228

Misc [illegible], A [illegible] [draft 4/6/84]

Jim - Please review factual accuracy and otherwise. In particular, is the discussion at pp. 20-21 accurate? Also, did you ever file FBI, DOJ, Webster + AG in both cases, and that the Certificate below is correct.

Please call me with your comments ASAP, since this has to be filed next week.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HAROLD WEISBERG,

Plaintiff-Appellant,

v. No. 84-5058
No. 84-5201

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

Defendants-Appellees.

JAMES H. LESAR,

Appellant.

HAROLD WEISBERG,

Plaintiff-Appellant,

v. No. 84-5059
No. 84-5202

FEDERAL BUREAU OF INVESTIGATION, et al.,

Defendants-Appellee.

JAMES H. LESAR,

Appellant.

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.

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

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HAROLD WEISBERG, Plaintiff-Appellant, v. WILLIAM H. WEBSTER, Director, Federal Bureau of Investigation, et al., Defendants-Appellees. JAMES H. LESAR, Appellant.	)	No. 84-5058 No. 84-5201

HAROLD WEISBERG, Plaintiff-Appellant, v. FEDERAL BUREAU OF INVESTIGATION, et al., Defendants-Appellee. JAMES H. LESAR, Appellant.	)	No. 84-5059 No. 84-5202

BRIEF FOR APPELLANT JAMES H. LESAR

In dismissing these actions, the district court directed both the plaintiff, Weisberg, and Lesar, his lawyer, to pay certain attorneys' fees and costs to the government for resisting discovery. Lesar adopts the legal arguments made in Weisberg's brief to this Court, but writes separately to raise one issue where his interests may conflict with Weisberg's. Lesar submits that if this Court should uphold

an award of expenses to the government, then only Weisberg should be liable for their payment.

At issue here is the question of imposing sanctions on a lawyer when the client flatly refuses to obey discovery orders. When a lawyer is threatened with having to pay for the actions of the client, a conflict is created in the lawyer's loyalties, which can hinder effective representative representation of the client's interests.

Under Rule 37, Federal Rules of Civil Procedure, district courts must weigh the relative culpability of lawyer and client when imposing sanctions on either or both of them. The district court failed to do that here. It awarded expenses against both Lesar and Weisberg when it appeared that only Weisberg was resisting discovery. Also, the court acted without specifically examining what Lesar had done about the situation and without any explanation or written findings for its ruling as to joint liability. Apart from any other reasons which may exist for reversal, these omissions warrant vacating the award of expenses against Lesar.

QUESTION PRESENTED[1]

1. Did the district court err in imposing sanctions for resisting discovery against the lawyer as well as the

---

1/ Thess cases have not been before this Court or any other Court under the same or a similar title. In addition, counsel is not aware of any related cases either presently pending in this Court or any other court in the future.

refusing to comply with the discovery order

client, when it appears that the client was responsible for ~~obstructing discovery~~?

2. Did the district court err in imposing sanctions against both lawyer and client without inquiring into their specific culpability and without making findings or other explanation why they were being held jointly and severally liable for expenses?

REFERENCE TO PARTIES AND RULINGS

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 U.S. Department of Justice.

The appeals in Nos. 84-5058 and 84-5059 were taken from 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.

The appeals in Nos. 84-5201 and 84-5202 were taken from the amended judgment in these cases, filed 31 January 1984, which dismissed the case and awarded attorneys' fees against Weisberg and Lesar, as well as from the 16 February 1984 order denying a motion by Weisberg and Lesar to vacate or

alter that amended judgment.

STATUTORY MATERIALS

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 take 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 stiking 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 diobedient 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.

STATEMENT OF THE CASE

The following facts are pertinent with respect to appellant Lesar's role in this litigation.

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. One suit sought records from the FBI's Dallas field office, and the other sought records from the FBI's New Orleans office. The two cases were consolidated, and while the FBI finished processing the requested records, there was little activity in court.

1. The FBI's Partial Summary Judgment Motion.

On 3 May 1982 the FBI moved for partial summary judgment on the ground that it had conducted an adequate search for the records Weisberg had requested. Weisberg opposed the motion, filing two affidavits challenging the adequacy of the search and a separate statement of certain contested material facts. In a memorandum filed 27 October 1982, the district court denied the government's motion, noting that "Weisberg had provided specific evidence in his second affidavit which casts substantial doubt on the caliber of the agency's endeavors." The court held summary judgment on the search issue to be inappropriate. Its memorandum set forth 12 contested factual issues, boiled down from the 14 issues in

Reference to appeals not acted on

plaintiff's amended Rule 1-9(h) statement.

2. FBI Seeks Discovery from Weisberg.

In December 1982, Weisberg and the FBI served interrogatories and requests for production on each other. The FBI propounded 14 interrogatories, encompassing 50 total questions. These interrogatories generally asked Weisberg to explain why he believed that the Bureau's search for specific records was inadequate, based on what he knew from FBI records already released to him, as well as his knowledge about the Kennedy assassination.

On 17 January 1983, Weisberg moved for a protective order so that he would not have to respond to this discovery. Apart from claiming that the Bureau's discovery requests were intended to harass him, his legal memorandum argued that there was "no need for the FBI or any government agency to seek discovery from an FOIA plaintiff on search issues." Memorandum at 2-3. He added that "the discovery sought concern[s] matters which they are required to know themselves, but plaintiff has previously provided some of the information sought through his numerous appeals (which defendants have steadfastly ignored) and by means of affidavits filed in the course of this litigation." (Id. at 2-3). He also argued that discovery "would be extraordinarily burdensome for plaintiff to provide, particularly given his age and ill health." (Id. at 3).

The FBI opposed the protective order, denying that the agency was trying to harass Weisberg. The Bureau responded

to Weisberg's argument that discovery was unnecessary by arguing 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." (1/27 Memo at 2).2/

3. The First Order Compelling Discovery.

The Bureau went one step further, however. It asked the district court to award it expenses against Weisberg and Lesar, pursuant to Rule 37(a)(4), Federal Rules of Civil Procedure, for the time spent opposing Weisberg's motion for a protective order (Memo at 2, 19, 20).3/

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

Before the deadline for filing answers arrived, Lesar moved for an extension of time. He explained that he had conferred with 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

---

2/ For example, it reiterated two subject areas where it claimed it has done a thorough search, despite Weisberg's contrary assertions, even though Judge Smith had ruled that a material issue was in dispute as to the adequacy of the search for these records (1/27 memo at 14).

3/ No reason for seeking an award against both client and lawyer was given, except for the Rule's goal of discouraging frivilous motions and encouraging attorneys to advise their cleints using best judgment. The FBI also requested a hearing before any sanctions were imposed under Rule 37(a)(4).

send it to his client," but that " a second draft may be necessary." Motion for Extension par. 4 (22 Feb. 1983).

On 8 March 1983, appellants filed objections to each of the FBI's interrogatories and document production requests. It was argued that discovery was irrelevant and unnecessary, since the Bureau has the pertinent documents at issue, and further that the burden on Weisberg was so extreme as to render compliance an impossibility.

To bolster his claim of ill health, referred to only briefly in the papers regarding a protective order, Weisberg filed a 14 page affidavit outlining his condition. The affidavit described how Weisberg, who was 70 at the time, suffered acute thrombophlebitis in both legs, which required surgery, as well as arterial blockage, which required additional bypass operations on his legs. He cannot get up or down except in stages, and his circulation is so poor that: "If I stand still, even momentarily, my legs and thighs, particularly the left, begin to swell immediately from the blood that gets down and cannot get back up to the heart" (Par. 16).

At the direction of his doctors, he can sit still for only 20 minutes at a time and must work from whatever materials are readily available on the top of his desk. All his files are located in his basement, and he has difficulty using the stairs without passing. In addition, even if he could go to his basement, his circulatory problems make it impossible for him to work from records in the lower drawers

in the filing cabinets. (par. 19-20).

4. Sanctions Imposed on Weisberg, Second Order Compelling Discovery Issues.

The FBI responded on 15 March 1983 by moving for an order compelling discovery, arguing that plaintiff was seeking to relitigate issues foreclosed by the denial of his motion for a protective order. The FBI again sought an award of expenses under Rule 37(a)(4) against both Lesar and Weisberg.

In response, it was argued that Weisberg had complied with the court's order by properly objecting to each interrogatory and production request, in accordance with Local 1-9(a), and by providing a detailed affidavit, not challenged by the FBI, attesting to the impossibility of Weisberg's providing discovery.

additional

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. In particular, the court expressed concern that Lesar had sought an extension of time to respond, representing that he needed to consult with Weisberg about preparing a responsive affidavit (hearing at 40).

Significantly for this appeal, Mr. Lesar explained: (4/8 tr. at 40-41)

> 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 of [sic] 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, dicovery is unwarranted -- discovery by the government is unwarranted in a case of this nature.

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

By order dated 13 April 1983, the district court again ordered Weisberg to file responses to the Bureau's discovery requests within 30 days. The Court also instructed the FBI to "submit an affidavit within 10 days from the date of this Order, detailing the expenses, including attorneys' fees, which were incurred in obtaining the Order compelling plaintiff to answer interrogatories and produce documents." The Bureau was also ordered to file responses to three of Weisberg's interrogatories.

The Bureau filed a timely application for expenses of $684.50, of which $662.50 accounted for the 12.5 hours spent by the government's counsel, Henry I. LaHaie, at a rate of $53 per hour. The other $22 was attributed to copying costs. The affidavit filed by LeHaie was not based on contemporaneous time records, but rather on "a reconstruction

of the time I spent preparing the motion and the two memoranda in support, and arguing the motion before the Court." Although the FBI's motion had sought expenses from both Lesar and Weisberg in the government's motion to compel discovery, its fee application and draft order named only Weisberg. The district court signed that proposed order without change.

5. Rule 37 Dismissal.

On 18 May 1983, when Weisberg had not filed a timely response to the FBI's discovery request, the Bureau moved to dismiss these cases pursuant to Rule 37(b)(2)(C), Federal Rules of Civil Procedure. Expenses incurred in filing the motion were also sought from Weisberg and Lesar pursuant to Rule 37(b). The FBI's accompanying memorandum stated that the Bureau's counsel spoke with Lesar several days earlier and was informed that Weisberg was not going to comply because of his position that the FOIA precludes an agency from seeking discovery against plaintiffs (p. 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 to records being withheld -- was too severe a sanction when the only issue was failure to comply with discovery orders on a threshold issue, viz., the adequacy of the search (6/6 memo at 4-5). Lesar simultaneously filed three affidavits prepared by Weisberg, which addressed various factual issues before the court, and submitted four additional affidavits

an search issue wanted to test question

in August 1983.

The district court heard arguments from counsel on this and other pending motions on 9 November 1983. There was no discussion either orally or in the FBI's papers about why expenses should be charged to Weisberg and Lesar collectively, nor did the district court inquire into the relative culpability of lawyer and client. The only discussion of why nothing had been filed came when Lesar repeated at the hearing that "Mr. Weisberg has taken an absolute position that discovery is not warranted on the search issue in a FOIA case and certainly not in the circumstances presented here where there was no showing of need at all." (11/9 tr. at 26).

The district court granted the FBI's motion and dismissed the case in a memorandum and order dated 18 November 1983 (filed 23 November 1983). The court's memorandum pointed to "the plaintiff's willful and repeated refusals to answer in compliance with court orders" and to pay the costs assessed against him in connection with the earlier motion to compel. Nowhere in the four-page memorandum did the court explain why Weisberg's conduct and refusal to answer questions merited an award of attorneys' fees against Lesar, his lawyer. Nor is Lesar mentioned anywhere by name, nor is his conduct in this litigation analyzed. The order directed the FBI to submit its fee application within ten days again, without specifying whether fees would be assessed against either Weisberg, Lesar or both.

6. Sanctions Imposed on Weisberg and Lesar.

The FBI sought attorneys' fees of $1046.75 for its counsel's time preparing and defending the dismissal motion (19.75 hours at a rate of $53/hour), plus $6.80 in duplicating fees, for a total award of $1053.55. Again, the hours were not conputed from contemporaneous time records, but from the FBI attorney's recollection of time spent. There was no discussion in the FBI's application, Weisberg's opposition or the FBI's reply memorandum as to the propriety of assessing expenses against Lesar. Nonetheless, the FBI's proposed order made the award run against both Weisberg and Lesar, and the court signed that order on 21 December 1983.

Matters did not end there, however. On 27 December 1983, the Bureau moved the Court for entry of judgment, in order to confirm dismissal of the suit and the entry of the two awards of expenses, as well as to set an appropriate amount of interest. The district court entered judgment for the FBI on 10 January 1984, but this order held only Weisberg liable for the two awards of expenses. The Bureau then moved on 20 January 1984 to amend the judgment, pursuant to Rule 59(e), in order to recite specifically that both Weisberg and Lesar were jointly liable for the second award of $1053.55, even though only Weisberg was liable for the earlier award of $684.50. Corrections with respect to the interest were also requested.

Without waiting the prescribed period of time for a

reply from Weisberg and Lesar, the district court on 30 January 1984 approved without change the Bureau's draft "amended judgment," making Lesar jointly liable for the second set of expenses. The amended judgment was filed the next day. Plaintiff's motion to vacate or alter this amended judgment was timely filed, and it was denied on 14 February 1984. Plaintiff's request to stay enforcement of the judgment was also denied in the same order. On 30 March 1984 Weisberg and Lesar both noticed timely appeals from the amended judgment and from the district court's denial of their motion to vacate or alter this amended judgment.[4/]

ARGUMENT

THE DISTRICT COURT ERRED IN IMPOSING SANCTIONS ON WEISBERG'S LAWYER

Rule 37(b), Federal Rules of Civil Procedure, specifies a range of sanctions that may be imposed on a party who fails to obey an order to provide or permit discovery. When confronted with such a situation, the district may enter such orders "as are just." In addition to or in lieu of such sanctions, the court may "require the party failing to obey the order or the attorney advising him or both to pay the

---

4/ Earlier, on 23 January 1984, Lesar noticed an appeal from the 23 November 1983 order which dismissed the case and directed the FBI to submit an application for expenses. That notice was docketed in this Court as Nos. 84-5058 and 84-5059, which were consolidated with the 30 March appeals (Nos. 84-5201 and 84-5202 in an order of this Court dated 18 April 1984.

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.

Before sanctions are imposed, especially the ultimate sanction of dismissal, "fundamental fairness" requires a hearing and an exploration of less drastic alternatives. Edgar v. Stillman, 548 F.2d 770, 773 (8th Cir. 1977); see also Israel Aircraft Industries, Ltd. v. Standard Precision, 559 F.2d 203 (2d Cir. 1977). If sanctions are in fact imposed, written findings setting forth the district court's conslucions are also required, in order to facilitate judicial review. Von Der Heydt v. Rogers, 251 F.2d 17, 17-18 (D.C. Cir. 1958); Smith v. Schlesinger, 513 F.2d 462, 467 n. 12 (D.C. Cir. 1975).

In reviewing the imposition of sanctions, an appellate court must decide whether the district court abused its discretion. National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 642 (1976); Roadway Express, Inc., 447 U.S. 752, (1980); Dellums v. Powell, 566 F.2d 231, 235 (D.C. Cir. 1977). On the facts of this case, the district court improperly imposed sanctions against both Weisberg and Lesar.

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 ~~obligation under the~~ Rules' requirement that ~~to impose~~ (be imposed) sanctions "as are just." It is important for a district court to "distinguish between

overzealous clients and overzealous clients in award expenses, Stillman v. Edmund Scientific Co., 522 F.2d 298.800 (4th Cir. 1975). Indeed, this Court has spoken of the need for "proportionality" in meting out sanctions against litigants and lawyers, in order to assume that clients are not punished for their lawyers' actions and vice versa. Butler v. Pearson, 636 F.2d 526, 531 (1980), quoting 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).

While the case law in this area is not always uniform, district courts have, as a general proposition, made a determination as to the relative culpability of lawyer and client and awarded expenses depending on the extent to which the lawyer or the client obstructed discovery, either affirmatively or through their own negligence. How this works in practice is illustrated in several different scenarios.

If the client is responsible for the delay, courts have not hesitated to award expenses solely against the client, even if their counsel defends their actions in court. 5/ Illustrative is Humphreys Extreminating Co., Inc. v. Poulker, 62 F.R.D. 392 (D. Md. 1974). In that case, the defendants failed to answer interrogatoires 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

1/ In a related 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. The reasoning in these cases is 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 v. Allied Artists Pictures, Corp., 602 F.2d 1062, 1068 (2d Cir. 1978).

held that "an award ought not 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 defendants. 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, no sanctions were imposed on him. See also Crawford v. American Fed. of Gov't Employees, 576 F. Supp. 812, 815 (D.D.C. 1983).

By contrast, 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), and 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 Note " " 44, U. Chi. L. Rev. 619, 631 (1978). Indeed, it has been said that: "When non-compliance is the result of dilatory conduct by counsel, the courts should investigate the attorney's responsibility as an officer of the court and, if appropriate, impose on the client sanctions less extreme than dismissal or default, unless it is shown that the client is deliberately or in bad faith failing to comply with the court's order." Edgar v. Slaughter, supra, 548 F.2d at 773 (emphasis added).

There are several situations in which the lawyer's conduct has been sufficiently egregious to merit an award of fees solely against the lawyer. Thus, fees have been awarded if a lawyer consistently interrupts a deposition to instruct the client not to answer questions, and there is no non-frivilous privilege that can be asserted. 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). 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 Sheepline 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.

In the situation where a district court contemplates imposing fees on both lawyer and client, the court should, after learning the pertinent facts, hold the parties jointly liable only if both parties can be blamed for the delay, either through their negligence or some affirmative ation which hinders discovery.

Illustrative is the recent decision in Tamari v. Bache & Co. (Lebanon) S.A.L., ___ F.2d ___ (7th Cir. 27 February 1984), which upheld an award of fees against both lawyer and client. After seven years of litigation and

various missed deadlines, the district court ordered the plaintiffs' depositions be completed and certain documents produced by a certain date, and their counsel represented that this would happen. When the plaintiffs did not appear, the case was dismissed. The plaintiffs moved to vacate because their lawyers had not informed them of the mandatory cut-off date. They added that the requested documents had been destroyed. Slip op. at 2.

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." Slip op. at 3.

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 opposed the motion for expenses. The plaintiffs, who are Lebanese citizens, were apparently aware of the deposition schedule, but claimed they could not appear or obtain access to the requested papers because of the war in Beirut. The court rejected these arguments because the plaintiffs had not been in Beirut during the relevant period. Slip op. at 3. The plaintiffs' law firm was held jointly liable for failing to communicate the mandatory nature of the discovery cutoff to the plaintiffs. Slip op. at 8. Accord Chesa

Int'l, Ltd. v. Fashion Associates, Inc., 425 F. Supp. 234, 237 (S.D.N.Y.), aff'd mem., 573 F.2d 1288 (2d Cir. 1977) (defendants refused to release certain records, but their counsel "contributed significantly" to the pattern of delay); see also Penthouse Int'l, Ltd. v. Playboy Enterprises, Inc., 663 F.2d 371, 382 (2d Cir. 1981)(remanding case because could had failed to to differentiate between attorney and client in awarding expenses); but see Palma v. Lake Waukomis Development Co., 48 F.R.D. 366 (W.D. Mo. 1970)(awarding expenses against lawyer and client, though without analysis); Hulvat v. Royal Indemnity Co., 277 F. Supp. 769, 771)(S.D. Wis. 1967)(awarding expenses against client who missed disposition, though not lawyer who advised him to oppose certain discovery; no explanation given for different treatment).

It is important to evaluate Lesar's conduct and culpability against these standards. When the first order compelling discovery was issued in February, 1983, Lesar did meet with his client and did attempt to draft a responsive document. However, Weisberg flatly vetoed the idea of giving any answers or documents to the FBI, reportedly as a matter of principle, and Weisberg refused to budge from that position throughout the litigation. Lesar represented this fact to the district court at both the April and November 1983 hearings.

Weisberg's obstinacy put 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 any 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 suitation, 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).

Stanton case

Lesar submits that he complied with these requirements, but that, as a practical matter, he could do nothing to assure compliance with the discovery orders, once Weisberg refused to cooperate. 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. Under the circumstances, it is unjust to make the lawyer pay for a situation which is beyond his control.

In making these statements, we recognize that deterrence, as well as punishment, is a goal of Rule 37, see NHL v. Metropolitan Hockey Club, Inc., supra, 427 U.S. at . Nevertheless, it is difficult to see how that goal would be achieved by awarding expenses against Lesar. If a client

My appeal determination & appeal & last issue

flatly refuses to obey a court order, and the lawyer properly counsels him but to no avail, what conduct by the lawyer would an award of expenses be expected to deter?

Under the circumstances, the district court erred in awarding expenses against Lesar. Apart from the substantive problems, the district court's approach to the question was procedurally deficient as well. In contrast to the careful fact-finding and articulation of reasons in Tamari v. Bache & Co., supra, and similar cases, the district court did not explore the relative culpability of Weisberg and Lesar, nor did it make wirtten findings n this point, as required in this Circuit by Von der Heydt v. Rogers, supra, and similar cases. This is not simply a failure to dot the i's and cross the t's. As just discussed, there is the need for proportionality in imposing sanctions under Rule 37, and has requires some articulation as to why both lawyer and client should be charged with expenses. The need is particularly strong here, since the record available to the court ~~suggested~~ reflected solely that Weisberg was responsible for impeding discovery.

The need for findings is also underscored by the fact that when Weisberg failed to obey the first motion to compel in April 1983, the court charged solely Weisberg for the expenses, although the FBI had sought expenses from both men. Later on, when expenses were awarded at the end of the case, the court signed an order making both Weisberg and Lesar liable for expenses, even though Weisberg's recalcitrance was still the only reason given for non-compliance.

There is no explanation why the district court deemed that sanctions were appropriate against Lesar ~~once, but not~~ in one instance, but (not the other, ~~twice~~, esepcially since the reason for non-compliance had not changed. Moreover, the absence of any careful consideration of this point is demonstrated by the fact that the district court simply signed the FBI's order assessing fees against Weisberg and Lesar in November 1983, then omitted Lesar from the Judgment that was filed ~~tow~~ IV months later, only to reinstate Lesar a few weeks later when the FBI sought to amend the judgment. The procedural due process concepts inherent in Rule 37's requirement that sanctions be imposed "as are just" are seriously compromised by the almost casual approach demonstrated by the district court here.

CONCLUSION

For the foregoing reasons, appellant James H. Lesar respectfully submits that, if any award of expenses under Rule 37 is upheld in this litigation, then only appellant Harold Weisberg should be liable for those expenses.

Respectfully submitted,

no award of expenses under Rule 37 should be ~~ass~~ assessed against him.