

FILED

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Neely, Justice:

Committee on Legal Ethics  
of the West Virginia State Bar

*Walter H. Neely*  
CLERK OF THE SUPREME COURT  
OF WEST VIRGINIA

No. 17087

v.

Mark D. Nigh, a Member of the  
West Virginia State Bar

This proceeding came on to be heard upon the petition of Mark D. Nigh, a member of the West Virginia State Bar for reinstatement to practice law; upon the reply of the Committee on Legal Ethics of the West Virginia State Bar; all papers and proceedings filed in this case; and oral argument of counsel.

Until his license to practice law was suspended on 10 March 1986, Mark D. Nigh was a member in good standing of the West Virginia State Bar. On 9 December 1985 the Committee on Legal Ethics of the West Virginia State Bar filed a complaint against Mr. Nigh alleging that: (1) Mr. Nigh entered into a settlement on behalf of a client to resolve pending litigation, representing that he had settlement authority when in fact he had no such authority; (2) Mr. Nigh filed a false affidavit in support of a motion to set aside a judgment; and (3) Mr. Nigh made a false representation to opposing counsel concerning whether an appeal bond had been properly filed in the circuit court.

At a hearing on 17 February 1986 before a panel of the Committee on Legal Ethics of the West Virginia State Bar, Mr. Nigh, represented by his counsel, admitted that "the

facts designated in the legal ethics investigation of the complaint are true and accurate." At that hearing Mr. Nigh offered to surrender his license to practice law pursuant to the provisions of Article VI, Section 26(c) of the Rules of the West Virginia State Bar, because in the words of the rule, he was suffering from "a disability by reason of mental or physical infirmity or illness. . . which [made] it impossible for the respondent to adequately defend himself." However, at the 17 February hearing Mr. Nigh admitted that the allegations of the complaint against him were true, and at no stage of these proceedings has he retreated from a frank confession of guilt. On 7 March 1986 the Committee on Legal Ethics met and recommended that the license of Mr. Nigh be suspended. This Court suspended Mr. Nigh's license to practice on 10 March 1986, and our Order of suspension recommended that Mr. Nigh seek counseling from a clinical psychiatrist.

Mr. Nigh began treatment with Patricia W. Williams, M.D., following his offer to surrender his license but before the license was actually suspended. On 17 July 1986 Mr. Nigh filed with this Court his petition for reinstatement to practice law supported by a report by Dr. Patricia W. Williams. This Court then set a hearing on the petition for 1 October 1986. Upon stipulation during oral argument by counsel for the West Virginia State Bar that there are no facts in dispute and that further proceedings before the Committee on Legal Ethics would not further illuminate the questions that this Court must ultimately decide, the proceeding was submitted to the Court on the merits for imposition of an appropriate sanction.

The record before us clearly indicates that Mr. Nigh violated the Code of Professional Responsibility. Nonetheless, the State Bar does not assert that Mr. Nigh's ethical violations were deliberately designed to gain him personal profit or even deliberately calculated to injure others. Although Mr. Nigh represented to another party that he had settlement authority regarding a case, his misrepresentation in this regard appears to have resulted more from failure of communication with his Washington-based client than from a deliberate intention to deceive. In a similar vein, although Mr. Nigh forged his client's name to an affidavit, there is no allegation by the bar that the averments in the affidavit were false. Mr. Nigh's action in signing his client's name to the affidavit was unethical "corner cutting", but it was not an attempt to defraud. Certainly we do not condone either of these two violations, but we point out his lack of sinister intent because an absence of sinister intent is relevant to the question of the appropriate sanction.<sup>1</sup>

Mr. Nigh's most serious violation was his misrepresentation to opposing counsel that an appeal bond had been posted in a case when no bond had been posted. This type of behavior violates our bar's tradition of gentlemanly conduct; every lawyer in this State must be able to take every

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<sup>1</sup> For the proposition that circumstances surrounding unethical conduct may be considered in mitigation of sanctions for prohibited conduct, see Committee on Legal Ethics of State Bar v. Pence, \_\_\_ W.Va. \_\_\_, 216 S.E.2d 236 (1975); see also Committee on Legal Ethics of State Bar v. Smith, 156 W. Va. 471, 194 S.E.2d 665 (1973).

other lawyer's word. Nonetheless, we take into consideration the fact that Mr. Nigh entered law practice in the small West Virginia town of Philippi immediately upon his graduation from West Virginia University College of Law and his isolated geographical location denied him the type of organized bar activity on a day-to-day basis that would have helped instruct his understanding of ethical problems.

Dr. Patricia W. Williams' report to the West Virginia Supreme Court of Appeals concerning Mr. Nigh said:

"My evaluation indicates that some of the characteristics of Mr. Nigh's condition, which prevented him from fully and adequately cooperating with counsel in his defense, and which influenced his conduct which led to disciplinary proceedings were the following:

1 - The tendency of Mr. Nigh to over-extend himself through excessive work and his involvement in civic and public organizations and leadership position, which volunteer work was to satisfy his need for praise and notoriety. His involvement in these activities diminished his ability to meet the demands of his law practice effectively.

2 - A need to please or placate those who he feels are more aggressive, dominant or in control. Mr. Nigh must develop the ability to control his practice and not undertake those matters which dilute his effectiveness as a practicing lawyer and must develop a greater ability to assert himself when placed in a compromising situation.

3 - Mr. Nigh has a weak and inconsistent conscience, allowing him to present whatever scenario is most likely to placate a person who seeks to dominate his personal or professional relationships. The ability to placate or please those with whom he has a personal or professional relationship at times overrides the ability to be objective and truthful.

We are impressed in this case that Mr. Nigh promptly admitted his guilt, voluntarily offered to surrender his license, and offered to pay all costs of these proceedings. When this case was submitted for decision here, James H. Ware, Esq. of Philippi, a 1953 graduate of the West Virginia College of Law and a practicing lawyer, offered to supervise Mr. Nigh's practice. Furthermore, Mr. Nigh has volunteered to continue psychiatric therapy for as long as is necessary to cure any psychological problems that may have been the proximate cause of his lapses in judgment. Counsel for the respondent committee stipulated at oral argument that no other ethical charges have been filed against Mr. Nigh and that to the best of her knowledge the complaint sub judice reflects an isolated event of misconduct.

Accordingly, it is Adjudged Ordered and Decreed that Mr. Nigh's license to practice law be suspended from and as of the date that he voluntarily surrendered his license, to wit, 10 March 1986, until 1 January 1987. As of 1 January 1987, Mr. Nigh is authorized to practice law only under the supervision of James H. Ware, Esq. for a period of one year. Mr. Ware shall make quarterly reports to State Bar Counsel concerning the progress of Mr. Nigh's psychiatric treatment, and during the one-year probationary period the State Bar may petition for further probation or for suspension of Mr. Nigh's license if the committee has reason to believe that Mr. Nigh has failed to conduct himself according to the Code of Professional Responsibility or has failed to continue in a serious program of psychiatric therapy. Thereafter, unless further proceedings are

initiated by the bar in this Court, as of 1 January 1988,

Mr. Nigh shall be restored unconditionally to the practice  
of law.



MAR 14 '86

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County on the 11th day of March, 1986, the following order was made and entered, to-wit:

The Committee on Legal Ethics of The  
West Virginia State Bar, Complainant

17087 vs.

Mark D. Nigh, Respondent

On a former day, to-wit, March 10, 1986, came the Committee on Legal Ethics of the West Virginia State Bar, by Robert H. Davis, Jr., its attorney, and presented its complaint against the respondent, Mark D. Nigh, a member of the West Virginia State Bar, praying that the respondent's license to practice law in the State of West Virginia be immediately suspended and that the Court order a prompt evaluation of his mental condition by a qualified physician or psychiatrist and direct the respondent to pay the costs of this proceeding and of the evaluation and report. Submitted with the petition was the transcript of proceedings before the Committee had on February 17, 1986, with attached Exhibit No. 1. Upon consideration of all of which the Court is of opinion to, and does hereby, grant the relief prayed for.

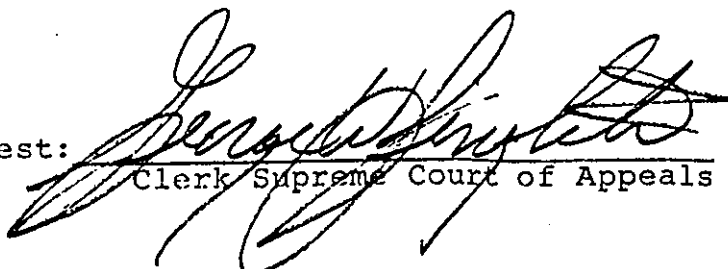
It is, therefore considered and ordered that the license of the respondent, Mark D. Nigh, to practice law in the State of West Virginia be, and the same is hereby, suspended, effective immediately, and the respondent, Mark D. Nigh is directed to report to 613 Burroughs Street, Morgantown, West Virginia for examination and evaluation by Patricia Williams, M.D. at such times and places as are deemed necessary by Dr. Williams to complete such examination and

evaluation. Such evaluation is to be done on behalf of the Court and Dr. Williams is to promptly make her written report addressed to the Clerk, Supreme Court of Appeals of West Virginia, State Capitol, Charleston, West Virginia, 25305, as to the respondent's existing incapacitation to practice and inability to fully assist his counsel in his defense of the charges brought against him to the Court. Her bill for services in this behalf is to be submitted primarily to Mark D. Nigh, and secondarily to the West Virginia State Bar, State Capitol, Charleston, West Virginia, 25305 if not promptly paid. It is further ordered that the respondent reimburse the West Virginia State Bar in the amount of \$145.80, its costs incurred to date in this proceeding.

Service of a copy of this order upon the respondent by certified mail, written receipt requested, shall constitute due notice to him of the contents hereof.

A True Copy

Attest:

  
Clerk Supreme Court of Appeals