing to bring about actual compliance with the discovery orders once Weisberg decided not to comply. Since Weisberg was the person with the requisite knowledge to answer the FBI's discovery requests, Lesar could not act independently to comply with the orders. Accordingly, it is not "just" within the meaning of Rule 37 to make Lesar pay for expenses which were beyond his control to prevent. Similarly, in light of the merits of Weisberg's claims that discovery was improper (see Weisberg brief, Argument, Part I), it would surely not be "just" to assess attorneys' fees against Lesar,

2/ In making these statements, Lesar recognizes that deterrence, as well as punishment, is a goal of Rule 37, see National Hockey League v. Metropolitan Hockey Club, Inc., supra, 427 U.S. at 643. However, it is difficult to see how that goal would be achieved by awarding expenses against Lesar. If a party refuses to obey a court order, and the lawyer properly counsels him but to no avail, no conduct by the lawyer would be deterred by awarding expenses against him or her.

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

2/ their clients. Imposing sanctions based on these facts will only serve to drive a wedge between clients and their lawyers whenever a question arises as to compliance with a discovery order, and it may cause counsel to "hold back" for fear of suffering sanctions. Plainly, it is difficult for a lawyer to obey Canon 7 and "represent a client zealously" while at the same time attempting to calculate whether he or she will become personally liable for sanctions based on the client's action. 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 attorneys if they are expected to vigorously represent their clients. 2/

who urged these arguments on the district court, even if this Court ultimately rejects them.

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 if their counsel defends their actions in court.^{3/}

Illustrative is Humphreys Exterminating Co., Inc. v. Poulker, 62 F.R.D. 392 (D. Md. 1974). In that case, the defendants failed to answer interrogatories or provide 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 Charon 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

^{3/} In an analogous area, courts have not been reticent 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. Hulvat 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).

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). There are several situations in which a lawyer's conduct has been sufficiently egregious to merit an award of fees solely against him or her. For example, fees have been awarded if a lawyer consistently interrupts a deposition to instruct the client not to answer questions, and there is no non-frivolous privilege that can be asserted. See, e.g., Shapiro v. Freeman, 38 F.R.D. 308, 311-13 (S.D.N.Y. 1965); Brazilier 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). Similarly, fees have been awarded solely against the lawyer in situations where the client is not kept apprised of what must be produced and when. See Stanziale v. First National City Bank, 74 F.R.D. 557, 560 (S.D.N.Y. 1977); United Sheep-lined Clothing Co. v. Arctic Fur Cap Corp., 165 F. Supp. 193, 194 (S.D.N.Y. 1958); see also Butler v. Pearson, supra, 636

Taken together, these cases stand for the proposition that, when a district court contemplates imposing attorneys' fees and costs on both lawyer and client, it must explore the pertinent facts, and it may hold lawyer and client jointly liable only if both can be blamed for the conduct. This is what should have been done, but was not done below.

Such a procedure was followed, however, in Tamari v. Bache & Co. (Lebanon) S.A.L., 729 F.2d 469 (7th Cir. 1984), which upheld an award of fees against both lawyer and client. After seven years of litigation and various missed deadlines, the district court in Tamari ordered that the plaintiffs' depositions be completed and certain documents produced by a certain date. Although their counsel represented that this would happen, the plaintiffs did not appear, and the case was dismissed. The plaintiffs moved to vacate, alleging that their lawyers had not informed them of the mandatory cut-off date. Id. at 471. Before ruling on the motion to vacate, the district court ordered defendant's counsel to depose the named plaintiff to see if he had been told of the discovery deadline. Based on this deposition testimony, the district court vacated the dismissal, finding that plaintiff's counsel had "inaccurately conveyed to his clients the substance of the court's order." Id.

The defendants then sought expenses for their time and costs in taking the deposition and opposing the plaintiffs' motion to vacate. The plaintiffs and their counsel unsuc-

Apart from these substantive problems, the district

Against Lesar Was Procedurally Deficient.
B. The District Court's Award of Expenses

penses against Lesar should be vacated.

ply with the discovery order. Accordingly, the award of ex-

sanctions on Lesar when it was Weisberg's decision not to com-

Under this analysis, the district court erred in imposing

tion).

tions, and expenses awarded against both, but without explana-

1970)(Lawyer instructs client not to answer deposition ques-

v. Lake Waukomis Development Co., 48 F.R.D. 366 (W.D. Mo.

or client should be held liable for expenses); but see Palma

under Rule 37(b)(2)(C) for determination of whether lawyer

663 F.2d 371, 392 (2d Cir. 1981)(remanding case dismissed

see also Penthouse Int'l, Ltd. v. Playboy Enterprises, Inc.,

records, their counsel "contributed significantly" to delay);

lawyer and clients; though clients refused to release certain

mem., 573 F.2d 1288 (2d Cir. 1977)(expenses awarded against

Associates, Inc., 425 F. Supp. 234, 238 (S.D.N.Y.), aff'd

liable for expenses. Accord, Chesa Int'l, Ltd. v. Fashion

was sufficiently negligent to justify holding the firm jointly

court of appeals affirmed, finding that the law firm's conduct

of the discovery cutoff to the plaintiffs. Id. at 474. The

liable because it failed to communicate the mandatory nature

were unpersuasive and that their law firm should be jointly

court found that the plaintiffs' reasons for not complying

plaintiffs' and their counsel jointly liable. The district

cessfully opposed this motion, and the district court held

court's approach to the sanctions question was procedurally deficient as well. In contrast with the careful fact-finding and articulation of reasons in Tamari v. Bache & Co., *supra*, and similar cases, the district court (while it did hear argument from counsel) did not explore the relative culpabilities, if any, of Weisberg and Lesar, nor did it make written findings on this point, as required in this Circuit in Von der Heydt v. Rogers, *supra*, and other cases.

The district court's omissions here, particularly its failure to make written findings, is not merely a failure to dot its 's and cross its 's. When a litigant makes a serious effort to hold both an adversary and opposing counsel responsible for obstructing discovery, the need for procedural correctness is important not only because of the requirements of Rule 37, but also for several reasons that lie at the heart of the attorney-client relationship.

As noted above (pp. 12-13), a threat that sanctions may be imposed on the lawyer reduces the likelihood that he or she can continue to represent the client with undivided loyalty. Either consciously or unconsciously, the lawyer may focus attention on avoiding personal liability rather than looking out for the client's best interests. For instance, if the other side moves for attorneys' fees against the lawyer, he or she may be tempted to reveal privileged attorney-client information which makes the lawyer look good at the expense of the client.

These problems, inherent in such a situation, are ex-

weighed the relative culpabilities, if any, of Weisberg and in the record is there any indication that the district court refusal to allow discovery on the search issue. Yet nowhere the reason for non-compliance, i.e., Weisberg's oft-stated In the present case, there was no factual issue as to record and explanation before it.

court review the imposition on sanctions with an adequate Civil Procedure. Written findings also help an appellate be held liable for expenses. Cf. Rule 52(a), Federal Rules of court to articulate why the client, the lawyer or both should factual issues that need to be resolved, and it requires the findings must be made forces the district court to focus on portant role in these proceedings. The knowledge that written The requirement for written findings also plays an im- and/or the client.

be necessary to obtain additional counsel for the attorney deed, where the threat of sanctions is significant, it may even tual record on who is to blame, as was done in Tamari. In- the district court to the need for compiling an adequate fac- ing (and perhaps take steps to avoid them), and it also alerts to focus on these potential conflicts in advance of the hear- counsel. Such notice is necessary to enable opposing counsel claimed to be the basis for imposing costs against opposing quate notice and a detailed explanation of the circumstances district court should require the moving party to give ade- the basis for imposing expenses on the lawyer. Thus, the acerbated when the moving party does not state in his motion

For the reasons stated in appellant Harold Weisberg's brief, appellant James H. Lesar respectfully submits that the judgment should be vacated. In addition, for the reasons stated in this brief, Lesar respectfully submits that if any award of expenses under Rule 37 is upheld in this litigation, Lesar should not be held liable. Alternatively, if this Court should decline to vacate the award of expenses as to Lesar in

CONCLUSION

Accordingly, Lesar requests that if this Court should decline to vacate the award of costs against him in its entirety, it should at least remand the case for findings on whether Weisberg, Lesar or both should be liable for expenses.

These are the sorts of matters that are supposed to be set forth in findings, which are important for the just adjudication of sanctions questions. Thus, if this Court is unwilling to reverse this award of expenses based on the underlying district court record, then at least it should require the district court to explain why it decided to impose sanctions on the lawyer as well as the client. Such a procedure is fair to both counsel and client, as their relative culpabilities, if any, can be assessed individually. And, as noted in Von der Heydt v. Rogers, supra, it also helps the court of appeals, by providing an adequate basis for reviewing any award of sanctions.

Lesar. Nor did the district court explain why, on these facts, it was making both Weisberg and Lesar liable for attorneys' fees and costs.

17 May 1984

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its entirety, then he respectfully requests that the case be
 remanded with directions that the district court prepare
 findings regarding the relative liability, if any, of
 Weisberg, Lesar or both for expenses.
 Respectfully submitted,

APPENDUM

Rule 37(b) of the Federal Rules of Civil Procedure

provides:

If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, 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 made an award of expenses unjust.