STATE GRAND JURY OF SOUTH CAROLINA

FILED

MAR 14 2014

JAMES R. PARKS
CLERK, STATE GRAND JURY

In the Matter of State Grand Jury Investigation # M 2014-237

REPLY OF ROBERT HARRELL, JR. TO RESPONSE TO MOTION TO DISQUALIFY ATTORNEY GENERAL ALAN WILSON

In reply to Attorney General Alan Wilson's response to the motion of Robert W. Harrell, Jr. to disqualify Attorney General Wilson, Robert H. Harrell, Jr., submits the following:

The affidavit of Attorney General Alan Wilson states as follows:

> On February 14, 2013, I referred the matter (complaint regarding violations by Speaker Robert Harrell) to the South Carolina Law Enforcement Division....[T]hrough February, March, and April of 2013...I became aware that Speaker Harrell may have had concerns about including the Public Integrity Unit in ethics reform legislation. I was worried that the Public Integrity Unit would not make it into the final bill.
>
> On April 11, 2013, a comprehensive ethics bill was introduced that did not contain a Public Integrity Unit. The Full Judicial Committee met on April 16, 2013, and I was advised the Public Integrity Unit was not included in the discussions.
>
> Because I believed it would create the appearance of impropriety if I were to meet directly with Speaker Harrell given the pending SLED review of the citizen complaint into possible ethics violations by Speaker Harrell, I decided to reach out to his chief of staff and his chief legal counsel, Brad Wright, to discuss the ethics reform legislation and Public Integrity Unit.
>
> Accordingly, on April 16, 2013, I had my staff obtain a cell phone number for Mr. Wright and invite him to a meeting at my office...[t]he meeting took place late that afternoon. I closed the door and Mr. Wright and I sat down in my office.
>
> My purpose in arranging this meeting was to get Speaker Harrell's support for ... a Public Integrity Unit...
>
> ... I conveyed to Mr. Wright my hope that the mere fact this Office referred the matter to SLED in the ordinary course of its business would not cause Speaker Harrell to publicly or privately withhold support for the Public Integrity Unit.

The foregoing from the affidavit of Attorney General Wilson shows that he had referred a

complaint concerning Speaker Harrell for investigation by SLED in February 2013. In April 2013 Attorney General Wilson, who was a strong supporter of laws that include the creation of a Public Integrity Unit, was aware that Speaker Harrell had concerns about including the Public Integrity Unit in ethics reform legislation. Attorney General Wilson correctly knew that he could not meet directly with Speaker Harrell because of the pending SLED review. Attorney General Wilson recognized the obvious conflict he had in asking a favor from a person under criminal investigation, in which he was participating. Nevertheless Attorney General Wilson attempted to do indirectly what he knew he could not do directly, i.e. request Speaker Harrell to take action which Attorney General Wilson favored by discussing it with Speaker Harrell's chief of staff and chief legal counsel, Brad Wright. Attorney General Alan Wilson admits that his purpose in arranging this meeting was to get Speaker Harrell's support for the Public Integrity Unit which is exactly the impropriety which Attorney General Wilson knew would result if he were to meet with Speaker Harrell directly. Attorney General Wilson arranged a meeting with Brad Wright after having his staff obtain Brad Wrights' cell phone number. This was a closed door one on one meeting between Mr. Wright and Attorney General Wilson. In the meeting Attorney General Wilson acknowledges that he discussed with Mr. Wright the fact that his office had referred the complaint against Speaker Harrell to SLED. Mentioning the SLED referral is a matter completely unnecessary to any discussion by Attorney General Wilson if he "only" wanted to convey why he felt Speaker Harrell should support the legislation favored by Attorney General Wilson. In fact, mention of the referral to SLED is the exact reason Attorney General Wilson believed it would create an appearance of impropriety if he were to meet directly with Speaker Harrell; yet, Attorney General Wilson brings up the very matter, which he knows that it is improper to discuss directly with Speaker Harrell, to his chief of staff and chief

legal counsel in a meeting, the purpose of which was to "get Speaker Harrell's support" for a Public Integrity Unit.

All of the foregoing clearly shows at least an appearance of impropriety and a conflict of interest requiring disqualification of Attorney General Wilson in the current Grand Jury investigation.

While Attorney General Wilson contends that the "mere" appearance of impropriety is a disfavored standard which has been abandoned and excluded from the model rules of professional conduct which in large measure were adopted by South Carolina effective September 1, 1990, the case of Matter of Craig, 317 S.C. 295, 454 SE2d 314 (S.C. 1995) belies this contention. In the Matter of Craig, an attorney disciplinary action, the Supreme Court found that the attorney in question had admitted that his actions constituted an appearance of impropriety and went on to find that such appearance of impropriety violated Rule 413, SCACR, by engaging in conduct which brings the legal profession into disrepute. Rule 413 consists of rules for lawyer disciplinary enforcement and under Section 3. General Provisions, Rule 7(a)(5) provides that it is a ground for discipline of a lawyer to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute. Rule 8.4 of Rule 407 also provides that it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice.

It is respectfully submitted that the action of the Attorney General, even as stated in his own affidavit, falls within the ambit of the rule set forth above and is at least the appearance of impropriety, and a conflict of interest, bringing the legal profession into disrepute and/or tending to pollute the administration of justice. Moreover, the National District Attorney's Association

National Prosecution Standards 3rd Edition provides that a prosecutor represents society as a whole. As such, a prosecutor should not engage in activities, like those here, that are likely to create a reasonable appearance of conflict with the duties and responsibilities of the prosecutor's office. (A copy of pertinent portions of standards attached).

In view of the foregoing it is respectfully submitted that notwithstanding the argument of Attorney General Alan Wilson, this court should inquire into the matter and disqualify Attorney General Alan Wilson from participation in the proceedings herein.

Robert Harrell, Jr. recognizes that the controversy and Grand Jury proceedings herein involve a matter of concern to the general public. In this regard Robert Harrell, Jr. is anxious to fully vindicate himself in a public forum. However as Attorney General Wilson recognizes, as is evidenced by the fact that Attorney General Wilson has made a motion that "any hearing on the issue of closing the courtroom be open and any hearing on whether the Attorney General should be disqualified be open as well," until the court determines otherwise S.C. Code Ann. §14-7-1770 requires

> Records, orders, and subpoenas relating to state grand jury proceedings must be kept under seal to the extent and for that time as is necessary to prevent disclosure of matters occurring before a state grand jury.

Further, as set forth by the S.C. Supreme Court in Evans v. State, 363 S.C. 495, 611 S.E.2d 510 (S.C. 2005), the Court determined that it may be appropriate to lift the veil of secrecy after a defendant has been indicted. However, until that time the court in Evans stated that state grand jury proceedings are secret and those involved are prohibited from disclosing the substance of proceedings before the state grand jury. The court specifically stated that the Attorney General may not disclose testimony of a witness except when directed by the court in limited circumstances. The language of Evans as

follows makes it clear that until the court determines otherwise secrecy is required.[1]

> The stringent secrecy provisions contained in the Act mirror the view long held uniformly by courts nationwide that secrecy of grand jury proceedings is desirable and necessary. As the United States Supreme Court has explained in a case involving the federal grand jury,
>
> > We consistently have recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings. In particular, we have noted several distinct interests served by safeguarding the confidentiality of grand jury proceedings....Finally, by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule. Evans at S.E.2d 515-516

Likewise, the Fourth Circuit Court of Appeals recognized that secrecy of grand jury proceedings serves to protect the integrity of an investigation and also to protect potentially innocent persons accused but exonerated by the grand jury. In Re Charlotte Observer, 921 F.2d 47 (4th Cir. 1990).

For the foregoing reasons as well as any which may be advanced upon any hearing as determined by the court, open or in camera, it is respectfully submitted that the motion of Robert Harrell, Jr. should be granted.

Respectfully submitted,

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[1]Notwithstanding that this Court has not ruled on the Attorney General's motion for an open hearing before this Court, the Attorney General has nevertheless given a public statement to The State newspaper confirming the motion of Robert Harrell, Jr. filed under seal as required by §14-7-1770.

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By: _____
Attorneys for Robert W. Harrell, Jr.

March 13, 2014

National District Attorneys Association

National Prosecution Standards

Third Edition

with Revised Commentary

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1-1.4 Rules of Conduct
A prosecutor shall abide by all applicable provisions of the rules of ethical conduct in his or her jurisdiction.

1-1.5 Inconsistency in Rules of Conduct
To the extent prosecutors are bound by his or her jurisdiction's rules of ethical conduct that are inconsistent with these standards, they shall comply with the rules but endeavor to seek modification of those rules to make them consistent with these standards.

1-1.6 Duty to Respond to Misconduct
A prosecutor is obligated to respond to professional misconduct that has, will, or has the potential to interfere with the proper administration of justice:

a. Where the prosecutor knows that another person associated with the prosecutor's office has engaged, or intends to engage in professional misconduct that could interfere with the proper administration of justice, the prosecutor should address the matter in accordance with internal office procedures.
b. If the office lacks adequate internal procedures to address allegations of professional misconduct, a prosecutor who learns of the misconduct may, in the first instance, request that the person desist from engaging in the misconduct. If such a request is, or is likely to be, futile or if the misconduct is of a sufficiently serious nature, a prosecutor should report the misconduct to a higher authority within the prosecutor's office.
c. If, despite a prosecutor's best efforts, no action is taken in accordance with the prior procedures to remedy the misconduct, a prosecutor should report the misconduct to appropriate officials outside the prosecutor's office (to the extent permitted by the law and rules of ethical conduct of the state).
d. A prosecutor's failure to report known misconduct may itself constitute a violation of the prosecutor's professional duties.

Commentary

A prosecutor is the only one in a criminal action who is responsible for the presentation of the truth. Justice is not complete without the truth always being the primary goal in all criminal proceedings. A prosecutor is not a mere advocate and unlike other lawyers, a prosecutor does not represent individuals or entities, but society as a whole. In that capacity, a prosecutor must exercise independent judgment in reaching decisions while taking into account the interest of victims, witnesses, law enforcement officers, suspects, defendants and those members of society who have no direct interest in a particular case, but who are nonetheless affected by its outcome.

As a representative of society as a whole, a prosecutor should take an active role in the legislative process when proposals dealing with the criminal justice system are being considered. In that role, the prosecutor once again should exercise his or her independent judgment in supporting legislation in the best interest of society.

Commentary

A prosecutor's obligation to comply with the rules of ethical conduct of his or her jurisdiction is a fundamental and minimal requirement. When a prosecutor falls below that standard, he or she may expect sanctions impacting on a particular case or on the individual prosecutor.

The dignity and honor of the profession call for compliance with a higher standard of conduct—one of professionalism. This standard requires the prosecutor to bring integrity, fairness, and courtesy into all interactions, whether they are with victims, witnesses, law enforcement officers, opposing counsel, the court, jurors, or defendants.

This standard follows the lead of many state and local bar associations that have created codes of professionalism. It should used to inspire and invigorate all prosecutors, from the recently admitted to the very experienced, as all can be affected by the stress of the situations encountered by prosecutors. This especially applies in litigation, where emotions run highest, and the adversary setting generates a competitive orientation. While professionalism is a word of elusive definition, the standard lists a number of types of conduct that must be considered. It is strongly recommended that wherever prosecution adopts and abides by a code of professionalism, the defense bar should reciprocate.

3. Conflicts of Interest

1-3.1 Conflict Avoidance

A prosecutor should not hold an interest or engage in activities, financial or otherwise, that conflict, have a significant potential to conflict, or are likely to create a reasonable appearance of conflict with the duties and responsibilities of the prosecutor's office.

1-3.2 Conflicts with Private Practice

In jurisdictions that do not prohibit private practice by a prosecutor:

a. The prosecutor in his private practice should not represent clients in any criminal or quasi-criminal related matters, regardless of the jurisdiction where the case is pending;

b. The prosecutor should avoid representing to private clients or prospective clients that the status of a prosecutor could be an advantage in the private representation;

c. The prosecutor should not indicate his or her status as a prosecutor on any letterhead, announcement, advertising, or other communication involved in the private practice, and should not in any manner use the resources of the prosecutor's office for the purpose of such non-prosecutorial activities;

d. The prosecutor should excuse himself or herself from the investigation and prosecution of any current client of the prosecutor and should withdraw from any further representation of that client.

been different in this case in light of the circumstantial nature of the State's case against petitioner and the Solicitor's closing argument. *Cf. Ford v. State, supra* (no prejudice from failure to request alibi charge where there is overwhelming evidence of guilt); *See also State v. Riddle,* 308 S.C. 361, 418 S.E.2d 308 (1992) (prejudice from Solicitor's closing argument where no alibi charge was requested).

REVERSED.

CHANDLER, C.J., and FINNEY, TOAL and WALLER, JJ., concur.

In the Matter of Jerry W. CRAIG, Respondent.

No. 24187.

Supreme Court of South Carolina.

Submitted Nov. 28, 1994.

Decided Jan. 23, 1995.

Disciplinary proceeding was brought against attorney. The Supreme Court held that negligence in management of trust account, failure to supervise employees, lack of diligence, failure to avoid appearance of impropriety, and failure to cooperate with Grievance Board investigation warrants 15-month suspension from practice of law.

Attorney suspended.

Attorney and Client ⇐58

Negligence in management of trust account, failure to supervise employees, lack of diligence, failure to avoid appearance of impropriety, and failure to cooperate with Grievance Board investigation warrants 15-month suspension from practice of law. Appellate Court Rule 407, Rules of Prof.Conduct, Rules 1.2–1.4, 1.15, 5.3, 8.1, 8.4.

Atty. Gen. T. Travis Medlock, Deputy Atty. Gen. William K. Moore, and Asst. Atty. Gen. James G. Bogle, Columbia, for complainant.

Justin O'Toole Lucey, Mount Pleasant, for respondent.

PER CURIAM:

In this attorney grievance matter, respondent admits he has committed ethical violations and consents to a definite suspension pursuant to Paragraph 28 of the Rule on Disciplinary Procedure, Rule 413, SCACR. We accept respondent's admission and suspend him from the practice of law for a period of fifteen (15) months, retroactive to December 20, 1993, the date respondent was temporarily suspended by this Court.

The Chepenick Matter

Respondent was retained by the Chepenicks to handle the refinancing of a mortgage on their home. The loan proceeds from the refinancing were deposited into respondent's trust account. Respondent subsequently issued a check on the trust account payable to Barclays American Mortgage in the amount of $116,018.82 to satisfy a prior mortgage. The check was twice returned by the bank for insufficient funds. Respondent's title insurance company, First American Title Company, paid off the mortgage and sought reimbursement from respondent. Respondent paid $24,000 to First American, and subsequently agreed to an out-of-pocket settlement with First American in satisfaction of a civil action it brought for the balance due.

Respondent admits his negligence in the management of the trust account and his failure to properly supervise his employees and to maintain proper accounting procedures.

The Turner Matter

Susan Goodman Turner hired respondent to represent her to collect a debt in the amount of $5,500.00. Ms. Turner paid respondent $1,500.00 in attorney's fees and $500.00 as costs. Respondent negotiated

with the debtor and obtained a partial payment of $3,500.00. Respondent admits the balance of the debt remains uncollected. Respondent contends arrangements were made for the debtor to sign a confession of judgment for the remaining $1,500.00, but that he was unable to obtain the debtor's signature approving the agreement. Respondent has returned the $500 that Ms. Turner previously paid him to cover costs. Respondent admits his lack of diligence in this matter and his failure to avoid the appearance of impropriety. Respondent further admits that he failed to provide a written response to the Board of Commissioners on Grievances and Discipline (the Board) as requested, and that he failed to cooperate with the Board in its investigation of this matter.

The Lawson Matter

Paul Lawson, Jr., is a Registered Land Surveyor and Director of Technical Services for Ashley Surveying Company of Summerville, South Carolina. Respondent admits that he paid Mr. Lawson for several flood zone certifications which Mr. Lawson did not perform. Respondent denies any intentional wrongdoing and asserts that a member of his staff may have altered certificates without his knowledge in order to avoid a late real estate closing. Respondent states he has no other information or explanation for this problem. Respondent admits his negligence in supervising his employees, and further admits that he failed to provide a written response to the Board in this matter as requested.

The Willard Matter

Respondent represented Kenneth Willard's ex-wife in several domestic matters since 1990. In 1992, respondent and another attorney agreed to an office-sharing arrangement. The other attorney had previously represented Kenneth Willard, but withdrew from her representation when she began sharing office space with respondent. Kenneth Willard subsequently appeared at a hearing without counsel because his attorney had withdrawn. However, respondent appeared on behalf of Mrs. Willard. Respondent denies that he agreed to cease his representation of Mrs. Willard, and states that his agreement with the other attorney was that they should not *both* keep representing the Willards. He further asserts that he consulted with the judge prior to the hearing as to a potential conflict and that the judge did not perceive one. However, respondent admits he failed to avoid the appearance of impropriety by documenting in writing what his arrangements were regarding former clients, and/or by terminating his representation of Mrs. Willard.

The Galloway Matter

Don Galloway hired respondent to represent Don Galloway Homes, Inc., a real estate development company. Mr. Galloway alleged respondent overcharged him approximately $35,000.00 for title insurance policies by charging his company the residential policy rate on his construction loans. Respondent denies having overcharged Mr. Galloway for title insurance. However, respondent admits failing to avoid the appearance of impropriety by documenting the reasons he was using the residential rate instead of the construction rate. He also admits failing to timely respond to the Board's inquiries in this matter.

The Jacob Matter

Barbara Jacob hired respondent in 1988 to represent her in her capacity as the appointed personal representative of the estate of Victor McClintic. The estate was not closed until 1994, and during that time bond premiums for the personal representative continued to accrue. Respondent contends some of the delay was caused by his difficulty in locating one of the heirs, who was due $1,300.00. Respondent states that once the heir was found, the heir would not cooperate in certifying payment so that respondent could close the estate. Respondent has received a waiver of the bond premiums from the insurer and reports that he has now closed the estate. Respondent admits his lack of diligence in responding to Ms. Jacob's inquiries and that he did not return many of her phone calls. He further admits his failure to respond to the Board's inquiries in this matter.

The Rhodes Matter

Mary M. Fender Rhodes hired respondent to represent her concerning allegations that her ex-husband had been mishandling her trust fund since their divorce. On five separate occasions, hearings were scheduled in the matter and then cancelled at the request of respondent. As a result of respondent's lack of diligence and delay, Ms. Rhodes' case was dismissed and she was ordered to pay $700.00 in attorney's fees to her ex-husband. Respondent admits that he cancelled several of the hearings for his own convenience. He has refunded $3,300.00 to Ms. Rhodes that she paid in attorney's fees and has reimbursed the $700.00 in fees which the court awarded her ex-husband.

General Financial Irregularities

During the period January 1, 1992, through September 30, 1992, respondent's real estate trust account incurred 54 separate charges for insufficient funds on deposit. On three occasions, the account carried negative balances. During the same period, respondent maintained a separate escrow account for non-real estate matters which incurred three separate bank charges for insufficient funds and showed negative balances on 14 occasions. Respondent admits he was negligent in the management of his bank accounts.

Conclusion

Respondent has violated the following provisions of the Rules of Professional Conduct contained in Rule 407, SCACR: Rule 1.2 concerning scope of representation; Rule 1.3 by failing to act with reasonable diligence and promptness in representing his clients; Rule 1.4 by failing to keep his clients informed about the status of their cases and to promptly comply with their requests for information; Rule 1.15 by failing to properly safeguard and preserve the identity of the property of his clients; Rule 5.3 by failing to properly supervise his nonlawyer assistants; Rule 8.1 by failing to respond to the Board's requests for information; and Rule 8.4 by respondent's misconduct in delaying hearings for his own convenience, which resulted in prejudice to his client and to the administration of justice. Respondent has also violated Rule 413, SCACR, by engaging in conduct which brings the legal profession into disrepute.

It is, therefore, ordered that respondent shall be suspended from the practice of law in this State for a period of fifteen (15) months, retroactive to December 20, 1993, the date respondent was temporarily suspended from the practice of law by order of this Court. Prior to reinstatement, respondent shall, as agreed, place the sum of $20,000.00 in escrow with his attorney to pay for the investigation and/or restitution of any other accounting errors which may be discovered in the future. The deposit of this amount shall in no way limit respondent's liability in these matters. Any unused portion of the escrow account will be refunded to respondent two (2) years after his reinstatement.

DEFINITE SUSPENSION.

In the Matter of M.M. WEINBERG, III, Respondent.

No. 24198.

Supreme Court of South Carolina.

Submitted Jan. 10, 1995.

Decided Feb. 13, 1995.

Rehearing Denied March 8, 1995.

Atty. Gen. T. Travis Medlock and Deputy Atty. Gen. J. Emory Smith, Jr., Columbia, for complainant.

Nathan M. Crystal, Columbia, for respondent.

PER CURIAM:

In this attorney grievance proceeding, respondent admits that he has committed ethical violations and consents to an eighteen (18) month suspension from the practice of