

1979

## Steven Kuhnhausen v. Utah State Bar : Brief of Utah State Bar

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

In the matter of:

STEVEN KUHNHUASEN

PETITIONER

PETITION FOR ADMISSION TO  
MEMBERSHIP IN THE UTAH STATE BAR

Case No. 1978-10

BRIEF OF UTAH STATE BAR

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FILED

MAY - 4 1978

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IN THE SUPREME COURT OF THE STATE OF UTAH

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IN THE MATTER OF STEVEN KUHNHAUSEN,  
Petitioner.

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)  
) PETITION FOR ADMISSION TO  
) MEMBERSHIP IN THE UTAH  
) STATE BAR  
)  
) Case No. 15692  
)

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BRIEF OF UTAH STATE BAR

NATURE OF THE CASE

This matter is on appeal from a ruling by the Board of Commissioners of the Utah State Bar that the petitioner has failed to satisfy the requirement that he be of good moral character, and is thus denied admission to the Utah State Bar.

RELIEF SOUGHT

Petitioner requests a reversal of the ruling of the Board of Commissioners and an order requiring his admission to the Utah State Bar.

STATEMENT OF FACTS

Petitioner presents a recital of the facts involved in the Introduction of his Brief. The first paragraph therein refers to a hearing before the Character and Fitness Committee of the Utah State Bar. Since a record of those proceedings was not made is not before the Court at this time in the record on appeal, we can only refer to the notice sent to petitioner, which states that the named committee "cannot certify the applicant is of approved good moral character and general fitness to practice law." (Record, p. 36). This notice also

advised petitioner of his right to a further hearing, which right was exercised by petitioner by the filing of a Formal Request for Hearing with the Executive Director of the Utah State Bar. (Record, p. 35). Subsequently, counsel for petitioner filed a motion to exclude certain evidence. (Record, p. 19). In part, petitioner sought to exclude any and all evidence pertaining to an arrest and conviction which were later reversed and for which an order of expungement issued. This part of petitioner's motion was granted. Petitioner also sought to exclude evidence which pertained to the expunged matter, but could be introduced into evidence without reference to the arrest, etc. Specifically, the issue was whether or not evidence could be admitted which was obtained from a search and seizure subsequently declared illegal under the Fourth Amendment to the United States Constitution in State criminal proceedings. The Hearing Officer ruled that this evidence was admissible.

In the evidentiary hearing the above rulings were adhered to. Petitioner presented evidence as referred to in his Brief - his testimony and that of three members of Bar who testified as to petitioner's good character. Rather than continue the date of the hearing, the Bar and petitioner stipulated to admission of the testimony of Larry Hedberg, who could not attend the hearing. Hedberg's stipulated testimony was that in June of 1976 he had observed approximately one pound of marijuana and a lesser amount of cocaine in the apartment being rented by the petitioner. The Bar also offered as evidence the application to the Bar of the petitioner. (Exhibit 1 of transcript). Petitioner had stated in that application that he had been accused of "smoking pot" in 1963 while in the Marine Corps, and later received an

undesirable discharge, which was later upgraded to a general discharge and then to an honorable discharge. On cross examination, each of the character witnesses offered by the petitioner stated that in his or her opinion, use of marijuana or cocaine is not, by itself, sufficient reason to exclude someone from membership in the Bar, because of lack of moral character.

## ARGUMENT

### I

EVIDENCE OFFERED BY THE BAR WAS PROPERLY  
ADMITTED AND DID NOT DENY PETITIONER A  
FAIR AND IMPARTIAL HEARING.

It is true, as stated in Petitioner's Brief, that the Bar's investigator obtained copies of the arrest, conviction, and subsequent expungement orders of the petitioner. It is also true that these materials should not have been provided by the court for the investigator. However, it is not true that this was the only source of the information which led to denying petitioner admission to the Bar. No where in the record is that stated. To the contrary, the investigation by the Bar was actually initiated by a call from a licensed member of the Bar to the Executive Director. Petitioner's counsel was informally told of this, but it also does not appear of record.

The Bar did not rely on nor even utilize the expunged matters in the evidentiary hearing. The Hearing Officer did, however, allow use of the Hedberg testimony, although it consisted of observations during a search and seizure later declared illegal under the

Fourth Amendment. This issue was argued at some length prior to the evidentiary hearing. (Record, pp. 8-31). The Bar argued then, and does so again, that the exclusionary rule as first established in Mapp v. Ohio, 367 U.S. 643 (1971), is not applicable to Bar applicant proceedings so as to prevent use of evidence obtained in a search later declared illegal. The purpose of the exclusionary rule is to deter police officers from conducting illegal searches. This purpose is adequately served by preventing the use of tainted evidence in criminal proceedings. As stated in United States v. Janis, 428 U.S. 433 (1976):

. . . the "prime purpose of the rule, if not the sole one is to deter future unlawful police conduct. . . in sum, the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved. . . as with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." at 466, quoting United States v. Calandra, 414 U.S. 338 (1974).

The Court found that the goal of deterrence was sufficiently served by excluding the illegally seized evidence in the state criminal proceedings. As a result, the evidence was allowed to be used in Internal Revenue Service proceedings. Similarly, in the case of Morale v. Grigel, 422 F.Supp. 938 (D.C.N.H. 1976), the court held that the exclusionary rule did not apply to college disciplinary action based on evidence of marijuana use obtained in a warrantless search. In examining the Janis rule, this court stated that "The Supreme Court clearly intends to limit the exclusionary rule to criminal proceedings and to allow only a criminal defendant to invoke its protections."



Thus, the Hearing Officer properly found that the exclusionary rule was inapplicable, and that the testimony of Larry Hedberg was admissible. The petitioner had previously been extended the benefits of the exclusionary rule in the criminal proceedings through dismissal and expungement. He was not entitled to the further application of the rule in the Bar proceedings, which are essentially civil in nature.

## II

### THE DECISION OF THE BOARD OF COMMISSIONERS WAS FULLY SUPPORTED BY THE EVIDENCE AND SHOULD BE SUSTAINED HEREIN.

This Court has elucidated the following standard in its review of Bar disciplinary cases:

This court has previously stated that it would look upon the findings and recommendations of the Bar Commission with indulgence and would not disregard its action unless there was something to persuade this court that the Commission had acted capriciously, arbitrarily, or beyond the scope of its power or was plainly in error.  
In re Badger, 27 Utah 2d 174, 493 P.2d 1273 (1972).

Presumably, the same standard applies in Bar application cases. It is clear from the record herein, that the Bar Commission did not abuse its authority in finding that the petitioner was not qualified for admission to the Bar.

Petitioner's evidence of good moral character consisted of his own testimony and that of three members of the Bar. The testimony of petitioner included information about his educational and employment background. (Tr. pp. 5-6). He described in some detail his work as a para-professional law clerk at Utah Legal Services. (Tr. pp. 6-9). He denied ever having committed or having

been accused of committing any acts which were dishonest or contrary to the Code of Professional Responsibility in connection with his dealings with clients at Legal Services. (Tr. p. 11-12). During cross examination, the petitioner further stated that in his opinion he had not engaged in any activities in his personal life in contravention of the code of ethics. (Tr. p. 13).

The three witnesses who testified on behalf of the petitioner all had worked with him at Utah Legal Services and all are members of the Utah State Bar. Each testified in large part as to the petitioner's professional competence. None addressed specifically the moral qualifications of the petitioner. In fact, none of them really had much contact with the petitioner outside of their on-the-job activities. Thus, petitioner's prima facie case of moral character consisted only of his own statements and those of colleagues relating primarily to professional and intellectual capabilities.

Cross examination of the three character witnesses revealed that their opinions as to the qualification of the petitioner were tainted by their opinions concerning the use of illegal drugs and its relationship to Bar membership. The first witness, Barney Gesas, testified as follows:

Q Mr. Gesas, in your opinion, is a person who uses marijuana morally fit to be a member of the Utah State Bar?

A You're asking me hypothetically?

Q In your opinion.

A My opinion, I would say I don't think that would constitute moral turpitude in my opinion as a basis for denial of admission to the Bar.

Q In your opinion, is a person who uses cocaine morally

fit to be a member of the Bar?

. . .

A The question you asked me is if someone uses cocaine would I deem them fit for admission to the Bar on the grounds of moral fitness?

Q Correct.

A My answer would be probably. I would have to know the totality of the person, their work product. I would generally say, if that was an isolated situation, that person were known to use cocaine, I would probably want to explore it more. But I would generally say I don't think that's a basis to deny admission. My reason for that is that the use of that drug-- I'm not personally familiar with it; I have only read about it--that's a consensual type of action. Someone is not imposing on others, is not profiting by it.

I'm not espousing that it should be legal, but I'm saying I would want to look further into that person. That alone I would not use as a basis to deny admission to the Bar.

(Tr. pp. 22-23).

Another witness, James T. Massey, testified as follows on cross:

Q Mr. Massey, in your opinion is a person who uses marijuana morally fit to be a member of the Bar?

In your opinion, is a person who uses marijuana morally fit to be a member of the Bar?

A That being the sole criterion, a person who has used it?

Q Who uses marijuana.

A It would be difficult without knowing what you mean "uses."

Q Smokes marijuana.

A In terms of frequency. I think a person -- I'll answer that question, no, not necessarily. I don't think it automatically disqualifies people from being fit to practice law the way the question was posed.

Q In your opinion, is a person who uses cocaine morally fit to be a member of the Bar?

A I would have the same answer." (Tr. pp.34-35).

The last character witness, Patricia De Michele, stated as follows:

"Q Patty, in your opinion, is a person who uses marijuana morally fit to be a member of the Bar?

A In general?

Q Yes.

A Yes, I believe so. Well, I would qualify that by saying, all things being equal, that alone would not in my mind make someone unfit.

Q In your opinion, is a person who uses cocaine morally fit to be a member of the Bar?

A With the same kind of qualifications?

Q Same.

A Yes."

(Tr. pp. 40-41).

The Bar presented the testimony of Larry Hedberg. Mr. Hedberg was unable to attend the hearing, but in the interest of having the issue resolved both parties stipulated to the content of that testimony. The testimony was as follows:

. . . in June of 1976 he was in the apartment of the applicant, Mr. Kuhnhausen, and in that apartment he observed approximately one pound of marijuana and a lesser amount of cocaine. (Tr. p. 42).

Also placed in evidence by the Bar as Exhibit 1, was the "Applicant's Questionnaire and Affidavit" filed with the Utah State Bar by the petitioner. The document was identified by the petitioner as having been filled and signed by him. (Tr. pp. 12-13). Question 3 of that document asks for information concerning service in the armed forces. Under a subsection designated "Other details" of question 3, petitioner states as follows:

In June 1963, I was confronted by my head NCO who said he knew I smoked "pot". I was advised by him that if a (sic) saw a doctor he would not inform the C.O. I went to the Naval Hospital the following morning and after telling the doctor that I smoked (sic) pot, he called my CO. I was then informed that no charges would be brought against me if I would accept an undesirable discharge. Two months later I was out of the service. I never had any disciplinary or complaints filed against me and other than this incident my service was exemplary. Subsequently the discharge was upgraded to General and as I understand it I am eligible for amnesty and an honorable discharge.

Petitioner testified that eventually he received an honorable discharge.

No evidence or testimony was presented to rebut that offered by the Bar. Petitioner did not deny that in 1963 he smoked pot or attempt to explain away by any means the statement included in his Bar application. Petitioner did not deny that in 1976 there were in his apartment substantial amounts of marijuana and cocaine. He did not even offer an explanation as to why the drugs were in his apartment. The Hearing Officer and the Bar Commission came to the logical and unrefuted conclusion that the petitioner used marijuana in 1963 while in the Marine Corps, and used marijuana and cocaine in 1976, while in law school. It was reasonable to assume that he used illegal drugs during the interim period between 1963 and 1976. It was also reasonable to find that, because of the quantities of drugs observed in petitioner's apartment in 1976, he intended to distribute the drugs for value. None of this was denied by petitioner, although he had ample opportunity to do so.

Petitioner had the burden of establishing good moral character. Every applicant for admission to the Bar must establish that he or she is "of good moral character, and must produce satisfactory testimonial of good moral character; . . ." U.C.A. 73-51-10 (1953). Neither the petitioner nor any of his witnesses were of the opinion

that use of illegal drugs constitutes lack of moral character sufficient to prevent admission to practice law. The Board of Bar Commissioners disagreed. They concluded that the evidence established that petitioner "has an attitude of defiance of the law rather than a willingness to abide by the law," and that "in failing to admit the wrongfulness of his conduct or offer any evidence of his rehabilitation strongly suggests that he considers the aforesaid conduct proper and therefore has no need for rehabilitation." (Record, p. 6, Conclusions 2 and 3).

The Oath of an Attorney, which every attorney admitted to practice in the state of Utah must take and follow in practice, provides in part as follows:

I will support the Constitution of the United States and the Constitution of the State of Utah, and that I will discharge the duties of Attorney and Counselor at Law with fidelity:

I will maintain the respect due to Courts of Justice and judicial officers;" Rule III, Revised Rules of Conduct of the Utah State Bar.


The evidence presented herein irrefutably established that Petitioner had possessed, used and possibly intended to sell, illegal drugs. Absent any further evidence, the Board of Commissioners properly found that the petitioner lacked the requisite good moral character and denied him admission to the Utah State Bar.

#### CONCLUSION

The evidence presented by the Bar in the hearing before the Hearing Officer was properly admitted and petitioner was given a full and fair hearing. Petitioner failed to establish that he possessed the necessary good moral character for admission to the

Bar or to refute evidence presented by the Bar and Board of Commissioners of the Utah State Bar properly denied petitioner admission to the Bar.

DATED this 1st day of May, 1978.

  
PAMELA T. GREENWOOD  
Attorney for Utah State Bar

#### MAILING CERTIFICATE

I hereby certify that I mailed two true copies of the foregoing document to Robert D. Moore, Attorney for Petitioner, at Suite 509, Ten Broadway Building, Salt Lake City, Utah 34101, postage prepaid this 2nd day of May, 1978.

