

IN THE MATTER OF DISCIPLINARY
PROCEEDINGS AGAINST MICHAEL J.
GABLEMAN, ATTORNEY AT LAW.

CASE CODE 30912

OFFICE OF LAWYER REGULATION,
Complainant;

CASE NO. 2024AP2356-D

FILED

MICHAEL J. GABLEMAN

FEB 28 2025

Respondent.

CLERK OF SUPREME COURT
OF WISCONSIN

**MOTION FOR AN ORDER COMPELLING RESPONDENT'S APPEARANCE
AT DEPOSITION, AND MOTION FOR SANCTIONS**

MOTION

The Office of Lawyer Regulation (OLR), by Retained Counsel, Donald K. Schott (Schott), moves, pursuant to Wis. Stat. sec. 804.12(1) and (4), for an order:

1. Compelling Respondent Michael J. Gableman (Gableman) to appear for deposition on March 20 and 21, 2025;
2. Stating that failing to appear for the deposition on March 6 and 7 will result in:

- a. An order under Wis. Stat. sec. 804.12 (2)(a)1 that all facts alleged in the complaint are taken as established for purposes of this proceeding;
- b. An order under Wis. Stat. sec. 804.12(2)(a)2 refusing to allow Gableman to offer any testimony or evidence from himself into the record in this case;

3. Limiting Gableman's assertion of a Fifth Amendment privilege to questions where he has reasonable cause to apprehend danger that answering will create a risk of self-incrimination; and

4. Requiring Gableman to pay the reasonable expenses, including attorney fees, incurred by OLR as a result of Gableman's failure to appear for his deposition noticed on February 17 and 18, 2025, and in connection with this motion.

RELEVANT FACTS¹

5. On November 19, 2024, OLR by Retained Counsel Donald K. Schott caused to be filed in the Wisconsin Supreme Court the Complaint which initiated this matter.

6. On December 12, 2024, Schott had a telephone conference with Gableman's attorney, Peyton Engel (Engel). Among other things, Engel asked Schott what type of sanction OLR considered appropriate in this matter. Engel raised the possibility that the matter could be resolved by stipulation. Schott replied that he would need to confer with others at OLR before responding.

7. During that discussion, Schott also told Engel that Schott was interested in taking Gableman's deposition in the near future, in part because Gableman's prior responses to OLR's requests for his comments on the grievances filed against him had failed to address many of the factual allegations in those grievances. Schott told

¹ The factual assertions in this motion are supported by the *Affidavit of Donald K. Schott* and the exhibits attached to the affidavit, which OLR submits along with this motion.

Engel that he would send him some proposed deposition dates soon.

8. On December 16, 2024, Schott followed up his conversation with Engel with an email proposing January 13, 14, 15, 16, 17, 20 and 21 as possible dates for a two day deposition. A true and correct copy of this email is attached as Exhibit 1 to the Schott affidavit.

9. Later on December 16th, Engel responded with an email stating that he might not be able to respond to Schott's email yet that day, but if not, he would respond "tomorrow." A true and correct copy of this email is attached as Exhibit 2 to the Schott affidavit.

10. Engel did not send a response on December 17th. However, on December 20, 2024, Engel did send an email response to Schott. In this email, Engel said he did not want to schedule a deposition of Gableman, in part because he thought there was a possibility of resolving the matter by stipulation. A true and correct copy of this email is attached as Exhibit 3 to the Schott affidavit.

11. On December 23, 2024, Schott replied to Engel by email. Schott told Engel that he understood Engel's concerns, but still wanted to schedule a deposition date during the window of dates Schott had provided to Engel earlier. Schott also told Engel that he--Schott--anticipated responding to Engel's question about the sanction OLR considers appropriate several days before the first of those deposition

dates, which would leave time before the deposition to see if an agreed upon resolution was possible. A true and correct copy of this email is attached as Exhibit 4 to the Schott affidavit.

12. Schott did not receive a response to his December 23rd email until January 8, 2025. On that day, Schott emailed Engel suggesting they meet by telephone on January 10th, at which time Schott would inform Engel of OLR's position regarding an appropriate sanction. Engel responded by email agreeing to a telephone meeting on January 10th, but Engel also stated he continued to be reluctant to have Gableman appear for a deposition. Engel set forth several reasons for that reluctance. A true and correct copy of Engel's email is attached as Exhibit 5 to the Schott affidavit.

13. On January 10, 2025, Schott had a telephone conversation with Engel. Among other things, Schott informed Engel what level of discipline OLR had determined, based on the information it had to date, to be appropriate. Engel said he would discuss OLR's position with Gableman "immediately" and get back to Schott letting him know if a stipulated resolution seemed possible. Schott told Engel that, since this matter had been known to Gableman for over a year, Schott felt Gableman could make a decision about agreeing to a stipulation relatively quickly and, therefore, Schott intended to notice a deposition of Gableman for February 5 and 6, 2025. Schott also told Engel that, if those dates were

not convenient for Engel, Schott would be willing to accommodate him.

14. Later on January 10, 2025, Schott caused to be served on Engel a notice of deposition for February 5 and 6, 2025. A true and correct copy of this notice of deposition is attached as Exhibit 6 to the Schott affidavit.

15. On January 16, 2025, Schott had another telephone conversation with Engel. Engel said that Gableman had not yet decided what his position was on a stipulated agreement. Engel also told Schott that he (Engel) had a conflict on February 5th and 6th. Schott and Engel discussed alternative dates for Gableman's deposition. Engel suggested February 17th and 18th. Schott told Engel that Schott had a conflict on those dates, but that he would see if he could work around it. Schott told Engel that he would get back to him.

16. On January 17, 2025, Schott sent Engel an email confirming that the February 17th and 18th dates worked for him. A true and correct copy of this email is attached as Exhibit 7 to the Schott affidavit.

17. On January 17, 2025, Schott caused to be served on Engel a notice rescheduling the Gableman deposition to February 17 and 18, 2025. A true and correct copy of this email is attached as Exhibit 8.

18. On January 23, 2025, a scheduling conference was held in this matter. Both Engel and Schott participated.

19. During that conference, Engel again mentioned that Gableman was considering a stipulated resolution. Schott

informed the Referee that he had noticed Gableman's deposition.

20. Engel did not express any objection to the deposition.

21. Schott did not hear anything more from Engel regarding the deposition or the possibility of a stipulation until Schott received an email from Engel on February 12th. Engel told Schott that "[a]fter much consideration, including 5th Amendment concerns, Attorney Gableman will not be appearing for deposition next week. We would like to meet with you, on either Tuesday or Thursday, to discuss the case, and perhaps resolve it." A true and correct copy of this email is attached as Exhibit 9 to the Schott affidavit.

22. Schott responded to Engel's email on February 13, 2025. Schott stated: "I was surprised and disappointed to receive your email, especially coming just a few days before the scheduled deposition. I am available to meet on Tuesday (2/18), but my agreement to do so does not waive any rights OLR has as a result of your client's refusal to attend the deposition. I would prefer we meet in person. I am available all day, but let me suggest 10:00 a.m. at your office. If another time is more convenient for you let me know". A true and correct copy of this email is attached as Exhibit 10 to the Schott affidavit.

23. Later on February 13th, Engel responded to Schott's email with an email stating--among other things--that that "[w]e understand that the decision not to appear may have

consequences." A true and correct copy of this email is attached as Exhibit 11 to the Schott affidavit.

ARGUMENT

24. Gableman was properly noticed for a deposition to be held on February 17 and 18, 2025. He did not seek a protective order to limit or prohibit the deposition. Instead, a few days before the deposition was to take place, he simply had his attorney send an email saying he would not attend the deposition because of "5th Amendment concerns." His failure to attend the deposition is a clear violation of Wisconsin's discovery rules and entitles OLR to relief under Wis. Stat. sec. 804.12(4).

25. Under Wis. Stat. sec. 804.12(4), the Referee is empowered to make such orders with regard to the failure of a party to attend that party's deposition "as are just," including taking any of the actions authorized by Wis. Stat. sec. 804.12(2)(a) 1, 2 and 3. While OLR could seek orders under 804.12(2)(a) 1 and 2 at this time, it instead seeks more limited relief, namely an order (1) compelling Gableman to attend a rescheduled deposition, (2) making clear that the remedies under 804.12(2)(a) 1 and 2 will be applied if Gableman once again fails to appear at that rescheduled deposition, (3) limiting Gableman's assertion of a Fifth Amendment privilege at the deposition to questions where he has reasonable cause to apprehend danger that answering will create a risk of self-incrimination, and (4) awarding OLR

the reasonable expenses, including attorney fees, incurred by OLR as a result of Gableman's failure to attend the deposition and in connection with this motion.

26. An order compelling Gableman to attend a rescheduled deposition, and making clear that the remedies under 804.12(2)(a) 1 and 2 will be applied if Gableman fails to appear for that rescheduled deposition, is clearly justified. While Gableman has a right to refuse to answer questions when doing so could expose him to criminal liability, he does not have a right to simply not appear at a properly noticed deposition:

When properly claiming the privilege, a party may not simply ignore its discovery obligations. For example, an individual who intends to assert the Fifth Amendment may not refuse to attend the deposition, and a notice of deposition will not be vacated on a claim that the privilege will be asserted. Instead, the party must attend the deposition, answer those questions that are not properly within the scope of the privilege, and claim the privilege as to the specific questions that create a risk of self-incrimination. ... In short, there is no such thing, at least not legally, as a blanket claim of the Fifth Amendment.

Taking the Fifth, 29 No. 1 Litigation 34, 36 (ABA, Fall 2002).

27. It is equally clear that a referee in a disciplinary case has authority to enter orders imposing the remedies provided under 804.12(2)(a) 1 and 2:

This court has held that the imposition of a sanction authorized by sec. 804.12(2)(a), Stats.1, which includes the striking out of a pleading and the rendering of a default judgment, is discretionary with the court. In re Estate of Glass, 85 Wis.2d 126, 270 N.W.2d 386 (1978). This statute is applicable to attorney disciplinary proceedings, SCR 22.23(2), and a referee in a disciplinary proceeding has the powers of a judge trying a civil case, SCR 22.03. In Glass the court further held that the imposition of a sanction under that statute does not require a violation of a discovery order made by the court; failure to comply with the statutory directive itself is sufficient. Id., 146-47, 270 N.W.2d 386.

Matter of Disciplinary Proceeding Against Haberman, 128 Wis. 2d 390, 391-92, 382 N.W.2d 439 (1986).

28. Similarly, since this proceeding is governed by the Wisconsin rules of civil procedure and evidence, SCR 22.16, Gableman may only assert a Fifth Amendment privilege with respect to questions where he has reasonable cause to apprehend danger if he answers:

Fifth Amendment protection "must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer." Hoffman v. United States, 341 U.S. 479, 486-87, 71 S.Ct. 814, 95 L.Ed. 1118 (1951). "The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself--his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified, and to require him to answer if 'it clearly appears to the court that he is mistaken.' " Id. (citations omitted). Thus, the "trial court has a clear responsibility to make a full record that the witness' fear of

incrimination is valid, real and appreciable, and not speculative or merely an imaginary possibility of incriminatory danger." State v. Harris, 92 Wis. 2d 836, 844-45, 285 N.W.2d 917 (Ct. App. 1979) (footnotes omitted).

Disciplinary Proceedings Against Curtis, 2018 WI 13, ¶35, 379 Wis.2d 521, 907 N.W.2d 91.

29. Therefore, an order limiting Gableman's assertion of a Fifth Amendment privilege to questions where he has reasonable cause to apprehend danger that answering will create a risk of self-incrimination is appropriate and reasonable.

30. Finally, since the deposition here was discussed since mid-December, and the date was noticed on January 17th, Gableman's nearly last minute, unjustified decision not to attend justifies awarding OLR its reasonable expenses, including attorney fees, incurred as a result of the failure to attend and in connection with this motion.

CONCLUSION

OLR asks the Referee for an order:

31. Compelling Respondent Michael J. Gableman to appear for deposition on March 20 and 21, 2025;

32. Stating that another failure to appear will result in:

- a. An order under Wis. Stat. sec. 804.12 (2)(a) that all facts alleged in the complaint are

taken as established for purposes of this proceeding;


b. An order under Wis. Stat. sec. 804.12(2)(a)2 refusing to allow Gableman to offer any testimony or evidence from himself into the record in this case;

33. Limiting Gableman's assertion of a Fifth Amendment privilege at the rescheduled deposition to questions where he has reasonable cause to apprehend danger that answering will create a risk of self-incrimination; and

34. Requiring, under Wis. Stat. sec. 804.12(4), Gableman to pay the reasonable expenses, including attorney fees incurred by OLR as a result of Gableman's failure to appear for his deposition noticed on February 17 and 18, 2025 and in connection with this motion.

Dated this 20th day of February, 2025

OFFICE OF LAWYER REGULATION



Donald K. Schott
Retained Counsel for OLR
State Bar No. 1010075