IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 1992 Term

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No. 20612

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THE COMMITTEE ON LEGAL ETHICS
OF THE WEST VIRGINIA STATE BAR,
Complainant

v.

THOMAS L. CRAIG, JR., A MEMBER
OF THE WEST VIRGINIA STATE BAR,
Respondent

Recommendation of the Committee on Legal Ethics
I.D. No. 90-138

Three-Year Suspension and Costs

Submitted: January 14, 1992
Filed: February 7, 1992

Sherri D. Goodman
West Virginia State Bar
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Attorney for the Respondent

JUSTICE MILLER delivered the opinion of the Court.

JUSTICE BROTHERTON dissents and reserves the right to file a dissenting opinion.

JUSTICE NEELY dissents.

SYLLABUS BY THE COURT

1. "This Court is the final arbiter of legal ethics problems and must make the ultimate decisions about public reprimands, suspensions or annulments of attorneys' licenses to practice law." Syllabus Point 3, Committee on Legal Ethics v. Blair, 174 W. Va. 494, 327 S.E.2d 671 (1984), cert. denied, 470 U.S. 1028, 105 S. Ct. 1395, 84 L. Ed. 2d 783 (1985).

2. "'In deciding on the appropriate disciplinary action for ethical violations, this Court must consider not only what steps would appropriately punish the respondent attorney, but also whether the discipline imposed is adequate to serve as an effective deterrent to other members of the Bar and at the same time restore public confidence in the ethical standards of the legal profession.' Syllabus Point 3, Committee on Legal Ethics v. Walker, [178 W. Va. 150], 358 S.E.2d 234 (1987)." Syllabus Point 5, Committee on Legal Ethics v. Roark, ___ W. Va. ___, 382 S.E.2d 313 (1989).

3. Perjured testimony before a grand jury by an attorney will be grounds for disciplinary charges even though no criminal indictment has resulted.

4. False testimony on a material issue is a serious breach of basic standards as well as a breach of the attorney's oath

of office and his duties as an attorney. Grounds for disciplinary action will lie even though no harm results from such wrongful acts.

Miller, Justice:

In this disciplinary proceeding, the Committee on Legal Ethics of the West Virginia State Bar (Committee) asks us to suspend for a period of two years the license of the respondent, Thomas L. Craig, Jr., to practice law. For the reasons stated below, we reject the recommendation of the Committee and order a three-year suspension.

The respondent was admitted to the Bar in 1981. Prior to that time, he was closely associated with former Governor Arch A. Moore, Jr. The respondent served as a field coordinator in Moore's 1972 gubernatorial campaign and subsequently worked as a special assistant and administrative assistant to Governor Moore from 1972 to 1977. The respondent later turned down an appointment to serve as campaign manager in Moore's 1980 campaign.

The respondent subsequently accepted an offer to be Moore's campaign manager in the 1984 gubernatorial election. The respondent requested a $60,000 salary, but settled for less upon Moore's promise to make up the difference after the election.

The respondent worked on the campaign with Richard Barber, an advisor to Moore. In the course of the campaign, Barber asked the respondent to tell Moore that he, Barber, needed "cash for the precincts." After the respondent conveyed the message, he met with Moore in a Charleston hotel room. Moore counted out $100,000 in one-hundred-dollar bills and gave it to the respondent. The respondent distributed the money to Barber and to other campaign workers.

Moore won the election. Afterwards, the respondent pressed Moore for the differential between his promised and his actual salary as campaign manager. At a subsequent meeting in Moore's law office, Moore gave the respondent $5,000 in cash as partial payment. When the respondent announced his intention to declare this money as income on his tax return, Moore told him "You can't report it." The respondent subsequently treated the cash payment as a gift. After Moore took office as governor, the respondent worked for the administration, first as Chief Transition

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In 1980, Mr. Barber was convicted of taking kickbacks in the form of cash political contributions and free liquor while serving as Governor Moore's Alcoholic Beverage Control Commissioner.

The respondent later declared this money as income and paid the taxes and penalties on it.

Officer and later as the Governor's Executive Assistant. The respondent returned to private practice in July of 1985.

In 1989, the United States Attorney for the Southern District of West Virginia was investigating Moore's possible involvement in unlawfully influencing changes in Workers' Compensation regulations while he was governor. The respondent was asked to testify before the federal grand jury in this regard. The respondent agreed and voluntarily testified before the grand jury on December 11, 1989. In the course of his appearance before the grand jury, however, the questioning turned to the 1984 gubernatorial campaign. A grand juror asked the respondent several questions concerning the use of cash in the campaign. Instead of consulting with his attorney, who was waiting outside, the respondent denied that cash payments had been made during the campaign. The Assistant United States Attorney, Joseph F. Savage, then asked the respondent whether, as in past campaigns, money had made its way from the governor to the precincts. The respondent again answered in the negative, stating that no cash had been injected into the 1984 campaign that he was aware of.

On December 28, 1989, Moore asked the respondent to meet with him at Moore's law office. Moore advised the respondent that

he intended to reveal that he had turned the $100,000 in cash over to the respondent during the campaign because he, Moore, was facing a tax audit and investigation. The respondent advised Moore that he had already told the grand jury that no cash was involved in the 1984 campaign. Moore responded that this created a problem with respect to "our credibility" and suggested that the respondent return to the grand jury and assert that he had not understood the questions. When the respondent rejected this suggestion, Moore proposed that the respondent solicit those to whom he had distributed the cash or others to tell the United States Attorney that Moore himself gave them the money, thereby keeping the respondent "out of the loop." Moore suggested another meeting after the first of the year to work out a final solution.

Upon leaving Moore, the respondent contacted Barber and told him he intended to "make this thing right." The respondent then either phoned or visited his attorney, telling him that he wanted to report to the United States Attorney that he had lied to the grand jury. The respondent's attorney contacted Mr. Savage the following morning and obtained an immunity agreement. The respondent spoke to Mr. Savage that afternoon. There is no evidence that the United States Attorney's Office was suspicious of the respondent's grand jury testimony prior to this time.

On February 1, 1990, the respondent formally recanted his prior testimony and testified truthfully before the federal grand jury. Moore was subsequently indicted on a number of federal charges and pled guilty to five counts. On October 31, 1991, we annulled Moore's license to practice law. See Committee on Legal Ethics v. Moore, ___ W. Va. ___, 411 S.E.2d 452 (1991).

On February 9, 1991, the Committee charged that the respondent violated Disciplinary Rules 1-102(A)(3), (4), and (6) of the Code of Professional Responsibility by accepting the $100,000 in cash from Moore during the campaign and by failing to report the $5,000 cash bonus on his income tax return. In addition, the

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These activities occurred prior to January 1, 1989, when the Code of Professional Responsibility was in effect. Disciplinary Rule 1-102 stated, in pertinent part:

> **DR 1-102 Misconduct.** -- (A) A lawyer shall not:
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> * * *
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> "(3) Engage in illegal conduct involving moral turpitude.
>
> "(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
>
> * * *
>
> "(6) Engage in any other conduct that adversely

Committee charged the respondent with violating Rules 8.4(b), (c), and (d) of the Rules of Professional Conduct by testifying falsely before the federal grand jury. It appears that the respondent cooperated fully with the Committee in the investigation leading to these charges.

A hearing was conducted before the Committee on June 7, 1991. The respondent attributed his misconduct to his loyalty to his friend and mentor, Arch Moore. He testified that he knew that his solicitation and acceptance of the $100,000 cash from Moore for distribution to campaign workers constituted election law

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reflects on his fitness to practice law."

These activities took place after January 1, 1989, and are, therefore, governed by the Rules of Professional Conduct. Rule 8.4 provides, in pertinent part:

> **RULE 8.4 Misconduct**
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> "It is professional misconduct for a lawyer to:
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> * * *
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> "(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
>
> "(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
>
> "(d) engage in conduct that is prejudicial to the administration of justice[.]"

violations, but asserted that he had no idea where the money came from or for what purposes it was used. The respondent testified that he treated the $5,000 cash bonus as a gift based on a legitimate interpretation of the federal tax laws. The respondent asserted that he gave false testimony to the grand jury because the direction of the questioning took him by surprise. He stated that he was distressed at having lied to the grand jury, but did nothing for several weeks because he felt the truth was not relevant to the Government's investigation. The respondent testified that it was not until his meeting with Moore on December 28, 1989, that he became aware of the probability that there had been substantial misconduct during the 1984 campaign and of the extent to which Moore was willing to subvert the judicial process to protect himself. The respondent expressed remorse for his actions and presented over 115 testimonials to his good character and standing in the community.

In its report, the Committee concluded that while the respondent may not technically have committed a crime in the course of his grand jury testimony, he did lie under oath, conduct the

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See W. Va. Code, 3-8-5 (1980); 3-8-5d (1976); 3-8-12 (1978).

18 U.S.C. § 1623(d) (1976), precludes a prosecution for perjury if, "in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such

Committee found to be deceitful, dishonest, and prejudicial to the administration of justice in violation of Rules 8.4(c) and (d) of the Rules of Professional Conduct. After considering the respondent's later recantation, his voluntary cooperation with federal authorities and the State Bar, and the "impressive and overwhelming array of witnesses attesting to [his] character," the Committee concluded that the respondent's misconduct warranted a two-year suspension of his license to practice law. Although the Committee found "compelling" the evidence relating to the respondent's violation of the election laws and his characterization of the cash payment from Moore as a gift, the Committee made no findings or conclusions with regard to the other charges. The Committee concluded that the respondent's false testimony alone was a sufficient justification for the recommended discipline.

In this proceeding, the respondent admits that he lied to the grand jury and does not challenge the Committee's conclusion that such activity violated the Rules of Professional Conduct. His only challenge is to the sanction to be imposed. The respondent argues that the facts presented demonstrated that further punishment is unnecessary to correct his behavior and that he is still fit to

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declaration to be false[.]" The parties apparently agree that the respondent came within the protection of this provision.

practice law. Basically, the respondent would have us impose no discipline at all. This we decline to do.

We have recognized that recommendations of the Committee are ordinarily to be given substantial consideration. See Committee on Legal Ethics v. Smith, ___ W. Va. ___, 399 S.E.2d 36 (1990); Committee on Legal Ethics v. Harman, 179 W. Va. 298, 367 S.E.2d 767 (1988); Committee on Legal Ethics v. White, 176 W. Va. 753, 349 S.E.2d 919 (1986); In re L.E.C., 171 W. Va. 670, 301 S.E.2d 627 (1983). However, such recommendations are advisory only. Committee on Legal Ethics v. Tatterson, 177 W. Va. 356, 352 S.E.2d 107 (1986). In Syllabus Point 3 of Committee on Legal Ethics v. Blair, 174 W. Va. 494, 327 S.E.2d 671 (1984), cert. denied, 470 U.S. 1028, 105 S. Ct. 1395, 84 L. Ed. 2d 783 (1985), we stated:

> "This Court is the final arbiter of legal ethics problems and must make the ultimate decisions about public reprimands, suspensions or annulments of attorneys' licenses to practice law."

Accord Syllabus Point 6, Committee on Legal Ethics v. Farber, ___ W. Va. ___, 408 S.E.2d 274 (1991), cert. denied, ___ U.S. ___, ___ S. Ct. ___, ___ L. Ed. 2d ___ (1992); Syllabus Point 1, Committee on Legal Ethics v. Charonis, ___ W. Va. ___, 400 S.E.2d 276 (1990); Syllabus Point 2, Committee on Legal Ethics v. Lilly, 174 W. Va.

680, 328 S.E.2d 695 (1985). We also made this statement in Syllabus Point 5 of Committee on Legal Ethics v. Roark, ___ W. Va. ___, 382 S.E.2d 313 (1989):

> "'In deciding on the appropriate disciplinary action for ethical violations, this Court must consider not only what steps would appropriately punish the respondent attorney, but also whether the discipline imposed is adequate to serve as an effective deterrent to other members of the Bar and at the same time restore public confidence in the ethical standards of the legal profession.' Syllabus Point 3, Committee on Legal Ethics v. Walker, [178 W. Va. 150], 358 S.E.2d 234 (1987)."

We believe the Committee's recommended sanction of a two-year suspension is insufficient. While the most serious of the respondent's violations was his false testimony before the grand jury, there was also evidence of election law violations of which the respondent was aware. Such actions violate the ethics rules and warrant sanctions in their own right. In addition, the question of whether the respondent improperly failed to report to the IRS the $5,000 cash bonus from Moore has not been resolved to this Court's satisfaction. The fact that the Committee did not impose sanctions upon the other charges in the complaint does not preclude us from considering such activities. See Committee on Legal Ethics v. Douglas, 179 W. Va. 490, 370 S.E.2d 325 (1988).

We have not had occasion to address disciplinary charges based on false or perjured grand jury testimony by an attorney. Other states have found that perjured testimony before a grand jury by an attorney will be grounds for disciplinary charges even though no criminal indictment has resulted. As the court stated in Olguin v. State Bar, 28 Cal. 3d 195, 200, 167 Cal. Rptr. 876, 879, 616 P.2d 858, 861 (1980): "[F]alse testimony on a material issue is a serious breach of basic standards as well as a breach of the attorney's oath of office and his duties as an attorney. Grounds for disciplinary action will lie even though no harm results from such wrongful acts." See also People v. Susman, 196 Colo. 458, 587 P.2d 782 (1978); In re Hutchinson, 534 A.2d 919 (D.C. App. 1987); Matter of Price, 429 N.E.2d 961 (Ind. 1982); State ex rel. Nebraska State Bar Ass'n v. Cook, 194 Neb. 364, 232 N.W.2d 120 (1975); In re Foster, 60 N.J. 134, 286 A.2d 508 (1972); Office of Disciplinary Counsel v. Shorall, ___ Pa. ___, 592 A.2d 1285 (1991). See generally 7 Am. Jur. 2d Attorneys at Law § 43 (1980 & Supp. 1991).

The respondent points to several cases where an attorney who gave false testimony was given a disciplinary punishment of a year or less. In re Hutchinson, supra; Matter of Price, supra. On the other hand, other courts have imposed punishments of three years or more for false swearing by an attorney. State ex rel. Nebraska State Bar Ass'n v. Cook, supra (three-year suspension);

In re Foster, supra (disbarment ordered); Office of Disciplinary Counsel v. Shorall, supra (three-year suspension). We agree with this statement from State ex rel. Nebraska State Bar Association v. Cook, 194 Neb. at ___, 232 N.W.2d at 131-32:

> "The fact that certain lawyers in other jurisdictions may have been lightly dealt with can be no consideration with this court. We are responsible for the discipline only of members of the bar of this jurisdiction and must adhere to disciplinary standards we believe appropriate."

As we have already pointed out, the respondent's dereliction lies not merely in his initial false statements to the grand jury with regard to any cash campaign contributions, but also in obtaining the $100,000 in cash from Moore and distributing this money in violation of the State election laws, a matter that he could not ignore as a knowledgeable campaign person. Much the same is true of the $5,000 cash payment he received from Moore which he initially characterized as a gift. These two matters were not dealt with by the Committee in arriving at its disciplinary recommendation. However, we find that they cannot be ignored.

Recently, in Committee on Legal Ethics v. Hess, ___ W. Va. ___, ___ S.E.2d ___ (No. 20225 12/19/91), we addressed the appropriate sanction for an attorney who, through deceit, had

converted the income of his law firm to his personal use. Even though the attorney ultimately repaid the funds, we concluded that his actions, constituting breach of his fiduciary duty to his law partners, warranted a four-year suspension from practice. Because the attorney had ceased practicing law two years before, we imposed an actual suspension of only two additional years.

We believe the respondent's misconduct is at least as serious as that which warranted a four-year suspension of the attorney in Hess. However, we feel that the mitigating circumstances present in this case justify some leniency. Accordingly, we order the respondent suspended from the practice of law for a period of three years. The suspension will commence upon April 15, 1992, to allow the respondent time to wind up his practice. At the conclusion of the three-year period, the respondent may petition for reinstatement to the Bar in accordance with the provisions of Article VI, Sections 31 and 32 of the By-Laws of the West Virginia State Bar. The costs of the Committee will be paid by the respondent.

Three-year suspension and costs.

Neely, Justice, dissenting:

I would accept the recommendation of the Committee on Legal Ethics of the West Virginia State Bar and impose only a two-year suspension.