SUPREME COURT OF FLORIDA

THE FLORIDA BAR, Petitioner,	)	Case No.: SC07-1197
	)	[TFB File No.: 2007-90, 387 (OSC)]
vs.	)	
MILES JAY GOPMAN, Respondent.	)	

RESPONDENT'S MOTION TO DISMISS BAR'S PETITION FOR CONTEMPT FOR FAILURE TO STATE THE OFFENSE OF INDIRECT CRIMINAL CONTEMPT AND/OR TO STATE GROUNDS UPON WHICH SANCTIONS UNDER TO SHOW CAUSE CAN BE GRANTED

Respondent, MILES JAY GOPMAN, a/k/a Miles J. Gopman, appearing pro se, and pursuant to Rule 3-7.7(g), Rules Reg. Fla. Bar, and Rule 3.840, Fla. R. Crim. P., and moves to dismiss the Bar's petition for contempt for failure to state an offense and/or grounds upon which sanctions may be granted, and states:

1) The Bar's petition for contempt and its Order to Show Cause that it caused the Clerk of this Court to issue thereon, requests the termination of the probationary period in Florida Bar v. Gopman, 923 So.2d 1164 (Fla. 2005), that this Respondent be held in contempt of this Court; and thereby suspended for period of 91 days; and assessed an administrative fine of $1,250.00.

2) A contempt sanction is criminal when the sanction is punitive; that is non-remedial, not intended to coerce compliance, and lacking opportunity to purge. International Union, United Mine Workers of America v. Bagwell, 512 U.S. 821, 826-27 (1994); Parisi v. Broward County, 769 So.2d 359, 364-65 (Fla. 2000).

3) A fixed sentence or term of punishment is characteristic of criminal contempt, as opposed to an indefinite term characteristic of a civil contempt sanction. Pugliese v. Pugliese, 347 So.2d 422, 424-25 (Fla. 1977); Demetree v. State ex rel. Marsh, 89 So.2d 498, 501 (Fla. 1956). Likewise: "any 'flat, unconditional fine' is considered a *criminal sanction* because it does not afford the opportunity to purge the contempt through compliance". Parisi, 769 So.2d at 359; Bagwell, 512 U.S. at 829.

4) The Bar's petition for contempt refers to the Court's disposition order of October 18, 2005 in Case No. SC04-87, Fla. Bar File No. 2003-71,056(11M), approving the referee's report, as modified therein, and alleges this Respondent's non-compliance therewith.

5) The Bar's petition for contempt does not seek to enforce the referee's report by a contempt filed in the original disciplinary proceeding. A staff counsel of the Bar's Tallahassee office, acting independently, without authorization from a disciplinary agency, as described in Rule 3-31, Rule Reg. Fla. Bar, self-generated the file number it placed on its petition and Order to Show Cause, that the Clerk's office has referenced as "Lower Tribunal No.: 2007-90,387 (OSC)", in order to initiate the present proceeding.

6) In its petition, without explicitly stating so, the Bar relies on Rule 3-5.1(c) and Rule 3-7.7(g), as opposed to Rule 3-7.11(f), in bringing this independent petition for contempt. As this Court observed in South Dade Farms v. Peters, 88 So.2d 891, 899 (Fla. 1956):

> "Fundamentally, a criminal contempt proceeding is between the public and the defendant. It is not directly a part of the original cause…. A civil contempt proceeding … is in actuality a proceeding between the parties to the cause and is instituted and tried as a part of the main case…."

7) Summary adjudication of indirect contempt is prohibited; and the imposition of a criminal contempt sanction requires the same constitutional due process protections afforded

to criminal defendants. Parisi, 769 So.2d at 364; Bagwell, 512 U.S. at 826-27. The specific procedures under Rule 3.840, Fla. R. Crim. P., must be followed. Parisi, 769 So.2d at 365.

8) To be sure, because the contempt alleged did not take place in the presence of this Court, "procedural due process of law demands that the proceedings be conducted in conformity with Fla.R.Crim.P. 3.840." Pugliese v. Pugliese, 347 So.2d 422, 426 (Fla. 1977).

9) Criminal Procedure Rule 3.840(a) requires that the Order to Show Cause be based upon "affidavit of any person having knowledge of the facts." The Bar's motion for contempt is neither sworn nor based upon "affidavit".

10) An application for order to show cause that is not supported by "affidavit or sworn testimony" is fundamentally flawed. Pugliese, 347 So.2d at 426, Baker v. State, 732 So.2d 6, 7 (4th DCA 1999).

11) The Bar's petition for contempt alleges Respondent's non-compliance with conditions in a referee's report that he "submit[s] to a comprehensive mental health evaluation by a mental health practitioner approved by Florida Lawyers Assistance, Inc. (FLA, Inc.)". (Bar's Petition, ¶ 2). This condition is facially vague and indeterminable, making its meaning and measure of compliance to be necessary dependent upon the future judgment of some unknown "practitioner", a stranger to the proceeding to be chosen by the Bar's designated agent, and through the non-professional, non-judicial interpretations by the Bar's regulatory staff.

12) This condition is nowhere to be found, and has never been judicially determined or explained. It was not determined or explained in this Court's disposition order of October 18, 2005 in Case No. SC04-87, which order does not expressly adopt or describe this rec-

ommended condition. The fact that this recommended condition is not among the conditions of probation that are specifically authorized under Rule 3-5.1(c) is reflective of its unusual, unprecedented and unknown character.

13) Respondent was not given fair or reasonable notice as to what specific actions he must take in order to comply with the referee's recommended condition. This violates due process under the XIV Amendment to the United States Constitution.

14) As such, the observation by the United States Supreme Court in Lambert v. People of the State of California, 355 U.S. 225, 229 (1957) is applicable:

> "… Engrained in our concept of due process is the requirement of notice…. Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed. Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act … where a person, wholly passive and unaware of any wrongdoing, is brought to the bar of justice for condemnation in a criminal case."

15) Similarly, with regard to indirect criminal intent, "there must be an order which clearly and definitely makes a person aware of the court's command and direction … [and] proof beyond a reasonable doubt that the individual intended to disobey the court." Levine v. State, 650 So.2d 666, 668 (4th DCA 1995); Eubanks v. Agner, 636 So.2d 596, 598 (1st DCA 1994).

16) The Florida Bar had its staff secretaries correspond with Respondent over compliance with the referee's recommended condition, by letters dated October 26, 2005 and February 9, 2006, attached to the Bar's petition as Composite "A". Those letters added to the absence of fair and reasonable notice by stating as follows:

> "… As a condition of your probation, you are required to undergo a mental health screening by certified mental health evaluator approved by Florida Lawyers Assistance, Inc., (FLA, Inc.) and comply with any follow-up treat-

ment, if recommended." (Bar's Petition, ¶ 3).

17) By letter dated March 28, 2006, attached to the Bar's petition as Exhibit "B", the director of lawyer regulation, Mr. Kenneth L. Marvin, corresponded with this Respondent to restate the terms of the referee's condition to require Respondent "to undergo a comprehensive mental health evaluation by a mental health practitioner approved by Florida Lawyers Assistance, Inc. (FLA, Inc.)", and to this end Respondent was instructed "to contact them to schedule a comprehensive mental health evaluation." (Bar's Petition, ¶ 4).

18) After Respondent sought further clarification, Mr. Marvin corresponded by letter dated April 12, 2006, in which Respondent was given 10 days to take "the necessary steps to comply [with the referee's recommendation concerning the FLA evaluation]"; otherwise, he would "file a Petition for Contempt and seek an indefinite suspension until you do comply." (Bar's Petition, ¶ 6, & Exhibit "D" thereto). Unlike the instant petition for contempt, the sanction described in Exhibit "D" is civil and remedial in nature by affording an opportunity to purge.

19) As acknowledged in paragraphs 7 and 8 of the Bar's petition for contempt, Respondent carried out the instructions given to him by its director of lawyer regulation, to take "the necessary steps to comply" with this Court's order of October 18, 2005 that approved the referee's report, and thereby "to contact [FLA] to schedule a comprehensive mental health evaluation [on April 17, 2006]."

20) As further shown in paragraph 8, Respondent did meet with Dr. Scott Weinstein, FLA's clinical director, on April 24, 2006, and did thereby "submit to a comprehensive mental health evaluation by a mental health practitioner approved by Florida Lawyers Assistance,

Inc."; and did, in furtherance thereof, sign medical releases so that Dr. Weinstein could gather and verify additional mental health records and facts to complete his evaluation of Respondent.

21) The Bar's petition does not allege non-compliance with any particular provision of the referee's recommended condition. Nowhere is Respondent required to do more than schedule an appointment with FLA and be evaluated by its clinical director. In fact, underlying the Bar's petition is the assumption of an implied condition to subject Respondent to subsequent evaluations by an FLA "approved provider", whenever the Bar so requests.

22) The faulty nature of the Bar's contention about the need for Respondent to still be evaluated beyond his session with Dr. Weinstein is reflected in the absence of any written statement from Dr. Weinstein, sworn to or otherwise; by being based wholly upon conjecture about what Dr. Weinstein believed at the time and what he intended to do; and by having to depend upon unprovable assumptions about what Respondent knew Dr. Weinstein believed at the time and what Respondent could have known about Dr. Weinstein's intentions.

23) The faultiness of these allegations is further revealed in Exhibit "E" to the Bar's petition, and its misinformation regarding same in paragraph 9. What Dr. Weinstein's letter to Respondent of January 22, 2007 actually proves is that Dr. Weinstein had completed his evaluation of Respondent; and rather than having spent the intervening seven (7) months from Respondent's session on April 24, 2006 at "work on finding a FLA, Inc. approved provider in respondent's area", he was acting instead upon the FLA's receipt of "an updated request from The Florida Bar to schedule an evaluation by an FLA certified professional."

24) The Bar's allegation implying that Dr. Weinstein had initiated the correspondence

of January 22, 2007 for purpose of "naming a provider for respondent to contact for his comprehensive mental health evaluation" is a plain misrepresentation. Further misrepresentations run throughout the remainder of the Bar's petition for contempt, highlighted by the Bar's implication of another unstated requirement for Respondent's "mental health evaluation by a mental health practitioner" be performed by "psychiatric evaluators" (Bar's Petition, ¶¶ 13 & 14); and by its most egregious misrepresentation of all contained in paragraph 15 that falsely alleges: "[T]his Court ordered respondent to have a comprehensive ***psychiatric*** evaluation by November 2005 and 20 months later, he has not complied."

25) Yet, nowhere is there any requirement for a "psychiatric" evaluation, in either the condition recommended by the referee, as shown in paragraph 2 of the Bar's petition, or in any order of this Court. In fact, the Court's disposition order October 18, 2005 says not one word about "a comprehensive mental health evaluation by a mental health practitioner", other than to state "respondent shall comply with all other terms and conditions recommended by the referee as set forth in the report".

26) That order of October 18, 2005 contains standard language, to wit: "Not final until time expires to file motion for rehearing, and if filed, determined." Respondent did file a motion for rehearing that was denied on February 6, 2006. The transparent falsity of the Bar's allegation that this Court ordered Respondent's "psychiatric evaluation by November 2005" demonstrates the unreliability of the Bar's allegations, and explains why the petition fails to satisfy the requirement of Rule 3.840, Fla. R. Crim. P., in being unsworn or unsupported by affidavit.

27) Even the Order to Show Cause that the Bar filed and caused the Clerk to issue is

facially flawed by reference to the "probationary period in Florida Bar v. Gopman, 923 So.2d 1164 (Fla. 2005)." Nothing appears at this citation other than listing of the prior disciplinary proceeding among a number of unpublished opinions. The sole disposition appearing at that citation in reference to the prior proceeding is that of a "Public Reprimand".

28) The Bar's allegations in paragraph 5, involve a selective and misleading use of the concluding passage at the very end of Respondent's four (4) page letter, dated April 7, 2006; and, as such, they are impertinent, immaterial and improper. On page 2 thereof, Respondent informs that his letter is based upon Rule 4-3.4(c), which states that a lawyer "shall not disobey an obligation under the rules of a tribunal except for an open refusal based upon an assertion that no valid obligation exists", whereupon Respondent maintained that "no valid obligation exists," quoting Rule 4-3.4(c). Thus, Respondent questioned the validity "under the Constitution and Laws of the State of Florida and under the Constitution and Laws of the United States for [him] to 'undergo a comprehensive mental health evaluation' – whatever that may mean".

29) Pursuant to Fla. Stat. § 38.23:

> "A refusal to obey any legal order, mandate or decree … after due notice thereof, shall be considered a contempt… But nothing said or written, or published, in vacation, to or of any judge, or of any decision made by a judge, shall in any case be construed to be a contempt."

30) As this Court found in State ex rel. Giblin v. Sullivan, 26 So.2d 509, 515-16 (Fla. 1946), where a published statement does not cause a direct interference with the administration of justice, it is "absolutely privileged" when "connected with, or relevant or material to, the cause in hand or subject of inquiry".

31) Because the petition for contempt depends upon the Bar's belated interpretation of

the referee's recommendation for Respondent to "submit to a comprehensive mental health evaluation by a mental health practitioner", which only now – after 20 months – is construed to mean a "psychiatric evaluation", Respondent could not have violated this previously unknown condition. To be sure:

> "A decree cannot be violated in advance of its entry and it cannot be made retroactive so as to establish a violation by the acts of parties committed before the decree was entered." South Dade Farms, supra, 88 So.2d at 900.

WHEREFORE, Respondent moves to dismiss the Bar's petition for contempt and to vacate its Order To Show Cause, the reasons stated above.

Respectfully submitted:

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Miles J. Gopman, Esq.
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the Respondent's foregoing Motion To Dismiss Bar's Petition For Contempt, Etc. was served by Express Mail upon The Florida Bar, c/o Kenneth L. Marvin, Esq., Director, Lawyer Regulation, at 651 East Jefferson Street, Tallahassee, FL 32399-2300 this ___ day of July, 2007.

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Miles J. Gopman, pro se