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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

ELLIS S. RUBIN,

Respondent.

_____/

Supreme Court Case No.: 72,255

ANSWER BRIEF OF RESPONDENT, ELLIS S. RUBIN

(On Appeal from the Report of Referee)

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PREFACE

The Respondent, ELLIS S. RUBIN, adopts the Preface of the Complainant.

STATEMENT OF THE CASE AND OF THE FACTS

Rubin adopts the Statement of the Case detailed on page 1 of The Florida Bar's Initial Brief, with the following addition:

The reasons the Referee recommended that Rubin be found not guilty were: (1) that there was evidence to support Rubin's contention that he had only two choices, to withdraw or allow his client to present perjured testimony; (2) that it was Rubin's reasonable perception that whichever way he acted he would be in jeopardy of apparent violation of his oath as an attorney: and (3) that Rubin's actions lack the willfulness necessary for him to be found guilty of any of the charges.

Also, Rubin would recite the following additional Statement of the Facts which emerged in the Final Hearing before the Referee:

That during February, 1985, the Court allowed Rubin to substitute as defense counsel (the fourth) in The State of Florida vs. Russell J.Sanborn, in the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida, after being assured that Rubin would be ready for an April 29, 1985 trial date and that Sanborn would continue with Rubin.

During the week prior to the jury trial date of April 29, 1985, Rubin and at least one member of his staff met with the Defendant Sanborn at the Dade County Jail to discuss the

evidence and trial tactics.

Defendant confided to Rubin that the version of the facts previously told by Defendant was not accurate and that, because of the physical evidence and deposition testimony that had been gathered by Rubin, the Defendant was going to have to change his story that he was to tell the jury during his own testimony. The Defendant said, "I'm going to testify and here's what I'm going to say:" He then proceeded to change some crucial elements of his story. He still maintained his innocence, but in the new version he now claimed to have spent the whole night of the crime weeping at the bedside of a hospitalized ex-girlfriend. Further, he said he had two witnesses who would back up this story, including the woman. He supplied telephone numbers to Rubin and promised that these new witnesses would give him an iron-clad alibi. "It's in the bag," he said. An associate of Rubin, Attorney H. Matthew Fuqua, called the two people. The girl backed the Defendant's story at first. She then called back, frightened and crying, and said she had been paid to testify falsely for the Defendant. She asked what to do. Mr. Fuqua advised her to not go anywhere near the courtroom and to refuse to participate in known perjury. The other witness, an admitted drug dealer, refused to corroborate the phony alibi.

Respondent's belief in the Defendant's candor and credibility had been totally shattered. Furthermore, Rubin realized that the Defendant's placing of the blame for the murder of the victim on a so-called former roommate was nothing

more than an attempt to shift blame and to implicate an innocent man. As a result, Rubin sent for the Defendant's mother, who had originally retained him for her son. He intended to urge the mother to convince her son to stay off the witness stand if he was going to commit perjury and tell a story'that could not be corroborated. Upon telling her this latest development in such wrongdoing, the mother, who had indicated a desire and intent to herself be a defense witness at the trial, confided to Rubin that she was not surprised. She related that she was the person who drove her son to the victim's house the night of the murder, that she waited while he was inside, and she watched him carry what looked like a "rolled carpet" over his shoulder to the victim's Mercedes Coupe. When he drove off, she followed him, lost him, and then drove to his apartment where she again saw the Mercedes parked outside. She then went home. A few hours later, when her son showed up at her house with questionable items of jewelry, she helped pawn it for him, signing the necessary papers.

In addition, when Attorney Fuqua called the Defendant's ex-girlfriend, as recited above, she reported that the person who gave her a bribe of cocaine to testify falsely for the Defendant in court was the Defendant's mother.

On July 16, 1985, the Third District Court of Appeal of Florida, while denying Rubin's Writ of Certiorari, discussed at length Rubin's dilemma in representing a client who wanted to present evidence and testimony known to be false. In Sanborn vs.

State, 474 So.2d 309 (3rd DCA, 1985), the court held that:

A. Up until the filing of his Motion To Withdraw, "Rubin has acted according to the moral and ethical obligations required of him as a member of the legal profession." (Page 311).

B. And, "Regardless of the client's wishes, defense counsel must refuse to aid the Defendant in giving perjured testimony and also refuse to present the testimony of a witness that he knows is fabricated." (Page 312).

C. At page 313, the court says: "The worst dilemma that could be facing Rubin in the present case is that his client, the Defendant, insists upon testifying falsely at trial. If at trial, however, there remains a chance of perjured testimony being presented by the Defendant, formulas have been proposed which preserve the sanctity of the tribunal and the ethical standards that Rubin, as an officer of the court, has vowed to uphold. The procedure most often sanctioned in this situation is to allow the Defendant to take the stand and deliver his statement in narrative form: the Defendant's attorney does not elicit the perjurious testimony by questioning nor argue the false testimony during closing argument".

D. And we find at page 314 that "... this is a case of first impression in Florida,..."

E. In footnote 4 on page 315, a member of the court mentions the then pending case of Nix vs. Whiteside, wherein the U.S. Supreme Court is expected to soon give attorneys guidance when "ethical obligations seemingly come in conflict with their

client's constitutional rights".

When the case of The State of Florida vs. Russell J. Sanborn was restored to the trial calendar, Rubin sought to withdraw based on the same grounds as before.

The trial court again denied Rubin's Petition to Withdraw and ordered him to proceed at trial.

On September 13, 1985, Rubin was held to be in direct criminal contempt of Court and sentenced to serve thirty (30) days in jail. The Order of Contempt noted that "Attorney Rubin has always been respectful to this Court and while refusing to proceed has never done so in a discourteous manner".

Rubin appealed the contempt to the Third DCA. While that court's decision was pending, the U.S. Supreme Court did decide Nix vs. Whiteside, at 106 S.Ct. 988 (Feb. 1986). The court observed, at page 994: "In Strickland, we recognized counsel's duty of loyalty and his overarching duty to advocate the defendant's cause, Ibid. Plainly, that duty is limited to legitimate, lawful conduct compatible with the very nature of a trial as a search for truth. Although counsel must take all reasonable lawful means to attain the objectives of the client, counsel is precluded from taking steps or in any way assisting the client in presenting false evidence or otherwise violating the law." (Emphasis supplied).

Further, on page 996, the court reviews in footnote 6 the rejection by the American Bar Association AND by Florida courts of the narrative formula dealing with client perjury.

The court then recommends withdrawal from representation by defense counsel when the client threatens perjury: "The essence of the brief amicus of the American Bar Association reviewing practices long accepted by ethical lawyers, is that under no circumstance may a lawyer either advocate or passively tolerate a client's giving false testimony. This, of course, is consistent with the governance of trial conduct in what we have long called 'a search for truth.' The suggestion sometimes made that 'a lawyer must believe his client not judge him' in no sense means a lawyer can honorably be a party to or in any way give aid to presenting known perjury."

Finally, at page 998, the Nix court concludes: "..., the right to counsel includes no right to have a lawyer who will cooperate with planned perjury. A lawyer who would so cooperate would be at risk of prosecution for suborning perjury, and disciplinary proceedings, including suspension or disbarment.

* * * * * *

"In short, the responsibility of an ethical lawyer, as an officer of the court, and a key component of a system of justice, dedicated to a search for truth, is essentially the same whether the client announces an intention to bribe or threaten witnesses or jurors or to commit or procure perjury. No system of justice worthy of the name can tolerate a lesser standard. The rule adopted by the Court of Appeals, which seemingly would require an attorney to remain silent while his client committed perjury, is wholly incompatible with the established standards of ethical

conduct and the laws of Iowa and contrary to professional standards promulgated by that State. The position advocated by petitioner, on the contrary, is wholly consistent with the Iowa standards of professional conduct and law, with the overwhelming majority of courts, and with codes of professional ethics."

On June 17, 1986, The District Court of Appeal of Florida, Third District, affirmed the trial court order holding Rubin in contempt for refusing to comply with the trial court's order requiring him to represent his client. (Rubin vs. State, 490 So.2d 1001, 3rd DCA, 1986). In the opinion, the Court failed to mention the U.S. Supreme Court Nix vs. Whiteside decision. However, the Court did recite at page 1003, footnote 2, Rubin's reason given to the trial judge for his refusal to use the narrative formula: "Yes, your Honor, I am obeying the Code of Professional Responsibility. There is not only an irreconcilable conflict between my client and myself, but between myself and the finding of the District Court of Appeal. I believe that I must rely on not only the Code of Professional Responsibility but my own code of honor and integrity. I have to live with myself and I could not live with myself knowing that I'm deceiving a jury with or without court approval."

After, Nix, the ABA issued Formal Opinion 87-353, which discusses the lawyer's responsibility in relation to client perjury. Because the opinion contains recommendations to attorneys about how to comply with the requirements of the Model Rules, it rejects the narrative approach. As the opinion

explains, "a defendant does not have the right, as part of the right to fair trial and zealous representation by counsel, to commit perjury. And the lawyer owes no duty to the client, in providing the representation to which the client is entitled, to assist the client's perjury."

SUMMARY OF ARGUMENT

While the Circuit Court of the Eleventh Judicial Circuit and the Third District Court of Appeal had the apparent authority and jurisdiction to issue an Order to Rubin compelling him to allow a defendant-client to narrate perjury during a jury trial, all the while pretending it was not happening, they should not have issued or approved such an Order because it directly violated and contravened Rubin's Oath as an Attorney, The Integration Rule of The Florida Bar, the Code of Professional Responsibility and prior Supreme Court of Florida decisions.

The Florida Bar now seeks to punish a member of the Bar for refusing to violate his Oath, The Integration Rule, the Code and prior Supreme Court decisions -- all of which prohibit an attorney from presenting or participating in dishonesty, fraud, deceit and perjury.

The Circuit Court and Third District Court of Appeal "formula" allowed and in fact ordered perjury and jury deceit, a course of conduct previously forbidden by Florida law-- condemned by the American Bar Association -- and recently prohibited by the United States Supreme Court case of Nix v. Whiteside, 106 S.Ct.988 (1986).

Our system of justice cannot function if lawyers are jailed and subsequently charged by The Florida Bar with unethical conduct for refusing to present perjury.

The Referee's finding of not guilty should be affirmed because Respondent did all he could to avoid violating any ethical code or requirement and his actions were justified and correct under the circumstances, since no willfulness to violate his Oath or the Code was ever shown.

Only the Supreme Court of Florida can set the record straight and bring Florida back to making a jury trial a search for the truth.

ARGUMENT

I. AN ATTORNEYS OATH, THE INTEGRATION RULE, THE CODE OF PROFESSIONAL RESPONSIBILITY AND FLORIDA SUPREME COURT CASE LAW IS LAW THAT MUST BE OBEYED BY PRACTICING FLORIDA LAWYERS. RUBIN HAD TO CHOOSE BETWEEN THESE AND AN ORDER OF A JUDGE TO ALLOW PERJURED TESTIMONY AND JURY DECEIT. RUBIN CHOSE ETHICS AND NOW THE BAR WANTS TO PUNISH HIM.

This case did not begin in April of 1985 when Ellis Rubin moved to withdraw as attorney for a First Degree Murder defendant who had confided an intent to testffy falsely at his upcoming jury trial in order to implicate an innocent person. At that time and place, Respondent was the product of our system of justice, his Oath of Admission, The Integration Rule of The Florida Bar, the Code of Professional Responsibility, decisions of the Florida Supreme Court and his perception of his role as a citizen and an attorney.

Before being admitted to the Bar in 1951, Respondent graduated from Holy Cross College in Massachusetts as an Ensign in the U.S. Navy during World War 11. His training there included obedience to an honor code that commanded: "A midshipman will not lie, cheat, or steal .and he shall not tolerate it in others." (T-40) And, at T-102, Rubin confessed belief in the Ten Commandments, the ninth of which states: "Thou shall not bear false witness." Three chapters later in Exodus, we find this explanation: "Thou shalt not raise a false report: put not thine hand with the wicked to be an unrighteous witness."

Augustine warned us 1,500 years ago: "When regard for truth has broken down or even slightly weakened, all things remain doubtful." And it was Sophocles who thought that, "'Tis better to fail with honor than to succeed by fraud."

Eight centuries after Christ, Alfred the Great, King of the West Saxons, implored his followers: "In the first place we enjoin you, as a matter of supreme importance, that every man shall abide carefully by his oath and his pledge." Skipping to the year 1275, the very first English Statute regulating the practice of law dealt with deceit upon the Court: "If any... Pleader.. . do any manner of Deceit or Collusion in the King's Court or consent (unto it) in deceit of the Court (or) to beguile the Court..., he shall be imprisoned for a Year and a Day, and from thenceforth shall not be heard to plead... in (that) Court for any Man."

A few years later, in 1307 England, it was demanded that a lawyer put on no false evidence "nor consent to any such." Then, in the Colonies, a Massachusetts lawyer's oath in 1701 demanded: "You shall do no falsehood, nor consent to any to be done in the court, and if you know of any to be done you shall give knowledge thereof to the Justices of the Court, or some of them, that it may be reformed."

It was George Washington who observed that, "The administration of justice is the firmest pillar of government." Daniel Webster put it a little differently: "Justice is the greatest interest of man." Alabama was the first to adopt a

Code of Ethics in 1887. It had a canon: "Client is not the Keeper of the Attorney's Conscience." It provided that "the attorney's office does not destroy the man's accountability to the Creator." In 1908 the American Bar Association adopted Canon 22: "The conduct of the lawyer before the Court and with other lawyers should be characterized by candor and fairness," and Canon 37 required the lawyer to reveal any announced intention of his client to commit a crime.

Respondent was sworn into The Integrated Bar of Florida in 1951, at which time he was required to solemnly swear that, "I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the Judge or jury by any artifice or false statement of fact or law." The Oath of Admission to the Bar, quoted above, "should ever control the lawyer in the practice of his profession"; and further that "for the wilful violation of which disbarment may be had." (From the preliminary sentence to the Oath).

In its Opinion, Petition of Florida State Bar Association, 40 So.2d 902 (Fla. 1949), establishing The Integrated Bar, The Florida Supreme Court placed a lawyer's responsibility to the public above his responsibility to clients. On page 908, we find:

> It is hardly necessary to assert that the bar has a responsibility to the public that is unique and different in degree from that exacted of the members of other professions. This difference is symbolized in the requirement that every lawyer subscribe to an oath

> to support, protect and defend the constitution of the United States when he is admitted to practice. On the theory that he is such an important factor in the administration of justice this Court has held that a lawyer's responsibility to the public rises above his responsibility to his client. The very nature of our democratic process imposes on him the responsibility to uphold democratic concepts regardless of how they affect the case in hand.

In adopting the Preamble to The Integration Rule of The Florida Bar, The Florida Supreme Court mandated to every member of The Florida Bar that The Integration Rule is law to be obeyed by every attorney all the time as an officer of Florida's courts. In addition, the same Integration Rule requires that all Florida lawyers support and obey "the Constitution and the laws of this state and of the United States." Finally, The Integration Rule requires that all lawyers are charged "with the duty to observe the high standards of the profession."

Article 10 of The Integration Rule mandates that The Code of Professional Responsibility is to "constitute a code of ethics applicable to members of The Florida Bar." Article 11 of The Integration Rule provides that every Bar member is within the jurisdiction of The Florida Supreme Court and "is charged with notice and held to know the provisions of this Rule and the standards of ethical and professional conduct prescribed by this Court." Section 11.02(3)(a) of The Integration Rule makes the commission of "any act contrary to honesty, justice or good morals... a cause for discipline."

The Florida Supreme Court, in 1970, adopted and made into law to be obeyed by all Florida lawyers, The Code of

Professional Responsibility. The Preamble to The Code orders lawyers "to maintain the highest standards of ethical conduct." And it states that "fundamental ethical principles are always present to guide" lawyers.. . and that lawyers must strive "for the highest possible degree of ethical conduct." Finally, the Preamble says that these ethical principles "permit of no compromise."

The Code of Professional Responsibility defines Ethical Considerations as representing a body of principles "upon which the lawyer can rely for guidance in many specific situations;" while Disciplinary Rules "are mandatory in character" and state a minimum level of conduct below which no lawyer can fall without disciplinary action. Ethical Consideration 7-1 of The Code of Professional Responsibility was in effect during April and September of 1985 (When Rubin respectfully declined to present perjury):

> "The duty of a lawyer, both to his client and the legal system, is to represent his client zealously within the bounds of the law, which includes Disciplinary Rules and enforceable professional regulations." (Emphasis added)

Ethical Consideration 7-6 states that a lawyer "may not do anything furthering the creation or preservation of false evidence." Ethical Consideration 7-26: "The law and Disciplinary Rules prohibit the use of fraudulent, false, or perjured testimony or evidence. A lawyer who knowingly participates in introduction of such testimony or evidence is

subject to discipline." This EC goes on to say that even though a client desires to present evidence, the lawyer cannot do so if "he knows, or from facts within his knowledge should know, that such testimony or evidence is false, fraudulent, or perjured." Ethical Consideration 8-5 states that "Fraudulent, deceptive, or otherwise illegal conduct by a participant in a proceeding before a tribunal... is inconsistent with fair administration of justice, and it should never be participated in or condoned by lawyers." Ethical Consideration 9-6 is that "Every lawyer owes a solemn duty to uphold the integrity and honor of his profession: to encourage respect for the law and for the courts and the judges thereof; to observe The Code of Professional Responsibility: ... to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public: and to strive to avoid not only professional impropriety but also the appearance of impropriety."

Disciplinary Rule 1-102 of The Code of Professional Responsibility was in effect during April and September of 1985 and it states that "A lawyer shall not violate a Disciplinary Rule: Circumvent a Disciplinary Rule through actions of another: Engage in illegal conduct involving moral turpitude; Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation: and Engage in conduct that is prejudicial to the administration of justice." Disciplinary Rule 7-101 allows a lawyer, in his representation of a client, to "Refuse to aid or

participate in conduct that he believes to be unlawful, even though there is some support for an argument that the conduct is legal." Disciplinary Rule 7-102 commands that a lawyer shall not "Knowingly use perjured testimony or false evidence; or Participate in creation or preservation of evidence when he knows or it is obvious that the evidence is false; or Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent; or Knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule." Disciplinary Rule 2-110(B) requires mandatory withdrawal when a lawyer is representing a client before a tribunal if "He knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule." Disciplinary Rule 2-110(C) permits a lawyer to withdraw if such requested action is because his client "Personally seeks to pursue an illegal course of conduct, or Insists that the lawyer pursue a course of conduct that is illegal, or that is prohibited under the Disciplinary Rules, or if His continued employment is likely to result in a violation of a Disciplinary Rule."

In 1957, The Florida Supreme Court decided Russ v. State, 95 So.2d 594, which has not been overruled. At Page 599 thereof, the court states that an attorney "is first and foremost an officer of this Court and the trial court. His sworn duty as an attorney requires that he be as much dedicated to finding the truth as are the courts he serves. Above all else, he owes to the courts the duty of good faith and honorable

dealing."

In 1960, The Florida Supreme Court decided Dodd v. The Florida Bar, 118 So.2d 17, which has not been overruled. At Page 19 thereof, the court states:

> "When an attorney adds or allows false testimony to be cast into the crucible from which the truth is to be refined and taken to be weighed on the scales of justice, he makes impure the product and makes it impossible for the scales to balance.
>
> No breach of professional ethics, or of the law, is more harmful to the administration of justice or more hurtful to the public appraisal of the legal profession that the knowledgeable use by an attorney of false testimony in the judicial process. When it is done it deserves the harshest penalty.
>
> * * * *
>
> It is essential to the well-being of the profession that every lawyer square his personal and professional conduct by the precepts of the Code of Ethics."

According to The Florida Supreme Court, in The Florida Bar v. Pearce, 356 So.2d 317 (Fla. 1978), an attorney who agrees with his clients to let them commit perjury at a court proceeding violates Disciplinary Rule 1-102(A) of The Code and Article X1, Rule 11.02(3)(a) of The Integration Rule.

In 1980, The Florida Supreme Court in The Florida Bar v. Moses, 380 So.2d 412, stated that "the single most important concern in the Court's defining and regulating the practice of law is the protection of the public from incompetent, unethical or irresponsible representation." And that once

admitted to practice, a person must continue to adhere to "strict standards of competence and ethical responsibility," or suffer "the disciplinary powers residing in this Court by constitutional mandate."

In 1976, the Second District Court of Appeals again showed the way in Easley v. State, 334 So.2d 630. Attorney Easley asked to withdraw from a criminal case. He was refused; whereupon his client agreed to sign an affidavit in support of a renewed request, Easley was excused from representation, but then cited for contempt for procuring the client's affidavit which embarrassed the Judge. At the hearing, Easley testified "that he was ethically bound to pursue this case as he did." Found guilty, he appealed. The 2nd DCA exonerated:

> "..., the undisputed facts of the instant case will not support a finding of a willful intent to commit a contemptuous act or interfere with the orderly administration of justice, There is no finding, nor indeed on the evidence could there be, that appellant did not in good faith feel his inadequacy to handle felonies. Moreover, in accord with the ethical obligations of an attorney, we think it was incumbent upon appellant to communicate his feelings of lack of competence to the defendant Gulvin."

This case holds that when the attorney's refusal is required by ethical obligations, it is not contempt; certainly not if willful intent to interfere with justice is not found, nor bad faith exhibited.

The First District Court of Appeal, in Ramey v. Thomas, Fla. App., 382 So.2d 78 (1980), found it necessary to observe that, "an attorney is first an officer of the court, bound to

serve the ends of justice with openness, candor, and fairness to all. This duty must be served even when it appears in conflict with a client's interests." (Emphasized)

1981 saw an attorney in the Second District freed from a Circuit Court contempt citation in Thomson v. State, 390 So.2d 514. In so holding, the court found that the attorney was not guilty of intentionally committing:

> "An act which is calculated to embarrass, hinder, or obstruct a Court in the administration of justice, or which is calculated to lessen its authority or dignity constitutes a contempt.., Intent is an essential element of contempt."

And in 1983 the First District Court of Appeal held, in Sewell v. State, 433 So.2d 164, that in order to find an attorney guilty of direct criminal contempt, it "requires some willful act or omission calculated to hinder the orderly functions of the court... if a finding of intent is supported by the facts."

Based on all of the foregoing, Rubin chose not to violate these precedents, commands, cases, common sense and integrity of the system. There is not a scintilla of evidence that Rubin willfully intended to disobey any provision of law or the ethics code, let alone clear and convincing proof thereof. On the contrary, all of the evidence shows that he tried desperately not to violate the rules, Some excerpts from his sworn testimony follow, From Pages 25, 26 and 27 of the Trial Transcript:

"Q Now, did you consider the consequences, not so

much of the discipline that might be imposed upon you, but the fact that what effect your actions would have on the entire legal system? For example, what would happen if every lawyer was to decide on his own what court order to obey, and what court order to not obey?

A I didn't decide anything on my own. When a man makes a decision in the puzzling predicament that I was in, a man makes that decision based on all of the training that he's had, all of the life that he has led, and all of the rules and regulations of God and man, but he especially, of the Supreme Court of Florida. An attorney has a real critical position in our system of justice. He's supposed to be a minister of the truth, and when a judge said, you will allow perjury and pretend to the jury that it isn't happening, I couldn't do that.

Now you've asked me if I considered what effect my decision would have on lawyers everywhere. Yes, I did, Paul. And you know what I thought? I thought that here's an attorney who was willing to stand up for the truth in a courtroom. Here's an attorney who is willing to say, my client wants to commit perjury, I can't go along. I think the public would applaud an attorney who went that far. I think that the role of attorney in our system of justice has been so disrespected by the public that today every lawyer in

the United States is under attack for being a lawyer because they are considered to be unethical, greedy, and dishonest. I know, because I ran into it for 38 years and I decided this time the State has given me the opportunity to make a statement. And the statement is that a lie, is a lie, is a lie. Even when a judge orders you to allow a lie, you should stand up and say, Your Honor, I cannot do so because you are ordering me to do something that the Supreme Court has prohibited me from doing, so I thought that what I was doing would be joined by the Florida Bar. I thought that you fellows would file an amicus curiae brief in my behalf because whether it's Ellis Rubin or Joe Jones makes no difference. A lawyer was standing up in open court and saying, I'm willing to go to jail because I will not present perjury to a jury and pretend that it's not happening."

From Pages 41 and 42:

"A Well, let's go into the Code of Ethics. What year did you get admitted to the Florida Bar, and what did you have to do in order to get admitted to the Florida Bar?

A 1951, and I had to take an oath and then be sworn in.

Q Referring to Respondent's Composite Exhibit, Your Honor, I'll hand Ellis Rubin the Oath of Admission and

ask him to relate which items of the Oath of Admission are - which you swore to uphold in 1.951, are pertinent to the facts which relate to this case.

A The pertinent sections are the general principles which shall ever control the lawyer in the practice of his profession are clearly set forth in the following Oath of Admission to the Bar, which they are sworn on admission to obey and for the wilful violation of which disbarments may be had. So I was told right from the start that you've got to obey these and if you don't, you can be disbarred. I do solemnly swear, blah, blah, blah, I will employ for the purpose of maintaining the causes confided to me, such means. only as are the consistent with truth, and honor, and will never seek to mislead the judge or jury by any artifice or false statements of fact or law.

Excuse me, my voice is breaking up a little bit, but that's the one that I was confronted with when the judge and the Appellate Court said, you must allow your client to commit perjury and pretend to the jury that it isn't happening. I couldn't do it, Your Honor, and still obey that oath. And I told the judge, why are you making me violate the oath?"

From Pages 58 and 59:

"a Now, in addition to the rules governing attorneys and to the Florida statutes, did you look at case law

to determine your position, the validity of your position, or what your position should be in terms of how your conduct should be facing this court order?

A The Integration Rule and the Code require that a lawyer shall keep abreast of the Code of Ethics and all case law and the Supreme Court decisions, and I read before going before that judge, I read the 1957 case of Russ versus State, which we've included in the packet at page 599, Your Honor, the Supreme Courts states, an attorney is first and foremost an officer of this court and the trial court. His sworn duty as an attorney requires that he be as much dedicated to finding the truth as are the courts he serves. Above all else he owes to the court the duty of good faith and honorable dealing, unquote.

I felt that presenting perjured testimony, knowing that it was going to be perjured, was not dealing in good faith and was not finding the truth. I felt that an attorney is, according to the Supreme Court of Florida, a minister of justice. He's supposed to present the truth to a tribunal, whether he's defense attorney or prosecutor. I learned and I felt that justice is the greatest interest of man.

What is justice? Justice is giving each his due according to law before a fair tribunal, that's justice. American justice is founded on the truth. A

jury trial is a search for the truth. And when you put perjury by court order into that crucible where you're supposed to distill truth from it, that's what a jury trial is, you can never find the truth."

From Pages 78 and 79:

"A I followed the law of the Supreme Court of Florida which every lawyer is required to follow, and by following that law I ran afoul of a Circuit Court order and I had to make a choice. I don't think that choice should subject me to discipline by the Florida Bar because even the Appellate Court who ruled against me said it's a case of first impression. It's a very difficult situation facing attorneys, there's never been a good resolution of the problem and they felt that this narrative form of perjury would be exercisable."

From Pages 99 and 100:

"Disciplinary Rule 2-110B requires mandatory withdrawal when a lawyer is representing a client before a tribunal if the lawyer knows, or it is obvious that his continued employment will result in violation of a disciplinary rule.

I knew that to further represent Sanborn would involve me in presenting perjury to a jury. The Rules said I cannot do so. My oath said I cannot do so. The Integration Rule said I cannot do so. The Supreme

Court cases said I cannot do so, but the Circuit Court said, You will. Why was I put in such a dilemma? To this day, I don't know."

From all of the foregoiong, Respondent would show that:

An attorneys Oath, The Integration Rule, The Code of Professional Responsibility and Florida Supreme Court case law is law that must be obeyed by practicing Florida lawyers.

From a study of his Oath, The Rule, The Code, and Florida case law, Respondent acted correctly in first attempting to dissuade his client from committing perjury and then presenting a Motion For Leave to Withdraw in April, 1985 before the start of trial.

By denying the Motion, the Circuit Court refused to recognize Ethical Considerations and Disciplinary Rules of The Code mandating withdrawal and thus forced Rubin to proceed in unchartered waters; The Code, as of 1985-86, does not speak to what an attorney should do if the requested (and mandatory) withdrawal is refused.

When ordered to proceed, Rubin had to choose between obedience to Supreme Court law and procedure, or a Court order that would put him in direct confrontation with 35 years of conduct, precedents, and his sworn oath. In addition, the Court Order was based on an ABA rejected procedure and one that had never been approved by the Florida Supreme Court.

Rubin's prior knowledge that a client intends to commit perjury and give false evidence at a jury trial, along with the

client ordering the lawyer to present additional witnesses who would allegedly corroborate the perjury and false evidence, all for the purpose of incriminating an innocent third person, represented to the lawyer a violation of his Oath of Admission as an attorney in Florida and a violation of The Integration Rule of The Florida Bar, a violation of several provisions of The Code of Professional Responsibility and a violation of several Florida Supreme Court decisions,

Every practicing attorney must be guided by the sacred directions of his Oath, the Preambles to The Integration Rule of the Florida Bar and the Code of Professional Responsibility, and The Integration Rule and The Code itself, as well as the case law decisions of the U.S. Supreme Court and all Florida courts referring to the conduct of attorneys. Those pronouncements make every attorney part of the judicial system and an officer of its courts, with the duty to observe the high standards of the profession. Those standards have been established by the Florida Supreme Court as The Code. A lawyer should strive for the highest possible degree of ethical conduct, not being content with minimum standards.

In upholding these standards which guide us, Rubin ran afoul of a suggested procedure promulgated by a lower court. By choosing provisions of The Code to govern his conduct, Respondent found himself condemned as a criminal sentenced to serve time in jail, and he now faces possible discipline requested by The Florida Bar.

Lawyers should not commit crimes nor should they assist their clients in criminal activity. They must use all honorable means to see that justice is done, rather than going to any lengths to see that the defendant is acquitted. An attorney must weigh his obligations to his client against his obligations to the profession and to society. It is often difficult to determine where the rights of clients end and those of society begin.

A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice. A lawyer is a member of the legal profession, and a professional person is one who places the public good above personal interests. An attorney is more than a passive observer of the judicial system; he is an integral participant in the fact-finding process at trial. So, he is obliged to protect and promote the integrity of the judicial system. How best to do this? Certainly not by presenting perjured testimony!

From the Preamble to the Code, we find that "Not every situation which he may encounter can be foreseen, but fundamental ethical principles are always present to guide him... Each lawyer must find within his own conscience the touchstone against which to test the extent to which his actions should rise above minimum standards."

Lawyers must be trusted to make moral and ethical decisions. It is both immoral and unethical to aid, participate in,

acquiesce to or suborn perjury - either actively or passively. The Code of Professional Responsibility does not require a lawyer to orchestrate a client's perjury; neither does The Code require defense counsel to be partners with a perjurious client in a dishonest and deceitful scheme. The Code requires just the opposite.

In effect, this Court is being asked to decide what the role of the lawyer in the system is to be. As it stands now, the law in the Third District of Florida compels the lawyer to ignore The Code which prohibits him from furthering, engaging or participating in or aiding and abetting any criminal or dishonest act. Instead, the lawyer must obey Sanborn and Rubin, which require him to allow perjury while pretending to the jury that he does not know perjury is being committed; thus silently participating in a dishonest trial. Rubin chose The Code and has been sentenced to jail and now faces discipline. What of lawyers in the future? What of the search for truth? What of the public perception of lawyers, judges and justice?

The great high priest of our time seems to be expediency. (If a lie will win the case, DO IT!!) The attorneys who allow themselves to become instruments to aid and abet a perjurer are the apostles; violation of the testimonial oath to illegally deceive a tribunal into finding as true that which the lawyer knows is false must not become the dogma. Rubin has refused to worship at that alter.

The Florida Bar espouses that not examining the Defendant and omitting his testimony in summation makes everything legal, fair, effective and ethical. And the courts, at least in the Third District of Florida, are saying that if the attorney pretends not to know his client is falsifying and deceiving the jury, that this is also right, in furtherance of justice and seeking truth. The Respondent cannot agree! The procedure required of him (and refused) perverts the lawyer from being an officer of the court sworn to uphold the law and further the administration of justice into an instrument helping someone who is determined to violate the testimonial oath and deceive a tribunal. NO COURT CAN FORCE THIS RESPONDENT TO ASSIST A CLIENT TO ACCOMPLISH THAT WHICH THE UNITED STATES SUPREME COURT HAS HELD THE CONSTITUTION DOES NOT PROTECT: PERJURED TESTIMONY. Harris v. New York, 401 U.S. 222 at 225 (1971).

Another law review article commented on the situation at Bar. In an article titled Pinocchio For The Defense, found in Volume 14, Number 4 of the Winter, 1987 edition of the Florida State University Law Review, the commentator reflects, at page 893:

> Florida has chosen to address the problem of the lying client through free narrative testimony. The defendant takes the stand and, under oath, tells his story to the court without interruption or examination by defense counsel. In choosing this approach, Florida has done a disservice to attorneys, judges, and jurors who participate in the judicial process and to the citizens of Florida who rely on the outcome. In this Comments, the author details the history of the free narrative approach and identifies

> its weaknesses through an analysis of Sanborn v. State.

And at page 900, the reader is asked:

> If the attorney knows that perjury is imminent but allows the client to take the stand and offer the perjury in narrative form, how is it that counsel has not knowingly assisted or participated in the commission of perjury or the creation of false evidence? The inescapable conclusion is that never before has silence counted for so much. * * * How defense counsel's knowing silence in the face of perjury avoids institutional damage is not explained by either court.

It is respectfully submitted that along the way to deciding this case, this Court must resolve, among others, these three questions: (1) Did Rubin willfully violate any ethical considerations by refusing to present perjury? (2) Did Rubin uphold any ethical considerations by refusing to deceive a jury? And (3) Which Judge would the public want to appear before -- one who orders perjury and jails a lawyer who refuses OR one who orders truth and jails defendants who lie?

ARGUMENT

II. THIS COURT CAN SET THE RECORD STRAIGHT AND *CAN* SHOW THE REST OF THE NATION THAT FLORIDA DOES NOT TOLERATE PERJURY NOR PUNISHMENT OF LAWYERS WHO PREVENT PERJURY.

Recently The Florida Bar Journal and The Florida Bar News have been full of articles and statements deploring the current status of the legal profession. They all say it is time to get back to the old standards of integrity and honesty and that it is time to take a stand. One example is the December 1986 article in the Journal by United States Court of Appeals for the Eleventh Circuit Judge Peter T. Fay. I quote:

> We must return to the basic truths of our profession. We must return to the traditions of true barristers.
>
> Attorneys' first, primary and overriding loyalty must be as "officer of the court" before he even meets a client and he must remain so throughout his relationship with that client.
>
> * * * * *
>
> Attorneys must be loyal to themselves. We must return to the principle that attorneys act independently of the client. "A lawyer is not a hired representative who does solely the bidding of a client." We are not, and must not become, hired guns. Lawyers must reassert their roles as independent professionals.
>
> And lastly, fraud on the court must be revealed, regardless of any breach of confidentiality. * * * The rendition of a judgment on the merits, with all the facts before the court, is the goal of our legal system. "Winning by lying" is never justified. "Winning by deceit" is no

different.

In criminal cases we often tell juries that regardless of the verdict, guilty or not guilty, society wins when the defendant receives a "fair trial." This same principle applies in all cases. We all win when the parties receive a fair trial. We all lose when the system is cheated. We are engaged in a "search for truth."

The legal profession has sunk to new lows. * * * Many attorneys throughout our land have become nothing more than mouthpieces for their clients. Moral values have become a thing of the past. Justice has been redefined. "Win at all costs" is the new motto. And why? This is the worst part of the problem - for money. Pure and simple-lucre!

* * * * *

We must return to the standards of our forefathers. We must instill the old values throughout our profession. We must give real meaning to the title - "officer of the court." The price of failure is far too high.

The Florida Bar Journal for July/August, 1988 contained a message from the President of The Florida Bar, Rutledge R. Liles, at page 5. Reflecting on our poor image, he noted:

Notwithstanding recognized historical prejudices, few, if any, lawyers would disagree with the statement that at this particular point in history, law, lawyers individually, the legal profession generally, and our system of justice suffer from an unprecedented lack of respect. Some of the historical criticisms continue: It is still argued that lawyers are for the wealthy with a different form of justice being dealt to the poor. Could there be a thread of truth?

One need only review the daily newspaper to see that our profession is a favorite target for journalistic vilification. In fact, as I write this article, I have before me a column which suggests that the legal profession in Florida is in a "state of sleaze."

* * * * *

> The best, most effective and lasting public relations is the individual lawyer whose relations with clients and the community exemplify the highest code of ethical and professional behavior.

In the October, 1988 issue of the Journal, page 9, a reader of the Fay and Liles articles responded with a letter to the editor:

> A calling characterized by the late Professor Terry as "A Minister of Justice" is dishonored by a small but increasing number of lawyers unconstrained by enduring values or a sense of honor. Ironically, they are frequently applauded as combative, unyielding and as winners. That they eventually lose self-respect and the respect of their clients and the community is of little moment to them. They revel in cleverness, the mind-set of win at any cost, transient notoriety and anecdotes of how they put one over on the other lawyer. Our shame is the discouraging expansion of the tolerance of gamesmanship in lieu of just results.
>
> For years most of us have reacted to criticism of our profession with several answers. Very few nonlawyers understand the nuances of legal practice, 10 or 12 dishonorable lawyers of a hundred are a mirror image of other professions, and history records similar complaints about lawyers. Those responses are of little value in confronting a growing contempt for the legal system and lawyers. There is no singe cause or cure, but major steps must be taken to solve a real problem.

* * * * *

> Allegiance to the oath to serve as officers of the court must be rekindled. Men who profane the pursuit of justice by counterfeit appeals to virtue and "duty to my client" should not be allowed to serve the cause of justice.

On page 8 of the January 15, 1989 issue of The Florida Bar News the President of the Palm Beach County Bar Association is quoted in the article WHAT PRICE HONOR? as follows:

> If you, my learned sisters and brothers, agree with me that we are losing the struggle to maintain our profession as one that is noble and honorable, then it's time to take a stand. We must lead by example. We must constantly remind ourselves that we are officers of the court and that the administration of justice is as of equal importance as the zealous representation of our client. Integrity, character, and professional courtesy should be traits we constantly strive for in our dealings with clients, the court, other counsel and the public. With this collective commitment to raise the level of our standards above the morals of the marketplace, we can restore our profession to its only lofty status in society.

This Court's Opinion in this case can be a real and valued response to the pleas of attorneys everywhere for a restoration of their good name and a lofty place for our profession. As observed by the Third District Court of Appeal in Sanborn, this is a case of first impression. Thus is presented an opportunity to become a beacon for truth and a pariah for perjury. Your Opinion will speak where no words have been uttered or written before by a court of last resort on the dilemma that has haunted lawyers and courts for centuries. What does a lawyer do when the client wante to lie?

This case has drawn articles in TIME MAGAZINE (July 21, 1986), US NEWS AND WORLD REPORT (June 8, 1987), editorial comment from THE MIAMI HERALD, THE FT. LAUDERDALE NEWS, THE

ORLANDO SENTINEL, and has been covered by CBS-TV EVENING NEWS, CNN, and radio talk shows all over America. Two professors from the same law school, Nova University, have taken opposite views in their law review (in its Initial Brief, the Bar cited 12 Nova Law Review 707. Rubin would point to 11 Nova Law Review 1450); but, most critically, high school and college students have taken notice with hundreds of letters to Rubin.

The Florida Bar v. Ellis S. Rubin can set the way for generations of lawyers, judges, law students and the public. In effect, to uphold the Referee will be to affirm that a jury trial must always be a search for the truth -- truth gathered and presented by the ministers of justice, attorneys. Contrariwise, this court is being asked by The Florida Bar to affirm, approve and enforce Sanborn and Rubin. Respondent asks, instead, that you do the same with Dodd and Nix. Which pair will instill lawyers and judges with pride in their profession? Which will signal the start of a rebirth of public trust in those same judges and lawyers?

The threat of public or private reprimand is of no consequence in this scenario, although Respondent is tempted to observe that a Public Reprimand published in the Southern Reporter would be an indelible badge of honor and one of the few written certifications of honesty that a lawyer would attain in judicial history. But, as Abraham Lincoln noted when telling the story of one who was tarred and feathered and ridden out of town on a rail, "Except for the honor, I'd rather not."

No matter what the outcome here, this lawyer has been truly blessed. By the unforeseen twist of circumstance, it has been his lot, in the last year, to participate actively in two events that legal scholars only dream and write about. To fight to free an innocent man who was confined in state prison for over twenty years (almost five of those on death row), should be the crowning achievement of any attorney's career. How many of us ever get the opportunity to represent a James Richardson? Then, to also be forced to choose to be jailed as an act of conscience in refusing to perpetrate a fraud upon a jury is the greatest legacy one can leave his family and the profession.

"The greatest interest of man is justice." Justice is the faithful rendering to each his just due by fair and honest means. Lawyers have a sacred trust to be ministers of justice, to gather the truth and present it. American justice is founded on the truth; that is why a trial by jury is a search for the truth. The truth is that all perjured testimony--court ordered or not-- is at war with justice. A lie is a lie is a lie. Ten thousand judges supported by ten thousand lawyers swearing on twenty thousand bibles that court ordered perjury is right will not make it right. This case has sent the wrong signal to the public. The system has broken down: it has lost the respect of the public. Morality, truth, honesty and integrity have been shoved aside for greed, treachery and lies. Our sense of values is running amuck. The same thing happened 2700 years ago when the Prophet Isaiah warned the nation of Israel that God was about

to destroy it. Here is how he put it in Chapter 59, Verses 3-4 of the Bible:

> "Your lips have spoke lies,
> and your tongue mutters wicked things.
> No one calls for justice,
> no one pleads his case with integrity.
> They rely on empty arguments and speak lies,
> they conceive trouble and give birth to evil.

Surely Respondent is no hero, neither does he profess to be a paragon of virtue. He does not wish to impose his sense of values and morals on other attorneys. He does not care what other lawyers would have done in his place; he has done what any moral person must. It was time for someone to speak out--someone who knows the truth, who has been in the arena and who was unafraid of the consequences. Apparently and ironically, Circuit Court Judge Sidney B. Shapiro selected the Respondent.

It is time to respond to the flood of requests to declare war on perjury, fraud and jury deception. The time for debate is over. The legal profession and indeed the legal system is now on trial. The pursuit of truth in the courtroom is the issue and this Court can make it clear to the American people: We shall know the truth and the truth will keep us free.

CONCLUSION

The Report of the Referee should be affirmed with a written opinion that would raise Florida above and beyond expediency and court ordered perjury. The Florida Bar should be directed to uphold the oath of attorneys, The Integration Rule of the Florida Bar, The Code of Professional Responsibility (now The Rules of Professional Conduct) and all Florida Supreme Court decisions.

Accordingly it is respectfully requested that this Court find Ellis S. Rubin not guilty of violating the Disciplinary Rules.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to: Paul A. Gross, Bar Counsel, The Florida Bar, 211 Rivergate Plaza, 444 Brickell Avenue, Miami, FL 33131; this 13th day of March, 1989.

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