1978

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

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

* * *

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

* * *

BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

STATEMENT OF NATURE OF CASE AGAINST THE APPELLANT

Formal disciplinary proceedings were commenced by the Ethics and Disciplinary Committee of the Utah State Bar before the Bar Commission, in compliance with the Revised Rules of Discipline of the Utah State Bar, as approved by the Utah State Supreme Court. After hearing before a Hearing Officer designated by the Board of Commissioners, Findings of Fact entered by the Hearing Officer were adopted and approved by the Commission and an order was entered by the Commission, recommending that the Appellant be suspended from the practice of law for two years and that subsequent reinstatement be only after a satisfactory demonstration to the Board of Commissioners that the Appellant is then competent to practice law.

STATEMENT OF FACTS

The facts are essentially as stated in the Appellant's brief with a few exceptions. The Appellant undertook, in September or October

of 1974, the legal representation of Floyd S. Hunting and Edith Hunti as defendants in a civil suit filed in the third Judicial District c Salt Lake County. Suit was filed by Kelene O'Callahan as plaintiff, Brian Barnard acting as her legal representative. The final disposit of the law suit was that judgement was taken against the Huntings for the amount praved, which included trebled damages, and the counter-cl of the Huntings was dismissed. Subsequent to this judgement, an exec was levied upon real property belonging to the Huntings, a sheriffs sa took place and the property was sold to the judgement creditor for app imately $473.00. The record indicates that Huntings suffered from se alcoholoc addiction. Testimony presented, however, is contradictory a to whether or not the Appellant knew of the health problems of Mr. or Hunting. Appellant testified that he was unaware of any such problems. The Hunting's daughter, LaRene Hales, testified that she had informed the Appellant at an earlier meeting of her mother's condition. No act was ever taken by the Appellant to set aside the judgement taken agai the Huntings or to redeem or reclaim the real property.

A subsequent action was brought to quiet title in the real property formerly belonging to the Huntings, which had been sold at th sheriffs sale. The Appellant undertook to represent the daughter and son-in-law of the Huntings, Mr. and Mrs. Hales in that action. The Hales had an interest in the real property pursuant to an assignment f Interlake Thrift Company and a warranty deed from the Huntings. The judgement enter in the case denied any interest in the real property to the Hales.

The Appellant now seeks relief from the findings and rec mendation of the Board of Commisssioners that his acts were in vio

interests. (R-154, 155). As further evidence, the Appellant did not advise his clients, Mr. and Mrs. Hales, of their possible liability for rents received from the real property which had been sold at the sheriffs sale (R-154). All of these factors indicate a lack of awareness on the part of the Appellant of possible steps he might take to protect the interests of his clients. It was reasonable and proper for the Hearing Examiner to deduce, and the Bar Commission to confirm, that the Appellant was incompetent to handle the legal question presented by the two lawsuits.

Subsection 2 of the same Disciplinary Rule, states that lawyer should not "handle a legal matter with preparation inadequate in the circumstances." Subsection 3 is similar, and states that a lawyer shall not "neglect a legal matter entrusted to him." The Appellant was faced with a serious problem when his clients Mr. and Mrs. Hunting failed to provide answers to interrogatories during December of 1974. However, once he was informed of the health situation of his clients, the picutre changed. His only positive action taken at that time was to call the office of opposing counsel, Brian Barnard. (R-123). On the 14th day of January, 1975, the order was entered striking the pleadings of the defendents and dismissing their counter-claim (Exhibit 17). During the intervening period until the Judgement by Default (Exhibit 18) was entered, the Appellent still did nothing at all. He claimed in his testimony he was waiting for the Huntings to be released from the hospital and complete the answers to interrogatories and provide a doctor's affidavit. He testified that on two seperate occasions she provided Appellant with that name. (R-65, 66). The Hearing Officer, as the trier of Fact, was entitled to give more cred-

of the Code of Professional Responsibility and that should therefore be suspended from the practice of law for two years.

ARGUMENT

POINT I

THE CONDUCT OF THE APPELLANT CONSTITUTES VIOLATIONS OF RULE IV, Canon 6, DR 6-101 (A)(1),(2) and (3) OF THE REVISED RULES OF CONDUCT OF THE UTAH STATE BAR.

Appellant contends that he cannot be held to have violated the provisions of Canon 6, DR 6-101 (A) Because he competently handled the two lawsuit

avers that he did all that was possible to properly represent his client in these matters. The record, including the Appellant's own testimony, indicates otherwise. An examination of each section of Canon 6's Disciplinary Rule inlight of the record, will demonstrate the inadequacy of Appellant in the two lawsuits.

DR 6-101 (A)(1) states that a lawyer should not "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."

After the judgement had been entered against the Huntings and the Appellant had been informed of the hospitalizaion of the Huntings the Appellant did not consider having a guardian appointed for his client the Huntings, because of their mental and physical conditions. (R-93). Also, the Appellant admittedly never advised his clients of their redemption rights in the real property, no of their possible homestead

ibility to the testimony of Mrs Hales. The Appellant testified that he finally became "disgusted" when the Huntings failed to provide him with all the information he needed. (R-131). The record is clear that he never made a serious attempt to communicate with his clients the Huntings, or to Mr. and Mrs. Hales, the seriousness of the matter. He considered it all along as a "flaky" lawsuit. (R-127). Therefore, he never pursued with any great determination, the proper remedies. The Appellant never advised the Huntings of the time constraints upon applying for setting aside of the judgement, pursuant to Rule 60 of the Utah Rules of Civil Procedure. Furthermore, he apparently never advised Mr. and Mrs. Hales, daughter and son-in-law of the Huntings, of this problem. (R-157). Mrs. Hales was still expecting the judgement to be set aside when time came for trial on the second suit wherein Brian Barnard was named as plaintiff. (R-77).

The Appellant made no attempt to contact his clients, Mr. and Mrs. Hunting, after they failed to show up for their late afternoon appointment. (R-130). This was despite the fact that he still considered the Huntings to be his clients. (R-162). The Appellant received notice of the sheriff's sale. However, he did not contact Mr. and Mrs. Hunting about that sale at all. He knew, by this time, that they had severe alcoholic problems. Evidently, he never discussed the same with Mr. and Mrs. Hales, until after the sheriff's sale, despite that fact that he was representing them in regard to the Interlake Thrift assignment. When they did discuss it, he just told her not to worry. (R-17). Furthermore, he never advised the Huntings nor the Hales about the re-

demption rights in the real property. (R-154). This real property was purchased at sheriff 's sale for the sum of $473.00. It had an equity of approximately $15,000.00. (R-103).

The Appellant's actions taken on behalf of Mr. and Mrs. Hales in the suit filed by Brian Barnard to quiet title in the real property, further demonstrate his lack of preparation and neglect of his professional responsibilities. After the Appellant had undertaken to represent the Hales in this lawsuit, his advise to Mrs. Hales consisted mostly of simply reassuring her that he would take care of everything. (R-72, 73, and 74). Then, when the time for trial came, the Appellant had not even advised the Hales of the date until the night before. His communication was so poor that Mrs. Hales was not even sure as to which trial was going to be held. (R-73). Evidence presented by the Appellant at trial to establish the Hales' interest pursuant to the assignment from Interlake Thrift, consisted only of the testimony of Mrs. Hales. It is not indicated on the record the extent of the testimony elicited. The Appellant states that the assignment was part of the court file. However, this is certainly not apparent and no evidence was presented to that effect. The complaint filed by the plaintiff refers only to a proported assignment and asks that the interest of the Hales be extinguished entirely. (Exhibit 21). The answered filed by the Appellant on behalf of the Hales does not include a copy of the assignment as an exhibit thereto. (Exhibit 22). In fact, Finding No. 9 of the Findings Fact signed by Judge Stewart M. Hanson in that matter, states that "the defendents presented no evidence of a judgement or lien on the above described real property held by Interlake Thrift, or of any subsequent assignment of such judgement lien." Once again the neglect of the

Appellant caused the Hales to lose all interest in the real property pursuant to the judgement which they had purchased. Moreover, the plaintiff was granted a judgement for rent received by the Hales on that property. As stated before, the Appellant had neglected to advise the Hales of their possible liability for these amounts.

Violations of subsection (1) of DR 6-101(A), acting incompetently, are sufficient to warrant disciplinary action. In the case of In re Greene, 276 Or. 1117, 557 P.2d 644 (1976), the attorney in guardianship proceedings failed to properly determine the value of estate realty and also failed to include savings account funds in the estate. The court therein held that the conduct was "incompetent representation" and called for discipline. Other cases have held that negligence, neglect, or inattention by an attorney justifies disciplinary action. In a California case similar to the one herein, the attorney was found to have disregarded the interests of his clients and failed to pursue legal action for which he had been retained. Schullman v. State Bar, 16 Cal.3d 631, 547 P.2d 447 (1976).

The evidence is clear and unmistakable that the Appellant was not competent to handle the legal matters presented in these two lawsuits. He failed to take the appropriate legal actions in representing his clients. Also, he not only failed to take the proper actions, but he failed to exercise proper diligence in his representation and neglected the interests of his clients. This constitutes clear violations of Canon 6 of the Rules of Conduct.

POINT II

THE CONDUCT OF THE APPELLANT CONSTITUTES VIOLATIONS OF RULE IV, CANON 7, DR 7-101(A) (1) AND (2) OF THE REVISED RULES OF CONDUCT OF THE UTAH STATE BAR.

The applicable parts of Canon 7 read as follows:

> DR 7-101
> (A) A Lawyer Shall not Intentionally:
>
> (1) Fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules, except as provided by DR 7-101(B). A lawyer does not violate this Disciplinary Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.
>
> (2) Fail to carry out a contract of employment entered into with a client for professional services, but he may withdraw as permitted under DR 2-110, DR 5-102, and DR 5-105.

It is obvious, from the foregoing discussion under Point I, that the Appellant failed to meet the requirements of Canon 7 and intentionally did not pursue all reasonable means of protecting his clie nor did he fulfill his implied contract with them for professional se vices. Not only did the Appellant act incompetently and negligently, also intentionally failed to properly represent his clients.

Appellant attempts to shift the blame from himself to the Huntings for the disastrous results obtained, and cites Canon 7 as st for the proposition that the clients are responsible. This overlooks only the facts, but also the intent of Canon 7. The Ethical Considerations of Canon 7 make it clear that the burden of responsibilit is with the client only in certain decision-making areas and only aft

adequately informed by the attorney. EC 7-9 states as follows:

> A lawyer should exert his best efforts to insure that decisions of his clients are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so. . . .

The Appellant failed in numerous incidents herein, to adequately inform his clients of the possible results of their actions or inaction. Under the circumstances presented, the Appellant's responsibility was even greater than usual. The Ethical Considerations of Canon 7 further provide as follows:

> EC 7-11. The responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client, . . .
>
> EC 7-12. Any mental or physical condition of a client that renders him incapable of making a considered judgement on his own behalf casts additional responsibilities upon his lawyer. . . .

In representing the Huntings, the Appellant had good cause to know that there were mental and physical problems that required extra care on his part. LaRene Hales testified that she told the Appellant something of her mother's problems and left her name and address with the request that the Appellant keep her advised of developments in the lawsuit. (R-56). The Appellant denies all but having met Mrs. Hales in the fall of 1974. (R-120). The Hearing Officer evidently accepted the testimony of Mrs. Hales. However, even accepting the Appellant's version, he ought to have been alerted to possible problems. The Appellant, when asked to describe Mrs. Hunting's appearance and behavior at their first meeting, stated as follows:

> Well, Mrs. Hunting, there was nothing about her appearance that made any impression on me. I did get the impression that she was kind of overconcerned, and it seemed to me like we were having some kind of a problem communicating

with each other. But that's . . .

. . .

> . . . She seemed to me to be aware. But I was having a hard time -- it seemed like to me that I would be discussing one aspect and she was inquiring about something else. I didn't have her complete attention, I guess, is the best wasy that I could describe it. (R-120).

At this point at least the Appellant should have been alerted to some problems in understanding. The Appellant stated that Mrs. Hunting appeared and acted about the same during the hearing as she had when he first met her in 1974. (R-149). Mrs. Hungting's testimony at the hearing demonstrates her to be confused, rambling, and unable to understand what was going on or had gone on. (R-25, 26).

After Mrs. Hales informed the Appellant of her parents' commitment in the State Hospital, the Appellant was clearly on notice of their impaired condition. However, he did nothing which acknowledged that information. Instead, he became disgusted and eventually just gave up. His attitude is typified by the following testimony offered at the hearing: "I had the feeling that I couldn't throw the Huntings over my shoulder and have them comply, and they seemed to be indifferent to it. I sort of had the attitude that if it didn't bother them, why, it didn't really bother me." (R-132).

It is even harder to understand why the Appellant failed to communicate with the Hales about the failure of the Huntings to complete the interrogatories and the consequences of that failure and of the ensuing sheriff's sale. He would not have had to make an extra special effort even, as he was then advising them as to assumption of the Interlake Thrift judgement.

The Appellant wilfully failed to take appropriate legal steps to protect the interests of his clients. He received all notices of motions and rulings in both lawsuits. He failed to take any action to prevent judgement being taken against the Huntings, although he had time and the grounds to do so. (R-158-160). He thereafter failed to take any action to set aside the judgement, failed to prevent the attachment and sheriff's sale, and failed to effect redemption of the property. In the second action, he failed to present the appropriate evidence to establish his clients' claim.

In every instance herein, the Appellant failed wilfully to properly communicate with his clients and advise them fully of the proceedings and the consequences. He did not adequately inform them of the consequences of failing to answer the interrogatories. He did not tell them that motions to set aside the judgment had to be timely. He did not properly inform them of the effects of the sheriff's sale. He did not advise them of rights of redemption or possible homestead interests. He did not talk to Mrs. Hales about his problems with her parents. He did not advise the Hales of possible liability for rents received after the sheriff's sale. He did not adequately inform them of progress in the quiet title action. He did not properly prepare them for the trial therein.

As a result, great harm was done to the Appellant's clients, which most likely could have been avoided. The Appellant did not even bother to withdraw as counsel for the Huntings, as allowed in Canon 7, but continued as their counsel without performing any services. His actions are in violation of the provisions of Canon 7.

POINT III

THE RECOMMENDATION OF THE BOARD OF COMMISSIONERS OF A TWO YEAR SUSPENSION IS APPROPRIATE HEREIN.

It is probably true, as stated in Appellant's brief, 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." (Brief, at 12). However, we contend that those purposes will be adequately and properly met by the discipline recommended herein. The actions of the Appellant have resulted in economic harm to his clients, adverse publicity for the legal profession, and thwarting of the attainment of justice. If the lawsuit originally brought against the Huntings was "flaky", as asserted by the Appellant, the judgement entered therein is a travesty. The action sought herein will serve to prevent repititions of the same sort of results, hopefully, resulting from incompetence, negligence, and a wilfull neglect of professional obligations.

CONCLUSION

The Bar urges that the Court adopt the recommendation of the Board of Commissioners and suspend the Appellant from the practice of law for a period of two years, reinstatement to be conditioned upon a satisfactory demonstration to the Board of Commissioners that the Appellant is then competent to practice law.

Respectfully submitted,

Pamela Greenwood
Counsel for the Utah State Bar

CERTIFICATE OF MAILING

I hereby certify that I mailed two (2) copies of Respondent's Brief to John A. Rokich, Attorney for Appellant, 3617 South 8400 West, Magna, Utah 84044, this 31st day of May, 1978.