

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 1994 Term

No. 22287

THE COMMITTEE ON LEGAL ETHICS OF THE
WEST VIRGINIA STATE BAR,

Complainant

v.

JAMES R. SHEATSLEY, A MEMBER OF
THE WEST VIRGINIA STATE BAR,

Respondent

Disciplinary Proceeding

PUBLIC REPRIMAND

Submitted: September 13, 1994

Filed: November 21, 1994

Sherri D. Goodman
Chief Disciplinary Counsel
West Virginia State Bar
Charleston, West Virginia

Attorney for the Complainant

Erwin L. Conrad
Conrad & Clay
Fayetteville, West Virginia
Attorney for the Respondent

JUSTICE McHUGH delivered the Opinion of the Court.

Chief Justice Brotherton did not participate.

Retired Justice Miller sitting by temporary assignment.

Justice Cleckley concurs and reserves the right to file a concurring opinion.

SYLLABUS BY THE COURT

1. ""In a court proceeding initiated by the Committee on Legal Ethics of the West Virginia State Bar to annul the license of an attorney to practice law, the burden is on the Committee to prove, by full, preponderating and clear evidence, the charges contained in the Committee's complaint." Syl. Pt. 1, Committee on Legal Ethics v. Pence, 216 S.E.2d 236 (W. Va. 1975).¹ Syllabus Point 1, Committee on Legal Ethics v. Walker, 178 W. Va. 150, 358 S.E.2d 234 (1987)." Syl. pt. 1, Committee on Legal Ethics v. Six, 181 W. Va. 52, 380 S.E.2d 219 (1989).

2. ""This Court is the final arbiter of legal ethic problems and must make the ultimate decisions about public reprimands, suspensions or annulments of attorneys' licenses to practice law." Syllabus Point 3, Committee on Legal Ethics v. Blair, [174] W. Va. [494], 327 S.E.2d 671 (1984).¹ Syl. pt. 1, Committee on Legal Ethics v. Charonis, 184 W. Va. 268, 400 S.E.2d 276 (1990)." Syl. pt. 1, Committee on Legal Ethics v. Ikner, 190 W. Va. 433, 438 S.E.2d 613 (1993).

3. Disciplinary Rule 7-109(C) of the Code of Professional Responsibility, effective through December 31, 1988, (which has substantively been incorporated into Rule 1.8(k) of the Rules of Professional Conduct, effective January 1, 1989) is violated when a lawyer acquiesces in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case. Therefore, when the Committee on Legal Ethics of the West Virginia State Bar proves by full, preponderating and clear evidence that a lawyer prepared an agreement that provided for the payment of compensation upon a favorable resolution of the case involving the lawyer's client and such agreement further reflected the possibility that the person to whom the compensation would be given may be a witness in that case, such lawyer is subject to appropriate disciplinary sanctions.

McHugh, Justice:

In this attorney disciplinary proceeding, the Committee on Legal Ethics of the West Virginia State Bar (hereinafter "Committee") recommends that this Court order that the respondent, James R. Sheatsley, receive a public reprimand and require the respondent to reimburse the Committee for the costs of the disciplinary proceedings that have occurred herein. The Committee charges the respondent with participating in and acquiescing in the payment of money to a person he later referred to as a witness. We adopt the findings and recommendation of the Committee. For the reasons stated below, we hereby order that the respondent shall receive a public reprimand, and we further order the respondent to pay all costs associated with the proceedings that have occurred herein.

I

The respondent is a licensed member of the West Virginia State Bar since 1978, and practices in

Raleigh County, West Virginia. Legacy One, Inc. (hereinafter "Legacy") was a client of the respondent. Legacy owns fourteen cemeteries, one of which is located in Beckley, West Virginia, called Blue Ridge Memorial Gardens.

In 1987, Legacy suspected that two of its sales representatives, Lamont Gaither and James Clement, were defrauding the company by "fronting" payments for customers on installment contracts even though these customers had no intention of making the remaining payments. As a result, the sales representatives would receive commissions when there were actually no sales. Ultimately, the president of Legacy, Darryl Roberts, fired Mr. Gaither and Mr. Clement.

Mr. Gaither and Mr. Clement, African-Americans, filed race discrimination claims as well as unemployment compensation claims before the Human Rights Commission alleging they were treated differently than white employees who were disciplined less severely for engaging in similar conduct. The two men retained attorney William D. Turner to represent them. Mr. Turner later withdrew from his representation of Mr. Clement due to a potential conflict between Mr. Gaither and Mr. Clement. In the meantime, the respondent began formulating Legacy's defense by contacting an investigative agency and hiring a private investigator, Michael Gosnell.

Thereafter, Mr. Clement approached Legacy and settled his case. The respondent subsequently prepared the settlement documentation. On December 24, 1987, Legacy settled with Mr. Clement for \$4,000. Also in December, Mr. Gosnell submitted to the respondent a report that was favorable to Mr. Clement and Mr. Gaither.

On June 3, 1988, the hearing examiner in the discrimination case issued a recommended decision that found Mr. Gaither had been discharged on the basis of his race. Later in June, Mr. Clement revealed to a Legacy employee, Paul Roop, that he knew why Legacy had lost the case brought by Mr. Gaither.

On June 27, 1988, the respondent met with Mr. Clement with Mr. Roop present. Mr. Clement hinted that Mr. Gosnell's investigation had been tainted, but Mr. Clement related to the gentlemen that he wanted to be compensated for what he knew.

Legacy then reached an agreement with Mr. Clement that he would be compensated for divulging what he knew. There is a dispute as to the characterization of the fee. The respondent referred to the payment as an investigative fee while Mr. Roberts, the president of Legacy, claimed Mr. Clement was an informant and being compensated for rendering such services.

In order to prevent Mr. Clement from changing his story, Legacy agreed to pay him \$3,250 immediately and \$3,250 upon a favorable completion of the case. The respondent prepared a document to supplement the original settlement agreement to reflect this new agreement. While the agreement noted the possibility that Mr. Clement may be called as a witness, Mr. Clement was opposed to testifying at the hearing for fear of Mr. Gaither. See footnote 1 After signing the agreement, Mr. Clement revealed the fact that Mr. Gaither had conspired with Mr. Gosnell to create untruthful questionnaire answers with respect to the survey of customers who were originally called upon by Mr. Clement and Mr. Gaither.

On June 30, 1988, Legacy filed a motion for reopening of Mr. Gaither's case before the Human Rights Commission based upon the newly discovered evidence. The motion was granted and the case was remanded on September 16, 1988. However, between the filing and the granting of the motion, Mr. Clement began demanding more money.

A meeting was called at the respondent's request. Those attending included Messrs. Robert, Roop, Clement and John Hutchison. Mr. Hutchison, a law partner of the respondent, determined that Mr. Clement would not be paid for fear that such a transaction could be viewed as purchasing testimony relevant to Mr. Gaither's case before the Human Rights Commission. Upon Mr. Hutchison's refusal, Mr. Clement demanded the first installment of \$3,250. Apparently, Mr. Hutchison then expressed concern that Mr. Clement would not follow through on the terms of the agreement unless the money could remain an incentive. Nevertheless, Mr. Clement made continual demands for the money. See footnote 2

The respondent later subpoenaed Mr. Clement to attend a deposition in April of 1989 regarding Mr. Gaither's case. Mr. Turner thereafter filed requests for information regarding all settlement documents. The respondent finally disclosed the requested information upon an order of the hearing examiner. In November of 1990, the respondent unsuccessfully tried to serve Mr. Clement with a subpoena for the upcoming hearing in Mr. Gaither's case. The respondent offered Mr. Clement's deposition at the hearing since Mr. Clement failed to personally appear. At the conclusion of the hearing, the hearing examiner found for Legacy.

II

We have historically placed the burden of proof on the Committee to prove by full, preponderating and clear evidence the charges contained in the complaint filed on behalf of the Committee as stated in syllabus point 1 of Committee on Legal Ethics v. Six, 181 W. Va. 52, 380 S.E.2d 219 (1989):

"In a court proceeding initiated by the Committee on Legal Ethics of the West Virginia State Bar to annul the license of an attorney to practice law, the burden is on the Committee to prove, by full, preponderating and clear evidence, the charges contained in the Committee's complaint." Syl. Pt. 1, Committee on Legal Ethics v. Pence, 216 S.E.2d 236 (W. Va. 1975).¹ Syllabus Point 1, Committee on Legal Ethics v. Walker, 178 W. Va. 150, 358 S.E.2d 234 (1987).

We find that the Committee has met this burden.

The Committee contends that the respondent wrongfully participated in the payment of money to a potential witness contingent upon a favorable resolution of the case. The respondent's actions constitute a violation of DR 7-109(C) of the Code of Professional Responsibility which states in pertinent part: "A lawyer shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case." See footnote 3.

The Committee relies upon the case of People v. Belfor, 591 P.2d 585 (Colo. 1979). In Belfor, an attorney representing a joint venture was defending a foreclosure on a lien arising out of a construction project. The foreman of the building project approached the client with the attorney present and informed the two men that he possessed information that would prove favorable to their case. But the foreman said he would only reveal the information if a judgment pending against him was satisfied. Ultimately, the attorney settled the judgment and paid the amount of the settlement from funds provided by the joint venture. To ensure that the foreman complied with the agreement, the attorney prepared an installment note which would have been forgiven upon the witness testifying favorably for the joint venture. Ultimately, the foreman refused to testify for the attorney's client.

The Supreme Court of Colorado suspended the attorney for one year and ordered that he pay all costs associated with the proceedings. In support, the court recognized: "In representing a client, a lawyer is prohibited from counseling or assisting his client in conduct that the lawyer knows to be illegal or fraudulent. It is both illegal and against public policy to pay or tender something of value to a witness in return for his testimony." Id. at 587 (quoting a finding of fact made by the Supreme Court Grievance Committee).

The Committee maintains that the respondent's actions are controlling regardless of the respondent's intentions. Mr. Clement was undoubtedly a potential witness as reflected by the agreement drafted by the respondent. See note 1, supra. Moreover, the agreement entered into by the parties with the respondent's approval contained a confidentiality provision designed to conceal a fact that could bear directly upon the veracity of Mr. Clement's testimony and ultimately Mr. Clement's credibility as a witness. See footnote 4 The respondent clearly acquiesced in the payment of money to a potential witness in exchange for favorable testimony leading to a favorable outcome.

The respondent primarily contends that the Committee erred in refusing to give res judicata effect to the final decision of the hearing examiner acting on behalf of the Human Rights Commission. See Conley v. Spillers, 171 W. Va. 584, 301 S.E.2d 216 (1983). See footnote 5 More simply, the respondent

argues that had the hearing examiner's decision been considered final with respect to the credibility of the witnesses and the weight given to their testimony, it would be obvious that Mr. Clement could not be viewed as a credible witness upon whose testimony one could be assured a favorable outcome.

We find the respondent's argument to be rather disingenuous in that what effect would a res judicata ruling of the hearing examiner's decision have with respect to the fact that the respondent paid a potential witness money? Whether Mr. Clement was in essence adjudicated a credible witness or not does not negate the fact that the respondent paid Mr. Clement money prior to the time the hearing examiner issued his ruling. Moreover, as evident by a review of the hearing examiner's final decision, the credibility of the witnesses was not an issue to be tried before the Human Rights Commission. See footnote 6

On the respondent's behalf, the Committee notes that throughout these proceedings the respondent has been honest and candid; and, the witnesses testifying to the respondent's veracity were credible. With that in mind, the Committee considered the unusual nature of the circumstances that occurred and are under the belief that the respondent would act differently if the circumstances were to arise again. The Committee, therefore, recommends a less severe mode of punishment in the form of a public reprimand.

We agree with the Committee's contentions and findings. It is the responsibility of this Court to determine and invoke the appropriate measure of discipline:

"This Court is the final arbiter of legal ethic problems and must make the ultimate decisions about public reprimands, suspensions or annulments of attorneys' licenses to practice law." Syllabus Point 3, Committee on Legal Ethics v. Blair, [174] W. Va. [494], 327 S.E.2d 671 (1984).¹ Syl. pt. 1, Committee on Legal Ethics v. Charonis, 184 W. Va. 268, 400 S.E.2d 276 (1990).

Syl. pt. 1, Committee on Legal Ethics v. Ikner, 190 W. Va. 433, 438 S.E.2d 613 (1993).

Accordingly, Disciplinary Rule 7-109(C) of the Code of Professional Responsibility, effective through December 31, 1988, (which has substantively been incorporated into Rule 1.8(k) of the Rules of Professional Conduct, effective January 1, 1989) is violated when a lawyer acquiesces in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case. Therefore, when the Committee on Legal Ethics of the West Virginia State Bar proves by full, preponderating and clear evidence that a lawyer prepared an agreement that provided for the payment of compensation upon a favorable resolution of the case involving the lawyer's client and such agreement further reflected the possibility that the person to whom the compensation would be given may be a witness in that case, such lawyer is subject to appropriate disciplinary sanctions. See footnote 7

We, therefore, accept the recommendation of the Committee and order that the respondent receive a public reprimand and require the respondent to reimburse the Committee for the actual and necessary expenses incurred by it in connection with this proceeding in the amount of \$1,284.83.

Public Reprimand.

Footnote: 1The relevant language set forth in the supplement agreement reads as follows:

2. The parties agree that an additional sum of money shall be paid to James Clement as part and parcel of the Settlement Agreement entered into effective December 24, 1987, in exchange for valuable consideration to be provided by the said James Clement as relates to the settlement of the Human Rights Commission Case and also as relates to other matters involving employees and former employees of Legacy One Inc.

3. The total sum of money to be paid to James Clement as consideration for entry into this supplement agreement is the sum of Six Thousand Five Hundred Dollars (\$6,500.00).

4. Of the total sum paid the sum of Three Thousand Two Hundred Fifty Dollars (\$3,250.00) shall be paid on the same of execution of this Agreement and the balance shall be paid at such time as the case now pending before the Human Rights Commission in the matter of Lamont Gaither vs Legacy One Inc., which was action number ER-260-87, shall be resolved favorably to Legacy One Inc. either through a ruling by the Human Rights Commission in favor of Legacy One Inc. or by the voluntary withdrawal of all proceedings by the Complainant therein, Mr. Lamont Gaither.

....

6. The parties anticipate the possibility that James Clement may be called as a witness in the event there are any further continued hearings either by the Claimant Lamont Gaither, potentially by the Human Rights Commission itself, or if necessary to substantiate other testimony elicited from other witnesses, by Legacy One Inc.

Footnote: 2The record is unclear as to how and when but it is apparent that Mr. Clement did in fact receive money from Legacy pursuant to the terms of the supplemental agreement.

Footnote: 3Disciplinary Rule 7-109(C) of the Code of Professional Responsibility further provides:

But a lawyer may advance, guarantee, or acquiesce in the payment of:

- (1) Expenses reasonably incurred by a witness in attending or testifying.
- (2) Reasonable compensation to a witness for his loss of time in attending or testifying.
- (3) A reasonable fee for the professional services of an expert witness.

The Code of Professional Responsibility was superseded by the Rules of Professional Conduct which were adopted and promulgated by this Court on June 30, 1988, effective on and after January 1, 1989. By and through this change, Disciplinary Rule 7-109(C) of the Code of Professional Responsibility was replaced with Rule 1.8(k) of the Rules of Professional Conduct which extends the earlier definition by stating:

A lawyer shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness or to anyone referring a lawyer to a witness, contingent upon the content of the witness's testimony or the outcome of the case. But a lawyer may advance, guarantee, or acquiesce in the payment of:

- (1) expenses reasonably incurred by a witness in attending or testifying.
- (2) reasonable compensation to a witness for his loss of time in attending or testifying.
- (3) a reasonable fee for the professional services of an expert witness.

Footnote: 4Paragraph five of the supplemental agreement contained the following language: "Legacy One Inc. agrees that the supplemental settlement agreement entered into with James Clement will not be discussed by the officers, attorneys, agents or other representatives of Legacy One Inc. with any third party as a part of the civil proceeding in the case of Lamont Gaither."

Footnote: 5In his brief to support this contention, the respondent apparently refers to the following portion of the hearing examiner's final decision:

Therefore it is found that Mr. Clement was 'fronting' in an effort to defraud the respondent. It is also found that Mr. Clement and Mr. Gosnell conspired to hinder the respondent's investigation into Mr. Clement's and [Mr. Gaither's] suspected 'fronting.' . . .

It must be specifically noted that the undersigned gave no weight to Mr. Clement's or Mr. Gosnell's testimony on any other issue than set out immediately above.

Footnote: 6The appellant raises two additional assignments of error. However, in light of our resolution of the first issue we are of the opinion that the remaining assignments of error are equally lacking in merit, and therefore, we do not find it necessary to expound upon and address those issues.

Footnote: 7The Committee further contends the respondent violated Disciplinary Rule 1-102(A)(5) of the Code of Professional Responsibility which provides: "(A) A lawyer shall not: . . . (5) [e]ngage in conduct that is prejudicial to the administration of justice." However, because we have found that the respondent specifically violated Disciplinary Rule 7-109(C) of the Code of Professional Responsibility we need not address this more general provision asserted by the Committee.