SUPREME COURT OF APPEALS OF WEST VIRGINIA

LAWYER DISCIPLINARY BOARD,
Petitioner,

v.

Docket No. 23-746

SCOTT A. CURNUTTE, a member of the
West Virginia State Bar,
Respondent.

RESPONDENT'S BRIEF

/s/ Scott Curnutte
SCOTT CURNUTTE
W.VA. BAR # 5780
CURNUTTE LAW
P.O. BOX 1605
ELKINS, WV 26241
304.636.5904
CURNUTTELAW@GMAIL.COM

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STATEMENT OF THE CASE

Scott Curnutte was admitted to The West Virginia State Bar on September 23, 1991, and is subject to the disciplinary jurisdiction of the Supreme Court of Appeals of West Virginia. He practices as a solo lawyer, with his office in Elkins, Randolph County, West Virginia.

The Investigative Panel of the Lawyer Disciplinary Board filed a *Statement of Charges* alleging violations of the WEST VIRGINIA RULES OF PROFESSIONAL CONDUCT which was served upon Respondent 5 January 2024. Respondent filed an *Answer* 26 January 2024.

An evidentiary hearing was held by a Hearing Panel Subcommittee 29 April 2024 in Charleston, West Virginia.

On 24 October 2024, the Hearing Panel Subcommittee filed its *Report*. Therein, it recommended a finding that Respondent had violated Rules 1.3, l.4(a)(3), 1.4(a)(4), 3.2, and 8.l(b) of the WEST VIRGINIA RULES OF PROFESSIONAL CONDUCT regarding Count I of the Statement of Charges, Rules 3.2 and 8.1(b) regarding Count II, Rule 8.1(b) regarding Count III, and Rules 3.4(c), 8.l(b), and 8.4(d) regarding Count IV. The Hearing Panel Subcommittee recommended that Respondent's license to practice law be suspended for six months, and that he be required to petition for reinstatement per Rule 3.32.

The Office of Disciplinary Counsel filed its consent to the recommendation of the Hearing Panel Subcommittee on 8 November 2024. Respondent filed his objection on 27 November 2024.

ARGUMENT

I. Standard of Review.

While the Hearing Panel Subcommittee makes recommendations in lawyer disciplinary matters, the Supreme Court of Appeals is the final arbiter. So, as noted in Syllabus Point 3 of *Committee on Legal Ethics v. McCorkle*,[1] its review is plenary:

> A de novo standard applies to a review of the adjudicatory record made before the [Hearing Panel Subcommittee of 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 [HPS's] recommendations while ultimately exercising its own independent judgment. On the other hand, substantial deference is given to the [HPS's] findings of fact, unless such findings are not supported by reliable, probative, and substantial evidence on the whole record.

II. Individual charges.

As discussed *infra*, Respondent admits he violated WEST VIRGINIA RULE OF PROFESSIONAL CONDUCT 8.1(b) because he did not timely respond to inquiries by the Office of Disciplinary Counsel. Rule 8.1 provides, in pertinent part, that "a lawyer in connection with … a disciplinary matter, shall not … knowingly fail to respond to a lawful demand for information from … [a] disciplinary authority."

He did not, however, commit the other violations alleged by the ODC in its *Statement of Charges*. Those allegations were repeated mostly verbatim in the ODC's *Proposed Findings of Fact and Conclusions of Law*. The Hearing Panel Subcommittee signed the ODC's proposal. Thus, a discussion of the underlying charges is warranted.

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1 *Comm. on Legal Ethics v. McCorkle*, 192 W. Va. 286, 452 S.E.2d 377 (1994).

A. Count I: Terry McFarlan.

Terry McFarlan retained Respondent for representation in a convoluted property case. Respondent concluded that Mr. McFarlan's neighbor Hollis Vance owned the parcel Mr. McFarlan thought he owned, and Mr. McFarlan owned the parcel Mr. Vance thought he owned. To complicate matters, there were competing surveys about the bounds of the parcels, competing claims of adverse possession of disputed validity, and a possible heir with a fractional interest. (Ex. 3; Tr. 25:1-15; 71:20-72:23).

Respondent filed suit on behalf of Mr. McFarlan against Hollis Vance. At a mediation 8 July 2019, a settlement was reached whereby the parties agreed to swap the parcels each party thought they owned, and to transfer a parcel which was not part of the disputed parcels to adjust the boundary dispute. Respondent prepared Deeds to effectuate the agreement, which were rejected by Mr. Bush. Respondent prepared a second set of Deeds. The second set of Deeds were recorded. (Tr. 100:8-103:14).

Later, the Assessor notified the parties of his belief that those deeds did not accomplish the purpose they were intended to accomplish. Respondent prepared revised deeds and forwarded them to Mr. Bush. (Tr. 100:8-103:14). Mr. Bush rejected them because they included a general rather than special warranty of title. After several communications, Respondent prepared a third set of proposed deeds with special warranty of title, and forwarded them to Mr. Bush. At the HPS hearing, Mr. McFarlan testified that Respondent no longer represented him. (Tr.23:6-12). Respondent agreed. (Tr. 75:24-79:5).

While it is not part of the evidence before the HPS, Mr. Vance ultimately executed the third set of proposed Deeds.

B. Count II: John Lambert.

Respondent filed an elective share petition on behalf of John Lambert against the estate of his deceased wife. Per the statute, that action was filed in the Tucker County Commission. Despite pleadings filed and hearings noticed, each hearing was canceled sua sponte by the County Commission. (Ex. 21; Tr. 159:1-12).

In June 2018, the County Commission, through the Prosecuting Attorney, said it did not intend to proceed and insisted the parties remove the case to Circuit Court. Respondent prepared a joint notice of removal, but opposing counsel would not respond to requests to sign it. Accordingly, in November 2018, Respondent successfully moved unilaterally to transfer the case to Circuit Court. (Tr. 159:7-12).

Because the Circuit Court did not set a scheduling conference, in February 2019 Respondent noticed a status hearing for the following month. Following the status hearing, the Circuit Court entered a scheduling order. The case was then bifurcated at the request of counsel: 1) ruling upon Mr. Lambert's elective share; and 2) ruling upon how the elective share was to be satisfied.

On 2 August 2019, the Circuit Court conducted an evidentiary hearing regarding the assets within the augmented estate for purposes of calculating Mr. Lambert's elective share. Respondent submitted a proposed order.

On 3 January 2020, the Circuit Court entered its *Order Delineating the Augmented Estate*, by which Mr. Lambert prevailed on every disputed issue.

Respondent repeatedly contacted opposing counsel with proposals to satisfy Mr. Lambert's elective share, without a substantive response. Ms. Channell—John Lamber's sister and attorney-in-fact—lives near the office of Respondent and frequently called or stopped by. While she claimed Respondent did not respond to her inquiries, Respondent informed the ODC and the HPS that his records reflected over two hundred phone and office conferences with Mr. Lambert or Ms. Channell or both, involving either Respondent or his staff. (Ex. 21).

As referenced during the hearing before the HPS, the Circuit Court was scheduled to hear the matter about one month later. While the result of that hearing was not in evidence before the HPS, it should be noted that during that hearing the Executrix made inculpatory admissions about her handling of the estate which demonstrate why her counsel was non-responsive to efforts to settle. She was indicted by the Tucker County Grand Jury at its February 2025 term. It is noteworthy that Ms. Channell contacted Respondent's office on Friday, 28 February 2025 asking Respondent to attend the criminal proceedings with her, even though she knows his representation in the civil case ended last year.

C. Count III: Edwin Orrillo.

Respondent was appointed by the United States District Court for the Northern District of West Virginia to represent Edwin Orrillo in a multi-defendant drug case pending in Martinsburg, West Virginia.

Mr. Orrillo sought the appointment of new counsel, and sent a complaint to the ODC. As reflected in Respondent's sworn statement to the ODC, Respondent had not reviewed the discovery with Mr. Orrillo at the time of his complaint for several reasons.

Ordinarily, the United States Attorney's office tenders a plea offer shortly after providing discovery in a case. It is the practice of Respondent to meet and discuss the discovery and the plea offer at the same time, because discovery in federal cases is subject to a protective order which prevents counsel from providing copies to his client. That was particularly the situation for Mr. Orrillo, because he was detained in the Eastern Regional Jail, about three hours' drive from the office of Respondent.

The case was pending for awhile in part because the last defendant in that case was not arrested until 28 July 2022. More germane is that the majority of the codefendants in that case played a game of round-robin regarding their appointed counsel. At regular intervals, one defendant after another would complain about his attorney and get another appointed. The new attorney would then move to continue the deadlines because he had just gotten into the case. Mr. Orrillo was neither the first nor the last defendant in that case to pull exactly the same maneuver.

Respondent is still appointed by the District Court to represent defendants. He begins a trial before the Honorable Thomas Kleeh tomorrow, 4 March 2025.

D. Count IV: Adam Kramer.

Respondent was selected by the attorneys to serve as a private mediator in a custody dispute between Adam Kramer and the mother of his daughter. Respondent was emphatically NOT appointed by the Family Court in that capacity; the Family

Court simply recognized the attorneys' selection of a private mediator. As he explained at length during the hearing, Respondent cannot be appointed as a mediator by a family court because he has chosen not to file the necessary paperwork with this Court: like many experienced mediators, Respondent does not want to take mediations for the mandatory fee scale. (Tr. 177 – 195).

By the mediation 29 April 2022, the parties had each had multiple successive attorneys, there had been three successive guardians ad litem for their child, and they had participated in five or six mediations. (Tr. 59:8 – 60:23). Mr. Kramer has filed at least one, and perhaps more, complaints against attorneys involved in the case.

During the mediation—attended by counsel for both parties and the guardian ad litem—Mr. Kramer agreed to abandon all his requests in exchange for joint decision-making responsibility for the child. The mother of the child agreed. Over the weekend following the mediation, Respondent was to memorialize their agreement in a document. However, counsel for the mother contacted Respondent to say her client was backing out of the agreement to share decision-making responsibility. Because there was no longer an agreement, there was nothing to memorialize. (Tr. 182:6 – 188:18). And it should be noted that despite the assertions of ODC to the contrary, RULE OF PRACTICE AND PROCEDURE FOR FAMILY COURT 43 by its plain terms applies to court-appointed mediations, not private mediations. (Tr. 177 – 195).

III. Discussion

Respondent admits he violated W.VA.R.PROF.CON. 8.1(b) because he did not timely respond to inquiries by the Office of Disciplinary Counsel. And, he argued to the

Hearing Panel Subcommittee that a sanction for that violation was appropriate. At the conclusion of the hearing, the chair sought closing argument:

> I'm asking — I've never done this in a hearing before, but I'm going to give everybody the opportunity to give us a closing statement, if you so desire, and explain how you think this Panel should rule and what sanction, if any maybe none is warranted or justified in this particular matter.
>
> (Tr. 200: 4-9).

Respondent admitted he violated Rule 8.1, and that a sanction is warranted:

> As I said earlier, the — I think what's undisputed, because it's indisputable, is that I did not respond to requests of the ODC for information. That was wrong of me, and as I pointed out earlier, it wasn't just a single time and, therefore, down to an oversight or a bad week kind of a situation.
>
> Furthermore, as I pointed out, I understand that the process doesn't work very well without some level of compliance by the attorneys with requests from the ODC.
>
> And while I wouldn't go nearly so far as my colleague in saying that the public would be somehow harmed if the lawyers of ODC had to work a little harder, I will acknowledge that the process does need to — to work in a professional organization like the state bar and that my conduct fell below what should be expected of a professional in any — in any profession, but certainly our profession.
>
> And so as a result, I believe that — I believe the discipline is appropriate. I believe that — I believe that the Board can't be seen to to not be taking something like this seriously.
>
> Now, having said that, I hope that — that the Board considers the rest of the circumstances of this case. You know, if — I think if — if we had chosen to spend a little bit more time with Mr. McFarlan or Ms. Channell, I think you would — you would see that I actually, you know, have a good relationship with them.

> And I strongly suspect that if you had asked them whether either one of them would hire me again, the answer would be yes. And if you asked them whether or not they'd recommend me to a family member, the — the answer would be yes, and I think that came through in their testimony.[2]
>
> And so I just ask that that you take into consideration in — in fashioning an appropriate sanction in this case the rest of the — the circumstances.
>
> But I'm certainly not sitting here before you today suggesting that that no punishment is appropriate, because it is.
>
> (Tr. 205:5 – 206:22).

In Syllabus Point 3 of *Committee on Legal Ethics v. Blair*[3] this Court noted some of the considerations in determining 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.

Respondent provides legal, guardian ad litem, and mediation services in a rural region of West Virginia which is under-served. At present, he has a caseload of about 75 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 about 50 family and civil cases (mostly family cases) he mediates each year.

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2 In fact, following the hearing before the HPS, Mr. McFarlan asked Respondent to resume pursuit of an executed Deed. Ms. Channell asked Respondent to assist her in navigating the criminal case despite knowing the civil case is concluded.

3 Syl. Pt. 3, *Comm. on Legal Ethics v. Blair*, 174 W. Va. 494, 327 S.E.2d 671 (1984).

A suspension of Respondent's license would mean that about 75 clients would be bereft of representation. In an area like Charleston or Morgantown, perhaps those clients could secure different counsel. But in a rural region like that served by Respondent, there simply are not enough attorneys. As to 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

In consideration of the entirety of the record, the following sanctions are appropriate:

1. Respondent be admonished for his failure to promptly comply with requests for information by the ODC; and

2. Respondent be ordered to pay the costs of these proceedings pursuant to Rule 3.15 of the West Virginia Rules of Lawyer Disciplinary Procedure.

/s/ Scott Curnutte
SCOTT CURNUTTE
W.VA. BAR # 5780
CURNUTTE LAW
P.O. BOX 1605
ELKINS, WV 26241
304.636.5904
CURNUTTELAW@GMAIL.COM

CERTIFICATE OF SERVICE

I certify I filed Respondent's Brief using File & Serve Express which will send a copy to all Parties.

Dated at Elkins, West Virginia, 3 March 2025.

/s/ Scott Curnutte
SCOTT CURNUTTE
W.VA. BAR # 5780
CURNUTTE LAW
P.O. BOX 1605
501 DAVIS AVENUE
ELKINS, WV 26241
304.636.5904
CURNUTTELAW@GMAIL.COM