1978

In Re Don O. Blackham, Disciplinary Proceeding : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

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In re	)	
	)	
	)	
DON O. BLACKHAM	)	
	)	Case No. 15610
	)	
Disciplinary Proceeding	)	

* * *

BRIEF OF APPELLANT

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CASES CITED

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BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

The appellant herein, Don O. Blackham, appeals to the Utah Supreme Court from the findings of a hearing officer in the disciplinary proceeding before the Board of Commissioners of the Utah State Bar, and from the recommendation of the Board of Commissioners of the Utah State Bar that the appellant be suspended from the practice of law for a period of two years, and that his reinstatement after such period be only upon satisfying the Board of Commissioners that he is then competent

to practice law.

STATEMENT OF FACTS

In late September, or early October 1974, Ms. Floyd Hunti contacted the appellant, Don O. Blackham, a practicing attorney with his offices in Salt Lake County, State of Utah, at his office, by telephone, inquiring about some rental property owned by Ms. Hunting and her husband, and located in Kearns, Utah. Appellant was advised that the real property of the Huntings had been condemned by the Utah State Health Department (R-115), and asked what could be done. Appellant advised her (R-116). At a later date, Ms. Hunting made a personal contact with appellant, after she had left a copy of summons and compla with appellant's secretary (R-117). After this personal conference, appellant filed on behalf of Mr. and Ms. Hunting, who were named defen in a legal action concerning real property owned by the Huntings, first a notice to dismiss (Exhibit 4), and appellant appeared at a hearing on suc motion. Thereafter, appellant filed an answer and counterclaim on behalf of Mr. and Ms. Hunting (Exhibit 11).

During the period when pleadings were being filed and hearin held, Mr. and Ms. Hunting were residing in Vernal, Utah, and contact between the appellant and Mr. and Ms. Hunting was primarily by telep

(R-120). In his conversations with Ms. Hunting, and also in conversation with Ms. Hunting's daughter, Ms. Hales, no one expressed to the appellant any concern over the mental or physical capabilities of Ms. Hunting (R-121).

On November 10, 1974, interrogatories were served upon appellant in connection with the pending lawsuit (Exhibit 13), and on November 12, 1974, appellant forwarded a copy of the interrogatories to Mr. and Ms. Hunting, requesting that the requested information be furnished prior to December 10, 1974 (Exhibit 37). Appellant received no communication from Mr. and Ms. Hunting; however, three separate appointments were made for the Huntings through appellant's office, none of which were kept by the Huntings (R-122-123).

On December 18, 1974, a motion to compel answers to interrogatories was filed (Exhibit 14), and appellant attempted to telephone the Huntings on several occasions with regard thereto, all without success (R-123).

A hearing on the motion to compel was held on December 31, 1974, at which time the court gave ten days to answer the interrogatories, and ordered that the default of the Huntings be entered, and their counterclaim stricken, if the interrogatories were not answered (Exhibit 16).

Appellant again attempted to contact the Huntings, and mailed a copy of the order to them (R-124).

On about January 7, 1975, appellant received a telephone call from Ms. Hales, the daughter of the Huntings, indicating that Mr. and Ms. Huntings had been committed to the Utah State Hospital because of alcoholism (R-125). Appellant telephoned to the office of opposing counsel, Mr. Brian M. Barnard, and left a message relating the facts he had received, and requested that Mr. Barnard contact him. On January 14, 1975, Mr. Barnard presented an order to the court which order dismissed the counterclaim of the Huntings and entered their default (Exhibit 17). Appellant did not file a motion for relief from the order of January 14, 1975, because he felt he should have some answers to the interrogatories in the file before requesting any relief (R-127).

Appellant requested Ms. Hales to furnish him with the name of the doctor treating the Huntings, in order for him to prepare pleadings that he felt would be satisfactory to the court in connection with this matter, but the requested information was never furnished to him (R-128).

At a later date, in April or May 1975, Mr. and Ms. Hunting

came to appellant's office and discussed the pending matter with him, at which time information was given to appellant for the answers to interrogatories that were still outstanding. Additional information was required, and Mr. and Ms. Hunting advised appellant that they would obtain the information and return to his office that same afternoon, so that answers to the interrogatories could be prepared, submitted to the court, and other appropriate action taken. The Huntings failed to return to appellant's office, and appellant had no further communication with Mr. and Ms. Hunting after that date (R-130).

Appellant's inability to communicate with the Huntings was frustrating, and resulted in no further communication being made or attempted (R-131).

In June 1976, an execution on the judgment entered against the Huntings was issued, and a sheriff's sale held, and the property sold and subsequently assigned to Brian M. Barnard, attorney for the plaintiff against the Huntings in the initial action.

In February 1976, Brian M. Barnard filed an action to quiet title to the property against Mr. and Ms. Hunting and Mr. and Ms. Hales, the son-in-law and daughter of the Huntings, who had received a deed from the Huntings and, in addition, held an assignment of a judgment against the Huntings and in favor of Interlake Thrift. The Hales received

this assignment of judgment, having paid Interlake Thrift consideration for the assignment, which assignment was part of the court file.

Ms. Hales contacted appellant, who filed on behalf of Mr. and Ms. Hales an answer in the quiet title proceeding commenced by Mr. Barnard (Exhibits 22 and 25). Various pleadings were filed in this action, including interrogatories, which set forth the claim of Mr. and Ms. Hales. The matter was subsequently tried before the Honorable Stewart M. Hanson, Sr., on November 10, 1976.

Prior to the trial date, the matter had been discussed by telephone (R-137) between appellant and Ms. Hales. At the time of trial Ms. Hales was called as a witness in support of the position of Mr. and Ms. Hales that they held not only a titled interest, but an interest by reason of the assignment of the Interlake Thrift judgment. After the matter was tried and argued to the court, the court took the case under advisement and entered a memorandum decision adverse to the interest of Mr. and Ms. Hales (Exhibit 30). Findings of Fact, Conclusions of Law and Decree were thereafter entered by the court.

At about the time the decree had been entered by the court, appellant received a telephone call from Arden W. Lauritzen, an attorney of Logan, Utah, who called on behalf of Mr. and Ms. Hales concerning

the trial and its results (R-141). Appellant thereafter talked by telephone to Mr. Hales and advised him of his rights of appeal in connection with the adverse decision by Judge Hanson. No further communications were had with the Hales or the Huntings, until this matter was brought before the Board of Commissioners of the Utah State Bar.

The hearing officer found that appellant had failed to take sufficient appropriate action to protect the rights of Mr. and Ms. Hunting, and failed to introduce evidence on behalf of Mr. and Ms. Hales, and that by reason of his conduct, he violated Rule IV, Canon VI, BR 6-101(A)(1)(2) and (3), and Canon VII, BR 7-101(A)(1) and (2).

ARGUMENT

POINT I

THAT THE CONDUCT OF THE APPELLANT DID NOT CONSTITUTE A VIOLATION OF RULE IV, CANON VI, BR 6-101(A)(1)(2) and (3) OF THE REVISED RULES AND CONDUCT OF THE UTAH STATE BAR.

Rule BR6-101 provides as follows:

"BR 6-101 - Failing to Act Competently.
(A) A lawyer shall not:
(1) Handle a legal matter which he knows, or should know, that he is not competent to handle without associating with him a lawyer who is competent to handle it.
(2) Handle a legal matter without preparation adequate in the circumstances.
(3) Neglect a legal matter entrusted to him."

From the testimony presented before the hearing officer in this matter, it is quite apparent that the appellant was competent, and able to represent both the Huntings and the Hales in connection with their problems. A review of the exhibits would show that the appellant was aware of the questions involved and the legal matters presented to him, and that he adequately represented the Huntings and the Hales insofar as he could do so without their full cooperation and assistance.

Appellant attempted to obtain sufficient information to permit him to continue his representation of the Huntings in the initial action, even after being advised by Ms. Hales of the commitment of the Huntings to the Utah State Mental Hospital. As indicated by the appellant it was extremely frustrating for him not to be able to communicate with the persons he was representing, and not to be able to obtain information that would assist him in their representation. It was apparent that the competence of the appellant to handle the matter for Mr. and Ms. Hunting was not the question at issue. The apparent question was how far should the appellant have gone in pursuing the Huntings in an attempt to obtain their cooperation in his representation of them. It is evident that appellant was not lacking competence, and that the finding of the hearing officer in this matter, that there was a violation of Canon VI, is just

not justified by the evidence presented.

POINT II

THAT THE CONDUCT OF THE APPELLANT DID NOT CONSTITUTE A VIOLATION OF RULE VI, CANON VII, BR 7-101(A)(1) AND 2) OF THE REVISED RULES OF CONDUCT OF THE UTAH STATE BAR.

Rule BR 7-101 provides as follows:

"BR 7-101 provides as follows:
(A) A Lawyer Shall not Intentionally:
(1) Fail to seek the lawful objections of his client through reasonable available means permitted by law and the disciplinary rules ...
(2) Fail to carry out a contract of employment entered into with a client for professional services ..."

Canon VII of the Revised Rules of Conduct of the Utah State Bar places upon the client the burden of making decisions which may substantially prejudice the client's own rights. The present case appears to be a classic situation, wherein the clients, Mr. and Ms. Hunting, made a determination that affected their own rights, notwithstanding the attempts of the appellant to prosecute and protect their interests. This is particularly borne out by the incident wherein after judgment had been entered, and within a period of time wherein relief could have been requested, Mr. and Ms. Hunting, after being apprised of the need to furnish complete information to answer the interrogatories propounded,

left appellant's office, committing themselves to return the same day so that the matter could be concluded, and thereafter failed to return or submit any further information to the appellant. It is true that a lawyer should represent his client with zeal, but the client has a responsibility to zealously assist his lawyer in the defense of his action, or the protection of his rights, and a lawyer cannot perform these acts for his client; thus, the frustration expressed by the appellant herein in his inability to communicate with Mr. and Ms. Hunting, even after they had returned to his office and expressed a desire to furnish information. Appellant attempted to represent with zeal the interests and position of Mr. and Ms. Hunting, but without assistance he was unable to make decisions, furnish information, and indeed proceed on their behalf. He was on a road that he could not travel alone.

In connection with the representation of appellant in the matter for Mr. and Ms. Hales, the evidence indicates that at the time of the trial of the quiet title action, that Ms. Hales testified as to the position that the Hales held concerning the real property, and that the files and records of the court at that time held the assignment of judgment in favor of the Hales, and that these pleadings were all before the court at the time of the court's decision. The fact that the court ruled adverse

to Mr. and Ms. Hales cannot be interpreted as a determination that the appellant had not represented them zealously and reasonably.

POINT III

THE RECOMMENDATION THAT APPELLANT BE SUSPENDED FOR A PERIOD OF TWO YEARS IS UNNECESSARILY SEVERE, AND A MORE MODEST ALTERNATIVE WOULD BETTER SUIT THE PUBLIC, THE PROFESSION AND THE APPELLANT.

The Committee of the Board of Bar Commissioners of the Utah State Bar recommended that Mr. Blackham, the appellant, be suspended from the practice of law for a period of two years. It is submitted that this recommendation, in light of the record, is unnecessarily harsh. It is not a question of whether or not Mr. Blackham represented the Huntings and the Hales in accordance with the requirements of the Canon of Ethics, but apparently a determination of the degree of representation.

It is recognized that this court will accord substantial weight to the recommendations of the Utah State Bar Commission concerning the disciplinary action to be imposed. In re King, 7 U. 2d 258; 322 P. 2d 1095. On the other hand, the court is not a rubber stamp for the recommendation of the Bar Commission. In re McFarland, 10 U. 2d 217; 250 P. 2d 631; In re Badger, 28 U. 2d 240; 501 P. 2d 1006. It is

submitted that the evidence presented to the hearing officer justifies a less severe response. It may be said that the purpose of disciplining lawyers is the protection of the public, the profession, and the administration of justice, and not the punishment of the person disciplined. In re Richey, 76 Ariz. 152, 261 P. 2d 673; in re Badger, 27 U. 2d 174, 493 P. 2d 1273. It is submitted that in the instant case, a two year suspension is far more than necessary to protect the public, the profession and the administration of justice, and at the same time works a substantial hardship on the appellant, when other alternatives would be more suitable. The evidence presented before the hearing officer showed basically nothing that would challenge Mr. Blackham's honesty, integrity or competence, and in fact showed nothing more than a determination to abide by the apparent decisions of his client. This was not a case where was a breach of professional conduct or mismanagement of client funds, or any other act that might impugn the honesty or integrity of Mr. Blackham.

In re King, Supra, this court felt that suspension for six months was sufficient where the attorney was a party to the knowing use of perjured testimony, a much more severe breach of professional conduct than that involved in the current case. Certainly, as was determined

there, the punishment should not exceed that which is necessary for the protection of the public and the profession in any given situation.

The California Supreme Court, in the petition of Gaffney, 171 P. 2d 873, considering the petition for reinstatement, observed:

> "The law is interested in the regeneration of erring attorneys, and in the enforcement of a sound discipline, its dispositions ought not to place unnecessary burdens upon them."

It is submitted that if this court agrees with the California court's expression, that it must conclude that the punishment imposed here is an unnecessary burden, and that there is a more suitable alternative that will adequately protect the profession, the public, and in fact assist more in the regeneration, if any be necessary, of Mr. Blackham, than that recommended by the Bar Commission. It is submitted that the more suitable alternative in this matter, and one that is highly effective, is that of public reproval. Public reproval may have a better effect in many cases than suspension from the practice of law. The attorney is appropriately disciplined, the public put on notice of the problem, and the attorney knows that his fellow practitioners will be watching his conduct, and that he must walk a very straight line. In Vaughn v. The State Bar, 100 Cal. Rep. 713, where there was a

comingling, without misappropriation, the court found public reprova. sufficient. In a case similar to In re King, Supra, although not as severe, the case of Masesian v. The State Bar, 103 Cal. Rep. 915, a reprimand was felt sufficient. In Hulland v. The State Bar, 503 P. 2d 608, the wilful failure to render legal services, and the wrongful use of a client's confession of judgment, was felt to be adequately met by a public reprimand.

California has also adopted the practice of censuring an attorney by suspending an attorney, but then not carrying out the actual suspension for such period as is deemed reasonable, and placing the attorney on probation. Fielding v. The State Bar, 509 P. 2d 193; Persion v. State Bar, 509 P. 2d 524. This places the attorney in a controlled setting where he knows that his probation can be revoked, and the suspension ordered active and effective for any other violation. It does not take the attorney's livelihood away from him, but acts as an incentive for him to meet the highest standards of ethics in the future.

CONCLUSION

It is submitted that the evidence does not support the finding of the Commission, and that the recommendation that Mr. Blackham be suspended for two years from the practice of law cannot be justified by the evidence presented. If, however, the court believes that Mr. Black-

should have been more zealous in his representation, should have done more to require that his clients participate in the matters before the court, and that by reason of his failure to act, some disciplinary action is justified, then it is submitted that in view of the facts, and in view of the circumstances, that public reproval will have the greatest effect, and will accomplish more realistically the desired result; that is, the protection of the public, the profession, and the administration of justice.

Respectfully submitted,

John A. Rokich