IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

ELLIS S. RUBIN,

Respondent.

_____/

Supreme Court Case No. 72,255

INITIAL BRIEF OF THE FLORIDA BAR

PAUL A. GROSS
Bar Counsel
The Florida Bar
211 Rivergate Plaza
444 Brickell Avenue
Miami, Florida 33131
(305) 377-4445

JOHN T. BERRY
Staff Counsel
The Florida Bar
Tallahassee, Florida
32399-2300
(904) 222-5286

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
Tallahassee, Florida
32399-2300
(904) 222-5286

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES

PREFACE

In this brief, the Complainant, The Florida Bar, will be referred to as "The Florida Bar" or "the Bar." Ellis S. Rubin, the respondent, will be referred to as "Rubin." The following abbreviations will be utilized:

T - Transcript of hearing held before J. Cail Lee, the Referee, on September 2, 1988.

RR- Report of Referee

STATEMENT OF THE CASE

AND OF THE FACTS

On December 7, 1987, Grievance Committee "E" of the Eleventh Judicial Circuit conducted a hearing concerning Ellis S. Rubin and recommended that Rubin be given a Private Reprimand for violating the following Disciplinary Rules of the Code of Professional Responsibility: 1-102(A)(5), conduct prejudicial to the administration of justice, 7-106(A), a lawyer shall not disregard a standing rule of a tribunal or a ruling of the tribunal, 2-110(A)(1), a lawyer shall not withdraw from employment in a proceeding before a tribunal without its permission.

On January 4, 1988, Rubin was mailed the Report of Minor Misconduct. However, on January 14, 1988, Rubin rejected the report and demanded a trial before a Referee. In addition, Rubin waived confidentiality. (T. 4). On September 2, 1988, a trial was conducted before J. Cail Lee, the Referee. The Referee recommended that Rubin be found not guilty.

The facts in this case are not disputed. The respondent, in his Answer and Response to Request for Admissions, admitted to the allegations made in the complaint of Minor Misconduct, except for Paragraph 17, which alleges the violations.

Judicial Notice was taken of the exhibits attached to the complaint. (T. 16, lines 19-25 and T. 17, lines 1-7)

The facts have been succinctly stated in Sanborn v. State, 474 So.2d 309 (Fla. 3d DCA 1985), a copy of the opinion is attached to the complaint, as Exhibit C-2.

The facts in brief form, are as follows:

Russell J. Sanborn was charged with first degree murder and a number of other crimes. However, he had problems with his lawyers. From April 1984 to February 1985, he had been represented by three lawyers and he had requested Ellis Rubin to be his fourth defense counsel. Rubin had been retained by Sanborn's mother without a fee. The trial judge agreed to substitute Rubin as defense counsel, as Rubin represented he would be ready for trial on April 29, 1985.

On April 25-26, 1985, Rubin discovered that his client planned on committing perjury. Based on this, Rubin petitioned the court on April 29, 1985, just prior to jury selection, to withdraw as defense counsel. His client did not oppose the withdrawal. The court denied Rubin's Motion to Withdraw and ordered him to proceed to trial. Rubin appealed to the Third District Court of Appeal, and it stayed the proceedings pending its decision.

In the case of Sanborn v. Florida, 474 So.2d 309 (Fla. 3d DCA 1985) the appellate court made it clear that a defense counsel must not aid a defendant in giving perjured testimony and must also refuse to present testimony of witnesses that he knows

is fabricated. However, the court stated, when the defense counsel is unable to dissuade his client from committing perjury, counsel should request permission to withdraw. If permission to withdraw is denied, counsel must continue to serve.

The Third District Court of Appeal recognized that Rubin was placed in a serious dilemma between his role as an advocate and as a guardian of the integrity of the judicial system.

In the way of dicta, the Court suggested a formula which would preserve the sanctity of the tribunal and the ethical standards that Rubin, as an officer of the court, has vowed to uphold. The court stated:

> 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.

The Third District Court of Appeal held that the trial court did not abuse its discretion in denying Rubin's Motion to Withdraw. Rubin was again ordered by the trial court to proceed with the trial. When he refused, he was held in direct criminal contempt of court and sentenced to serve thirty (30) days in jail for his contemptuous conduct. [See Exhibit C-3 which is attached to the complaint.] The Third District Court of Appeal affirmed the decision of the trial court and Rubin did serve the thirty (30) days in the Dade County jail. [See Rubin v. State, 490 So.2d 1001 (Fla. 3d DCA 1986) which is attached to the complaint as Exhibit C-4].

On December 19, 1988, this court denied Rubin's Petition for Review and Writ of Habeas Corpus. On January 16, 1987, this Court denied Rubin's Petition for Rehearing for Writ of Habeas Corpus.

On or about June 22, 1987, the United States Supreme Court denied Rubin's Writ of Certiorari, letting the contempt order stand.

SUMMARY OF ARGUMENT

The facts are not in dispute. Rubin disobeyed a lawful order of the trial court. The appellate court sustained the trial court's order, but Rubin sought no further appeal.

Rubin contends he had only two choices, assist the client in committing perjury or withdraw as counsel. The Florida Bar submits that Rubin had other options, to wit:

1) Have client testify in narrative form:

2) Refuse to have his client testify, as the client does not have a right to testify falsely;

3) Warn the client that if he should commit perjury, Rubin would be required to inform the court and Rubin could be called as a witness to impeach the client. This method could be used to deter the client from committing perjury.

Our system of justice cannot function if individuals are free to ignore court orders.

The Referee's finding of not guilty because he believes Rubin's motives were good, is no defense to failure to obey a court order.

Although mitigating circumstances are involved, a public reprimand is warranted in this case.

ARGUMENT

I. WHEN ORDERED BY A COURT TO CONTINUE REPRESENTATION OF A CLIENT, A LAWYER MUST CONTINUE THE REPRESENTATION, NOTWITHSTANDING THE LAWYER'S BELIEF THAT THE CLIENT WILL COMMIT PERJURY.

The Referee found, "that Rubin refused to obey a lawful order of the court is clear". (RR 3). Nevertheless, the Referee gave consideration to Rubin's motives, and he stated, the sum of Rubin's evidence, his testimony that he considered himself to be in a dilemma, and that he could not, with integrity, continue to represent his client, was credible and convincing. (RR. 3)

Because of the foregoing, the Referee recommended that Rubin be found not guilty. Apparently, Rubin convinced the Referee that he could not, with integrity, continue to represent his client.

It was Rubin's position, that if he were to continue his representation, he would have been in violation of the laws, as well as the Code of Professional Responsibility. According to Rubin, his choices were to withdraw or assist his client in committing perjury and be charged with ineffective assistance of counsel and violating the law and the ethical rules.

The Florida Bar submits that Rubin had several options available to him, and he was not limited to the choices mentioned above. Rubin could have followed the suggestion of the Third District Court of Appeal in Sanborn v. State, 474 So.2d 309 (Fla. 3d DCA 1985) by having Mr. Sanborn testify in the narrative. While Rubin considered having his client testify in narrative

form to be improper, thereby exposing him to prosecution and grievance proceedings, it is noted that, as a general rule, a person's good faith reliance on a court order is a complete defense to criminal prosecution. See footnote 4, Rubin v. State, 490 So.2d 1001 (Fla. 3d DCA 1986). Likewise, it would be a defense to bar grievance proceedings. In addition, another option could be to refuse to have the client testify, as the client does not have the right to commit perjury. U.S. v. Curtis, 742 F.2d 1070 (7th Cir 1980), Nix v. Whiteside, 475 U.S. 157, 106 S.Ct. 988 (1986).

An additional suggestion would be to warn the client that if he should commit perjury, the lawyer would have to notify the judge. In this event, this would create a situation whereby the lawyer might be called as a witness to impeach the testimony of the client. Perhaps this information would encourage the client to change his mind about committing perjury. See Braccialarghe, Client Perjury: The Law in Florida, 12 Nova Law Review 707 at 734-736 (Spring 1988).

While Rubin had different choices on how to handle his client, who he says planned on committing perjury, he had no choice but to obey the court order directing him to continue his representation of Sanborn.

The primary issue to be considered in the brief is not how a lawyer should handle a situation concerning his client's

intention of committing perjury. The main issue is whether a lawyer has the right to disobey a court order because he believes the order erroneous.

This issue was thoroughly discussed in Rubin v. State, 490 So.2d 100 (Fla. 3d DCA 1986). In that case, the Third District Court of Appeal stated:

> The reason behind the rule requiring obedience to court orders regardless of their alleged invalidity is that the need for obedience to a court order far outweighs any detriment to individuals who may be temporarily victimized by the order, even if erroneous.

In Seaboard Airline Ry. Co. v. Tampa Southern R. Co., 101 Fla. 468 at 476; 134 So. 529 at 533 (1931), the Court stated:

> If a party can make himself a judge of the validity of orders which have been issued for the protection of property rights, and by his own act of disobedience can set them aside, then are the courts impotent, and what the constitution of the State ordains as the judicial power becomes a mere mockery.

The Florida Bar agrees with the views expressed in Rubin v. State, at 1004, where the Court stated:

> Our system of justice simply cannot function if individuals--however strong their views--are free to ignore Court orders. Therefore, that Rubin may believe that his position is virtuous and his disobedience moral--or that his view may some day in some other case, prevail--does nothing to excuse his refusal to comply with the court's order to proceed with the defense of Sanborn.
>
> * * * * * * * * * *
>
> Surely Rubin--one trained in the law should know that if persons may with impunity disobey the law it will not be long before their is no law left to obey.

The evidence in this case is clear and the facts are not disputed, Rubin admittedly disobeyed an order of the court. (RR 3).

While Rubin may have believed that his "position was virtuous and his disobedience moral," it does not excuse his refusal to comply with the Court order.

Although the Referee believes that Rubin's "motive is central to this matter, since it bears on the issue of willfulness," (RR 3), it is the view of The Florida Bar that the Referee's finding in this regard is erroneous, as "motive" and "willfulness" are not relevant to the issue of whether a lawful order of a court has been disobeyed.

Although the civil rights marchers in Birmingham, Alabama had virtuous motives, the Supreme Court of the United States upheld their contempt convictions because they disobeyed a Court ordered injunction. Walker v. City of Birmingham, 388 U.S. 307, 87 S. Ct. 1824, 18 L.Ed 2d 1210 (1967). In that case, the Court stated:

> One may sympathize with the petitioners' impatient commitment to their cause. But respect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom.

While some people might sympathize with Rubin's position concerning his refusal to represent a client he believes plans on committing perjury, there is no justification for Rubin's refusal to obey the lawful order of the Court.

The factual situation in this case makes it clear that to grant Rubin's request to withdraw as counsel would have been harmful to the orderly administration of justice. Rubin was the fourth attorney, and he petitioned the trial court just prior to jury selection to withdraw as defense counsel.

> The trial court recognized that allowing Rubin to withdraw and appointing a fifth defense counsel would not alleviate the problem. If withdrawal were allowed everytime a lawyer was faced with an ethical disagreement with the accused, the ultimate result could be a perpetual cycle of eleventh-hour motions to withdraw and an unlimited number of continuances for the defendant. In addition, new counsel might fail to recognize the problem of fabricated testimony and false evidence would be presented to the Court. Sanborn v. State, 474 So.2d 309 at 314 (Fla. 3d DCA 1985).

When one considers the foregoing situation, it is apparent that the trial court had no alternative but to find Rubin guilty of contempt when he refused to obey the court's order. Also it is clear that Rubin's contempt constituted violations of the following Disciplinary Rules of the Code of Professional Responsibility: DR 1-102(A)(5), Conduct prejudicial to the Administration of Justice; DR 2-110(A)(1), a lawyer shall not withdraw from employment in a proceeding before a tribunal without its permission; DR 7-106(A), a lawyer shall not disregard a ruling of a tribunal.

II. A PUBLIC REPRIMAND IS MORE APPROPRIATE THAN A PRIVATE REPRIMAND IN THIS CASE

Although the Bar Counsel requested the Referee to recommend a Private Reprimand for Rubin, the Board of Governors of The Florida Bar directed the Bar Counsel to petition for review, requesting that Rubin be found guilty and that he be given a public reprimand.

When Rubin failed to obey the original Order of the Court, denying his Motion to Withdraw, the Court gave Rubin time to file an appeal. This first failure to obey could be considered an open refusal to obey an order based on an assertion that no valid obligation existed. However, when the Third District Court of Appeal held that the trial Court did not abuse its discretion in denying Rubin's Motion to Withdraw, and when Rubin again disobeyed the Order (without appealing the Third District Court of Appeal decision), Rubin was in open defiance of the Court. This, in our view, was an abuse of the legal process.

According to Rule 6.22, of Florida's Standards for Imposing Lawyer Sanctions, suspension is appropriate when a lawyer knows that he is violating a Court Order and there is injury or potential interference with a legal proceeding. However, according to Rule 9.32(k), of Florida's Standards for Imposing Lawyer Sanctions, imposition of other penalties or sanctions are considered mitigating circumstances.

Therefore, since Rubin served thirty days in jail for his disobedience, the Bar considers it a mitigating factor. Accordingly, the Bar is requesting Rubin be disciplined by a Public Reprimand rather than a suspension.

CONCLUSION

Based upon the foregoing reasons and citations of authority, The Florida Bar respectfully submits that the Referee's recommendation of not guilty is erroneous and unjustified. Accordingly, it is respectfully requested that this Court find Ellis S. Rubin guilty of violating the Disciplinary Rules, as shown in the Complaint and that he be given a Public Reprimand which should be published in the Southern Reporter.

In addition, it is respectfully requested that Ellis S. Rubin be charged with the following costs, which were expended by The Florida Bar, and that execution should issue:

Administrative Costs at Grievance Committee Level and Referee level (Rule 3-7.5(k) (5)	$ 300.00
Court Reporter Costs:	
Grievance Committee Hearing (12/07/87)	$ 75.00
Referee Hearing 9/2/88	400.25
Travel Expenses:	
Referee Hearing (9/2/88) and Meeting with Referee (Bar Counsel and Respondent's Counsel 9/9/88)	$ 42.15
Total Costs:	$ 817.40

Respectfully submitted,

PAUL A. GROSS, BAR COUNSEL
The Florida Bar
211 Rivergate Plaza
444 Brickell Avenue
Miami, Florida 33131
(305) 377-4445

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of The Florida Bar's Initial Brief were mailed to Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32399-1927, and a copies were mailed to Ellis S. Rubin, 265 N.E. 26th Terrace, Miami, Florida 33137, and John T. Berry, Staff Counsel, The Florida Bar, Tallahassee, Florida 23299-2300 this 20 day of February, 1989.

PAUL A. GROSS, BAR COUNSEL