

SUPREME COURT OF PENNSYLVANIA

Office of Disciplinary Counsel v. Fina

No. No. 2624 Disciplinary Docket No. 3 / No. 166 DB 2017, Supreme Court of Pennsylvania (February 19, 2020)

SUMMARY

The Pennsylvania Supreme Court affirmed a one-year-and-one-day suspension for prosecutor Frank Fina for violating Rule of Professional Conduct 3.10, which requires prosecutors to obtain prior judicial approval before subpoenaing an attorney to testify before a grand jury about a client. The court held that the rule applies to the prosecutor who directs the subpoena, even if their name is not on the subpoena, rejecting an interpretation that would allow evasion by using another attorney's name. Fina violated the rule by misleading the supervising judge about the scope of his intended questioning of Penn State's general counsel, thereby preventing the judge from performing the required check on prosecutorial power and the attorney-client privilege.

CASE DETAILS

COURT	Supreme Court of Pennsylvania
JURISDICTION	Pennsylvania
DECIDED	February 19, 2020
DOCKET	No. 2624 Disciplinary Docket No. 3 / No. 166 DB 2017
DISPOSITION	affirmed
PROCEDURAL POSTURE	Appeal from the Disciplinary Board's recommendation of suspension
PRECEDENTIAL VALUE	Published
PARTIES	Office of Disciplinary Counsel v. Frank G. Fina

TOPICS

prosecutorial misconduct

grand jury

attorney client privilege

criminal procedure

sanctions

PRACTICE AREAS

Legal Ethics

Professional Responsibility

Criminal Procedure

QUESTIONS PRESENTED

1. Whether a prosecutor violates Rule 3.10 when the subpoena is issued in the name of another attorney in the office?
2. Whether Fina's conduct in subpoenaing and questioning an attorney without prior judicial approval violated Rule 3.10?

HOLDINGS

1. The rule encompasses the prosecuting body as a whole; a prosecutor cannot avoid the requirement by having another attorney issue the subpoena.
2. Fina violated Rule 3.10 by misleading the supervising judge and eliciting privileged testimony, subverting the attorney-client privilege.

KEY QUOTATIONS

“The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous.” (at 3)

“The need for safeguards on the grand jury is enhanced by the fact that it is not bound by the rules of evidence that normally protect the publicly accused from baseless or unduly prejudicial information.” (at 4)

“Instead of Baldwin serving as a shield for her former clients, her testimony was elicited and used by Fina as a sword against them, to devastating effect.” (at 6)

FACTUAL BACKGROUND

Fina, as Chief of Criminal Prosecutions in the Pennsylvania Office of Attorney General, led the investigation into child abuse allegations against Gerald Sandusky. In December 2010, the OAG subpoenaed the testimony of Penn State administrators Timothy Curley, Gary Schultz, and later Graham Spanier. Cynthia Baldwin, Penn State's general counsel, appeared with each before the grand jury. In October 2012, Baldwin was subpoenaed to testify before the grand jury. Fina questioned Baldwin before the grand jury, despite having assured the supervising judge that he would not inquire into privileged areas. The Disciplinary Board found that Fina violated Rule 3.10 by subpoenaing an attorney without prior judicial approval and by misleading the court.

PROCEDURAL HISTORY

The Office of Disciplinary Counsel charged Fina with violating Rule of Professional Conduct 3.10 for subpoenaing an attorney without prior judicial approval. The Hearing Committee recommended dismissal, but the Disciplinary Board found a violation and recommended a one-year-and-one-day suspension. Fina appealed to the Supreme Court, which affirmed the suspension.

DISPOSITION

affirmed

CASES CITED

- Commonwealth v. Starks, 387 A.2d 829 (Pa. 1978)

- Appeal of Nicely, 18 A. 737 (Pa. 1889)
- Berger v. United States, 295 U.S. 78 (1935)
- Commonwealth v. Clancy, 192 A.3d 44 (Pa. 2018)
- In re Fortieth Statewide Investigating Grand Jury, 190 A.3d 560 (Pa. 2018)
- In re Grand Jury Proceedings, Special Grand Jury 89-2, 813 F.Supp. 1451 (D. Colo. 1993)
- ODC v. Baldwin, 2587 DD3, slip op.
- Commonwealth v. Schultz, 133 A.3d 294 (Pa. Super. 2016)
- Commonwealth v. Spanier, 132 A.3d 481 (Pa. Super. 2016)
- Commonwealth v. Curley, 131 A.3d 994 (Pa. Super. 2016)

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