NO. 20612 - THE COMMITTEE ON LEGAL ETHICS OF THE WEST VIRGINIA STATE BAR V. THOMAS L. CRAIG, JR., A MEMBER OF THE WEST VIRGINIA STATE BAR

Brotherton, Justice, dissenting:

I dissent to the majority opinion for two reasons.

First, I believe that the evidence presented at the West Virginia State Bar Committee on Legal Ethics hearing makes the three-year suspension inappropriate for the ethical violations charged and proven. Based upon that evidence, the penalty should have been annulment of the respondent's license to practice law.

Secondly, I am disturbed by this opinion's creation of a new method of proving ethical violations and for obtaining leniency or forgiveness in the resulting penalty.

For years I have heard it said that those who can afford "high-priced" lawyers and have connections with people in positions of authority stand a better chance of receiving a lesser sentence for wrongdoing than people who lack contacts and must depend on legal

assistance from the public defender or a lawyer/friend who is not experienced in the type of case being undertaken. This is not to suggest that the respondent's connections are what saved him from a greater punishment in this case, although one must admit that the Ethics Committee record, report, and recommendations create an aura of suspicion.[1]

That suspicion bursts into life upon reading the Committee on Legal Ethics' Findings of Fact, Conclusions of Law and Recommended Decision:

> The Committee has never been presented with such an impressive and overwhelming array of witnesses attesting to an individual's character. Witnesses from such diverse perspectives as the president of a major university, the associate editor of a major metropolitan newspaper and the former chair person of a Committee on Legal Ethics of the West Virginia State Bar, all offered with passion and conviction, their views that the respondent was a unique individual deserving of compassion from the Committee for any misdeeds that he may have committed.
>
> It is against this backdrop that the Committee is being asked to determine if the respondent has violated any ethical standards

[1]In the more than seven years that I have been a member of this Court, I have never had an occasion to believe that any past or present member of this Court gave any consideration to the attorneys, parties, or witnesses, in arriving at their decision. The decisions are reached solely on the basis of the legal issues presented.

> and if so, what the recommended discipline should be.

(Emphasis added.)

Further fanning the flames is the Committee's finding that the respondent did not violate Disciplinary Rules 1-102(A)(3) and (4), despite the respondent's own testimony admitting that the charges were true. There was no evidence introduced to the contrary. The Committee found the evidence as to the election law violation -- acceptance and use of the $100,000 cash and failure to report the $5,000 bonus as income -- "compelling," but made no finding that this conduct constituted an ethical violation. How much more compelling would the evidence have to be to find a violation of DR1-102? Surely the average lay person reviewing this evidence would recognize the testimony as both compelling and a violation of the rule. Yet the Committee on Legal Ethics, despite admitting the testimony was "compelling," found no violation of DR1-102. As if to excuse their omission, the Committee gushed that they had never

[2]The alleged violation resulted from a charge that during the 1984 general election campaign the respondent accepted $100,000 cash from gubernatorial candidate Arch Moore. This cash was to be distributed to others to facilitate the election of Arch Moore. The respondent was also charged with failing to report a $5,000 cash bonus from Moore on his income tax return.

been presented "with such an impressive and overwhelming array of witnesses attesting to an individual's character."

If the respondent's own testimony does not prove a violation of DR1-102 in this case, then perhaps that disciplinary rule is best characterized as a fiction, to be applied only when the Committee wishes to discipline an offending lawyer and can find no other disciplinary rule under which to do so. In this case, the proof of a violation of DR1-102 is clear and convincing, and, in my opinion, beyond all reasonable doubt.

The Committee then determined that the State Bar offered clear, convincing and preponderant proof that the respondent violated Rule 8.4 of the Rules of Professional Conduct by testifying falsely before the federal grand jury. It is difficult for me to see how the State Bar's proof could be clear, convincing and preponderant on the charge of falsely testifying before the federal grand jury and, although compelling, lack clarity on the issues of election law and income tax violations. Such a finding leaves a

[3]To the credit of the majority, they saw through the attempt to reduce the magnitude of the ethical violation and found that there was a violation of the ethics rule which warranted sanctions in its own right. The majority further found that the matter of the $5,000 cash bonus or payment had not been resolved to this Court's satisfaction.

distinct impression that the Committee was biased and intent upon finding a lesser violation.

The Committee's recommendation in this case becomes even stranger when one examines the recommendation in both of the In Re Boettner hearings. Boettner plead guilty to a felony charge of federal income tax evasion, and the facts were far less egregious than those admitted to by Craig. On two separate occasions, following the original charge of unethical conduct and after the mitigation hearing, the Committee recommended annulment of John Boettner's license to practice law. When the two are compared, the two-year suspension recommended for Craig is inconsistent and difficult to explain.

Oddly enough, it was this Court's opinion in Boettner that created the inconsistency. In Boettner, the Court overruled In re Mann, 151 W.Va. 644, 154 S.E.2d 860 (1967), and, for the first time, gave lawyers a right to a mitigation hearing on ethics charges. The majority opinion in Craig now expands the parameters of a mitigation hearing and illustrates my most serious objection to the Committee's finding and the majority's opinion: the adoption of a standard for evaluating punishment based upon the "character of the violator."

Bouvier's Law Dictionary, (1946 ed.), defines mitigation as "[c]ircumstances which do not amount to a justification or excuse of the act committed yet may be properly considered in mitigation of the punishment: as, for example, the fact that one who stole a loaf of bread was starving." The definition of mitigation and the mitigation evidence presented in the majority opinion in this case are totally dissimilar. No recognizable mitigating circumstances can be identified in Craig.

Craig's unethical conduct began in 1984 and included the acceptance of $100,000 in cash for use in the general election, the actual distribution of that cash to others in the general election, and the failure to report a 1984 $5,000 "gift" as additional payment for work in the campaign. The unethical behavior culminated five years later when the respondent was given an opportunity to confess his 1984 actions when called before a federal grand jury and asked about the use of cash by Arch Moore in the 1984 election. With his lawyer sitting outside the grand jury room, the respondent denied that he had seen or used money in the 1984 election.

[4]The distribution of that cash resulted in the subsequent conviction of some of those to whom the money was distributed.

[5]The respondent admitted in testimony before the Committee

Without question, the respondent lied to the grand jury and obviously felt no remorse for having violated the law in 1984. It was not until some weeks later, when Governor Moore told him that he, too, was under investigation, and he was going to have to make an explanation to the same federal grand jury, that the respondent realized that lying to the grand jury was a mistake. Yet even after he realized that his lie would be discovered when Governor Moore appeared before the grand jury and implicated him, the respondent did not go directly to the federal prosecutor and confess his perjury. Instead, he first informed a confederate who participated in the distribution of the cash, and then consulted with his attorney. His attorney went to the federal prosecutor and told him his client had information that might help them get Moore, but if he testified he would criminally incriminate himself. Needing the respondent's testimony, the prosecutor granted him immunity from prosecution if he gave truthful testimony before the grand jury. The respondent agreed to be named as an unindicted co-conspirator or an unindicted aider and abettor.

---

that this payment was actually income and not a gift.

The reason for the respondent's sudden attack of conscience is obvious from his testimony before the Committee:

> By Ms. Rose:
>
> Q. Mr. Craig, I just have one or maybe two [more questions].
>
> The meeting with Moore was the event that triggered your recantation; is that correct?
>
> A. It was the catalyst for it.

T. L. Craig, Jr. - Cross-examination at page 330.

Except for the fact that the respondent was not indicted, how does this case differ in principle from the ethics cases against Arch Moore, John Leaberry, Greg Gorrell, and others, who, had they known of the Committee's adoption of a new character test, could have offered similar testimony? But for the immunity Craig received, he would have been indicted. Where in this sordid scenario can the majority find "mitigation" as defined by the dictionary? What circumstances amount to a justification of his acts or what excuses spell out mitigating circumstances? The answer is simple: there are none.

With the Boettner and Craig opinions, this Court shifts, without warning, from an objective standard of judging ethical

conduct to a subjective standard that allows each justice to establish a standard of punishment in his own mind rather than judging solely on the facts. Mitigation is now defined as an issue of character. Instead of limiting the mitigation evidence to the circumstances that caused the lawyer to commit the ethics violation, this opinion permits the introduction of an unlimited number of letters reciting the fine qualities of the violator, testimony of outstanding public works, service on community agencies and boards, a veritable "This Is Your Life" TV program. Somewhere, we have lost the focus of the reason for professional ethics: to protect the public, not the welfare of the violator.

The type of mitigation evidence presented in this case is irrelevant and puts the cart before the horse. Isn't every lawyer required to be of good character, a performer of pro bono work, a contributor to the betterment of the community in which he lives? If this is true, and I always thought it was, how does the evidence in Craig or Boettner allow for a punishment different from that prescribed in In re Mann?

Although the majority opinion recognized that Craig's violations warranted a four-year suspension rather than the two years proposed by the Committee, it then fell prey to the new mitigation

standards born in the Boettner opinion, nurtured by the Legal Ethics Committee character test, and legitimized in this opinion, and reduced Craig's suspension to three years.

In an interview with the Washington & Lee Law News, Vol. 20, No. 7, February 13, 1992, Professor Franklin M. Schultz explained how he felt the practice of law had changed:

> I asked him if he thought that students had changed since he began teaching in 1947. "Really, the practice of law has changed," he replied. "The emphasis today is so much more on the business side of practice . . . making a good living, that I think it's reflected in the attitude of the students that come to law school.
>
> "When I started, there was more of a notion that if you want more material things in life, go into business. Making money should not be the reason for going into law. . . . Back then, law was first a profession, and second a business."

Professor Schultz' comments echo my dismay with this case and this Court's general trend in ethics cases. With opinions like Craig and Boettner, this Court reduces the ethical standards of our

[6] B.A. 1939; L.L.B. 1942; Yale University, Visiting Professor of Law, Washington & Lee University of Law, 1991-92; Associate Professor, Indiana University School of Law; Visiting Professor, University of Iowa School of Law; D.C Bar General Counsel and Member of Ethics Committee; Chairman, Administrative Law Section of the American Bar Association; American Law Institute; ABA Joint Committee on Continuing Legal Education.

profession to a level that is embarrassingly low and encourages the image of the law, not as a profession, but as a business with limited accountability to the public we are meant to serve.