

CONCURRING OPINION:

I concur with the Commission's decision but feel impelled to elucidate my reason for doing so. Evidence presented in this case did not sustain a conclusion that Respondent had violated Canons 1, 2(A) and 2(B) when he appeared at the arraignment and bail hearing in Cause No. 96-1-94462-0, State v. Owen Adolphus Barnes ("Barnes hearing"), based on the clear, cogent and convincing evidentiary standard that the Commission must apply pursuant to CJCRP 7.

The dispositive question, for purposes of determining whether or not a violation of the Code of Judicial Conduct had occurred, is: Did Respondent act in the capacity of an attorney representing a client at the Barnes hearing? This question could not be definitively answered, but disciplinary counsel's case did not sustain the burden of proving that Respondent had not acted as an attorney.

No documented evidence was brought to affirm that an attorney-client relationship had existed between Respondent and Mr. Berggren at the time of the Barnes hearing. Both Respondent and Mr. Berggren readily admitted that no written contract or other documentation had been prepared which could prove that an attorney-client relationship between them had been established. (See tr. at page 79, line 5.) The Commission was therefore required to rely primarily on verbal testimony and transcribed evidence to evaluate the relationship between Respondent and Mr. Berggren. Such evidence was often ambiguous and seemingly contradictory or inconsistent.

Even though Mr. Berggren and Respondent both attested to the fact that they had established an attorney-client relationship, their respective statements and representations in this respect did not completely, or at least clearly, comport with each other. Mr. Berggren testified that he had contacted Respondent to inquire about

posting a bond for his friend, Mr. Barnes (See tr. page 78, lines 6-18), and he acknowledged that he had made "no (formal) agreement" with Respondent for representation; but he believed that he would be precluded as a lay person from participating in the Barnes hearing and therefore needed representation from counsel. (See tr. pages 80-81, lines 25-2.) (Others who testified at the Commission's proceeding asserted that it is generally permissible, although a rare event in practice, for non-attorneys to speak at arraignment and bail hearings.) Moreover, while Mr. Berggren never discussed "a bill" with Respondent, he thought Respondent was acting as his representative when Respondent called to inform him about details associated with the Barnes hearing. (See tr. page 99, lines 10-12.) From Mr. Berggren's testimony, it can be surmised that he did not believe that Respondent would be representing him until Respondent called to apprise him of specifics about the hearing.

Respondent confirmed that Mr. Berggren "never used the word attorney" (see tr. page 113, line 12) in his discussions with Respondent, but he contended that his attorney-client relationship was initiated by the aforementioned telephone call by Mr. Berggren to ascertain information about posting bail. (See tr. page 112, lines 16-17.) In his testimony before the Commission, Mr. Berggren never said that he had directly requested that Respondent represent him. Respondent, however, testified that, during one of the telephone calls that he had had with Mr. Berggren about the Barnes hearing, he explicitly asked Mr. Berggren if he "wanted me to represent him"; Respondent further testified that Mr. Berggren answered in the affirmative. (See tr. page 113, lines 13-14.) Respondent testified with greater conviction than Mr. Berggren that they had explicitly discussed "representation." Despite the difference in extent of conviction or clarity of recollection between Respondent and Mr. Berggren, the fact that they had held the same belief was established.

The claim of Mr. Berggren and Respondent that they had an informal

attorney-client relationship was not supported by any other party appearing as witnesses before the Commission. No evidence was introduced to prove that Respondent had made any statement contemporaneous with the Barnes case to the effect that he was representing Mr. Berggren -- or anyone. Mr. Greer recalled that, when he had encountered Respondent in the courthouse preceding the Barnes hearing, he had inquired if Respondent was at the courthouse for "official business", to which Respondent answered in the negative. (See tr. pages 51-52, lines 25-1.) Mr. Greer further testified that Respondent had informed him that he (Respondent) was there "as a friend of Pastor Pete" (see tr. pages 41-42, lines 52-1). However, Respondent disputed this testimony (See tr. pages 143-144, lines 22-6) and no other witness was brought to confirm Mr. Greer's portrayal of events.

Disciplinary counsel appropriately attempted to evaluate Respondent's role at the Barnes bail and arraignment hearing within the context of that proceeding. Mr. Greer had informed the Court that "Judge Hutchinson is present . . . I believe he is here on behalf of the defense" (see Barnes transcript page 6, lines 12-15), before Judge Steiner recognized Respondent. Respondent testified that he felt no compulsion or need to rebut Mr. Greer's earlier comments or clarify his role at the proceeding, because Judge Steiner had referred to him as "Mr. Hutchinson." (See tr. pages 151-152, lines 25-1.) The fact is, however, that Respondent was given a chance to speak, and exercised that opportunity, before Judge Steiner acknowledged him as "Mr. Hutchinson." The chronology of events is illustrative:

JUDGE STEINER: Okay. Does someone else wish to be heard?

MR. HUTCHINSON: Only as a neighbor, Your Honor.

JUDGE STEINER: All right. Mr. Hutchinson. (Emphasis added.)

MR. HUTCHINSON: I appreciate the opportunity to speak . . .

(Barnes transcript page 7, lines 12-19.)

Respondent's explanation as to why he failed to explain his participation in the Barnes hearing loses credibility when examined in a temporal context. When Judge Steiner asked, "(d)oes someone else wish to be heard." Respondent answered "(o)nly as a neighbor." This response, on its face, completely resolves any doubt whether Respondent was present as "Judge Hutchinson" or "on behalf of the defense". It evidenced personal involvement. Judge Steiner's eventual recognition of "Mr. Hutchinson" merely confirmed what Respondent had made obvious.

Respondent announced to the Court at the onset that he was participating in the Barnes hearing "(o)nly as a neighbor." Respondent testified at the Commission's hearing that this statement actually reflected the position of his client, Mr. Berggren. Yet, when this introductory remark is juxtaposed with Respondent's subsequent comments at the hearing, it appears that Respondent was describing himself as the "neighbor." Respondent's testimonial about his relationship with Mr. Barnes was couched in the first person singular, much like a character witness would express himself/herself ("I appreciate . . . I feel . . . I've attended . . . I think . . . I should attempt to reciprocate . . . I needed . . .") Respondent insists that his introductory statement must be scrutinized beyond its context. But Respondent's remarks should be interpreted on their literal meaning and in context with his entire plea before the Court. Other witnesses to Respondent's speech, namely Judge Steiner, Mr. Greer, Ms. Cavanaugh and Ms. Noble, had all gotten the "impression" that Respondent was speaking on behalf of himself, not a client. Based upon the transcribed evidence from the Barnes hearing, it would appear that Respondent was not acting in the capacity of a lawyer.

Respondent's case before the Commission consisted of three components: (1) demonstration that an attorney-client relationship had been established; (2) proof that Respondent participated in the Barnes hearing on behalf of a client because he had sat

"in the lawyer section" of the court; and (3) evidence that he was not a character witness because he "was talking like a lawyer" (see tr. page 114, line 20), speaking to relevant factors under CrR 3.2(b). On these issues Respondent relied exclusively on his own testimony and that of Mr. Berggren. The content of their testimony refuted that of other witnesses in several critical respects. Disciplinary Counsel's case, on the other hand, was predicated on the Respondent's actual conduct and the "impressions" provided by other participants at that proceeding. Respondent's case failed with respect to points (2) and (3) above, but Disciplinary Counsel's case did not sufficiently dispute Mr. Berggren's contention that an attorney-client relationship had existed with Respondent. Mr. Berggren's credibility was never in question.


K. Collins Sprague