ORIGINAL

IN THE SUPREME COURT OF FLORIDA

LAWTON CHILES, as Governor of the State of Florida,

Appellant,

v. CASE NO. 93,665
DCA NO. 97-2359

STATE EMPLOYEES ATTORNEYS GUILD and RAYMOND J. GREENE,

Appellees.
_____/

REPLY BRIEF OF APPELLANT

On Appeal from the Florida
First District Court of Appeal

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I. CLIENT CONSENT IS A REQUIRED CONDITION PRECEDENT TO ATTORNEY BARGAINING WHICH HAS NOT OCCURRED IN FLORIDA

The trial court judgment expressly found that collective bargaining under Chapter 447, Florida Statutes, is an adversarial process. (R 2:227) It twice stated that the state had a **compelling interest** in preserving the attorney-client relationship, and particularly the ethical obligations of competence, diligence, confidentiality and avoidance of conflicts of interest. (R 2:233 & 235) Due to the inherently adversarial nature of collective bargaining, conflicts of interest are inevitable. Accordingly, consent is required from the client-State before its publicly employed attorneys may be permitted to engage in collective bargaining.

Collective bargaining by attorneys is the exception not the rule in both the private and public sectors. It is an aberration that, when found in the public sector, has one common denominator -- ***client consent***.

In each of the few States and governmental contexts in which public lawyers have been permitted to unionize, the legislative body, consenting for the State as client, has expressly authorized limited collective bargaining by statute. In no jurisdiction has bargaining been permitted by all public attorneys. And in no jurisdiction has bargaining been imposed

upon a public entity in the absence of express legislative consent through a legislative grant of bargaining rights.

Consent is not a "strawman" (Appellees' Answer Brief, p. 9). Consent is a condition precedent which has not occurred in this case. Indeed, consent has been expressly denied by the Florida Legislature, which has expressly rejected such a fundamental denigration of its relationship with its attorneys.

Consent to the inherent conflict of interest created by the antagonistic nature of collective bargaining can only be made by the People or the Legislature. Consent has been given to this conflict by neither in Florida.

A. The Trial Court Erroneously determined that the People of the State of Florida Consented to Attorney Collective Bargaining through the Enactment of Article I, Section 6

Rule 4-1.7 of the Rules Regulating The Florida Bar provides in relevant part that:

> **(b) Duty to Avoid Limitation on Independent Professional Judgment.** A lawyer shall not represent a client if the lawyer's exercise of independent professional judgment in the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interest, unless:
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
> (2) the client consents after consultation.

The trial court held that:

> . . . The People of the State of Florida, through the State Constitution, have mandated that this process be available to all employees, whatever

> its burdens or benefits.
>
> It is not the province of the Legislature nor of this Court to nullify the political judgment of the People of the State of Florida, but rather to uphold the judgment whenever possible. . . .

(R: II, 241-242).

However, no evidence was presented at trial by Appellees which supports such a conclusion by the trial court. Indeed, a review of the factual record at trial and the state of the law at the time that Article I, section 6 was ratified demonstrates that it is inconceivable that the electorate even contemplated attorney bargaining, let alone gave knowing and informed consent to it as required by the Rules Regulating the Florida Bar.

The only statement relating to attorney unionization by members of The Florida Bar which existed in 1968, when Article I, section 6 was ratified, was Opinion 64-57, issued on September 29, 1964. That opinion concluded in relevant part that:

> It is improper for a lawyer, employed full-time as an assistant city attorney and also serving as president of an association of city employees, to present the association's proposed amendment of the city's pension plan to municipal officials.
>
> * * *
>
> It is the opinion of this Committee that the lawyer cannot ethically represent the interests of the association before municipal officials. His position is such that he owes a professional obligation to the city as well as occupying a position of leadership in the association. The possibility of conflicting interests is imminent and obvious.
>
> It is further the Committee's opinion that it is improper for him to be a member of the association, which appears to be a labor union or

> quite similar to one. Legal ethics authorities are unanimous and unequivocal in holding that a lawyer may not join a labor union. . . .In Informal Opinion 267, ABA Opinions of Committee on Professional Ethics and Grievances (1957), page 641, the American Bar Association holds: A lawyer may not join a union of the employer's employees.
>
> ABA Opinion 275 [September 20, 1947] deals with the propriety of a lawyer, employed full-time by an insurance company, joining a proposed labor union representing employees of the company. The opinion points especially to the possibility of a conflict of interests between the company and the union. It also stresses the lawyer's obligation to keep in confidence information gained from his employment. . . .

Although later opinions of both The Florida Bar and the ABA have overruled the existence of a *per se* ethical violation as a consequence of attorney membership in a union, these opinions were rendered years after enactment of Article I, section 6.[1] Thus, at the time that the People ratified this constitutional provision, *ALL* members of The Florida Bar were *prohibited* from joining a union. Therefore it is inconceivable that the People *consented* to attorney bargaining through ratification in 1968.

Further, consent is only effective when done *after consultation.* No evidence was presented at trial to suggest that

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[1] However, even in these later opinions, grave concerns are expressed regarding the need for attorneys in unions to adhere to their ethical requirements. See, e.g. Informal Opinion 1325 (March 31, 1975)("Proper guidelines, therefore, for lawyers considering union membership or participating in union activities, are simply these: Lawyers who are union members should not permit the organization to prescribe, direct or suggest how to fulfill one's professional obligations, but should be vigilant at all times to safeguard one's fidelity to employer free from outside influences.")

the People were informed, as required for effective consent to a conflict of interest under the Rules Regulating the Florida Bar, that a vote in favor of ratification of Article I, section 6 would constitute consent for the attorneys employed by the State of Florida to undertake a conflict of interest with their client the State. The trial court erred in concluding that the People had consented to attorney bargaining.

B. The Legislature has the Right and Authority to Exclude Attorneys from Collective Bargaining

Contrary to the trial court's conclusion that "[t]he People . . . have mandated that this process be available to *all* employees . . ."(emphasis supplied), Article I, section 6 is not self-executing. The parties stipulated to this fact at trial. (R 1:46, ¶¶5-9). *See also Dade County Classroom Teachers' Ass'n v. Legislature*, 269 So.2d 684 (Fla. 1972). It is the Legislature's responsibility to define the parameters of collective bargaining under Article I, section 6.

If consent to attorney bargaining is to be given, it must come from the Legislature or from the People *after consultation*. Indeed, as noted in Appellant's Initial Brief in this case, Appellee SEAG previously vehemently asserted before this Court that the Legislature had exclusive jurisdiction to exclude attorneys from bargaining.

In SEAG's response to this Court's Order to Show Cause in that prior case, SEAG contended that the absence of any express

legislative exclusion of or reference to government attorneys in Section 447.203 was persuasive proof in support of its position that the State as client had either waived or consented to any conflict with, or alterations of, the attorney-client relationship. SEAG specifically said:

> Even if this legislation alters or impacts upon the attorney-client relationship in some manner, this Court lacks the power to intercede because the Legislature, not this Court, determines on behalf of the client--the people of the State of Florida--which aspects of the attorney-client relationship are available to governmental entities. By failing to specifically exempt attorneys from the definition of "public employees" in Section 447.203(3), Florida Statutes (1991), the Legislature has preserved collective bargaining rights for state-employed attorneys and has either waived or consented to any conflicts with or alterations of the traditional attorney-client relationship the exercise of these rights might entail.

(R. SEAG Response to Order to Show Cause issued in Supreme Court Case No. 81,835, pp. 5-6).

Appellees now seek for this Court to intercede to nullify the Legislature's determination on behalf of the State as client that these aspects of the attorney-client relationship -- fidelity, loyalty, confidence, and avoidance of conflicts of interest -- remain available to governmental agencies and agency heads with the same vitality as is enjoyed by all other clients served by members of The Florida Bar.

Here, when the Legislature was asked to consent to attorney bargaining, they expressly declined to give it. The Legislature

has in fact refused to consent to its attorneys undertaking the conflict of interest inherent in adversarial collective bargaining. No legal precedent exists which supports disturbing the Legislature's determination not to consent to a conflict of interest by its attorneys and such a conflict should not be imposed against the client State's will by judicial fiat.

Further, under the interpretation employed by Appellees and the trial court, the Legislature would have no authority to exclude even managerial and confidential employees from bargaining. SEAG asks this Court to give Article I, section 6, the most literal reading possible and to hold that the People of the State effectively signed a blank check when they approved the 1968 constitution. If that is how Article I, section 6, is to be read, then the same arguments SEAG makes with respect to attorneys would also apply to managers, who as a class are excluded from collective bargaining by section 447.203.

Surely, an attorney's fiduciary relationship with an agency or agency head cannot be less important than the "loyalty" expected of managers, which heretofore has been the accepted rationale for their exclusion. Thus, if Appellees succeed in this attempt to nullify the exclusion of attorneys from collective bargaining, this Court can envision similar attacks on the exclusion for managerial employees. Such an expansion of bargaining rights is unwarranted and unsupported by the history

of Article I, section 6.

II. THE LOWER COURTS FAILED TO GIVE PROPER LEGAL WEIGHT TO THE EVIDENCE

Because this case involves review of a decision declaring a state statute unconstitutional, *de novo* review is required. *See* Padavano, Florida Appellate Practice §§9.3,9.4 (1997 2d ed.). Applying such review demonstrates that the trial court failed to give proper legal effect to the evidence.

It is undisputed in the record, that collective bargaining in other jurisdictions (New York, California, Wisconsin and the federal government) has engendered frequent suits against client-employers both by attorneys' unions and individual attorneys over issues related to collective bargaining and attorney grievances. This evidence comes from ***Appellees'*** witnesses. In New York alone, for example, there have been literally hundreds of such suits or grievances. (D.Ex.39, p.42)

The parties' experts on ethical issues, Professor Rotunda (for Appellants) and Professor Slagle (for Appellees) differed significantly over the ethics of attorneys' collective bargaining. Although Appellees attempt to cast their opinions as fact, Appellant submits such issues present questions of law. (*See infra*, p. 8-9,12) In this context, Professor Slagle's failure to adequately explain his admission that he had no expertise in collective bargaining and no understanding of the attorney-client relationship between the State of Florida and its

attorneys (T 473, 477) is particularly significant.

Appellees' assert that the State's arguments below were deficient because the State did not establish that the trial court's findings and conclusions were clearly erroneous or not supported by competent substantial evidence. The State is further accused of asking the appellate Courts to retry the case and of offering speculation and hypothesis rather than proof that harm will occur.

The State acknowledges that it did not prove what its lawyers would do in the future--an impossible burden. But it is a long-established principle of appellate review that in cases tried without a jury, reversible error can arise from a misinterpretation of the legal effect of the facts found, *see Richards v. Dodge*, 150 So.2d 477, 481 (Fla. 2nd DCA 1963), or when the trial court misconceives the weight and probative effect of the evidence. *See Huwer v. Huwer*, 175 So.2d 242 (Fla. 2d DCA 1965).

At the very least, the evidence in this case indisputably established that suits by attorneys against employers are commonplace in all four jurisdictions examined, that collective bargaining is inherently antagonistic, that the employer-employee relationship is adversarial, and that divided loyalty is

inevitable.[2] As Court has previously explained:

> A finding which rests on conclusions drawn from undisputed evidence, rather than conflicts in the testimony, does not carry with it the same conclusiveness as a finding resting on probative disputed facts, but is rather in the nature of a legal conclusion.

Holland v. Gross, 89 So.2d 255, 258 (Fla. 1956). If the trial court misapplies the law to established fact, then its decision is "clearly erroneous" and the appellate court will reverse because the trial court "has failed to give legal effect to the evidence" in its entirety. *Id.* A trial court's ruling on the constitutionality of a statute is generally reviewed de novo and not accorded a presumption of correctness.

Appellant submits that the issue below was properly whether section 447.203(3)(j), Florida Statutes, is a rational means of implementing the state's compelling interest in preserving the attorney-client relationship. Had the trial court given proper legal effect to the evidence, it would necessarily have found that section 447.203(3)(j) meets that test.

Further, the trial court's characterization of the adversarial aspects of collective bargaining as "potential problems emanating from collective bargaining" resulting in

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[2] Appellees essentially acknowledge as much (the inherent antagonism and divided loyalty that collective bargaining engenders) when they concede that the lawyer/employee phenomenon " requires a realistic accommodation between an attorney's professional obligations and the rights he or she may have as an employee" [Answer Brief p. 21].

"little or no adverse consequences" was error. Indeed, the evidence presented by *both* Appellant and Appellees incontrovertibly demonstrates that Appellant's concern is far from speculative or hypothetical. In each and every jurisdiction reviewed the unionized attorneys have engaged in conduct which, but for the fact their Legislature's have consented to a debased attorney-client relationship, would violate the attorneys' ethical obligations. The State of Florida should not have to endure a compromised and diminished attorney-client relationship unless the State of Florida chooses, through its elected officials who are charged with making such determinations, to do so.[3] Accordingly, Section 447.203(3)(j), Florida Statutes, should be upheld as constitutional.

III. THERE IS NO UNFETTERED RIGHT TO UNIONIZE BY ATTORNEYS IN THE PRIVATE SECTOR

Appellees' reliance on *Lumberman's Mutual Casualty Co.*, 75 N.L.R.B 1132 (1948) (Lumberman's), to support their assertion that private attorneys have enjoyed collective bargaining rights both before and after the adoption of Article I, section 6 in 1968, is misplaced. First, *in Florida*, despite the existence of the 1947 decision in *Lumberman's*, neither private nor public attorneys were permitted to engage in union activities against

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[3] Indeed, appellees would apparently require that the State's attorney-client relationship be dysfunctional or incapacitated (rather than merely diminished or compromised) before the State could meet appellee's constitutional test.

their client-employers in 1968, when Article I, section 6 was ratified. See, e.g. Opinion 64-57 (supra) (an Opinion which is not limited to the public sector). Second, the jurisdiction of the National Labor Relations Act (NLRA)and the National Labor Relations Board (NLRB) is, by law, very limited and does not mandate unionization to all private sector attorneys.

Although the legislative history of the Labor-Management Relations Act[4] indicates that Congress intended to extend protection to lawyers under the definition of "professional employee,"[5]nevertheless, the inclusion of attorneys within the meaning of "professional employees" did not give the NLRB absolute jurisdiction nor did the NLRB's limited jurisdiction result in attorney bargaining becoming commonplace in the private

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[4] Labor-Management Relations Act of 1947 (Taft-Hartley Act), ch. 120, tit. III, §301, 61 Stat. 156 (1947) (current version at 29 U.S.C. §185).

[5] 29 U.S.C. §152(12), provides in pertinent part that:

> The term 'professional employee' means--(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that . . . the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a fields of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning . . ., as distinguished from a general academic education . . .

sector. Under the NLRA, the NLRB is limited in jurisdiction to determinations of any question of "representation affecting commerce."[6]/[7] However, the NLRB is not required to exercise its full statutory authority over labor disputes that have a minimal impact on interstate commerce.[8]

Before the NLRB will exercise jurisdiction over a law firm, the employer's activity must have a "substantial" impact on interstate commerce.[9] Rare are the times such jurisdiction has been asserted by the NLRB and the existence of this limited NLRB jurisdiction over private attorney bargaining begs the larger question of whether attorney bargaining is permissible in the absence of client consent -- a question never addressed by the NLRB and clearly beyond its jurisdiction to determine.

The obligations of lawyers to adhere to the Rules Regulating The Florida Bar constitute a compelling limitation on any rights

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[6] 29 U.S.C. § 152(7) provides: "'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

[7] The United States Supreme Court held that the NLRB is granted authority under the NLRA only when the actions of an employer threaten to burden or obstruct interstate commerce. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 31 (1936). This judicial limitation was enacted into the NLRA by Congress in 1959.

[8] For example, in *Evans & Kunz, Ltd.*, 194 N.L.R.B. 1216 (1972), the NLRB refused to assert jurisdiction over a relatively small law firm whose practice was largely confined to one state.

[9] Stavitsky, *Lawyer Unionization in Quasi-Governmental Public and Private Sectors*, 17 Cal.W.L.R. 55 (1980).

to unionize -- constitutional or otherwise. Neither the People nor the Legislature have consented to the conflicts of interest in collective bargaining. Accordingly, in the absence of client consent, public lawyers in Florida cannot force the State as client to engage in adversarial collective bargaining.

Conclusion

The lower court opinions should be reversed and Section 447.203(3)(j), Florida Statutes, should be declared constitutional.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to THOMAS W. BROOKS, Esquire, Meyer and Brooks, P.A., 2544 Blairstone Pines Drive, Post Office Box 1547, Tallahassee, Florida 32302; this 26th day of October, 1998.

Kimberly J. Tucker
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