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Record No. 5249

In the
Supreme Court of Appeals of Virginia
at Richmond

OTTO L. TUCKER

v.

SEVENTH DISTRICT COMMITTEE OF THE VIRGINIA STATE BAR

FROM THE CIRCUIT COURT OF WARREN COUNTY

RULE 5:12—BRIEFS.

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 5249

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 4th day of October, 1960.

OTTO L. TUCKER, Plaintiff in Error,

against

SEVENTH DISTRICT COMMITTEE OF THE VIRGINIA STATE BAR, Defendant in Error.

From the Circuit Court of Warren County

Upon the petition of Otto L. Tucker a writ of error is awarded him to a judgment rendered by the Circuit Court of Warren County on the 9th day of February, 1960, in a certain proceeding then therein depending entitled: In the Matter of a Complaint against Otto L. Tucker, an Attorney at Law; upon the petitioner, or some one for him, entering into bond with sufficient security before the clerk of the said circuit court in the penalty of three hundred dollars, with condition as the law directs.

RECORD

* * * * *

REPORT AND COMPLAINT.

To the Honorable Elliott Marshall, Judge of the said Court:

The undersigned, the Seventh District Committee of the Virginia State Bar, created under the provisions of Rule 13 of the Rules for the Integration of the Virginia State Bar, adopted and promulgated by the Supreme Court of Appeals of Virginia on October 21, 1938, respectfully reports:

1. That on the 6th day of July, 1959, it received a complaint of unprofessional conduct on the part of Otto L. Tucker, a licensed Attorney at Law, practicing in the County of Warren, Virginia. Copy attached hereto as Exhibit "A."

2. That after making a preliminary investigation of the said complaint, it found that the same justified further investigation, and the committee thereupon caused the said complaint to be reduced to writing, a copy of which is hereto attached and filed herewith as Exhibit "B," and fixed upon August 22, 1959 as the time, and Warren County Court House, in the County of Warren, town of Front Royal, as the place, for a hearing to be had thereon.

3. That the said Otto L. Tucker was served with or mailed a copy of the written complaint and was given notice of the time and place of the said hearing more than ten days prior thereto by registered mail, as required by the said Rule.

4. That at the hearing, at which the said Otto L. Tucker appeared in person, and was represented by counsel, the written complaint was read to the said Otto L. Tucker. Evidence, consisting of the testimony of Buford Kibler and other witnesses who were cross examined, as well as argument of counsel for Mr. Tucker, was heard.

page 2 } That the transcript of the said proceedings before the Seventh District Committee is hereto attached and filed herewith as Exhibit "C" as to the testimony of Buford Kibler, the other evidence having been taken by the court reporter but not transcribed.

6. At the conclusion of the said hearing, the committee found it necessary to defer decision for further study and later unanimously decided that disciplinary action against the said Otto L. Tucker is merited for the following reason:

Solicited the account from Buford L. Kibler.

The committee directed that a report of its proceedings with a verified complaint be filed in the Clerk's Office of your Honors' Court for further proceedings to be had thereon in accordance with the statutes in such cases made and provided, and that a copy thereof be filed with the Secretary of the Virginia State Bar, all as required by the said Rule.

The Chairman of the committee was authorized to sign the complaint on behalf of the Seventh District Committee.

Respectfully submitted,

SEVENTH DISTRICT COMMITTEE OF THE VIRGINIA STATE BAR
By J. ADAIR MOORE
Chairman.

Filed in Clerk's Office Oct. 23, 1959.

Teste:

HELEN E. MAUCH, Deputy Clerk.

* * * * *

page 3 } EXHIBIT A.

Marked by J. Adair Moore, Chairman Seventh Dist. Committee Va. State Bar.

State of Virginia,
County of Warren, to-wit:

The deponent, Buford L. Kibler, of the age of 17 years, personally appeared before me, Aurelia G. Cary, a Notary Public in the county and state aforesaid and made oath as follows:

1. That his name is Buford L. Kibler, and that at present he is in Warren County Jail and is charged with felonious assault as one of a mob.

2. That on Monday, June 22, 1959, the jailor took me to the conference room in the jail building where I saw Otto L. Tucker. Tucker gave me a card with his name and address on it and asked me "Do you want me to represent you?" I told him he would have to ask my family, he then told me what to say and I wrote this to my mother as he told it

to me, and to the best of my memory I wrote, "Dear Mom, I want Otto L. Tucker to represent me" and signed it which he asked me to do.

3. I knew that my Mother and Father would not let a colored lawyer represent me.

In witness whereof I hereunto affix my signature and seal.

/s/ BUFORD L. KIBLER (Seal)

This 24th day of June personally appeared before me, Aurelia G. Cary, a Notary Public in and for the county and state aforesaid, Buford L. Kibler, and after being duly sworn affixed his signature to the above statement.

/s/ AURELIA G. CARY
Notary Public.

My commission expires March 3rd, 1963.

page 4 } State of Virginia,
County of Warren, to-wit:

The deponent, Alma L. Kibler, over the age of 21, a resident of Warren County personally appeared before me, Aurelia G. Cary, a Notary Public in the county and state aforesaid and made oath as follows:

1. That on Monday, June 22, 1959, at about 3:30 P. M., Otto L. Tucker who represented himself to be an attorney came to my residence in the Town of Front Royal and handed me a note written by my son, Buford L. Kibler which read as follows: "Dear Mom, will you please let this man represent me." and signed by my son; that the said Otto L. Tucker showed me a contract which he asked me to sign agreeing to pay him THREE HUNDRED DOLLARS ($300.00) to represent my son, Buford; that I did not sign the contract.

2. That Otto L. Tucker returned to my home later and my husband and I refused to talk to him; that Otto L. Tucker at this time informed my daughter, Barbara Ann Kibler, that he represented all of the others involved.

3. That I never saw Otto L. Tucker before this day and that neither my husband or I had in any way ever attempted to contact him.

In witness whereof I hereunto affix my signature and seal.

/s/ ALMA L. KIBLER (Seal)

This 24 day of June personally appeared before me, Aurelia G. Cary, a Notary Public in and for the county and state aforesaid, Alma L. Kibler, and after being duly sworn affixed her signature to the above statement.

/s/ AURELIA G. CARY
Notary Public.

My commission expires March 3rd, 1963.

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EXHIBIT B.

Marked by J. Adair Moore, Chairman Seventh Dist. Committee Va. State Bar.

NOTICE AND WRITTEN COMPLAINT.

IN RE: Otto L. Tucker, A licensed attorney practicing in the City of Alexandria, Va.

TO: Otto L. Tucker, 901 Princess Street, Alexandria Va.

WHEREAS, a complaint of unprofessional conduct on your part has been received by the Seventh District Committee of the Virginia State Bar, and WHEREAS, the said Committee is of the opinion that the said complaint justifies and requires further investigation:

NOW, THEREFORE, you are hereby notified, in pursuance of the provisions of Rule 13 of the Rules for the Integration of the Virginia State Bar, that on the 22nd day of August, 1959, at the Circuit Courtroom, Front Royal, Virginia, at 10:30 A. M., a hearing will be had on the said complaint which the said Committee has caused to be reduced to writing, and which is as follows:

Violation of Canon 27 of the Canons of Professional Ethics in soliciting employment as counsel for Buford L. Kibler from both Buford L. Kibler and Alma L. Kibler on or about June 22, 1959 in Front Royal, Virginia.

At the aforesaid time and place you are privileged to appear in person and to be represented by counsel, if desired, and produce by summons or otherwise such testimony as you may care to offer. Subpoenas for such witnesses as you may care to summon will be issued to you upon application.

GIVEN UNDER MY HAND this 6th day of August, 1959.

SEVENTH DISTRICT COMMITTEE VIRGINIA STATE BAR
By s/ J. ADAIR MOORE
Chairman.

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EXCEPTIONS.

Exceptions taken by Otto L. Tucker to the Report and Complaint against him filed October 23, 1959, by the Seventh District Committee of the Virginia State Bar:

FIRST EXCEPTION: The committee did not afford Otto L. Tucker or his counsel an opportunity to examine the transcript of testimony and determine its accuracy before such transcript was filed herein to be the basis of a judicial determination.

SECOND EXCEPTION: The committee, after having considered the testimony for a period of two months, has filed with its report only that part of the testimony which might lead the court to deem the case a proper one for the issuance of a rule to show cause why the license of Otto L. Tucker to practice law should not be revoked or suspended; and, in so doing, the committee has wrongfully suppressed and withheld from the court's consideration certain testimony which, together with other evidence available to the committee and to the court, shows or tends to show:

(a) That at the time of his first interview with Buford Kibler at the county jail, Otto L. Tucker had been employed

to represent other persons who, with Kibler, were charged with having feloniously composed a mob which did maliciously or unlawfully wound one, Edith Johnson, with intent to maim, disable, disfigure or kill the said Edith Johnson, or Frederick Hiatt, against the peace and dignity of the Commonwealth.

(b) That the conference between Otto L. Tucker and Buford Kibler at the county jail lasted considerably more than thirty minutes.

(c) That when Otto L. Tucker had concluded his conference with Buford Kibler the sheriff or his deputy or jailer questioned Kibler as to the subject of the conference.

page 7 } (d) That then or thereafter one or more of the officials and employees of the County of Warren caused Buford Kibler to form or express a prejudice against being represented by Otto L. Tucker, such prejudice being based solely upon the fact that Otto L. Tucker is not a white person.

(e) That the Commonwealth's Attorney for the County of Warren (William J. Phillips, Esq.), accompanied by John F. Ewell, Esq. (who subsequently was appointed by this court to represent Buford Kibler), interviewed Buford Kibler at the jail shortly after Buford Kibler had requested his mother to permit Otto L. Tucker to represent him.

(f) That said Commonwealth's Attorney prepared or caused to be prepared and caused Buford Kibler to sign the affidavit which appears to have been a part of the initial complaint to the committee; and that said affidavit is patently a distortion of the pertinent facts.

(g) That said Commonwealth's Attorney prepared or caused to be prepared and caused Buford Kibler's mother to sign an affidavit which appears to have been a part of the initial complaint to the committee; and, in the total absence of any such suggestion from Mrs. Kibler, said Commonwealth's Attorney caused Mrs. Kibler in her affidavit to falsely swear that Otto L. Tucker tendered for her signature a contract obligating her to pay a fee of three hundred dollars.

(h) That notwithstanding the fact that two of Buford Kibler's companions (neither of whom had previous criminal records) had been sentenced to serve two and three years, respectively, in the penitentiary, and notwithstanding the further fact that Buford Kibler at the time of his arrest was on probation in connection with a prior conviction and sentence for burglary, said Commonwealth's Attorney, "in consideration of the fact that Kibler had cooperated fully with the Commonwealth," recommended to the court that Kibler be sentenced to one year in jail with suspension of all of such sentence except sixty days.

THIRD EXCEPTION: In violation of its promise made at the hearing on August 22, 1959, the committee failed to provide or make available to Otto L. Tucker or to his counsel a copy of the transcript of the testimony or of any part thereof.

page 8 } FOURTH EXCEPTION: It is here submitted that it is not the purpose and intent of the statute that the court should perfunctorily issue a rule against an attorney concerning whom a committee has filed a report and complaint, but that such rule should be issued by the court only as a result of its judicial determination that the case is a proper one for such action; and it is further submitted that the court cannot here make such determination without benefit of all of the facts in the case which were developed before or were reasonably available to the committee.

WHEREFORE said Otto L. Tucker doth except to the said report and complaint and prays that his said exceptions may be sustained; and that the court take no further action on said report and complaint, save to dismiss the same, unless and until the said committee will have caused the full transcript of all of the testimony heard before it to be filed herein.

OTTO L. TUCKER
S. W. TUCKER
By counsel.

Filed 11/2/59.

ELLIOTT MARSHALL.

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This matter was heard by the Court on the 2nd day of November, 1959, upon the duly verified complaint and exhibits of Seventh District Committee of The Virginia State Bar filed against Otto L. Tucker, attorney at law, on the 23rd day of October, 1959; upon the "Exceptions" to the "Report" and to the said complaint this day filed by the said Otto L. Tucker; upon the appearance of the said Otto L. Tucker in person and by counsel and of J. Adair Moore on behalf of

the said Seventh District Committee and upon argument of counsel.

Upon consideration whereof, the Court being of the opinion that the said exceptions are not well taken it is adjudged and ordered that the same be and they are hereby denied, to which ruling of the Court the exceptant objected and excepted.

It being the opinion of the Court that a copy of the complete transcript of the evidence taken before the said Seventh District Committee at its hearing at Front Royal, Virginia, on August 22, 1959, should be made available to the said Otto L. Tucker, and there being no objection thereto by the Committee, it is ordered that the reporter shall prepare and deliver to the said Otto L. Tucker or his representatives a true copy of the complete transcript of the evidence, or any desired portion thereof, taken at said hearing upon demand accompanied by tender of the costs thereof.

Upon further consideration of said verified complaint, it being charged therein that the said Otto L. Tucker, a licensed attorney at law, qualified to practice before this Court, is guilty of an improper solicitation of legal or professional business or employment, pursuant to the provisions of Virginia Code Section 54-74, it is adjudged and ordered that the said Otto L. Tucker, attorney at law, 901 Princess Street, Alexandria, Virginia, be and he is hereby

page 10 } required to appear before this Court, sitting with two other qualified Judges to be designated under the provisions of said statute, at ten o'clock A. M., or as soon thereafter as it may be heard, on the 21st day of December, 1959, at the Court House in Front Royal, Virginia, and then and there show cause, if any he can, why his license to practice law shall not be revoked or suspended.

ELLIOTT MARSHALL, Judge.

Date Nov. 3, 1959.

Teste:

HELEN E. MAUCH, Deputy Clerk.

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MOTION TO DISMISS RULE.

The said Otto L. Tucker, by counsel, moves that the rule issued herein on November 3, 1959, be dismissed; and, as grounds for such motion, says:

That neither the rule, nor the report and complaint filed by the Seventh District Committee of the Virginia State Bar, nor any of the testimony or other evidence returned with said report and complaint shows or tends to show any act or acts on the part of Otto L. Tucker constituting an improper solicitation or legal or professional business or employment. The evidence returned with said report shows or tends to show merely that Otto L. Tucker, a licensed attorney at law, who then had been engaged to represent one or more of several persons who were jointly accused of constituting a mob and committing an assault, did, on the .... day of June, 1959, visit another of those several persons at the Warren County Jail, namely, Buford Kibler, a minor under the age of twenty-one years, and that, having interviewed said Kibler as a witness and having been made aware that said Kibler and his parents were not financially able to employ an attorney, said Otto L. Tucker, without requiring payment or promise of payment for his services, did tender an offer to represent and defend said Buford Kibler, such offer being expressly conditioned only upon the approval and consent of the parents of said Kibler.

WHEREFORE, such action on the part of the said attorney being neither dishonorable nor disreputable and being no ground for disbarment or censure, it is moved that the said rule be dismissed.

S. W. TUCKER
Counsel for Otto L. Tucker.

Filed Nov. 24, 1959.

HELEN E. MAUCH, Dep. Clerk.

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MOTION FOR BILL OF PARTICULARS.

The said Otto L. Tucker, by counsel, moves that he be furnished a bill of particulars specifying what act or acts of Otto L. Tucker will be shown and relied upon as constituting improper solicitation of legal or professional business or employment and wherein such alleged act was or such alleged acts were illegal or improper.

S. W. TUCKER
Counsel for Otto L. Tucker.

Filed Nov. 24, 1959.

HELEN E. MAUCH, Dep. Clerk.

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BILL OF PARTICULARS.

Comes now the Seventh District Committee of the Virginia State Bar, by counsel, pursuant to an order previously entered in this case requiring said Committee to furnish Otto L. Tucker and his counsel a Bill of Particulars specifying what act or acts of Otto L. Tucker the Committee will show and rely upon as constituting improper solicitation of legal or professional business or employment and wherein such alleged act or acts were illegal or improper, and says as follows:

1. That Otto L. Tucker, on or about June 22, 1959, did seek out, ask for and talk to Buford Kibler in the Warren County Jail on the morning of said day, and at that time did ask the said Kibler if he was represented by an attorney. Upon receiving a negative answer, he then inquired of Kibler if he was going to get an attorney and was informed by Kibler that it would be up to the parents of Kibler. Whereupon the said Tucker, during the course of said conversation, did then solicit employment from Kibler by asking Kibler if he wanted the said Tucker to represent him, and that he did, in further pursuit of said employment and upon being informed by Kibler that it would be up to Kibler's parents to obtain counsel, urge and direct the said Kibler to write a

note to his parents and did inform him of the manner and form in which to write said note, and did thereupon, during the course of said conversation, give his personal card to the said Kibler.

2. That the said Kibler, prior to the conference with the said Tucker, did not know Tucker, had never
page 31 } asked for Tucker, had never heard his name, and had never asked any other attorney to represent him.

3. That Tucker thereupon that same day, in possession of said note from Buford Kibler, sought out the parents of said Kibler on two occasions that day, showed them a contract and asked them to sign it for his employment in the defense of their son who was charged with a felony, and for said legal services to pay him a sum of $300.00.

4. That neither Mrs. Alma L. Kibler, mother of Buford Kibler, nor her husband, the father of said Buford Kibler, ever sought out Otto L. Tucker for his legal services in the defense of their son, Buford Kibler, and that they did not know Otto L. Tucker prior to his solicitation of them for the representation of their son.

5. That said acts of Otto L. Tucker are in violation of Section 54-74, Sub-section 6, of the Code of Virginia for 1950, as amended, in that he did commit acts of improper solicitation of legal or professional business or employment either directly or indirectly.

SEVENTH DISTRICT COMMITTEE OF THE VIRGINIA STATE BAR
By J. A. MASSIE, JR.
Counsel.

Filed Dec. 21, 1959 in open court.

JULIAN UPDIKE, Clerk.

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ANSWER TO RULE.

The answer of Otto L. Tucker to a rule requiring him to appear before this Court on the 21st day of December, 1959,

and show cause why his license to practice law shall not be revoked or suspended.

This respondent, reserving to himself the benefit of all just exceptions to the report and complaint of the Seventh District Committee of the Virginia State Bar, to the issuance of the rule based upon said report, and to the rulings of the Court on his motion to dismiss the rule, and being advised that he should now answer the said rule, answers and says:

FIRST DEFENSE.

1. That at his law office in the City of Alexandria, this respondent was engaged and employed by and on behalf of John Flynn to represent and defend said Flynn in connection with charges that Flynn and several others feloniously composed a mob which did assault and maliciously wound one Edith Johnson with intent to maim, disfigure, disable or kill.

2. Having been so engaged and employed by and on behalf of said Flynn, and subsequently by and on behalf of another or others who with Flynn were jointly accused, respondent went to the Warren County Jail where he sought and obtained an interview with Buford Kibler, another of those page 33 } persons jointly accused with Flynn, for the purpose of ascertaining Kibler's version of the occurrences on which the criminal charges were founded.

3. During the course of said interview, and after Kibler had related to this respondent much, if not all, of what had occurred, Kibler said that he was on probation in connection with a previous offense of breaking and entering; and Kibler asked this respondent's opinion whether such probation would be revoked as a result of the charges then pending against him.

4. Without replying to Kibler's inquiry, respondent asked him if he had a lawyer to represent him; and Kibler said that he did not have a lawyer and that his parents could not afford to hire a lawyer for him.

5. Thereafter, this respondent offered to represent Kibler along with those of Kibler's alleged accomplices by and on whose behalf respondent had been employed; but, being aware that Kibler was a minor aged sixteen or seventeen, respondent expressly conditioned said offer upon the consent and approval of Kibler's parents.

6. Buford Kibler then gave respondent directions how to reach his parents' home and wrote and signed and gave to respondent a note requesting that his mother give respondent permission to represent him. On that day respondent ex-

hibited that note to Buford Kibler's mother at her home; but she declined to give or to withhold the requested permission until she had consulted with her husband who was then not at home.

7. On a subsequent day, that being the day on which a preliminary hearing of said criminal charges was held, and in a corridor of the Warren County Courthouse, the father of Buford Kibler informed this respondent that his page 34 } services in the defense of Burford Kibler were not desired. Thereupon, when the court had convened and the case against Buford Kibler and others was called, this respondent informed the Juvenile Court of his aforesaid conditional offer and of its rejection by Kibler's parent and of the consequent fact that he would not be representing Buford Kibler, any former appearances to the contrary notwithstanding.

8. This respondent is advised that Buford Kibler had a right to his choice of counsel available to him; that, in view of Kibler's apparent financial inability to hire counsel, this respondent had a right to make his services available to Kibler; and that the right of respondent to have offered his services under the circumstances stated above is protected by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States as a necessary incident of the protection with which that clause safeguards the right of an indigent accused to his choice of counsel available to him. Further, this respondent believes and is advised that his aforesaid actions were neither dishonorable nor disreputable, but on the contrary, were in accord with the positive demand common to all ethical concepts as stated in the Golden Rule and were in keeping with the finest traditions of the legal profession.

SECOND DEFENSE.

9. Respondent is advised that solicitation of professional employment by personal communication or interview is not proscribed by the Canons of Ethics as adopted in the Rules for the Integration of the Virginia State Bar when such personal communication or interview is warranted by personal relations; and respondent is further advised that page 35 } the direct and personal nature of the relation of attorney and client is recognized by said Rules and, hence, warrants a personal communication or interview between an attorney and one who is alleged to have been his client's accomplice.

10. Respondent says that at and before the time when he first communicated with or interviewed Buford Kibler, respondent was and had been employed to represent John Flynn with whom said Kibler was jointly accused. Accordingly, respondent says that if he had solicited employment to represent Buford Kibler in the case in which respondent had already been engaged, such would not have been an improper solicitation.

And now, having fully answered the said rule, this respondent prays to be hence dismissed with his reasonable costs by him in this behalf expended.

OTTO L. TUCKER
Respondent.

Filed Dec. 21, 1959, in open court.

JULIAN UPDIKE, Clerk.

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On the 21st day of December, 1959, again came the petitioner and also came the defendant, pursuant to an order previously entered in this case setting the same for trial this day.

Whereupon the defendant, by his attorney, moved for a bill of particulars in support of a written notice for the same previously filed in this case. Whereupon the acting attorney for the Commonwealth did thereupon supply said bill of particulars which was ascertained by the Court to be satisfactory to the defendant. Whereupon the Court, consisting of three Judges duly appointed by the Chief Justice of the Supreme Court of Appeals, did then hear evidence on behalf of the petitioner and on behalf of the defendant, and did then hear final arguments on behalf of the petitioner and defendant, and did then retire to their chambers. Whereupon, after due deliberation upon the case, they did then return to the court room and inform the petitioner and the defendant of their opinion of the case, which opinion was read by the Judges in open court, and which is incorporated herein as follows:

"Virginia Code Section 54-74(6) and Canon 27 of The Canons of Professional Ethics promulgated by The Virginia State Bar impose upon all Attorneys at Law in Virginia a high standard of professional conduct with respect to the solicitation of professional employment.

"Under our conception of these provisions an attorney should carefully abstain from any word or act page 38 } which might tend to influence any person toward a decision to retain his services. We think this is true although such person might be without funds to retain an attorney of his own, especially since the court is required to provide counsel for all indigents charged with felony. Nor do we believe that the fact that an attorney is retained by several other persons implicated in the offense with which the subject was charged would give such attorney the right to volunteer his services.

"In this case, after careful consideration, we are of the opinion that the respondent's conduct violated the said Statute and Canon.

"However, we have taken into consideration that the respondent's reputation for professional conduct in the past is good, and also the fact that the motive for solicitation was not so much personal gain, of which there was little hope, as a desire to serve his other clients efficiently.

"Accordingly, we feel that no suspension of the right to practice law is justified, and that the ends of justice will be met by an official reprimand, and it will be so ordered."

It is adjudged and ordered that this opinion and judgment of the Court be recorded among the records of this Court.

It is further adjudged and ordered that the Clerk of this Court shall cause to be made up and certified to the Treasurer of Warren County, Virginia, compensation for the payment of Judge J. H. May of the Circuit Court of Staunton, Virginia, and Judge Lyttelton Waddell of the Circuit Court of Albemarle County, Virginia, at the rate of $10.00 per day for one day in attendance upon the case, and at the rate of $.07 per mile for round trip from their homes to Front Royal, Virginia. It is further adjudged and ordered that the said Clerk make up the necessary voucher for the payment to Bessie Gibbs, as court reporter, the sum of $25.00 for services rendered, and to Joseph A. Massie, Jr., acting Commonwealth's Attorney, the sum of $20.00 for investigation of the case and attendance in court for a total of two days and two round trips from Winchester to Front Royal, Virginia, at the rate of $.07 per mile, all of which shall be paid out of the treasury of Warren County, Virginia.

Enter:

LYTTLETON WADDELL, Judge
J. H. MAY, Judge
ELLIOTT MARSHALL, Judge

Date Feb. 9, 1960.

Teste:

HELEN E. MAUCH, D. Clerk.

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NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR.

Otto L. Tucker gives notice of his appeal to the Supreme Court of Appeals of Virginia from the judgment of the Circuit Court of the County of Warren entered February 9, 1960, in the matter of the complaint of the Seventh District Committee of the Virginia State Bar against Otto L. Tucker, an attorney at law.

The Assignments of Error are:

I. The court erred in issuing the rule to show cause and in denying the motion to dismiss same, inasmuch as the complaint of the Seventh District Committee of The Virginia State Bar does not state or show any impropriety in the alleged solicitation.

II. The court erred in its opinion and judgment that the respondent's conduct was unlawful or unethical; and thereby, and in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, the court has denied the equal right of an indigent accused to be represented by his choice of counsel available to him and the correlative right of an attorney to volunteer his professional services to such indigent accused.

OTTO L. TUCKER, Respondent
By S. W. TUCKER
Of counsel.

Buford Kibler.

Filed March 29, 1960.

HELEN E. MAUCH, Deputy Clerk.

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BUFORD KIBLER,
was called as a witness for and on behalf of the plaintiff, and having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Massie:
Q. What is your name?
A. Buford Kibler.
Q. Where do you live?
A. Route 1, Front Royal.
Q. How old are you?
A. 17.
Q. On the 22nd day of June, 1959, how old were you?
A. 17.
Q. On that day, were you in the Warren County Jail charged with a felony, namely, mob violence?
A. Yes, sir.
Q. On that day, did the defendant, Otto L. page 3 } Tucker, come to the jail and talk to you?
A. Yes, sir.
Q. Whereabouts did he have this conversation with you?
A. In the back office.
Q. Was it just the two of you in this room?
A. Yes, sir.
Q. Was the door closed?
A. Yes, sir.
Q. About what time of the day did this conversation take place?
A. Just before dinner. That was between 11:00 and 12:00, I guess—between 11:00 and 12:00.
Q. In the morning?
A. Yes, sir.
Q. Had you ever seen or heard of the defendant, Otto

Buford Kibler.

L. Tucker, prior to his seeing you in the jail that morning?
A. No, sir.
Q. Had you ever discussed the employment of counsel with anyone at that time?
A. No, sir.
Q. Or prior to that time?
A. No, sir.
Q. Do you know a boy named Newman, who was also charged with this offense?
page 4 } A. Yes, sir.
Q. Where was his jail cell in relation to yours?
A. Right on next to mine.
Q. Did you talk back and forth between each other?
A. Yes, sir.
Q. Had he ever discussed with you the employment of Otto L. Tucker prior to your seeing Mr. Tucker on this day?
A. No, sir.
Q. Had he ever mentioned Otto Tucker's name?
A. No, sir.
Q. Was he a colored boy?
A. Yes, sir.
Q. Now, when you went into this room to talk to Mr. Tucker, did he introduce himself to you?
A. Yes, sir.
Q. Did he inform you that he was a lawyer?
A. He told me he was an attorney.
Q. An attorney. And did he discuss with you the question of whether or not you had an attorney representing you?
A. Yes, sir.
Q. What did you tell him?
A. No, sir.
Q. Did you tell him that you did not have a
page 5 } lawyer representing you?
A. Yes, sir.
Q. Did he offer to represent you?
A. Yes, sir.
Q. What did he tell you or say to you about being represented by counsel?
A. Sir?
Q. What did he say to you about his representing you in this case, or being—correction, being represented by counsel or a lawyer?
A. You mean, he asked me to have—I don't know what you mean.

Buford Kibler.

Q. What did he say to you about a lawyer in this case?
A. Well, he told me—I don't exactly know.
Q. Well, before signing a note, did he talk to you about having a lawyer represent you?
A. He asked me did I have one, and I told him no, sir, my father couldn't afford a lawyer.
Q. You said your father could not afford one?

Mr. Hill: Mr. Massie, will you—
Mr. Massie: Excuse me.
Mr. Hill: What is this?

(Mr. Hill is shown document by Mr. Massie.)

page 6 } By Mr. Massie:
Q. About how long was he in there with you?
A. About a half hour, I guess.
Q. Did he give you a card with his name on it?
A. Yes, sir.
Q. I show you this card, and ask you if this is one he gave you?
A. Yes, sir.
Q. When did he give you the card?
A. About when he got ready to leave, before he opened the door.
Q. Now, prior to that time, you mentioned that you wrote a note?
A. Yes, sir.
Q. To whom did you write the note?
A. My mother.
Q. What did the note say?
A. I don't exactly know. I can tell you, it is almost like a—
Q. Well, as you recall, what did it say?
A. It said, "Dear Mom, would you let Otto L. Tucker represent me?" Something like that.
Q. Did you sign the note?
A. Yes, sir.
Q. I show you this piece of yellow paper, and
page 7 } ask you if this is the note that you wrote?
A. Yes, sir, that is the note.

Mr. Massie: I would like to read that note:

Buford Kibler.

"Mon, please give Otto L. Tucker permission to represent me. Thanks. Buford Kibler."

By Mr. Massie:

Q. Now, when you wrote this note, were you told how to write it?

A. No, sir, I told him I didn't know how to—I asked him, and I didn't know exactly how to say it, and he told me.

Q. He told you what to say?

A. Yes, sir.

Q. Did you write down on this note what he told you to say?

A. Yes, sir.

Q. Did you know how to spell his name?

A. No, sir. He give me—I don't know whether he give me the card. He showed it to me, or told me; I don't exactly remember.

Q. Now, was this when he first came in there or in the middle of the conversation, or at the end of the conversation?

A. It was in the middle.

Q. Now, what was your impression of his pur-
page 8 } pose of coming to see you there?

A. To represent me.

Mr. Hill: I object.

Mr. S. W. Tucker: Not the purpose, his impression.

Judge Marshall: The objection is sustained.

By Mr. Massie:

Q. What did you talk about mostly while you were there? While he was with you?

A. Well, different things. We talked about representing us and about the pay, and things like that.

Q. What did you talk about in regard to the pay?

A. Well, he said we would work that out later. I told him we didn't have enough money to pay him, and he said we would work that out later.

Q. Did he say how you would work it out later?

A. No, sir.

Q. Did you talk about the charge that was against you at that time?

A. Just a little. Not much about the case.

Q. What did you talk about mostly, while he was there?

A. Well, I don't know.

Buford Kibler.

Q. Well, in regard to whether or not he would represent you, or in regard to the facts in the case. What did you discuss the most between those two things?

page 9 } A. You mean which one of them was discussed the most?

Q. Yes.

A. Well, about representing me.

Q. Did you tell him what had happened that night of the offense?

A. He asked me a few questions, not many.

Q. Did you tell him what had happened that night?

A. You mean all of it?

Q. Did you tell him what you had done?

A. Yes, sir; I told him I drove.

Q. Did you tell him what the others had done?

A. I'm not sure.

Q. Now, at the time that he came to see you at the jail the first time, had any lawyer been to see Newman prior to that time before that?

A. No, sir.

Q. As far as you know, did Newman have a lawyer at that time?

A. No, sir.

Q. Were any of these other boys with whom you were charged with mob violence in the jail with you at that time?

A. Downing was with Newman, but he got out on bond.

Q. Downing was in the jail cell with Newman?

A. Yes, sir, but he got out on bond.

page 10 } Q. Did he get out on bond before Mr. Tucker came to see you, or afterwards?

A. Before.

page 11 } Q. Did Downing at any time mention Tucker's name?

A. No, sir.

Q. Do you know whether or not Downing had a lawyer at that time when he was released on bond?

A. No, sir.

Q. Now, had you been in the toils of the law before? That is, had you ever been charged with a felony?

A. I had been charged with breaking in.

Q. When was that charge placed against you?

A. January.

Q. Of what year?

A. This year.

Q. Did you appear in the Circuit Court at that time?

Buford Kibler.

A. No, sir.
Q. Was that handled in the lower court?
A. Yes, sir.
Q. Did you have a lawyer?
A. No, sir.
Q. That was in the Juvenile Domestic Relations Court?
A. Yes, sir.
Q. Now, when Mr. Tucker was leaving you that day, did he make any statement as to whether or not he would be back to see you?
A. Yes, sir, it was time for lunch, so he said he would be back later on in the evening—I'm not sure about
page 12 } the first time. It might have been the second time he said that; I'm not sure.
Q. How many times did you see Mr. Tucker?
A. Twice.
Q. When was the second time?
A. One Saturday morning, I believe, just before the trial came up.
Q. Was that before the preliminary hearing in the County Court?
A. I don't know.
Q. Did Mr. Tucker represent you in the Circuit Court of Warren County when you were appearing in that Court on this charge?
A. No, sir.
Q. Who did represent you?
A. Mr. Ewell.
Q. Was he appointed by the Court to represent you?
A. Yes, sir.
Q. How did you plead to this offense?
A. Guilty.
Q. Are you on probation for this offense now?
A. Yes, sir.
Q. Now, after Mr. Tucker had seen you that morning, did you say anything to any of the jailers or deputy sheriffs or the Sheriff about his visit to see you?
page 13 } A. Not as I know of.
Q. Do you recall giving up this card here that you have identified?
A. Yes, sir.

Mr. Massie: That card reads:

Buford Kibler.

"Temple 6-5510" in the upper left-hand corner; "Otto L. Tucker, Attorney and Counsel at Law." In the lower right-hand corner, "901 Princess Street, Alexandria, Virginia."

By Mr. Massie:

Q. When did you give that card up?

A. I don't know what time of day it was. I give it to Mr. Merchant.

Q. Is that the Deputy Sheriff?

A. Yes, sir.

Q. Did you give it to him the day Mr. Tucker was there to see you the first time?

A. I'm not sure.

Q. Did Chief Menefee talk to you that day?

A. Yes, sir.

Q. Did you talk to him about Mr. Tucker being there to see you?

A. Yes, sir.

Q. Did you talk to Mr. Merchant about that note that you had signed?

page 14 } A. I don't know.

Q. Did you talk to Chief Menefee about a note that you had signed directing or asking your mother to let Mr. Tucker represent you?

A. I'm not sure.

Q. Whose suggestion was it that you write the note?

A. Well, I don't know. I just asked him—I didn't ask him—kind of how you would say it. I just said I don't know exactly how you would say it.

Q. I understand that, but whose idea was it that you write a note? Yours or Mr. Tucker's?

A. Well, I guess it was both of us. I guess I would have been willing to write the note.

Mr. Massie: Your Honors, I would like to introduce the card and the note as Commonwealth's Exhibits 1 and 2.

Judge Marshall: Without objection, it is submitted.

Will you have the reporter mark them, Mr. Marshal?

(The card and note referred to were marked Commonwealth's Exhibits 1 and 2, respectively, for identification.)

Mr. Massie: That is all of this witness.

Buford Kibler.

CROSS EXAMINATION.

By Mr. S. W. Tucker:

Q. When Mr. Tucker first came to the jail to see you, he asked you about what had happened up there at the
page 15 } place the other night, didn't he?

A. A little bit about it.

Q. Didn't he tell you at that time he was representing Flynn?

A. Yes, sir.

Q. He told you that Flynn had been down to Alexandria to see him?

A. Yes, sir, Flynn and Robertson.

Q. Flynn and Robertson had been to Alexandria to see him?

A. Yes, sir.

Q. Flynn and Robertson were two men who were in trouble with you?

A. Yes, sir.

Q. Now, at the time he was talking to you, he had a pad and was making notes, didn't he?

A. Yes, sir.

Q. And you told him that Downing and Newman had passed out?

A. Yes, sir.

Q. And you told him that Downing and Newman hadn't done anything, they were so drunk?

A. Yes, sir.

Q. You said someone named Robertson was throwing a pop bottle against the car?

page 16 } A. Yes, sir.

Q. And you told him about somebody hitting on the trunk of a car?

A. Yes, sir.

Q. And you said that Flynn or somebody else might have broken the glass?

A. Yes, sir.

Q. Then you told him you were on probation for breaking and entering, didn't you?

A. Yes, sir, I guess so.

Q. And you asked him did he think that was going to cause your parole to be revoked?

A. I don't know.

Q. Well, you told him you were on probation?

Buford Kibler.

A. Yes, sir—I don't know whether I did or not. I don't remember.

Q. But did you ask him didn't he think, or did he think, that your parole would be revoked because of this?

A. I don't know. I don't remember talking about parole.

Q. Didn't he ask you if you had a lawyer?

A. Yes, sir.

Q. When that—didn't he tell you you ought to have one?

A. I don't know.

page 17 } Q. He did tell you that on this question of his representing you, he would represent you if your parents approved?

A. Yes, sir. I told him it was up to my parents.

Q. I see.

You said that Mr. Ewell was a court-appointed attorney for you?

A. Yes, sir.

Q. When did you first see Mr. Ewell? After you got arrested?

A. I don't know. He come to see me after they appointed him.

Q. After they appointed him? He came to see you before the preliminary hearing?

A. I don't know.

Q. Did Mr. Ewell or somebody else come to see you after Mr. Tucker was in to see you?

A. Mr. Phillips and somebody else.

Q. Wasn't that somebody else Mr. Ewell?

A. I don't know.

Q. You wouldn't say it was not Mr. Ewell, would you?

A. No, I wouldn't say it wasn't.

Q. Right after you left, or right after Mr. Tucker left, didn't Mr. Menefee or somebody ask you what was he doing there?

page 18 } A. Yes, sir.

Q. You signed an affidavit in this case, also before you went to a hearing before the Juvenile Court, too, didn't you?

A. I don't remember.

Q. You signed some papers there in the jail, didn't you?

A. Yes, sir.

Q. Mr. Phillips' secretary was there when you signed the papers, wasn't she?

A. Yes, sir.

Buford Kibler.

Q. Now, so that you talked to Mr. Phillips about this in the jail, didn't you?
A. Yes, sir.
Q. That was the time Mr. Phillips and this other gentleman were there in the jail cell?
A. Sir?
Q. That was the time when Mr. Phillips and this other gentleman whom I am referring to as Mr. Ewell were in the jail cell?
A. They never come in the jail cell.
Q. Or in the jail, talking to you?
A. Yes, sir.
Q. That was all before the preliminary hearing, wasn't it?
page 19 } A. It might have been. I don't know; I don't remember.
Q. You testified in this matter before the Committee, didn't you?
A. Before the—
Q. Here in this courtroom before the Committee. You have testified in this matter before, haven't you?
A. Yes, sir.
Q. All right. And the time that you testified before the Bar Committee was in August, on August 22 of this year, wasn't it?
A. I don't know.
Q. Well, the time that you got arrested was in June of this year, right?
A. Yes, sir.
Q. And the time that you testified before the Bar Committee was some months afterwards, probably August of this year, right?
A. Yes, sir.
Q. All right.
Now, at that time, you said you were first asked about what Mr. Tucker was doing there by the Chief of Police, didn't you?
A. Yes, sir.
Q. And then the question was asked you, "Who asked you to make the affidavit?" Now, I ask you who
page 20 } asked you to make that affidavit, or who asked you to sign this paper that you signed there in jail?
A. That woman, the secretary.
Q. That was Mr. Phillips' secretary?
A. Yes, sir.

Buford Kibler.

Q. Who was with him?
A. Mr. Merchant.
Q. Who is Mr. Merchant?
A. The Deputy Sheriff.
Q. All right.
Now, to whom had you given the information by which that paper was made up?
A. Mr. Phillips and Mr. Ewell, I guess.
Q. Mr. Ewell. At the time you testified before the Bar Committee, you didn't have any doubt that the other man was Mr. Ewell, did you?
A. No, sir.
Q. So it was Mr. Ewell with Mr. Phillips, wasn't it?
A. I don't know. There was another person with him. I can't remember who it was.
Q. Now, had you sent for Mr. Phillips or for Mr. Ewell?
A. No, sir.
Q. At the time that they came to see you, you were still expecting Mr. Tucker to represent you?
page 21 } A. That was what my parents were doing.
Q. If your parents had approved it, it would have been all right for Mr. Tucker to represent you, wouldn't it?
A. Yes, sir.
Q. You never made any complaint to anybody about the fact that Mr. Tucker had talked to you or offered to represent you?
A. What do you mean?
Q. That didn't make you angry, or you didn't get angry or dissatisfied about the fact that Mr. Tucker had offered to represent you, did you?
A. No, sir.
Q. It was perfectly all right with you if he had represented you?
A. It was up to my mother and father.
Q. That is right. All right.
I want to ask you, did you testify back in August that in the meeting between you and Mr. Tucker, money wasn't brought up?
A. No, sir, we said—the first time we seen each other, he said we would take care of that later. He said we would talk about the money later.
Q. He never said how much money he would charge you?

Buford Kibler.

A. No, sir.

Q. He never said he would charge you anything?

page 22 } A. He said we would talk about the money later. That is all the money we talked about.

Q. Do you remember that in August, you expressed that he said he would worry about that later?

A. Yes, sir.

Q. Now, which did he say?

A. He said we would worry about it later.

Q. He didn't say anything about we'd talk about it later?

A. Sir?

Q. He said he would worry about it later?

A. Yes, sir.

Q. So he didn't say he would talk about it later?

A. Well, that is about the same thing.

Q. Do you remember at the hearing, one of the attorneys was speaking about this matter of money, and he said it wasn't brought up at the first meeting, and you answered, "Nary a meeting?"

A. Sir?

Q. When one of the attorneys in August, Mr. Moore, was asking you, he asked you, "Was money brought up at the first meeting," and you answered him, "Nary a meeting."

A. I answered him what?

Q. "Nary a meeting." Not at any meeting?

A. No, sir.

page 23 } Q. I want to review—Mr. Moore asked you, "Did he discuss money at all with you this first meeting? Did he say anything about it?"

Your answer, "No, sir, money wasn't brought up.

"Question: It wasn't brought up at this first meeting?

"Answer: Nary a meeting."

Do you remember testifying to that?

A. No, sir.

Q. You don't deny that you did testify to that?

A. No, sir.

Q. You were under oath at the time you were testifying before the Committee?

A. Yes, sir.

Mr. Tucker: No further questions, sir.

Alma Kibler.

Mr. Massie: No further questions.
We call Mrs. Alma Kibler.

Thereupon,

ALMA KIBLER,
was called as a witness by counsel for the plaintiff, and having first been duly sworn, took the stand, and was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Massie:
Q. What is your name?
page 24 } A. Alma Kibler.
Q. Where do you live?
A. Front Royal.
Q. Are you the mother of Buford Kibler, who just testified?
A. Yes.
Q. I show you a piece of paper here marked Plaintiff's Exhibit 1, and ask you if you can identify that?
A. I guess so.
Q. Have you seen that before?
A. I guess so.
Q. Is that in the handwriting of your son, Buford Kibler?
A. I guess it is. It looks like his writing.
Q. I ask you if you have ever seen Otto Tucker before?
A. Well, I saw him when he come up to the house, and I saw him down here on the trials, that is all.
Q. Now, when did he come to your house?
A. Well, before they had that trial. I don't know exactly the date. But it was in June, I guess, or July. I don't know when they had the trial. But you know when they had the trial down here. He come up there about that piece of paper.
Q. Now, what time of day was it that he came
page 25 } to your home?
A. Well, it was around 3:30.
Q. Is that in the afternoon?
A. Yes, sir.
Q. Did he have this piece of yellow paper with him at the time?

Alma Kibler.

A. He had a piece of paper.
Q. Did he introduce himself to you?
A. Yes, he did.
Q. Did he tell you he was a lawyer from Alexandria?
A. He come up on the porch, and he says, "I'm an attorney from Alexandria."
Q. Did he say anything to you about representing your son, Buford?
A. He said he's been down to see my son, and he had a note that my son sent up.

Mr. Hill: I didn't hear the answer.

(The last answer was read by the reporter.)

By Mr. Massie:
Q. Did he show you this note at that time?
A. Yes, sir, he did.
Q. What else did he say to you?
A. Well, he just said—he showed me this note, and he said if I wanted him to represent him, sign underneath the note.
Q. Sign underneath this note?
page 26 } A. Yes, sir.
Q. Did you sign your name?
A. No, sir, I didn't sign anything.
Q. Why didn't you?
A. Well, I don't think that he should have done it, that's why.
Q. Did he mention what it would cost?
A. He says, "I'll tell you like I told the rest, $300."

Judge Marshall: What was your answer to that?
The Witness: He says, "I'll tell you like I told the rest, $300."

By Mr. Massie:
Q. Now, did he make any statement that he was representing some of the other people that were charged with this offense?
A. No, he didn't say anything about the others to me.
Q. What did you think he was talking about when he said the $300 was like the rest?
A. I didn't give that a thought, because I wasn't figuring on representing him, so I never thought a thing about it.
Q. Now, you didn't sign this piece of paper, and didn't

Alma Kibler.

take him up on his offer to represent your son. What did you tell him?

page 27 } A. I didn't tell him anything more. I just told him he would have to see my husband, that I couldn't tell him anything.

Q. Where was your husband at that time?

A. He was working.

Q. Did he then leave your premises?

A. Yes, he did.

Q. Did he make any statements as to whether or not he would be back?

A. Yes, he said he would be back later.

Q. Did your husband come home that afternoon?

A. Yes, he come home about quarter to five.

Q. When he got home, did you tell him about this?

A. Yes, I did.

Q. What did you all do?

A. When I told him about it, he got in the car and left. Me and him and I think my daughter.

Q. What one?

A. Gathaline.

Q. Did you leave anybody at home?

A. My other daughter.

Q. And what is her name?

A. Barbara Ann.

Q. Gathaline is how old?

page 28 } A. Fifteen.

Q. How old is Barbara Ann?

A. She's 19.

Q. Was Barbara Ann there when Tucker came to you and talked to you about this?

A. No, sir.

Q. She came after he had gotten there?

A. Yes, sir.

Q. Was anybody else at home beside yourself at the time you talked to Mr. Tucker?

A. My daughter.

Q. Which one?

A. Gathaline.

Q. Gathaline was home? Where was she when you talked to Mr. Tucker?

A. Standing right there with me.

page 29 } Q. Was this on the porch of your home?

A. She was standing in the door facing. I was

Alma Kibler.

just out of the door facing. I was standing against the door facing, and she was right behind me.

Q. When you left home with your husband, where did you go?

A. We come down here to the office.

Q. What office is that?

A. Mr. Merchant's office.

Q. Is that the sheriff's office?

A. The sheriff's office.

Q. Did you see Mr. Merchant?

A. Mr. Slaughter.

Q. Mr. Slaughter?

A. Yes.

Q. Did you tell him?

A. I told him about it.

Q. You told Mr. Slaughter about Mr. Tucker, coming up and talking to you about the case?

A. Yes, I did.

Q. Did you discuss it with the sheriff at that time?

A. I told him about him being up there, but I can't recall the words I said to him. I don't remember. I just told him he had been up there.

Q. Then did you leave the sheriff's office?

page 30 } A. I left the sheriff's office, and went back to the car.

Q. Did you go back to the sheriff's office that day?

A. Yes, I did, but I didn't remember it.

Q. You remember it now?

A. I remember now going back, but I didn't remember it at that time.

Q. Was anybody with you?

A. My husband.

Q. The second time?

A. Yes, sir.

Q. Was he with you in the sheriff's office the first time?

A. No.

Q. Now, what did you talk about with the sheriff the second time you went in?

A. I don't think I said anything. I don't know.

Q. Did your husabnd talk to him?

A. I think he told him about his being up there. I don't remember. I can't recall a word was said. I just remember I went over to see him.

Q. Did you object to Mr. Tucker—

Alma Kibler.

Mr. Hill: Your Honor, I submit that is entirely irregular and leading. He can ask her what they talked
page 31 } about, and we can object if anything is objectionable, but I don't think he has the right to ask her if it was objectionable.

Judge Marshall: We think it is a leading question, Mr. Massie. Objection sustained.

By Mr. Massie:

Q. What was your feeling about Mr. Tucker coming on your property to talk to you about this matter?

A. Well, I feel this way about colored people. I think they should tend to their race and the whites tend to theirs. That is the way I feel towards them. If we couldn't have a white attorney, I didn't want him to have a colored one.

Q. Did you want him coming up there?

A. No, sir, I didn't.

Q. Did you tell that to the sheriff?

A. I don't know whether I did or not. I think I did tell Mr. Merchant. I don't know if I told Mr. Slaughter or not, but I remember telling Mr. Merchant that.

Mr. Massie: I think that is all of the witness.

CROSS EXAMINATION.

By Mr. Hill:

Q. Now, Mrs. Kibler, Mr. Tucker drove to your place in a car, did he not?

A. Yes, sir.

page 32 } Q. And there were someone else in the car with him, was there not?

A. Yes, sir, there were two other colored people.

Q. And he came up on your porch? Got out of the car?

A. Yes, sir.

Q. He told you he was Otto Tucker, a lawyer from Alexandria, did he not?

A. Yes, sir.

Q. He told told you he was representing some of the other boys involved in this matter?

A. No, he never told me that.

Q. But he did tell you he had talked with your boy?

A. Yes, he did.

Alma Kibler.

Q. And he had a note from your son relative to this representing him?

A. Yes.

Q. Now, Mrs. Kibler, if the fact that he was a Negro attorney was sufficient for you to reject him, why didn't you just tell him, "I don't want you representing my son?"

A. My husband is the head of the house.

Q. Just answer my question, please.

A. That is the reason I told him that.

Q. But you didn't tell him that at the time.

page 33 } A. I told him I couldn't tell him nothing.

Q. I'm saying when he came up on your porch, he was a Negro lawyer, and it is perfectly obvious he was a Negro. There is no question about that.

Judge Waddell: She has answered your question, Mr. Hill.

Mr. Hill: I had another variation, sir.

Judge Waddell: Well, ask the other question, but don't repeat it.

Mr. Hill: Your Honor, I think I have the right on cross examination to make some preliminary remarks to sum up my questions.

Judge Waddell: All right, go ahead, but she has answered your question.

By Mr. Hill:

Q. Now, Mrs. Kibler, wasn't the only reference to money made when you asked him what it would cost?

A. I didn't ask him what it would cost. He said, "I'll tell you like I told the rest, $300."

Q. Why would he say, "I'll tell you like I told the rest, $300?"

A. I didn't ask him any questions about it.

Q. You didn't ask him any questions about what it would cost?

A. No, sir.

page 34 } Q. Do you deny—

A. Deny what?

Q. Please let me ask my question. Do you deny that no mention was made of money until you asked him what it would cost?

A. He says, "I'll tell you like I told the rest, $300."

Q. All right, we agree on that. And then you told him he would have to wait for you to talk to your husband.

Alma Kibler.

A. I told him, "I can't tell you nothing. You'll have to see my husband."

Q. He would have to wait until your husband came home, come back, and see your husband?

A. Shall he see him or didn't see him. I wouldn't have nothing to do with it.

Q. But you did tell him come back to see your husband?

A. Yes, I did.

Q. And he left?

A. Yes, he did.

Q. Now, when he came out to your house, the only thing he showed you was this note, is that correct?

A. That is right.

Q. You subsequently signed an affidavit, did you
page 35 } not?

A. For Mr. Phillips, yes.

Q. For Mr. Phillips?

A. And his office girl, I guess you would say. It was his office girl brought it up there for me to sign.

Q. You testified about that when you were up here before, did you not? Weren't you asked some questions about it?

A. Yes.

Q. As a matter of fact, you were asked did you sign it on 24 June, is that correct?

A. I don't know. I signed it.

Q. You were asked whether or not you read the affidavit?

A. Well, I can't say I read it. I just glanced at it. I wouldn't say I read it. It was—I can't recall that I read them. I just glanced over them as I signed the notes.

Q. Don't you recall one of the attorneys who constituted the Committee, Mr. Smith, asked you, do you recall him asking you this question:

"Do you recall in that affidavit that the affidavit said as follows:

'That the said Otto L. Tucker showed me a contract which
he asked me to sign, agreeing to pay him $300
page 36 } to represent my son Buford, but I did not sign
the contract?' "

A. I said he showed me a note.

Q. And your answer was, "He didn't."

That is correct, isn't it?

A. I said he showed me the note that Buford wrote, and

said if I wanted him to represent him, to sign on the bottom.

Q. But when you testified in August, you denied that he had given you a contract of employment, stipulating some $300. You denied that, didn't you?

A. I didn't say he asked me about a contract.

Q. In other words, he didn't?

A. I told you all what he done.

Q. Have you ever told anyone that he did that?

A. I told her just exactly what I have told—I never told nowhere but her.

Q. Have you ever told anyone at any time that he tried to get you to sign a contract for $300?

A. No, I have never told nobody.

Q. That is all.

Mr. Massie: That is all, Mrs. Kibler.

I call Gathaline Kibler.

Thereupon,

GATHALINE KIBLER,

was called as a witness for and on behalf of the page 37 } plaintiff, and having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Massie:

Q. What is your name?

A. Gathaline Kibler.

Q. Would you speak up so everybody can hear you?

A. Gathaline Kibler.

Q. Where do you live?

A. 428 Criser Road, Front Royal.

Q. Is that with your mother and father?

A. Yes, sir.

Q. How old are you?

A. 16.

Q. Miss Kibler, do you recall, last June, Mr. Otto Tucker coming to your home?

A. Yes, sir. He didn't come into my home. He came up on the porch.

Q. Where were you?

A. Standing in the doorway.

Q. And was your mother there?

Gathaline Kibler.

A. Yes, sir.
Q. Did you hear him in conversation with your mother?
A. Yes, sir.
page 38 } Q. Did he show any paper to your mother?
A. Yes, sir.
Q. Did you see the paper?
A. Yes, sir.
Q. I show you here Plaintiff's Exhibit No. 1, and ask you if this is the paper he showed to your mother?
A. Yes, sir.
Q. Now, when he showed that paper to her, did he also identify himself as a lawyer?
A. Yes, sir.
Q. Did he make any statement about wanting to represent your brother, Buford?
A. Yes, sir. He said that he had a note from my brother to show mamma, and he said if she wanted him to represent my brother, all she would have to do would be to sign that note.
Q. Did he make any statement of what it would cost?
A. I think he did.
Q. What did he say?
A. He said he would tell her like he told all the rest, the fee would be $300.
Q. Did your mother accept the employment?
A. She told him she couldn't tell him a thing, he would have to come back and see my father.
Q. Did he make any statements as to whether
page 39 } or not he would be back?
A. Yes, sir, he said he would be back later in the evening.
Q. Did you stay there?
A. No, sir.
Q. Did your mother or father stay there?
A. No, sir.
Q. What did you all do?
A. We went to town.
Q. Did your father come back after Mr. Tucker had left?
A. Yes, sir.
Q. When you came to town, where did you go?
A. I think we went to the jailhouse.
Q. To the jailhouse?
A. Yes, sir.
Q. Did you go in or stay outside?

A. I stayed outside.

Mr. Massie: That is all.

CROSS EXAMINATION.

By Mr. Hill:

Q. Miss Kibler, at the time that Mr. Tucker came up on your porch to talk with your mother, you were standing in the doorway, is that correct?

A. Yes, sir.

page 40 } Q. And the automobile Mr. Tucker came up in, that was right out of, just a few feet, from your porch, is that correct?

A. Yes, sir.

Q. And there were two colored persons in the automobile other than Mr. Tucker, is that right?

A. Yes, sir.

Q. Mr. Tucker walked up on the porch and introduced himself to your mother?

A. Yes, sir.

Q. And he showed her the note that Mr. Massie just showed you?

A. Yes.

Q. Did you look at the note, too?

A. Yes, sir.

Q. And the note—then after this, your mother told him he would have to see your father, did she not?

A. Yes, sir.

Q. Then she told him about what time your father would be home, didn't she?

A. I guess so.

Q. Do you recall testifying in this matter last August?

A. I don't know.

Q. You do remember coming down here?

page 41 } A. I remember coming down here, but I don't remember—

Q. And talking about this same series of questions you're now being asked, a lawyer asking you?

A. Yes, sir.

Q. And you were asked about money at that time, weren't you, this other time you were here, whether or not any mention of money was made?

A. I guess so.

Gathaline Kibler.

Q. Now, I'll ask you this. Do you know Mr. Whiting, a lawyer named Mr. Whiting?

A. No, sir.

Q. But you do remember that you were questioned by several of these lawyers who were sitting around the table at that time?

A. There were several here, but I was only questioned by one.

Q. Do you recall him asking you, "Oh, yes, did you hear any amounts of money mentioned?" Any such question as that?

A. I don't remember.

Q. Let me ask you this. According to the transcript, you were asked, "Oh, yes, did you hear any amounts of money mentioned?"

You replied, "Yes, sir, mamma asked how much
page 42 } it would *it would* be, and he said the fee would be
$300. He told the rest of them that and that is what it was."

Isn't it a fact, Miss Kibler, that your mother asked him what it would cost, and he said, "I told you like I told the rest of you, $300," or words to that effect?

A. I don't know.

Q. Recalling now about it, did the conversation come up?

A. I know he said the money would be $300, but I don't know how it was brought up.

Q. Well, if you said in August—your memory of this was better in August than it is now, wasn't it?

A. Yes, sir.

Q. And you don't deny that in August you said, "Yes, sir, mamma asked how much it would be and he said the fee would be $300?"

A. No, sir, I don't deny it.

Q. Before you testified in August, you were under oath? Just as you are under oath now, they put you under oath in August when you testified, did they not?

A. Yes, sir.

Q. Have you talked with anybody about this matter since August?

A. No, sir.

Q. No one at all?

page 43 } A. No, sir. I forgot about it.

Mr. Hill: O. K. That is all.

Emmett L. Merchant.

RE-DIRECT EXAMINATION.

By Mr. Massie:

Q. Miss Kibler, just a moment. Did you talk to me the other day about this matter?

A. Oh, yes, sir.

Q. When you say you haven't talked to anybody about it, what do you mean?

A. Not until you come over there and asked me about it.

Q. You mean you hadn't talked to the family or anybody else about it, or your friends?

A. No, sir.

RE-CROSS EXAMINATION.

By Mr. Hill:

Q. You say you talked to Mr. Massie about it a few days ago?

A. Yes, sir.

Q. That just slipped your mind?

A. I thought you meant just anybody, not him.

Q. I see. Well, you talked to Mr. Massie about it. Do you mean to say that you, your mother, your father, your brother, haven't discussed this matter since then?

page 44 } A. Maybe mamma has asked me a couple of things about it and I have told her.

Q. Have you talked to Mr. Phillips or anybody else about it since then?

A. No, sir.

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EMMETT L. MERCHANT,

was called as a witness for and on behalf of the plaintiff, and having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Massie:

Q. What is your name?

Emmett L. Merchant.

A. Emmett L. Merchant.
Q. What is your occupation?
A. Deputy Sheriff of Warren County.
page 48} Q. Mr. Merchant, on 22 June 1959, were you on duty at the jail of Warren County?
A. Yes, sir, the sheriff and I were both on duty that day.
Q. Did Otto Tucker come to the jail?
A. Yes, sir.
Q. About what time?
A. Just about 11:00 or 11:30.
Q. Was anybody with him?
A. I didn't notice anybody. There could have been.
Q. Did he ask for anyone?
A. He asked the sheriff could he see Kibler, sir.
Q. Did he ask for anyone else?
A. Not at that time.
Q. Did you get Kibler for him?
A. Yes, sir, I went back and got Kibler.
Q. That is Buford Kibler?
A. Yes, sir.
Q. Did he talk to Buford Kibler?
A. Yes, sir.
Q. Whereabouts?
A. In the conference room office we have there, off the sheriff's office.
Q. About how long were they in conference?
A. Oh, I would say about 20 minutes to a half
page 49 } hour at that time.
Q. And after the conference was over, did Mr. Tucker make any statements as to whether or not he would be back?
A. Yes, it was lunch time, and Kibler had to go to lunch, and he stated to the sheriff that he would be back later.
Q. Did he come back that afternoon?
A. Yes, sir.
Q. About what time?
A. Around 1:00, or probably a little after.
Q. Whom did he see at that time?
A. He came in, and I went back and got Kibler and brought him back.
Q. Did he again talk with Kibler in the conference room?
A. Yes, sir.
Q. How long did he talk to him this time?
A. I don't think much longer than it was the first time, sir.

Emmett L. Merchant.

Q. All right.
Now, did he talk to him at any other time?
A. Not while I was there.
Q. Did he talk to anyone else that afternoon?
A. Yes, sir, after he finished with Kibler, I went
page 50 } up and got Newman and whichever ones were still in there. He talked to them.
Q. Did he talk to Newman then?
A. Yes, sir.
Q. Was that in the conference room, also?
A. Yes, sir.
Q. Now, did Mr. and Mrs. Kibler come to the jail that afternoon?
A. Yes, sir, they came down late that afternoon, sir.
Q. Was that before or after Mr. Tucker had been there the second time?
A. That was after.

Mr. Hill: May it please the Court, in a way, it seems Mr. Massie is asking him irrelevant questions. There doesn't seem to be any denial of the fact that Mr. Tucker went to the jail and talked to these witnesses. I don't see the relevance or materiality, or anything else, of this kind of evidence.
Judge Marshall: Isn't this admitted in the answer?
Mr. Massie: I'm not too well acquainted with the answer. I can check it.
Judge Marshall: I think the answer does admit that he went to the jail before he had ever met Kibler.
Judge Waddell: I don't see how the fact that Mr. and Mrs. Kibler came to the jail has any relevance, or other people.

page 51 } By Mr. Massie:
Q. Now, did Kibler make any statement to you when you took him back to the jail cell after Mr. Tucker had spoken to him the first time?

Mr. Hill: One moment.
Your Honor, I think that is objectionable. The defendant wasn't present.
Judge Marshall: How would that be admissible, unless the respondents were present?
Mr. Massie: The question would be, I think, by the Court to decide whether it is *res gestae* of the act that had been committed in the office there.

Judge Marshall: The objection is sustained.

Mr. Massie: All right, sir.

I have no further questions of this witness.

Mr. Hill: No questions.

Mr. Massie: Mrs. Cary.

Your Honor, I'm going to preface this witness' testimony by stating a reason. I think we can probably shorten this by stating that the reason for calling her is because of the affidavit being brought out.

Judge Marshall: The affidavit is not in evidence at this time?

Mr. Massie: No, sir, it is not.

Judge Marshall: It wouldn't be admissible?

page 52 } Mr. Massie: The affidavit would not be admissible, I don't think. The only other evidence we would have would be along the line of the deputy sheriff's testimony as to the activities that went on.

Judge Marshall: Apparently there is no issue as to that. There is no issue as to the averment that the respondent entered the jail and conferred with Kibler without having previously met him or having been requested by Kibler to do so.

Mr. Hill: No, sir, no issue about that.

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OTTO L. TUCKER,

was called as a witness in his own behalf and, having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Hill:

Q. Will you state your name and address?

A. Otto L. Tucker. My mailing address is 901 Princess Street, Alexandria, Virginia. I live in Fairfax County, Virginia.

Q. Are you a member of the Bar?

A. I am a member of the Virginia Bar.

Q. How long have you been a member of the Bar?

Otto L. Tucker.

A. I was admitted to practice in the State of Virginia in 1946, in the City of Alexandria, a corporaton court; August, I think the month was.

Q. Now, directing your attention to early June of this year, were you consulted by some persons relative to your employment as an attorney in this county?

A. Yes, I was.

Q. Will you tell the Court the first knowledge that you had with reference to this case, at the time you were contacted relative to your employment?

A. Yes. First, I was in my office, and I received a telephone call asking me if I would be in my office, and it
page 67 } was parties out of Front Royal whom I had never seen before, to my knowledge. I indicated to them I would wait in my office for them.

Subsequent to that, the same day, to my office came one Flynn—that is his last name; I can't think of his first name just now—and DeWitt Robertson. Flynn was a Negro, a colored man, and DeWitt Robertson was a white boy.

So they came to my office, and both of them presented to me a newspaper clipping of a certain affair that went on in this area. They both indicated to me that they felt that they could not get a fair trial if they retained an attorney in this county. Robertson indicated to me that he was not there for the purpose of retaining me, because he was going to get a lawyer out of Luray. But Flynn came expressly for the purpose of retaining me.

I interviewed Robertson, I talked with Flynn, and I later talked with Flynn's mother, and I think it was the parent of the defendant who was concerned with this matter, named Matthews.

Q. Was all of this in your office in Alexandria?

A. All of this was in my office in Alexandria. I think to be exact it was on a Friday afternoon.

Q. Now, subsequent to that conversation, did you accept the employment to come to Front Royal?

A. I did, and I arrived in Front Royal on Mon-
page 68 } day morning. When I arrived, there was assembled Mrs. Washington, who was the mother of Flynn, and a Mr. Downing, who is the father of one of the defendants, a Mrs. Newman, who is the mother of one of the defendants, and Mrs. Matthews, and there were some other people around as well. This was a Monday, yes, and I recall Mrs. Washington informed me that her son was back in jail. Downing at this time was the one defendant who was out of jail, and

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Mrs. Washington informed me that her son was in jail because of a disorderly conduct charge that had come about on the day—on the Saturday before.

Now, what had happened there was—

Q. Well, let's not get into that. Let's stick to this case.

A. Very well.

Q. Now, you talked with these parents, is that correct?

A. I did.

Q. After talking to these parents, what was the next thing you did on that morning in reference to the matter you had then been retained concerning?

A. I went with one Mr. Downing over to the county jail. When I walked in, the Sheriff was there. I told him who I was, and I told him that I wanted to talk with, and I named off my clients, Newman, Downing, Flynn, Matthews, and I told him I also wanted to talk with Kibler. In
page 69 } fact, I asked him first to send me in Kibler, but Kibler was not sent in first, it was one of the other clients that was sent in first.

I talked with him about what went on concerning the charge under the Mob Violence Act.

Q. Did you also talk to Kibler that morning?

A. I did.

Q. Now, with reference to the conversation with Kibler—well, first, when you went into the jail, whom did you see?

A. I saw the Sheriff.

Q. Was anyone else there at that time?

A. No, sir.

Q. Now, you talked to—who was the first person you talked to, then? I mean among the defendants?

A. I'm sure that Flynn was the first one I talked to among the defendants, because at the time I was talking to Flynn, Flynn pointed out to me the Deputy Sheriff driving up, parking his car.

Q. Then, after you talked with Flynn, then whom did you talk to?

A. At this time, I'm not certain. But subsequent, after talking to Flynn, I talked with Kibler.

Q. You did talk with Kibler?

A. I did talk with Kibler.

Q. Now, will you relate to the Court just what
page 70 } occurred when you talked to Kibler? What was your purpose in talking to him, to start with?

A. My purpose in talking to Kibler was finding out his ver-

sion of what went on at Low Water Bridge, finding out the part my clients had in the thing he was charged with.

Q. Tell the Court what occurred.

A. All right. The Sheriff or Deputy—I don't know which one brought him from the cell block to the conference room just off the Sheriff's office. But anyhow, when Kibler entered, I told him who I was, that I was a lawyer, and I told him who I represented. I told him I wanted to find out from him his version of what went on.

Kibler began to tell me certain things about it, and some things I made notes on, other things I didn't, because I had prior notes, and it was also a matter of trying to visualize or fit in a scene, that I did not know anything or too much about.

In discussing that, he asked me if his probation would be revoked, and I found out from him that he, subsequent and apparently not too long, had been found guilty of breaking and entering. The first question I asked him was, did he have a lawyer. His answer was no.

Q. When you asked him did he have a lawyer, what was your purpose in asking him did he have a lawyer at that time?

A. If he had a lawyer, I was going to ask him,

page 71 } you talk to your lawyer about your parole; that is his business, not mine.

When I found out he did not have a lawyer, I began to consult with him to try to alleviate his mind upon the breaking of his parole. My conversation was mostly that the best thing for him to do was to be concerned about the present matter that he was concerned with, because the outcome of that would determine whether or not his probation would be broken, would be revoked.

Q. Now, was there any conversation between you relevant to your representing him?

A. Yes, there was. When I, or somewhere in that interim, after I had told him that he had better be most concerned about the present incident, and I tried to draw attention back to what I came there for—that is, interviewing him as a witness—we got off on an excursion again, and he was talking about this case, and he asked me who did I represent, or put it this way, he said, "You're representing Newman and," and he enumerated all of them except Robertson.

I said yes.

Somewhere else we went into this talk on his probation. So again I insisted to him his best job was—his best position

would be to retain a lawyer. So then he informed me that his parents were too poor to retain a lawyer, and further on he indicated that he wished that I could represent page 72} him. He asked me what was I charging the others, and I'm satisfied that I told him that I was charging the others $300.

Q. Now, when did the question of his signing the note that has been introduced into evidence—that was signed on your yellow pad, is that correct?

A. Yes. Now, this is when this came about. At the time that I mentioned that I was charging the other people $300, we had some conversation, and he impressed me with the idea that he was without money and could not retain counsel. So I told him that he was a minor and I couldn't represent him, and it was a matter that his parents did not have money, but that I would represent him anyhow. So his parents didn't know me, and if he wanted me to represent him, to write a note to his parents telling them that, and I gave him my pad.

He asked me what must he write, and I said, "Well, you know what to write your own mother. Just ask to give me permission to represent you."

With that he proceeded to write, and there was no further coaching or anything else, so far as what he said about telling him to write. It was in answer to his question, what must he write to his mother, and that was my reply to that question.

Q. All right. He wrote the note. This was still page 73 } on your pad; is that correct? You didn't tear it off?

A. No, it was never torn off.

Q. Now, a card has been introduced into evidence. Did you give him a card?

A. Yes, I gave him that card as he was leaving the cell block—I don't mean the cell block. When he was returning to the cell block.

Q. In other words, his recollection of that is correct, that you handed him the card just as he was going back?

A. Yes.

Q. Now, subsequent to your talking to young Kibler, did you talk to any of the other defendants that day?

A. Yes, I had talked with Flynn, I had talked with Robertson, and I talked with one other there in the jail.

Q. That is what I'm talking about. Did you talk with anybody else in the jail?

A. Yes. I talked with one before I talked to Kibler.

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Q. I'm talking about after you talked to Kibler.

A. Yes, because came lunch, and I was informed that it was lunch hour, and I indicated to, I believe it was the sheriff, that I would come back, rather than disturb the routine. I had two or three others to talk with.

Q. So you went away for lunch, and you returned to jail?

A. Yes.

page 74 } Q. And you talked to some of the other defendants when you returned to jail; is that correct?

A. That is right.

Q. After you talked to all of them that were in the jail, what did you do then?

A. After that I left. I went back and I talked with the parents—yes, because the parents were waiting for me to return.

Q. Did you tell the parents the purport of your conversation with Mr. Kibler?

A. Yes, I did. I'm pretty much certain that I did, because one of them went over to where he lived, because that is—Kibler tried to give me directions on how to get to his home, and I wasn't familiar with this area. I'm pretty much certain that I must have made some mention to the parents, because one of them took me over there.

Q. Did you discuss with the parents of the other defendants the possibility that you might represent young Kibler?

A. Yes, I did. And my reason for that was this: I had informed them of what I was charging them, and knowing that Kibler could not afford to pay a lawyer, my idea was to represent him for free, but I didn't want these parents, those that I was charging a fee, to feel that I was being unjust to them.

page 75 } Q. Did you explain to them what your position was, why you made that suggestion?

A. That's right. I explained to them that Kibler was a good witness, and so long as he told the truth he would be a good witness for some of those involved.

Q. Now, after your conference with the parents of these children, these boys you were representing, you say Mr. Downing and his son piloted you to the Kibler home?

A. To the Kibler home.

Q. Will you tell us what occurred when you got to the Kibler home? Whom did you see?

A. I drove up and I stopped the car. Mr. Downing and his son stayed in the car. I don't know what attracted the Kiblers' attention, but, anyhow, Mrs. Kibler and her daughter

Otto L. Tucker.

came out, and I introduced myself, told her who I was, told her that I had seen her son in jail, because I represented the others, the four colored lads that were concerned in this matter. I told her that Kibler had informed me that he would like for me to represent him, and gave her the pad that had his note on it. The mother informed me that she couldn't tell me a thing about it until her husband, the boy's father, came home.

Q. Now, did she tell you when the boy's father would be home?

page 76 } A. Yes, she did indicate it, and I told her that I still had some work to do in Front Royal, and this was more or less in the direction towards Alexandria, and if I had not finished before time for the father to come home, I would stop back.

Q. Now, did you request any money—I'll put it this way: Was any question of money discussed between you and Mrs. Kibler?

A. No.

Q. Did you ask her to sign a contract, or anything of that nature?

A. I did not.

Q. Did you ask her to sign this—was this note that has now been introduced into evidence, was that still on your pad at that time?

A. That was still on my pad.

Q. Did you ask her to sign that?

A. I did not.

Q. What did you do with it?

A. Do? I don't get you.

Q. I say, what did you do with the note, physically?

A. I left it on the pad. I offered it to her, but she acted a bit concerned, like she didn't want to take it, so I just left it there on the pad.

Q. In other words, you held the pad out for her; is that right?

page 77 } A. That's right. And I was in the process of tearing it off, but she just gave a negative answer. So at that, I just let it hang there to the pad.

Q. Now, this was in the summertime when you went out to see Mrs. Kibler, was it not?

A. That is right.

Q. The weather was warm, or was it raining, or anything of that nature?

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A. No, the weather, as well as I can remember, was a dry day, or a hot day.

Q. Did Mrs. Kibler indicate—you say the attitude was negative. Did she say she did not want you to represent her son?

A. No. All she said was she couldn't tell me a thing until her husband got home.

In other words, she couldn't make the decision, the decision would be up to her husband. That is the attitude I got.

Q. Whereupon you left; is that right?

A. That is right.

Q. Now, did you subsequently go to the Kibler home?

A. A second time?

Q. Yes.

A. Yes, on the way out of town to Alexandria, I stopped back by there.

page 78} Q. You didn't see Mr. or Mrs. Kibler?

A. No, I saw another sister, and I asked for them. She indicated to me the father had been there and gone.

I said, "Well, I can't wait any longer." And I was on my way out to Alexandria.

Q. Now, did you ever receive any communication from Mr. Kibler indicating whether or not he wanted you to represent his son?

A. No, I was back here to the jail on the day of the preliminary hearing, and I went into the jail house, yes, to see one or two of my clients—how many now I have forgotten—still remaining in the jail, and also to see Kibler. I went there to indicate to Kibler that I hadn't gotten his parents' consent to represent him.

Q. Did you tell him that?

A. I told him that. Even before I started to tell him that, he indicated to me he hoped he hadn't gotten me into trouble, and began to enumerate to me the individuals who had been talking to him—Mr. Phillips, Mr. Ewell, Mr. Merchant, and so forth.

So I told him, well, I didn't see where he would get me into any trouble if he told the truth.

Q. You also told him you had not contacted his parents up to that time?

A. That is right, I did.

page 79} Q. Now, did you later see his father?

A. Yes, on the way into the Juvenile Court. There is a bench in the corridor just before you get into the

Court, and I recognized his mother and his sister. His mother said to his father, "Pa, there is that man who was over to the house to see about Bo," and his father said to me, "I don't think I want you to represent him."

I said, "Very well," and kept on walking.

Q. That was all the conversation you had?

A. That is the conversation that took place.

* * * * *

CROSS EXAMINATION.

By Mr. Massie:

Q. Mr. Tucker, when you first went to jail on the morning of the 22nd of June, of this year, you say you had talked to whom?

A. I had talked with Flynn, I had talked with DeWitt Robertson, I had talked with Downing. Those were the three who were charged with the same thing. I had talked with the parents, or at least one parent, of Flynn, of Newman, of Downing, and Matthews.

Q. In other words, the only ones you had to talk to, then, were Newman, Matthews, and Kibler?

A. I didn't get that.

page 80 } Q. The only ones you had not talked to of the six involved in this charge were Newman, Matthews and Kibler?

A. Newman, Matthews, and Kibler, and I wanted to see Flynn, because I was employed to represent him on the disorderly conduct charge, and he was back in jail.

Q. Now, who did you ask for first when you went in there?

A. Really, I can't—oh, yes, I do. I first introduced myself, and I told the sheriff who I wanted to see. I first called for Kibler.

Q. You called for Kibler first?

A. Yes, but the sheriff didn't bring him first.

Q. Who did he bring?

A. I believe it was Flynn, because at the time I went in, no one was in there but the sheriff.

Q. What time of day was that?

A. Oh, this was in the morning.

Q. What time?

A. That I can't pinpoint exactly, because I can't recall what time I got up there.

Otto L. Tucker.

Q. You spoke of the fact that lunch was served and it interrupted your talk with Kibler.

A. No, it didn't interrupt it. I had finished with Kibler and Kibler was being returned to the cell block when I was informed it was lunch period. That is when I

page 81 } indicated to the sheriff or the deputy that I could come back after lunch.

Q. So you talked to Flynn first, and then talked to Kibler that morning?

A. Yes.

Q. When you talked to Flynn, who brought him to you?

A. As well as I can remember, it was the sheriff.

Q. When you talked to Kibler, who brought him to you?

A. I can't say, because I was in the room when I returned Flynn, as well as I can remember, and I stayed inside, so I can't remember who did bring him in.

Q. You say when you first went in there, the sheriff was by himself?

A. As far as I can remember.

Q. And you and Mr. Downing were there with the sheriff?

A. Mr. Downing went to the jail with me, yes.

Q. That is what I say.

A. Yes.

Q. So that morning you only saw the sheriff in the office?

A. When I first went there, yes.

Q. And when you left, you saw him; is that right?

A. Now, I don't recall whether it was the sheriff or the deputy who was there when I left, but I recall when the deputy sheriff drove up, because he was pointed

page 82 } out to me, driving up, out of the window, by Flynn.

Q. Now, as I understand your testimony, you stated to Kibler that you would not charge him anything, that you would represent him for nothing?

A. Well, as best I can remember, when Kibler was feeling around—let me put it that way—to find out what I was charging the other people, I'm pretty much certain that I must have indicated it to him. Anyhow, when I suggested to him that I would represent him, subject to his parents' approval, because he was a minor, the question came up about money, and I told him not to be concerned about money, because I wasn't. I'm sure I gave him the impression that I would represent him for free.

Q. Now, did you tell him you would represent him for nothing?

Otto L. Tucker.

A. I'm certain that I did.

Q. A moment ago you said it was your impression. Now I want you to know whether you are definite about this or not.

A. I'm certain that there was conversation about the fee with him, but there was no conversation—put it this way—with him that I was charging him a fee.

Q. Now, at that time you had talked only to Flynn and to Robertson about this case?

A. And Downing.

Q. And Downing?

page 83 } A. Yes.

Q. Did you know that you were representing all the others, without having talked to them?

A. I don't get your question.

Q. There were two more that you hadn't talked to when you talked to Kibler, Newman and Matthews?

A. Oh, yes, their parents had retained me.

Q. Now, when you talked to Kibler, you then knew that you were representing all of them except him?

A. Uh-huh. I wasn't representing Robertson.

Q. You did represent Robertson, did you?

A. I was not representing Robertson.

Q. You did represent Robertson before this Court, did you not?

A. I represented Robertson before this Court, but at the time I talked to Kibler I was not representing Robertson.

Q. Now, when you talked to Kibler about this matter, he told you what happened out there, you say?

A. Yes.

Q. Now, from what he told you, he would be guilty of this offense, wouldn't he?

Mr. S. W. Tucker: If your Honor please, I don't know if we are trespassing too far now on things of a confidential nature. The attorney cannot elicit what he told page 84 } him and what he didn't tell him.

Judge Marshall: Objection sustained.

By Mr. Massie:

Q. Now, when you went out to Kibler's house, that was here in Warren County, wasn't it, the town of Front Royal?

A. Yes, I guess it is the town of Front Royal.

Q. And his mother was standing there on the porch?

A. She came out on the porch.

Q. His sister was there, too, wasn't she?

Otto L. Tucker.

A. Yes.

Q. They were standing there together?

A. I don't know what you call together, but at least—

Q. Well, as close as these two stenographers are together?

A. I guess they were.

Q. Not over a couple of feet apart? Put it that way.

A. Well,—(gesturing).

Q. They were standing at the doorway to their house, on the porch?

A. They were standing on the porch.

Q. Now, the day of preliminary hearing, was Mr. Ewell present?

A. I don't know. I didn't know him then. In fact, I wouldn't know him now, if he was present. I have seen him, but I wouldn't recognize him.

page 85 } Q. Was Mr. Phillips present?

A. Oh, yes, he was present.

Q. Did you talk to Kibler that morning before the preliminary hearing?

A. Yes.

Q. Did you talk to him about the case?

A. No, I didn't, because he started off talking to me, about hoping he hadn't gotten me into trouble, and began to tell me who had been talking to him. Of course, at that particular time the names didn't mean too much to me. I told him that as long as he told them the truth, it made no difference to me, or words to that effect.

Q. When you talked to Kibler the first time, did you advise him of your full relationship with the other defendants in that charge?

A. I did.

Q. Did you advise him that his interest might be different than their interest in the case?

Mr. Hill: Well, I think, first, your Honor, before you would be obligated to advise him, you would have to determine whether or not his interest was different from the others. He may not have advised him because he may not have seen any conflict of interest.

Judge Marshall: Counsel didn't suggest that there was conflict of interest. He merely asked whether

page 86 } or not it was possible that one might exist.

The objection is overruled.

The Witness: What was your question?

Otto L. Tucker.

By Mr. Massie:

Q. Did you advise him that there might be a conflict of interest in his relationship with the other boys involved in this case?

A. Frankly, I don't think I advised him that.

Q. You were willing to represent him without advising him that?

A. I apparently didn't see at that time any conflict of interest.

Q. In other words, you feel that Kibler's interest was the same as the others?

A. Now, you mean?

Q. At the time you talked to him, in the jail, and so on.

A. Yes, I did.

Q. He had given you a full disclosure of what he knew about the case?

A. I think he had.

Q. He advised you that he was not the one that had thrown the bottle?

Mr. S. W. Tucker: Objection, again, for the same reason. I think now again we are getting close to the con-
page 87 } fidential nature of what he told him and what he didn't tell him.

Judge Marshall: That wasn't the reason I sustained the other objection.

What is the relevance?

Judge Waddell: Not whether he advised him or whether he—

Mr. Massie: I understand that.

Judge Waddell: I don't see that it is relevant to this.

Mr. Massie: The relevancy I have in mind is that the reason for the solicitation being money primarily, of course, and because of the relationship of these other clients—that the situation of these other clients in regard to the charge made against them.

Judge Marshall: The bill of particulars doesn't set forth any such complaint.

Mr. Massie: Of course, the bill of particulars was very broad, but in the last paragraph I state that he is in violation of Subsection 6 of 54-74.

Judge Marshall: Will you read that section?

Mr. Massie: (Reading)

Otto L. Tucker.

"Subsection 6: 'Any malpractice or any unlawful or dishonest or unworthy or corrupt or unprofessional conduct,' as used in this section, shall be construed to include the improper solicitation of any legal or professional business or employment, either directly or indirectly, or the
page 88 } acceptance of employment, retainer, compensation or costs from any person, partnership, corporation, organization, or association, with knowledge that such person, partnership, corporation, organization, or association, has violated any provision of Article 7 of this Chapter, or the failure, without sufficient cause, within a reasonable time after demand, of any attorney at law to pay over and deliver to the person entitled thereto, any money, surety or other property, which has come into his hands as such attorney; provided, however, that nothing contained in this article shall be construed to in any way prohibit any attorney from accepting employment to defend any person, partnership, corporation, organization, or association accused of violating the provisions of Article 7 of this Chapter."

Judge Marshall: That doesn't contain any provision as to representing persons with conflicts of interest, does it?

Mr. Massie: It would in regard to unworthy or corrupt or unprofessional conduct.

Judge Marshall: Well, there is a canon on that, isn't there?

Mr. Massie: Canon 6 is the one I questioned him about.

Judge Marshall: Is there another canon?

Mr. Massie: Canon 27 is the one on solicitation. I think that is the one, advertising, direct or indirect.

page 89 } Judge Marshall: Do you actually contend that there was a conflict of interest?

Mr. Massie: I think conceivably there was. The conflict of interest being that one was principal and another was accessory, or principal in the second degree.

Judge Waddell: We can't go into all that evidence, can we, to determine that fact?

Mr. Massie: No, sir. But what I'm getting at is the manner in which he solicited this person.

Judge Waddell: Isn't your case solicitation, and nothing else?

Mr. Massie: I think it is.

Judge Waddell: All right, sir.

Judge Marshall: Objection is sustained.

Otto L. Tucker.

By Mr. Massie:

Q. Mr. Tucker, do you know of the ruling of the Supreme Court of the United States made in the last ten or fifteen years, in which it is required that the courts appoint attorneys for oppressed indigent persons in felony cases?

A. I don't know.

Q. You know that the Courts of Virginia do that, don't you?

A. I know they do when it gets to a grand jury indictment, but they don't, as a general rule, prior to
page 90 } that time.

Q. This boy you knew was charged with a felony?

A. In fact, I am also familiar with the practice of Judge Thomas, who is a County Court Judge in Arlington. Of course, he never assigned any lawyer to represent a client on a preliminary hearing, but he always tried to have some lawyer to at least volunteer his service to represent a client there.

That has also been the practice of Judge Hall, in Alexandria. Judge Hall, in Alexandria, has continued a case for an individual on preliminary hearing to retain counsel, if possible.

Q. And where a man cannot retain counsel because of lack of funds, the Court appoints counsel for them?

A. Not until after the grand jury indictment.

Q. Your intention here, original intention, was to represent this man all the way through the courts; is that right?

A. What do you mean, original intention?

Q. When you offered to represent him, you were going to represent him on the felony charge in the Circuit Court, if the grand jury indicted him?

A. Well, I don't know what could have developed afterwards. I'm certain that afterwards, if I had seen some conflict of interest, then I would have tried to right
page 91 } the situation. But at that particular time, you must remember that you had six people here charged under a mob violence statute, that they had acted collectively, concertedly. At that time, I wasn't too familiar with the statute, but I was familiar enough with it to be concerned as to whether or not it would be a joint trial or just what. But I definitely did not see any conflict of interest at that time.

Otto L. Tucker.

Q. You were charging all the others, weren't you?
A. What is that?
Q. You were charging all the others?
A. Charging those that I represented, yes.
Q. Why was it that you would take one without a charge?
A. Why? Because he indicated to me that his parents were too poor, and asked me to represent him, or wished that I would.
Q. Do you go around representing people that can't afford counsel, just for nothing?
A. Well, it depends. I feel if I have the service to offer and wish to do it, I have never seen anything wrong with it. I have represented people for nothing.
Q. This fee that you were charging, was that to take the case all the way through the Circuit Court?

Mr. Hill: Your Honor, I don't see that that has anything to do, one way or the other. Either he is guilty of
page 92 } some conduct or he isn't. Whether he was going to do it preliminary trial and charge another fee in Circuit Court, it wouldn't alter the situation.
Judge Marshall: Objection overruled.
Will you answer that question, please?
The Witness: What is the question, please?

(Pending question read.)

The Witness: The fee I was charging who?

By Mr. Massie:
Q. You said you were charging the others $300 apiece.
A. That was for handling their matter on through the Circuit Court?
Q. Yes.
A. Yes, it was.
Q. Now, they had sought you out, is that right, the other five?
A. The other four.
Q. Forgetting Robertson for the moment, at that time the other four had sought you out?
A. Either directly or through their parents, yes.
Q. But neither Kibler or his parents had ever sought you out?

A. No. Kibler soughting me out was at that moment when I'm talking to him as a witness, and he asked me to represent him, or indicating to me he wished he could have page 93 } me to represent him. And there I informed him that I couldn't do business with him, I would have to do business with his parents. I would represent him, subject to his parents' approval. And the reason I couldn't do business with him was because he is a minor. He couldn't make a contract with me, even if I had been out to make one with him.

Mr. Massie: I think that is all.

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page 99 }

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JOHN DOWNING, SR.

was called as a witness for and on behalf of the defendant and, having first been duly sworn, was examined and testified as follows:

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CROSS EXAMINATION.

By Mr. Massie:

Q. Mr. Downing, you state that the first time you saw him was on the morning of the 22nd, when he came here to discuss the representation of all of you?

A. Yes.

Q. And the idea was for him to go up to the jail and talk to Kibler and see if he could represent him, too?

A. I didn't say he went up to the jail to talk to Kibler? There was another boy, two more boys there, at the time.

Q. But you talked to all of them?

A. To get them all.

Q. The idea was to represent them all?
A. The idea was, yes.

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EMMETT L. MERCHANT,
was recalled as a witness for and on behalf of the plaintiff and, having previously been duly sworn, was examined and testified further as follows:

DIRECT EXAMINATION.

By Mr. Massie:
Q. Mr. Merchant, on the 22nd of June, 1959, were you at the Sheriff's office in Warren County, when Otto L. Tucker came to that office?
A. Yes, sir.
Q. What did he do when he came?
A. He introduced himself to the Sheriff.
Q. Did he ask to see anybody?
A. He asked to see Buford Kibler, sir.
Q. Did he ask to see anybody else?
A. Not at that time.
Q. I gather from that that he did on some other occasion ask to see some other people.
page 118 } A. After he asked to see Kibler twice, he asked to see others.
Q. On what occasions did he talk to Kibler?
A. At that time, when he came in; and when he came back after lunch.
Q. Who got Kibler for him?
A. I did.
Q. Did he talk to Flynn first that morning at the jail?
A. I didn't get Flynn, no.

Mr. Hill: I didn't hear the answer.
The Witness: No, sir.

Emmett L. Merchant.

By Mr. Massie:

Q. When he called for Kibler, was that the first person he called for?

A. Yes, it was.

Q. You were on duty that morning?

A. Yes, sir.

Q. Did he see Kibler before he saw anybody else?

A. Yes, sir.

Q. Approximately what time did Tucker leave that afternoon, leave the jail?

A. I'm not sure on that, sir. I think he talked to them all, sir.

Q. Well, were you in the jail that afternoon
page 119 } when Mrs. Kibler came down?

A. It was late in the afternoon when she came down, yes.

Q. Did Mrs. Kibler make any statement as to whether Tucker had been at her home?

Mr. Hill: If your Honor please, there is no question but what he went to her home.

Judge Waddell: It has been admitted.

Mr. Massie: I have another question that that is leading up to.

Mr. S. W. Tucker: He wasn't present.

Judge Marshall: Go ahead.

By Mr. Massie:

Q. About what time was the first time she came to the jail?

A. It was late in the afternoon, sir. I don't know just exactly what time it was.

Q. Now, did she make any statement as to whether or not Mr. Tucker had asked to represent her son, and for a fee?

A. She did.

Q. What did she mention?

Mr. S. W. Tucker: I submit, your Honor, that all of this is hearsay, so far as the respondent goes. He wasn't present. He doesn't know anything about this. It is all objectionable.

Judge Marshall: The objection is overruled.

page 120 } By Mr. Massie:

Q. What fee did she mention?

A. Mrs. Kibler told the Sheriff that Mr. Tucker tried to get her to sign a paper for $300.

Q. What was that for?

A. A fee to represent Kibler.

Q. Did you then report this matter to the Commonwealth's Attorney?

A. I did.

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FRANCIS SLAUGHTER,

was recalled as a witness for and on behalf of the plaintiff and, having previously been duly sworn, was examined and testified further as follows:

page 123 } DIRECT EXAMINATION.

By Mr. Massie:

Q. Sheriff, were you in your office on the afternoon of June 22nd of this year, when Mrs. Kibler came to the office?

A. Yes, sir.

Q. Did she make any complaint about Mr. Tucker coming to her home seeking to represent her son?

A. Mr. Massie, I can best answer that by saying she came there for what I considered to be advice. She told me that Mr. Tucker had been there.

Mr. Hill: Pardon me. Just a minute, sir.

If your Honors please, I think we are going over the same thing you ruled out from the other witness.

Judge Marshall: Isn't this just what you objected to, yourself, Mr. Massie?

Mr. Massie: No, sir.

Judge Marshall: I don't know what the Sheriff is about to say, of course.

Mr. Massie: I can change that question.

By Mr. Massie:

Q. When she came to your office that afternoon, did she

Francis Slaughter.

make any statement as to whether or not Mr. Tucker had charged her a fee to represent her son?

A. Yes, sir, she did.

page 124 } Q. What fee did she mention?

A. $300.

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A Copy—Teste:

H. G. TURNER, Clerk.