

No. 31713 *Lawyer Disciplinary Board v. Theodore R. Dues, Jr., a member of the West Virginia State Bar*

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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Benjamin, Justice, dissenting:

I must respectfully dissent from the decision of my colleagues to reduce the sanctions recommended by the Lawyer Disciplinary Board in this matter. While the record demonstrates mitigating factors in Mr. Dues' actions, I cannot overlook the impact of Mr. Dues' violations to his clients and, therefore, to the justice system.

In the instant matter, Mr. Dues admits to committing thirty-nine violations of the Rules of Professional Conduct. Although Mr. Dues suffered from physical and mental health problems, these violations caused serious harm to his clients. By impairing his client's legal rights, including in some cases missing filing deadlines, Mr. Dues violated a sacred trust between an attorney and client. Viewing the entire record, I believe the sanctions recommended by the Lawyer Disciplinary Board were appropriate and fair to adequately address the seriousness of Mr. Dues' conduct, in light of his demonstrated mental illness, and

to attempt to restore his former clients' confidence in the legal profession.¹

Depression is an insidious and terrible disease historically stigmatized by our society. It hurts not only the person inflicted, but all those around that person. We must do everything possible to encourage persons suffering from this disease to seek and receive the help that they need. However, our compassion for the person inflicted should not include condoning harm to innocent persons arising from a failure or refusal to get appropriate help for a mental illness, such as depression. By enforcing appropriate consequences for acts and/or omissions which harm their clients, we encourage attorneys to seek help at the earliest possible moment.²

I am particularly disturbed by the majority's rejection of the eighteen month recommended suspension and its decision to permit Mr. Dues to serve as a mental hygiene

¹ I take this opportunity to suggest that we, as a Court, consider creating a rule which would, as a condition of practicing law in West Virginia, mandate all attorneys actively practicing in West Virginia, with some reasonable exceptions, to maintain legal malpractice insurance coverage generally sufficient to protect clients, and to produce proof of such coverage at the time annual bar dues are paid.

² Any member of the West Virginia State Bar suffering from a mental illness, such as depression, or abusing alcohol or drugs may seek assistance from our State Bar and are encouraged to do so. An attorney seeking assistance or who believes he or she may be in need of assistance may contact Executive Director Tom Tinder at (304) 558-7993 or (866) 989-8227. Mr. Tinder and the State Bar's Committee on Assistance and Intervention will keep the contact confidential and place the attorney in contact with appropriate professionals who will work with the attorney to both treat the illness and protect his or her clients.

commissioner for a period of twenty-four months under the supervision of the chief judge of the Circuit Court of Kanawha County. A mental hygiene commissioner, like an attorney, is in a position of public trust. Simply because Mr. Dues has, to date, not experienced problems when functioning as a mental hygiene commissioner does not mean problems will not arise before his severe depression is adequately controlled. I believe the recommended eighteen month suspension was appropriate and would have given Mr. Dues time to recover without the stress of either private practice or the duties of a mental hygiene commissioner.

Likewise, the majority's decision to allow Mr. Dues to return to the practice of law unsupervised after the twenty-four month period so long as he has documentation that his severe depression is under control is cause for concern. I agree with the recommendation of the Lawyer Disciplinary Board that any return to the practice of law should be supervised for a period of at least two years. Depression can be a recurrent illness and stress is often a trigger for relapse. Under the majority's approach, there is no safety net to protect Mr. Dues' clients should the stress of a return to the practice of law trigger a relapse of severe depression. The Lawyer Disciplinary Board's recommendation best protects the judicial system. I truly hope the Mr. Dues is able to recover from his physical and mental health problems. However, I find the absence of such safety net to be unacceptable.

For these reasons, I respectfully dissent and would adopt the recommendations of the Lawyer Disciplinary Board.