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In Re: Robert B. Hansen Disciplinary Proceeding : Brief In Support of Petition

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

In Re: ROBERT B. HANSEN)
) No. 15605
Disciplinary Proceeding)

BRIEF IN SUPPORT OF PETITION

POINT ONE

THE COURT ERRED IN HOLDING APPELLANT IS ENTITLED TO SPECIAL TREATMENT BECAUSE HE IS ATTORNEY GENERAL.

While sustaining the findings of the Bar Commission that appellant committed multiple violations of the Code of Professional Conduct, the Court did not accept the recommendation of a one year suspension and simply issued a reprimand. The Court rejected the suspension, in part, because appellant's responsibilities as Attorney General would be hampered by his suspension from the practice of law.

The Court thus effectively granted appellant immunity and placed him above the Code for any penalty more severe than reprimand. This is error. It shields the Attorney General from discipline except reprimand, no matter how serious his misconduct may be.

Further, the effect, if any, of a suspension from the practice of law on the status of appellant as Attorney General was not before the Court, and it was error for the Court to consider it.

POINT TWO

THE COURT FAILED TO CONSIDER THE DUTY OF PROTECTING THE PUBLIC IN DETERMINING THE SANCTION TO APPLY TO APPELLANT.

The primary purpose of the Code of Professional Conduct and disciplinary proceedings thereunder is to protect the public. The legal profession holds a public trust, and has been accorded the privilege of internal discipline, which the Bar Commission submits has not been adequately exercised in this case.

The Court failed to recognize the paramount interest of the public in two respects. First, the Court gave undue weight to the education and commitment devoted to the career of an individual attorney, thereby establishing it as a competing interest to be balanced against the protection of the public. Secondly, the Court erred in holding that an attorney's license to practice law should not be interfered with unless he is guilty of culpable wrong, dishonesty or willful misconduct.

Clearly, an attorney has an important property interest in his license to practice law and it may not be interfered with or revoked without due process. Nonetheless, the standard to be applied is noncompliance with the affirmative duties imposed by the Code of Professional Conduct--irrespective of the presence of intent. The public interest would obviously require disbarment of an incompetent attorney despite the best intentions on his part.

An attorney who is negligent may cause as much damage to the public as one who is dishonest. Particularly where the negligence is, as it was here, gross, continuing and in disregard of the entreaties of clients. Simple neglect may be excused with a reprimand. Gross and continuous neglect warrants suspension or a more severe penalty.

POINT THREE

THE COURT ERRED BY APPLYING AN IMPROPER STANDARD OF REVIEW OF THE FINDINGS AND RECOMMENDATIONS OF THE BAR COMMISSION IN DISCIPLINARY MATTERS.

In deciding this case, the Court held that the findings and recommendations of the Bar Commission are merely advisory since it is the sole responsibility of the Court to discipline attorneys. This holding ignores the clear weight of authority

contained in previous decisions of this Court wherein it was held that the Bar's findings and recommendations are presumed to be correct and proper and that they will be sustained unless found to be arbitrary, capricious or not supported by substantial evidence. In re Johnston, 524 P.2d 593, 594; In re Badger, 493 P.2d 1273; In re Wade, 497 P.2d 106; In re MacFarlane, 350 P.2d 631, 633; In re Fullmer, 405 P.2d 343, 344 (Ut. 1965).

It is undisputed that the Court has the final responsibility for disciplining attorneys who have violated the Code of Professional Conduct. However, the Court in its former decisions has recognized, at least implicitly, that the Bar shares that responsibility. In MacFarlane, supra, the Court noted that the Bar Commission is uniquely qualified to fulfill this role, stating:

On this problem it is relevant to observe that the propriety of the questioned conduct must necessarily be directed to the good conscience and ethical and moral standards of members of the Bar, and that the Bar Commissioners as its elected representatives are peculiarly suited to be the arbiters of such standards. They are vitally concerned with the general conduct of the Bar and its public relations and are

also seriously concerned with a charge against a fellow member such as that involved in the instant proceeding. 350 P.2d at 633.

The Court has often stated that the judge or tribunal hearing the evidence is in the best position to draw findings and conclusions therefrom. If this Court holds that the Commission's findings and recommendations are merely advisory, then it should have the benefit of more than the "cold" record in determining the appropriate sanctions in this case. It would better enable the Court to fulfill its responsibility to discipline attorneys if the Bar withdrew entirely from the disciplinary process. The Court should have the same opportunity the hearing panel had to hear the testimony and observe the demeanor of the witnesses.

In performing what is essentially a de novo review, the Court was sorely deprived in having before it only the bare transcript together with the briefs and abbreviated arguments of counsel.

POINT FOUR

THE COURT ERRED IN FAILING TO CONSIDER MATERIAL ASPECTS OF APPELLANT'S CONDUCT IN DETERMINING THE SANCTION TO APPLY.

The Bar Commission did not expressly find that appellant

engaged in any dishonesty or willful or intentional misconduct. Nor did the Commission find that appellant's conduct constituted mere neglect or indiscretion. The majority opinion's characterization of appellant's conduct in these terms is unsupported by the record and ignores the gravamen of the findings against him.

With respect to Counts I and II, appellant's initial misconduct was the result of simple negligence and inattention. However, once the mistakes were called to his attention by his clients and demands for accounting were made, his actions became knowing and willful. Appellant failed to make an accounting upon the demand of the clients and later, their attorneys. He did not pay over the funds until complaints were filed with the Bar. He refused to assemble and turn over his records until the eve of the hearing before the Bar Commissioners.

In all of this, appellant knowingly and willfully put his own interests before those of his clients. Appellant insisted on operating a part-time law practice in addition to his full-time job of Deputy Attorney General. In doing so, he attempted to maximize his income at the expense of his clients, Lowry and Emarine, and then sought to justify his misconduct with the excuse that he was too busy or his records were too disorganized.

Some time after appellant became aware of his clients' demands for accountings and disbursements, he decided to run for elective office. During his campaign, he continued to refuse to account to his clients or their attorneys. The import of the Code of Professional Conduct is that an attorney may not put his own interests ahead of the client's when there is a conflict. Appellant, by his conduct, forced his clients to take a back seat to his political ambitions.

Thus, what may have begun as neglect on appellant's part took on a knowing and more serious character over the following years due to his foot-dragging. His refusal to pay over moneys to Mrs. Emarine until she produced cancelled checks from the effects of her dead ex-husband, in order to prove they did not bounce, is totally unjustifiable. Appellant was in a far better position to know whether the checks cleared since he deposited them. Instead of accounting to Mrs. Emarine, he forced her to prove to him that he owed her the money.

As of the date of the hearing, Mrs. Lowry still had not been provided an accounting. Her rights for additional recovery have been totally foreclosed since the original judgment debtor is dead.

With respect to Count III, the majority opinion characterized the remarks of appellant as an "indiscretion". However, the Court did not consider the fact that the statement was made during a controversial trial in the midst of appellant's political campaign. There was no reason for appellant to talk to the reporter in the first place--as a responsible prosecutor, he should have declined comment. His conduct cannot be construed as an inadvertent slip of the tongue in the performance of his duties. When appellant encouraged publicity, he was obligated to see to it that he did not make statements which encroached on society's interest in maintaining free and fair trials.

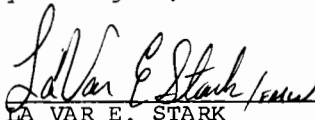
The central theme running through the findings of the Bar Commission and the supporting evidence is that appellant compounded his initial mistakes by constantly placing his own interests--political and economic--ahead of those of his clients and the public at-large. This is contrary to the lawyer's role which is to serve his clients and the interests of justice. The public trust, of which this Court is the bulwark, demands protection from appellant's conduct.

CONCLUSION

The recommendation of the Bar was supported by the evidence. As has been pointed out in the responding brief of the Bar Commission on appeal, the record reflects substantial evidence of gross and continuing violations of the code of such a nature to warrant suspension. The Bar Commission carefully considered the matter, exercised restraint, and certainly did not act arbitrarily nor unreasonably.

Holding suspension is not warranted, ignores the substantiated weight of the evidence and constitutes error.

DATED this 31 day of August, 1978.



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