IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIPA BAR,
Complainant,
v.
ELLIS S. RUBIN,
Respondent.
_____/

CONFIDENTIAL

REPORT OF REFEREE

1. SUMMARY OF PROCEEDINGS:

Pursuant to Rule 3-7.5 (a), of the Rules Regulating The Florida Bar, the undersigned was appointed Referee on April 26, **1988**, to conduct disciplinary proceedings in this case.

The Following attorneys appeared as counsel:

For The Florida Bar: Paul A. Gross of Miami

For The Respondent: Ellis S. Rubin, I. Mark Rubin and Guy Rubin, of Miami.

Grievance Committee "E" of the Eleventh Judicial Circuit heard testimony considering this matter and issued a Report of Minor Misconduct. However, on January 14, **1988** the Respondent rejected the report and the case was referred to the Referee on a complaint for Minor Misconduct. Although complaints for Minor Misconduct are confidential, the Respondent waived confidentiality. In addition, venue was waived and Respondent agreed to have the trial in Broward County. The final hearing was held on September 2, **1988** at the Broward County Courthouse, Fort Lauderdale, Florida.

11. FINDINGS OF FACT

As to each item of Misconduct of which the Respondent is charged: The facts in this case are not disputed. The Respondent, in his Answer and Response to Request to 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.

The facts have been succinctly stated in Sanborn v. Florida 474 So. 2d 309 (3rd. DCA, 1985), and 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 3rd. DCA and it stayed the proceedings pending its decision.

In the case of Sanborn v. Florida, 474 So.2d 309 (3rd 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, 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 condinue to serve.

The 3rd DCA recognized that Rubin was placed in a serious dilemma between his role as advocate and as a guardian of the integrity of the judicial system, but nonetheless 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 3rd DCA affirmed the decision of the trial court and Rubin did serve the thirty (30) days in the Dade County jail. [See Rubin v. Florida, 490 So.2d 1001 (3rd DCA, 1986) which is attached to the complaint as Exhibit C-41.

That Rubin refused to obey a lawful order of the court is clear. However, the act of disobedience is not the only aspect, of this case. His motive is central to this matter, since it bears on the issue of willfulness, in a legal sense. Willfulness, in a legal sense, is concerned not only with an act but with its intended result, as is stated in Sewell v. State 433 So 2d 164, 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.

III. RECOMMENDATION AS TO WHETHER ~~OR NOT THE RESPONDENT SHOULD~~ BE FOUND GUILTY.

There has been considerable publicity concerning this matter and much of it has been favorable to the position taken by Rubin.

Rubin contends that most of the public believes that he had only two choices, to Withdraw or allow his client to present perjured testimony. Certainly there is evidence to support this contention, as well as Rubin's reasonable perception that whichever way he acted he would be in jeopardy of apparent violation of his oath as an attorney.

The referee finds that Rubin's actions lacked the willfulness necessary for him to be found guilty of any of the violations charged in the complaint by the Florida Bar.

The referee recommends that Rubin be found not guilty and therefore, that no discipline be imposed.

Respectfully submitted,

J. Carl Lee, Referee