IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket Number 19-0636

In Re: SCOTT A. CURNUTTE, a member of The West Virginia State Bar

Bar No. 5780

RESPONDENT'S BRIEF

Scott Curnutte

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STATEMENT OF THE CASE

Formal charges against Respondent were filed 11 July 2019 and served 18 July 2019. Respondent filed an *Answer* 21 August 2019.

A hearing was held 22 October 2019 before the Hearing Panel Subcommittee. Before the hearing, the Office of Lawyer Disciplinary Counsel and Respondent entered into written stipulations regarding the relevant facts, and aggravating and mitigating factors pursuant to RULE OF LAWYER DISCIPLINARY PROCEDURE 3.16. Those stipulations were admitted into evidence. At the hearing, Respondent and Diane Young, Pro Bono Coordinator, West Virginia Legal Aid, testified. Respondent's curriculum vitae was admitted into evidence.

The HPS' *Report of the Hearing Panel Subcommittee* was filed 13 February 2020.

On 16 March 2020, the Respondent filed an objection to the recommended disposition.

SUMMARY OF ARGUMENT

The Hearing Panel Subcommittee failed to acknowledge additional mitigating factors, and failed to balance those properly against the violations and aggravating factors. More, the HPS failed to balance the harm to the public against its recommended sanction.

STATEMENT REGARDING ORAL ARGUMENT

By Order entered 17 March 2020, oral argument is scheduled for 22 September 2020.

ARGUMENT

A. Standard of Review

In lawyer disciplinary proceedings, the West Virginia Supreme Court of Appeals applies the following standard:

> A de novo standard applies to a review of the adjudicatory record made before the [Lawyer Disciplinary Board] as to questions of law, questions of application of the law to the facts, and questions of appropriate sanctions; this Court gives respectful consideration to the [Board's] recommendations while ultimately exercising its own independent judgment. On the other hand, substantial deference is given to the [Board's] findings of fact, unless such findings are not supported by reliable, probative, and substantial evidence on the whole recordreviewing a final order entered by a circuit court judge upon a review of, or upon a refusal to review, a final order of a family court judge, we review the findings of fact made by the family court judge under the clearly erroneous standard, and the application of law to the facts under an abuse of discretion standard. We review questions of law de novo.
>
> Syllabus Point 3, *Comm. on Legal Ethics v. McCorkle*, 192 W. Va. 286, 452 S.E.2d 377 (1994).

Regarding the appropriate disciplinary action,

> In deciding on the appropriate disciplinary action for ethical violations, this Court must consider not only what steps would appropriately punish the respondent attorney, but also whether the discipline imposed is adequate to serve as an effective deterrent to other members of the Bar and at the same time restore public confidence in the ethical standards of the legal profession.
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> Syl. Pt. 3, *Comm. on Legal Ethics v. Blair*, 174 W. Va. 494, 327 S.E.2d 671 (1984).

B. The Hearing Panel Subcommittee failed to find additional mitigating factors.

The Office of Lawyer Disciplinary Counsel and Mr. Curnutte entered into written stipulations regarding the relevant facts, and aggravating and mitigating factors pursuant to RULE OF LAWYER DISCIPLINARY PROCEDURE 3.16.

The Parties stipulated to the existence of the following aggravating factors:

> (1) dishonest or selfish motive; (2) a pattern of misconduct in that the conduct involved multiple reporting years; and (3) substantial experience in the practice of law.
>
> (*Stipulations*, ¶ 25; *Report*, p. 10).

The Parties stipulated to the existence of the following mitigating factors:

> (1) Respondent does not have a prior disciplinary record in that while thirteen (13) complaints, not including the instant matter, have been filed against Respondent since he was admitted to practice in 1991, none resulted in any discipline being imposed on Respondent;[1] (2) full and free disclosure to disciplinary board and cooperative attitude toward proceedings; (3) good faith effort to rectify the consequences of his conduct; and (4) remorse.
>
> (*Stipulations*, ¶ 24; *Report*, pp. 10-11).

The Parties agreed Mr. Curnutte could present evidence of, and argue, additional mitigating factors. (*Stipulations*, ¶ 24). In that regard, Mr. Curnutte presented his own testimony, his curriculum vitae, and the testimony of Diane Young, Pro Bono Coordinator, West Virginia Legal Aid. That evidence was presented primarily in support of one

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1 During these proceedings, an additional complaint was filed against Respondent. That complaint was screened out by the Office of Disciplinary Counsel as not substantiated. Respondent does not know if the Order entered by The Honorable John Preston Bailey in connection with that complaint was received by the Office of Disciplinary Counsel. But, Respondent respectfully requests that Order be made a part of the record herein.

of the mitigating factors adopted by the Supreme Court of Appeals: "character or reputation." *Lawyer Disciplinary Board v. Scott*, 213 W.Va. 209, 216, 579 S.E.2d 550, 557 (2003) (*quoting*, ABA MODEL STANDARDS FOR IMPOSING LAWYER SANCTIONS, 9.31 (1992)).

Mr. Curnutte has contributed to the development of the law in multiple ways. Mr. Curnutte has been a member of the Governing Council of the West Virginia Law Institute from 2003 to the present. And, he has served as President of the West Virginia Law Institute from 2008 to the present. During that time, the West Virginia Law Institute has submitted numerous scholarly reports to aid the West Virginia Legislature.

Mr. Curnutte has actively participated in the West Virginia State Bar. Most recently, he has served as Co-chair of the Family Law Mediation Subcommittee, West Virginia State Bar, from 2018 to the present.

Mr. Curnutte has published several scholarly articles, two of which have been repeatedly cited by the Supreme Court of Appeals as persuasive authority: *Reforming the Law of Intestate Succession and Elective Share: New Solutions to Old Problems*, 93 W.VA.L.REV. (1990) (with Dean John Fisher) and *Preventing Spousal Disinheritance: An Equitable Solution*, 92 W.VA.L.REV. 441 (1989).

Mr. Curnutte has contributed to the practice of law by teaching various Continuing Legal Education courses from 2000 to the present.

Mr. Curnutte has contributed to the future of the law by teaching various courses at the West Virginia University College of Law continually from 2000 to the present.

Mr. Curnutte has an exemplary record of providing pro bono publico services to the citizens of West Virginia. Diane Young, Pro Bono Coordinator, West Virginia Legal

Aid, testified that Respondent has performed extensive pro bono publico work from 1991 (when he was admitted to the Bar) to the present. In fact, Ms. Young testified he has never declined to provide pro bono publico services when she has asked. In 1999, Mr. Curnutte was awarded the Kaufman Award by the West Virginia State Bar in recognition of the fact that he provided the most pro bono publico services during that year. And, Mr. Curnutte has served as a member of the Pro Bono Committee of West Virginia Legal Aid.

All of the foregoing were established by the testimony of Mr. Curnutte, his curriculum vitae, and the testimony of Diane Young. The Office of Disciplinary Counsel did not disagree about any of that evidence. In its *Report*, however, the HPS does not mention any of that evidence whatsoever. The HPS does not even acknowledge the evidence was presented, other than identifying Ms. Young as a witness in its recitation of the procedural history of the case. (*Report*, p. 2). Those admissions constitute error.

C. A suspension would severely harm a large group of people in an area of the State under-served by legal services.

Mr. Curnutte provides legal, guardian ad litem, and mediation services in a rural region of West Virginia which is under-served in each of the foregoing areas. At present, Mr. Curnutte has a caseload of approximately 125 civil, family law, and federal criminal cases, and serves as guardian ad litem for children in multiple family court circuits. That caseload does not reflect the approximately 100 family and civil cases (mostly family cases) he mediates each year.

A suspension of Mr. Curnutte's license would mean that approximately 125 clients would be bereft of representation. In an area like Charleston, Morgantown, or Martinsburg, perhaps those client could secure different counsel. But even there, those clients would suffer additional costs and delays. In a rural region like that served by Mr. Curnutte, there simply are not enough attorneys. Those clients would have to proceed pro se; those children would not have guardians ad litem to protect them. As to guardians ad litem and family law mediations, it is a fantasy to pretend they would actually occur; Family Courts in rural areas have an extremely restricted pool from which to draw.

The Hearing Panel Subcommittee failed to take those factors into account.

CONCLUSION

Mr. Curnutte's behavior was clearly wrongful and constituted a violation of his solemn obligations as an attorney. Mr Curnutte has never denied that wrongful conduct, and has been cooperative with the Office of Disciplinary Counsel.

On the other hand, the integrity of the profession demands that he be sanctioned: misrepresentation by an attorney upon any material issue cannot be tolerated.

It appears this case presents novel issues to the Supreme Court of Appeals. There have been multiple cases involving misrepresentations by attorneys with no clear result: some cases have resulted in suspensions, others in reprimands. But the financial responsibility disclosure requirement provides the public with an important source of information even if there has never been a single instance in which a consumer has ever relied upon it. Mr. Curnutte has never denied that he should be sanctioned.

Mr. Curnutte's service to the public, the Bar, and the profession should be acknowledged, but they are not a shield to insulate him from appropriate discipline.

In determining an appropriate sanction, the Supreme Court of Appeals cannot ignore the impact of its decision upon the residents of the State and the region of it that Mr. Curnutte serves. Suspension of Mr. Curnutte's license would punish at least 125 citizens of this State unreasonably.

Even if no citizen of this State has ever made a decision about whether or not to retain an attorney based upon the Bar's records regarding the financial responsibility requirement, that disclosure is mandated. And, crucially, Mr. Curnutte was not truthful about that disclosure from 2014 to 2017.

A public reprimand is warranted.

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