

IN THE SUPREME COURT OF APPEALS OF THE
STATE OF WEST VIRGINIA

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STATE OF WEST VIRGINIA ex rel.
OFFICE OF LAWYER DISCIPLINARY COUNSEL,

Petitioner

vs.)

No. 23-619

JAMES W. KEENAN, a member
of the West Virginia State Bar,

Respondent

BRIEF OF THE RESPONDENT JAMES W. KEENAN

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I. STATEMENT OF THE CASE

A. Procedural History

The Office of Disciplinary Counsel (hereafter ODC) filed a Petition, pursuant to Rule 3.27 of the Rules of Lawyer Disciplinary Procedure seeking the immediate suspension of the license to practice law of James W. Keenan. The Petition was filed on October 26, 2023 even though ODC knew or should have known that the Supreme Court of Appeals was scheduled to decide whether the law license of Mr. Keenan should be suspended pursuant to the Petition in Case No. 22-0510 on November 14, 2023. The Supreme Court of Appeals approved the recommended disposition of the Hearing Panel Subcommittee of the Lawyer Disciplinary Board in Case No. 22-0510 and entered an Order on November 15, 2023 which suspended the license of James W. Keenan for a period of six months, effective immediately. The Order permits Mr. Keenan to file a petition for reinstatement, pursuant to Rule 3.32 after the six-month suspension. That Order sets forth the requirement that prior to reinstatement, Mr. Keenan must complete an additional three hours of continuing legal education in ethics, specifically in the area of awareness and education in unwanted advances and/or sexual harassment / misconduct, which may be completed via electronic pre-recorded presentation, in addition to the ethics hours he is otherwise required to complete.

Finally that Order requires Mr. Keenan to pay the costs of the disciplinary proceeding pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

Mr. Keenan was suspended for six months on November 15, 2023 and will remain suspended unless or until the Supreme Court of Appeals grants his petition for reinstatement. Mr. Keenan is not eligible to seek reinstatement until May 15, 2024.

If Mr. Keenan files a petition for reinstatement, ODC will have an opportunity to respond to the petition.

Mr. Keenan is currently suspended from the practice of law and he has closed his office and has referred his clients to other attorneys. There are, therefore no clients “in critical need of protection at this time” and there is no “danger of irreparable harm” to those clients as alleged by ODC.

B. Response to Proposed Findings of Fact

1. The Respondent has no objection to Findings 1-3.
2. Findings of Fact 4-7 refer to an open criminal complaint pending in Fayette County Magistrate Court. ODC correctly states that it opened an investigation into that matter on August 10, 2023. The Respondent responded on September 1, 2023 and invoked his Fifth Amendment Constitutional right against self-incrimination. ODC has stayed the investigation in this matter until the underlying criminal matter is resolved. Findings of Fact 4-7 do not contain the facts of the alleged incident from the Respondent’s point of view. This honorable Court should draw no conclusions from the mere allegations of the Complaint.
3. The Respondent is licensed under West Virginia law to carry a firearm.
4. Finding of Fact 8-10 concern a Facebook post made by the Respondent on

July 14, 2023. On July 31, 2023, Judge Thomas Ewing sent a letter to ODC on behalf of himself and Judge Matthew England reporting the Facebook post. That letter reported that the Facebook post contained the statement “The WV State Bar ODC can go COITUS themselves.” By the time Judge Ewing sent his letter, he was aware that the Respondent had already removed the quote statement from the post as his letter states “It appears that Mr. Keenan has since removed this quoted statement from the post.”

5. The context of the Facebook post as the Respondent explained in the post is that ODC objected to his use of the “F” word with his clients so he made a number of statements substituting COITUS for the “F” word. Clearly, the statements (e.g. Pass the COITUSing butter!) were intended to be humorous and were not intended, in any way, to be threatening. Petitioner’s Exhibit 4 contains the entire post including the signature wherein the Respondent identifies himself as “Attorney at Law & Irish Poet, A Pretty Good COITUS er”. Mr. Keenan included his piece “COITUS” without the references to the West Virginia State Bar ODC in his fourth book “Poetry near a Lawyer, Collection IV of Poetic and Artful Expressions.”
6. The Respondent did post a poem on Facebook on July 31, 2023 and the signature line did include the phrase “Ready to Draw”. That poem was not directed to or sent to ODC and is in no way threatening to any person. This phrase is also included in Mr. Keenan’s fourth book.
7. Findings of Fact 12-17 concerns a text message that Respondent sent on September 21, 2023 to Jennifer Smith. That message contained language that

some may find offensive and that message invited Ms. Smith to engage in sexual activity. The Respondent incorrectly thought Ms. Smith would find humor in his text as they were social friends. The Respondent now understands that the text message was not welcomed and he extends a sincere apology for his language and his conduct.

8. Respondent has not made any additional unwelcomed contact with Jennifer Smith and the single text of September 21, 2023 should not be considered harassment. The Respondent made a single, written contact and being informed that Ms. Smith was not interested in his proposal, he has made no further contact.
9. Findings of Fact 18 concerns a hearing before Judge Ewing. The Respondent was unable to attend a Summary Judgment Motion hearing on September 15, 2023 due to health issues. Judge Ewing's Affidavit (Petitioner's Exhibit 10) correctly reports that Respondent did file an objection to the request for summary judgment and "in that objection, however, Mr. Keenan clearly identified himself as a material witness to the real estate transaction at issue and the grantor's capacity to make the disputed deed, thereby raising concerns about his ability to ethically represent Mr. Maddy in the case under Rule 3.7 of the Rules of Professional Conduct." The Respondent contends and will so testify if this issue is the subject of a hearing, that he informed the client, Mr. Maddy, prior to the hearing that he was a material witness and could not represent Mr. Maddy at the hearing of September 15, 2023."
10. Summary Judgment was granted in favor of the plaintiff based upon a question of law. The defendant did not appeal that ruling. The ruling of the Court on the

Summary Judgment was not based on Mr. Keenan's absence at the hearing of September 15, 2023. If Mr. Keenan had been able to attend the hearing, he would have announced that he was a material witness and was therefore unable to provide representation to the client.

C. Conclusions of Law

The Conclusions of Law of the ODC lack merit. ODC contends this Respondent has violated Rule 8.4(b) which states "It is professional misconduct for a lawyer to (b) commit a criminal act that reflects adversely on the lawyer's honesty, trust worthiness or fitness as a lawyer in other respects." The Respondent has been charged with a crime and that matter has not been resolved. ODC stated that it has stayed the investigation but ODC apparently contends the Supreme Court of Appeals should ignore the Respondent's rights to due process and the presumption of innocence and impose the sanction of suspension based upon the unresolved charge. Despite the claims of the ODC, there is no evidence before this Court that the Respondent has made threats of violence and harassment against the public and Court employees.

The claim that the Respondent violated Rule 8.4(d) is unfounded. There is no evidence that the Respondent has engaged in conduct that is prejudicial to the administration of justice.

II. ARGUMENT

ODC filed this Petition on October 26, 2023 pursuant to Rule 3.27 of the Rules of Lawyer of Disciplinary Procedure. The Petition and the Brief in support of the Petition seek the immediate suspension of Respondent's license to practice law indefinitely pursuant to Rule 3.27 and ODC requests, pursuant to Rule 3.29 of the Rules

of Lawyer Disciplinary Procedure that this Court authorize the Chief Judge of Fayette County Circuit Court to appoint a trustee to protect the interests of Respondent's clients. Rule 3.27 is not intended to provide an indefinite suspension.

The Court suspended the Respondent from the practice of law for six months by Order of November 15, 2023. That Order permits the Respondent to file a Petition for reinstatement after the six-month suspension and after the completion of other requirements. As a result of the Order of November 15, 2023, the Respondent is therefore already suspended until such time as a Petition for reinstatement is granted.

The Respondent already closed his office after notifying his clients to find other attorneys. There are, therefore, no clients of the Respondent in need of the "emergency" protection which ODC now seeks. The Court authorized the appointment of a Trustee in the Order of November 15, 2023.

The current suspension does not expire until May 15, 2024. There is no purpose in seeking the emergency suspension of a lawyer who is currently under suspension.

ODC is correct in stating "Rule 3.27 of the Rules of Lawyer Disciplinary Procedure should only be utilized in the most extreme case. Syl. Pt. 1, Office of Disciplinary Counsel v. Battistelli, 193 W.Va. 629, 630, 457 S.E.2d 652, 653 (1995). The instant case does not qualify as a "most extreme case".

In Battistelli, the Court considered the emergency suspension provision for the first time and ruled that the law license of the Respondent should be temporarily suspended until the underlying disciplinary proceedings against the Respondent have concluded. In that case, there were eleven pending Complaints against the Respondent including six complaints that the Respondent unfairly sought and received loans from

his clients. There were also allegations that the Respondent lied to Disciplinary Counsel regarding a real estate transaction and his agreement to return a \$15,000 retainer to a client.

In Office of Disciplinary Counsel v. Morgan, 242 W.Va. 667, 839 S.E.2d 145 (2020). ODC filed a Petition pursuant to Rule 3.27 seeking the immediate, interim suspension of the Respondent's law license pending the outcome of a twenty-two count Statement of Charges against the Respondent that was then being considered by a Hearing Panel Subcommittee. In that case, the Investigative Panel found probable cause to believe that the Respondent committed 134 instances of violating nineteen different Rules and the violations included repeated instances of mishandling clients' cases, dishonesty and the misappropriation of client funds. The evidence included a bank statement that showed that the Respondent's client trust account had a negative balance.

The Morgan Court granted the temporary suspension but also stated "Because of the extraordinary nature of this matter, where we are granting the ODC's request to suspend a lawyer before the proceedings on formal charges have been completed, it is necessary for the Lawyer Disciplinary Board to expedite its consideration of the charges." The Court ordered the Hearing Panel Subcommittee to file its final report on the pending Statement of Charges no later than sixty days after the granting of the immediate suspension.

Rule 3.27 of the Rules of Lawyer Disciplinary Procedure provides for "Extraordinary Proceedings" when there is sufficient evidence that a lawyer (1) has

committed a violation of the Rules of Professional Conduct or is under a disability and (2) poses a substantial threat of irreparable harm to the public.

ODC contends that the Respondent has violated Rule 8.4(b) and Rule 8.4(d). The only allegation that reasonably corresponds to Rule 8.4(b) is the July 26, 2023 criminal charge which does not justify the October 26, 2023 Petition seeking an emergency suspension of the Respondent. ODC has stated that it opened an investigation on August 10, 2023 and the Respondent made a response on September 1, 2023 and the investigation is stayed pending the outcome of the case in the Fayette County Magistrate Court. Unless that case results in a conviction, there is no competent evidence that the Respondent has violated Rule 8.4(b). Clearly, there was no emergency on October 26 arising from the July 26 criminal charge that was the subject of an investigation that ODC had already stayed.

Although the Petition is nonspecific, it appears that ODC argues that the Respondent has violated Rule 8.4(d) by engaging in conduct that is prejudicial to the administration of justice.

The Court found in Lawyer Disciplinary Board v. Hatfield, 2020 WL 7223352 that the lawyer violated Rule 8.4 (d) where there were clear discussions between the attorney and the prospective client regarding his potential representation of her divorce proceedings, and in the same discussions, the attorney offered to represent the client but quoted a retainer amount knowing she could not afford it and told the client he really wanted sex in exchange for representation.

In Lawyer Disciplinary Board v. Stanton, 2010 695 S.E.2d 901, 225 W.Va. 671, the Court found that the attorney's conduct in deliberately misrepresenting to the

corrections officials at the jail that he represented an inmate in order to arrange a meeting with the inmate violated the professional rules that prohibited a lawyer from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation or engaging in conduct that was prejudicial to the administration of justice.

In Lawyer Disciplinary Board v. Martin, 2010, 693 S.E.2d 461, 225 W.Va. 387, the Court found that the attorney's mishandling of an estate while acting as the executor which included payment of fees to himself from estate funds without any documentation or accounting to substantiate his claims resulting in harm to the estate's beneficiaries violated the professional rule prohibiting lawyers from engaging in conduct prejudicial to the administration of justice.

The Court in Lawyer Disciplinary Board v. Albers, 2006, 639 S.E.2d 796, 219 W.Va. 704 ruled that the attorney was subject to discipline for her conduct leading to convictions for misdemeanor destruction of property and misdemeanor trespassing of her former husband's home and stated the attorney violated the Rules of Professional Conduct by engaging in conduct that is prejudicial to the administration of justice "in that her behavior caused injury not only to her former husband and the legal system but also to the public in general.

In the cited cases, the lawyer engaged in conduct, as an attorney, which directly harmed a client or demonstrated dishonesty or resulted in the attorney being convicted of a crime.

The Respondent in the instant case did not engage in comparable conduct. This Respondent is charged with posting messages on Facebook which were intended to be humorous. He is also charged with sending a single text message to an adult woman

that he knew socially inviting her to join him for sexual activity. The recipient was not a client and the text message was not published to the public in any way. The Respondent is also charged with missing a single hearing. None of the charged conduct constitutes a basis for finding that the Respondent has engaged in conduct that is prejudicial to the administration of justice.

Even if this Court would find that the Respondent has violated a Rule of Professional Conduct, there is no evidence that the conduct of the Respondent poses a substantial threat of irreparable harm to the public.

The Respondent has a Constitutional right to post his thoughts and opinions on Facebook or in the press. Those postings were not of a threatening nature and certainly are not evidence that this Respondent poses a substantial threat of irreparable harm to the public.

The Respondent is charged with sending a single text message to Jennifer Smith on September 21, 2023. Although the text message was of a sexual nature, it cannot fairly be considered evidence that the Respondent poses a substantial threat of irreparable harm to the public. The text message was a private communication to an adult woman. The Respondent has made no further contact with Ms. Smith and a single text message cannot be fairly described as harassment.

The Respondent is charged with failing to attend a hearing on September 15, 2023. There is no basis for claiming that missing a single hearing constitutes sufficient evidence that the Respondent poses a substantial threat of irreparable harm to the public. The Respondent has closed his office and has no clients and therefore has no future hearings scheduled. The Respondent had informed the client that he would be

a material witness and could not, therefore, represent the client at the hearing. The Respondent did not choose to miss the hearing but had health issues that prevented him from attending that hearing. Missing a single hearing is not a basis for finding that this Respondent poses a substantial threat of irreparable harm to the public.

ODC has failed to support the Petition for an emergency suspension of the law license of the Respondent. Despite the claim by ODC that “Respondent’s regular and vociferous self-reports of being “armed” and “ready to draw” constitute evidence that Respondent is “currently a danger to the public and needs to be removed from the practice of law indefinitely” there is no basis to take the extraordinary measure of suspending the license of the Respondent pursuant to Rule 3.27.

Rule 3.27 is not a means of removing a lawyer from the practice of law indefinitely as prayed for by ODC. It is intended to provide a means of providing an interim suspension of a lawyer to protect the clients and the public until the underlying disciplinary proceedings before the Lawyer Disciplinary Board have been completed. (Rule 3.27(c))

Rule 3.27 (c) provides that after ODC filed a report to the Supreme Court of Appeals, the Respondent should have been given a hearing in not less than thirty days before the Supreme Court of Appeals. The Petition was filed on October 26, 2023 and Notice (Exhibit 1) was provided to counsel for the Respondent on October 27, 2023. Counsel for the Respondent requested a hearing by letter of November 21, 2023. (Exhibit 2) On December 5, 2023 an Order (Exhibit 3) was entered providing a briefing schedule and setting oral argument for April 16, 2024. (The Order, in error, states

2023). Rule 3.27(c) provides for the hearing within thirty days because the Rule is an extraordinary measure designed to provide for an emergency interim suspension.

The ODC brief argues that this honorable Court should consider aggravating factors in considering what sanctions should be imposed. Under Rule 3.27, the Court should only consider whether ODC has satisfied the requirements for imposing an emergency, interim suspension until the underlying disciplinary proceeding before the Lawyer Disciplinary Board have been completed. No consideration of aggravating factors is appropriate or necessary pursuant to Rule 3.27.

Similarly, ODC improperly argues in the “Sanction” section of the brief that this Court should consider “what steps would appropriately punish the respondent attorney, but also whether the discipline imposed is adequate to serve as an effective deterrent to other member of the Bar and at the same time restore public confidence in the ethical standards of the legal profession.” Committee on Legal Ethics v. Walker, 178 W.Va. 150, 358 S.E.2d 234 (1987). ODC improperly urges this Court to follow the Walker decision despite the fact that Walker was not a Rule 3.27 case and was rather a case seeking the annulment of that respondent’s law license after proceeding by a subcommittee and a full Committee were completed.

This case was brought as a Rule 3.27 matter and there have been no proceedings by a Hearing Panel or a Committee. This Court need only consider whether there is sufficient proof that the Respondent violated Rules 8.4 (b) and 8.4 (d) of the Rules of Professional Conduct and whether the Respondent poses a substantial threat of irreparable harm to the public. The purpose of a Rule 3.27 interim suspension is to protect clients and the public until the underlying proceedings are completed. Here,

there are no underlying proceedings in progress and there are no clients in need of protection and there is no evidence that the Respondent poses a substantial threat of irreparable harm to the public.

III. CONCLUSION

ODC has failed to produce sufficient evidence that this Respondent has violated the Rules of Professional Conduct. ODC has also failed to produce sufficient evidence that the Respondent poses a substantial threat of irreparable harm to the public.

This Respondent is currently suspended from the practice of law and will remain suspended until such time as this honorable Court grants his petition for reinstatement. The Respondent is not eligible to seek reinstatement until May 15, 2024. The Respondent has closed his law office and has no clients requiring protection. There is no need for an emergency, interim suspension.

This honorable Court should dismiss the Petition of ODC for all the reasons stated herein.

**James W. Keenan,
By Counsel.**

/s/ Joseph M. Farrell, Jr.

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CERTIFICATE OF SERVICE

The undersigned counsel for Respondent, James W. Keenan, does hereby certify that a copy of the foregoing **“BRIEF OF THE RESPONDENT JAMES W. KEENAN”** has been filed with the Clerk of the Court through the File&ServExpress filing system, and served upon counsel of record through the File&ServExpress filing system, this 22nd day of February, 2024.

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