

6102

FILED

STATE OF NORTH CAROLINA  
COUNTY OF DAVIDSON

MAY 20 10 31 AM '83  
DAVIDSON COUNTY, C.S.C.

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
83 CVS 0515

IN THE MATTER OF THE RIGHT BY TO  
PRACTICE LAW OF CARROLL C. WALL,  
III and J. CALVIN CUNNINGHAM,

FINDINGS OF FACT  
AND CONCLUSIONS OF LAW

Respondents

THIS CAUSE coming on to be heard on May 14, 1983, before the Undersigned Judge regularly assigned to hear cases in the Twenty-second Judicial District, upon the Petition heretofore filed by petitioner on or about April 22, 1983 and the Show Cause Order duly entered on or about April 22, 1983 by the Honorable Robert A. Collier, Jr., Senior Resident Superior Court Judge, Twenty-second Judicial District, and it appearing to the Court:

(1) That the petitioner is the duly elected and acting District Attorney for the Twenty-second Judicial District and as such is duly authorized by law to maintain this action.

(2) That the parties have stipulated that the parties are correctly designated and that there is no question with respect to this Court's jurisdiction to hear and decide the matters raised by the aforesaid Petition.

(3) That the parties have announced that the matter is ready for trial and that no further motions need be decided.

(4) That respondents have duly served a Response to Show Cause Order on May 14, 1983, which appears of record.

(5) That the parties have entered into an Order upon Final Pretrial Conference, which appears of record.

Based upon the evidence presented, the stipulations of fact contained within said Order upon Final Pretrial Conference and the Petition and Response thereto, the Court finds as fact as follows:

(1) Respondents are citizens and residents of Davidson County, North Carolina and are attorneys at law licensed to practice law with this State.

(2) That Debbie Pedraza is a citizen and resident of the State of Ohio.

(3) Pedro Pedraza was given suspended sentences and placed on probation in Ohio for crimes committed in Ohio in 1976 and 1978.

(4) In June, 1981, he and his wife, Debbie Pedraza, moved to Davidson County.

(5) In May, 1982, Pedro was arrested on two "bad check" cases in Davidson County. He pled guilty and received a two year sentence suspended for three years. He was placed on probation. Betty McCrary was the probation officer assigned to his case. He was represented by respondent Wall.

(6) While free, he, according to warrants now pending, committed a number of crimes during August and September, 1982. Deputy Sammy Hampton was the investigating officer. The crimes consisted of various petty larcenies and damage to personal property.

(7) He was not arrested for the crimes until October, 1982. By then he had moved back to Ohio. He was arrested at such time for violating the terms of his Ohio probation and his "Ohio" suspended sentences invoked.

(8) The Davidson County officials learned that Pedro was incarcerated in Ohio and placed detainers.

(9) In January, 1983, Debbie and her grandfather, Vincent Deis retained a Dayton, Ohio, attorney, Bobby Joe Cox, to assist Pedro.

(10) Attorney Cox came to North Carolina on January 21, 1983, and attempted to work out a plea whereby Pedro could receive suspended sentences with respect to North Carolina charges in exchange for the payment of restitution to the victims of the North Carolina crimes. The hope was that the Ohio officials would also release him from prison in Ohio as well, thereby freeing him of all pending charges.

(11) Attorney Cox ascertained from Deputy Hampton that the amount required for restitution at that time for the pending charges was approximately \$2,800. He was not able to convince Betty McCrary to agree to recommend that all the charges, plus the existing probation violation charges, be dropped without Pedro serving some active time. She would not

recommend any solution not calling for an active sentence. Accordingly, the idea of paying restitution was abandoned and Mr. Cox returned to Ohio.

(12) The money to pay the restitution was to have been supplied by Mr. Deis. He paid attorney Cox's fee of \$2,000 on Debbie's behalf. This left Debbie \$8,000 out of the \$10,000 Mr. Deis had promised to give each of his grandchildren, provided he approved of the use to be made of the money.

(13) Mr. Cox then worked out a deal in Ohio whereby Pedro waived extradition to North Carolina and was placed on "shock" probation. Ohio law permits, under certain circumstances, a prisoner who has served some active time (as Pedro had after his arrest) to be put back on probation after serving from 60 to 90 days in prison.

(14) Pedro was returned to Davidson County on March 16, 1983, to face the charges pending there.

(15) Attorney Paul Mitchell was appointed to represent Pedro on March 21 with respect to the 14 counts and the probation violation charges. He learned of his appointment on March 23 or 24. The first appearance date was March 28.

(16) After talking to Debbie, Pedro, Deputy Sheriff Hampton and Officer McCrary, Mr. Mitchell concluded that the best plea likely to be worked out, even with full payment of restitution, would see Pedro serving two years' active time with perhaps some suspended time thereafter.

(17) The case was continued by Mr. Mitchell until either April 11 or April 12 in the hope something better could be negotiated. Additionally, Mr. Hampton had not worked up the exact figures on the restitution.

(18) On March 30, Mr. Cunningham was told by one of his clients, Mr. Tony Bailey, who was in jail, that Pedro wanted to talk to Mr. Cunningham, because Pedro believed that some better arrangement should be obtainable than a two-year active sentence. Since Pedro had "cleared up" the Ohio charges, and did not face confinement there, avoiding an active sentence in North Carolina meant Pedro would be free.

(19) Mr. Cunningham and Mr. Wall visited the jail on the evening of March 30 and talked to Pedro. They told him that their fee would be \$5,000. Any court costs or restitution would be in addition to the fee. They told him that they

believed that they could negotiate pleas which would result in Pedro's not serving an active sentence if funds were available to pay the restitution.

(20) Pedro got in touch with Debbie in Dayton, Ohio, on March 30, 1983, and told her of his conversation with Messrs. Wall and Cunningham and urged her to get the \$5,000 legal fee and the additional money required to pay the restitution.

(21) During the period of March 30 to April 12, there were a series of phone calls between Messrs. Cunningham and Wall and Mrs. Pedraza, Mr. Cunningham and Mr. Deis and Mrs. Pedraza and Mr. Mitchell. At no time did Messrs. Cunningham and Wall intend to imply or infer or suggest the bribery or attempted bribery of any person. Statements were made, however, from which Mrs. Pedraza and Mr. Mitchell came to the good faith, but mistaken view, that bribery or attempted bribery was planned. For instance, Messrs. Cunningham and Wall told Mrs. Pedraza that Betty McCrary "would be taken care of" meaning that they could either convince her to withdraw her opposition to Pedro's release without serving an active sentence or so time the hearing that she would not know of Pedro's departure. Respondents also mentioned "payments to Sammy," their meaning being that payment of restitution would be based upon information provided by Deputy Sheriff Hampton.

(22) Mr. Mitchell became concerned with Messrs. Wall and Cunningham on April 12 because he saw them with Pedro at the jail. Based upon their conversation with Debbie on April 5, they had been led to believe that she was going to retain them on Pedro's behalf. Mr. Mitchell reported to Betty McCrary of April 12 that bribery plans had been reported to him by Debbie. Betty in turn told her father, Sheriff McCrary, who reported the matter to the SBI. Agent Burns was assigned to investigate the case on behalf of the State Bureau of Investigation.

(23) The SBI caused Mrs. Pedraza to be flown to North Carolina and "wired" her for sound. Prior to leaving she called Attorney Cunningham and told him she would arrive on the afternoon of April 13.

(24) Five conversations were recorded.

(a) Debbie's call to Mr. Cunningham at 4:30 p.m. on April 13 at his office.

(b) Debbie's call to Mr. Wall at 7:55 p.m. on April 13 at his house.

(c) Office conference at the law office of Wall and Cunningham at approximately 8:00 P.M. on April 13.

(d) Deputy Hampton's call to Mr. Wall on the evening of April 13.

(e) Debbie's call to Messrs. Cunningham and Wall at their office on the morning of April 15.

(25) In the first call, Debbie told of her arrival at Greensboro and plans were made for Debbie's transportation from Greensboro to Lexington and for a meeting that evening.

In this call, Debbie, who was very nervous, began with a long question-statement as to what had happened and would happen. References were made by Debbie to "payments to Hampton" and "taking care of McCrary." These references are taken by Mr. Cunningham as follows: "Payments to Hampton" were understood to be a short-hand for "payments of restitution." "Taking care of Betty McCrary" was understood to Mr. Cunningham to mean "getting by her objection to Pedro's not serving an active sentence."

Debbie ended the long sentence-question by asking what was to be done about Betty McCrary. Mr. Cunningham answered this question by, in essence, saying that one of two things would happen: (1) Either Pedro would leave the courthouse in haste before she prepared the warrant for probation violation or (2) The judge would be asked to find as a fact that the guilty pleas entered as to the 14 charges did not constitute violations of the probationary sentence. Accordingly, Ms. McCrary's consent and cooperation would not be needed.

There is also a statement by Mr. Cunningham that: "That's what lawyers are for." Mr. Cunningham meant by such statement that Debbie would not herself have to attend to all the details of paying the Clerk, obtaining a receipt, and getting Pedro released but that the lawyers would handle these matters.

The above reference reinforced Mrs. Pedraza's mistaken, but good faith, belief that bribery was being discussed.

(26) The second taped conversation relates solely to discussions between Mr. Wall and Debbie as to meeting her at the office.

(27) In the conversation recorded on the third tape:

(a) Although they did not realize the conversation was recorded and would presumably have felt free to be "open," neither Mr. Cunningham nor Mr. Wall stated or suggested in any way that any official would or had been paid anything illegally or "under the table," the one exception being the "since yesterday he owes me bad" reference discussed hereafter.

(b) All the references to the handling of the money were to the effect that all payments would be paid the Clerk of Court.

(c) In response to a question by Debbie as to whether Hampton would be paid anything himself for his own benefit, the answers are "no" by Mr. Wall, and "no, never" by Mr. Cunningham.

The tape of the office meeting contains a number of references to and statements by respondent Cunningham about the Honorable George T. Fuller, District Court Judge, before whom Messrs. Cunningham and Wall planned to appear on Thursday, April 14, to assert the pleas. These statements were to the effect:

- (1) That the attorneys "owned" Judge Fuller.
- (2) That Judge Fuller "owed" the attorneys.
- (3) That since the day before, Judge Fuller owed Mr. Cunningham "bad."
- (4) That the attorneys had contributed heavily to his campaign.

Mr. Cunningham had consumed wine before coming to the conference and consumed other alcohol during such conference and his comments were influenced by such consumption of alcohol. The statement made by respondents concerning Judge Fuller were totally untrue and were made for the purpose of convincing Mrs. Pedraza that they had a special "in" with Judge Fuller so that Mrs. Pedraza would retain them.

In point of fact:

(a) Mr. Cunningham and Mr. Wall had each contributed \$75 to Judge Fuller's campaign.

~~Mr. Cunningham~~ <sup>Judge Fuller</sup> The basis for Mr. Cunningham's statement that ~~Mr. Cunningham~~ owed him "real bad" was a ruling in an unrelated civil case by Judge Fuller against Mr. Cunningham and Mr. Cunningham's erroneous idea that judges should "balance the scales." Mr. Cunningham testified that he understands that no judge is obligated to "balance the scales" with rulings for and against individual attorneys and that the statement was totally irresponsible and reprehensible.

(c) Although Messrs. Cunningham and Wall both knew Judge Fuller and had appeared before him frequently, they could in fact exert no improper influence on his decisions.

(28) The tapes contain a number of references to plans to get Pedro out of the State after the planned hearing before Judge Fuller. Respondents did not knowingly counsel an illegal act, it being their belief that the plan was legal, although marginally so. In their Responses and in their testimony, respondents have conceded, however, that their approach was overly aggressive, that they exercised poor judgment and created the impression of professional impropriety and of disrespect for the orderly process of the system of justice.

Messrs. Wall and Cunningham began the conversation believing that the probationary warrant had not been served and that Pedro would be got out of the State before it was served. In such event they believed he would not be avoiding service of an outstanding warrant. Moreover, Mr. Cunningham believed that it was not illegal for a client to leave a state before being served. In the course of the conversation, they were told of the violation of probation warrant. Thereupon, they concluded that they would ask Judge Fuller to find that the guilty pleas did not constitute a violation of the terms of Pedro's probation and that he might leave the State. Under such circumstance, they believed it would not be illegal for Pedro to leave the State.

(29) There are a number of references to other cases which Mr. Wall and Cunningham handled in which restitution was paid. The sum and substance of these prior cases was that the payment of restitution was a very weighty factor in obtaining

leniency because the judiciary was rightly interested in seeing that the victims of crime be repaid the damage caused them. The tapes make clear that in each instance the restitution payments were to the victims, not the law enforcement officials or judges. Respondents testified at the trial that in the context of the conference, the references to the other cases were susceptible to a meaning not intended by them and they will hereafter exercise caution in making certain that they do not make references subject to a double interpretation.

(30) During the course of the conversation Debbie asked for a "guarantee" that the plan would work and Pedro would be released. From this request came assurances by Messrs. Wall and Cunningham that if the plan were unsuccessful, they would return the \$5,000 fee. It is clear that the notion of a contingent fee should have been rejected and that discussion of it should have been avoided. Respondents have admitted in their Response and in their testimony that they improperly attempted to arrange a contingent fee in a criminal case, which, if consummated would have resulted in a violation of Disciplinary Rule 2-106(a).

(31) The fourth recorded conversation is one in which Deputy Hampton called Mr. Wall at his office. In it Mr. Wall simply asks to come over to the jail to talk to Mr. Hampton and is granted permission to do so.

(32) In the last recorded conversation, Debbie called the law office on Friday morning. She had failed to return Wednesday evening or Thursday as she had told Messrs. Cunningham and Wall she would. She inquired whether the plan was still workable and whether Messrs. Cunningham and Wall were mad with her. She also inquired how much of the \$10,000 which she claimed to have with her she would get back. Mr. Cunningham replied "none," which would have resulted in an increase in the fee of as much as \$2,000. The basis of the increase was Messrs. Cunningham's and Wall's irritation in having to spend Wednesday evening with Debbie discussing employment and in her not calling back when she had promised she would.

(33) Respondents conceded during their testimony that increasing their fees without full discussion with Mrs. Pedraza reflected poor judgment and created the impression of professional impropriety.

(34) In their response and in their testimony in Court respondents demonstrated awareness that they have violated the Rules for Professional Responsibility and that they have acted unprofessionally and irresponsibly.

(35) The Court concludes that respondents are genuinely repentant of their conduct and have learned valuable lessons from this experience.

(36) Respondents introduced substantial evidence clearly demonstrating (a) their general good character and reputation; (b) their ability as attorneys and dedication to their clients' causes; and (c) their continuing worth as citizens of the community and as members of the bar.

(37) The Court concludes that many of the statements made by Mr. Cunningham on the evening of April 13 were the product of alcoholic beverages he had consumed.

Upon the basis of the foregoing findings of fact the Court concludes as law as follows:

(1) Neither respondent ever stated to Debbie Pedraza or ever intended to imply or suggest or insinuate to her or any other person that they would be able to obtain the defendant's release from jail or any other consideration by means of bribery of any public official. Expressions such as "take care of Betty" and "payments to Sammy" were used by respondents innocently with one meaning intended, but were susceptible to the interpretation, and were interpreted, under the circumstances, by Mrs. Pedraza to mean bribery. The result was an unfortunate series of miscommunications and misunderstandings. The Court is satisfied that respondents intended no illegal payments or other wrongdoing, nor did they intend to imply any wrongdoing. Respondents are admonished, however, that in further conversations with their clients they should take extra care to insure that what they say is not susceptible of double meaning and that their clients fully understand that no bribery or other illegality is intended. They are admonished to remain well within the confines of the law.

(2) Respondents clearly violated Disciplinary Rule 8-102(b) in that they falsely implied to Mrs. Pedraza that they could exercise influence over the Honorable George T. Fuller when in fact they could not.

(3) Respondents clearly violated Disciplinary Rule 9-101(c) in that they implied that they would be able to influence the Honorable George T. Fuller upon irrelevant grounds.

(4) Respondents did not violate Disciplinary Rule 7-102(a)(7) in that they did not knowingly counsel or assist in any illegal or fraudulent conduct. The advice given did,

however, as conceded by respondents, create the impression of professional impropriety. Respondents are admonished that they shall, in the future, take extra care to insure that not even the appearance of impropriety be created and to insure that by words and actions they do not adversely reflect upon the orderly legal process.

(5) The evidence establishes that respondents violated Disciplinary Rule 2-106(e) in that they entered into an arrangement for a contingent fee in a criminal case.

(6) Respondents did not violate Disciplinary Rule 7-104 or Disciplinary Rule 7-102(a)(5) with respect to their transactions with Attorney Mitchell or their comments about the court appointed system. As conceded by respondents, however, they were professionally discourteous to Attorney Mitchell in not freely communicating with him about their conversations with Pedro Pedraza. Moreover, the comments about the court appointed system in general were in poor taste and should not have been made.

(7) The aforesaid acts and statements by respondents Wall and Cunningham were improper and unethical, created an appearance of professional impropriety on the part of the said attorneys and constituted an unfair and uncalled for affront and insult to Judge Fuller and adversely reflected upon the dignity and integrity of the Courts and the Judges of this County and judicial district in violation of canon 9 of the Code of Professional Responsibility and the disciplinary rules thereunder.

(8) The aforesaid conduct of the respondents and the public knowledge thereof is prejudicial to the administration of justice in this district and this Court has the inherent authority and jurisdiction to enter orders disciplining the respondents for professional misconduct.

This the 19 day of May, 1983.

James C. Davis  
Judge Presiding

A TRUE COPY  
CLERK OF SUPERIOR COURT  
DAVIDSON COUNTY

BY Irene H. Lovell  
Assistant Deputy Clerk Superior Court