

**STATE OF WEST VIRGINIA**

**At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 29th day of September, 1994, the following order was made and entered:**

**Lawyer Disciplinary Board, Complainant**

**vs.) No. 22433**

**David A. Downes, a member of The West  
Virginia State Bar, Respondent**

**On a former day, to-wit, July 20, 1994, came the complainant, the Lawyer Disciplinary Board, by Teresa A. Tarr, its attorney, and presented to the Court its written recommended disposition in the above-captioned proceeding pursuant to Rule 3.10 of the Rules of Lawyer Disciplinary Procedure, together with the record of proceedings before the Board, including the Hearing Panel's adoption of the Subcommittee Report; the Subcommittee Report; the transcript of pre-hearing telephone conference of November 19, 1993; the transcript of the hearing held on March 21, 1994; the closing argument submitted by The West Virginia State Bar; the closing argument submitted by the respondent, and a certificate of expenses in the amount of One Thousand Six Hundred Sixty-Three Dollars and Seventy-Six Cents (\$1,663.76), and moved the Court to issue a rule to the said respondent directing him to show cause why an order should not be entered issuing a public reprimand and requiring him to reimburse the Lawyer Disciplinary Board for the expenses incurred in the investigation and hearing of this matter.**

**There being heard neither consent nor objection from the respondent pursuant to Rule 3.11, Rules of Lawyer Disciplinary Procedure, it is hereby ordered that**



the written recommended disposition of the Lawyer Disciplinary Board be, and it hereby is, adopted. It is therefore ordered that a public reprimand issue of the respondent, David A. Downes, and that he reimburse the Lawyer Disciplinary Board for the expenses incurred in the investigation and hearing of this matter in the amount of One Thousand Six Hundred Sixty-Three Dollars and Seventy-Six Cents (\$1,663.76). Chief Justice Brotherton absent.

Service of a copy of this order upon all parties herein shall constitute notice of the contents herein.

A True Copy

Attest: \_\_\_\_\_



Clerk, Supreme Court of Appeals



BEFORE THE COMMITTEE ON LEGAL ETHICS  
OF THE WEST VIRGINIA STATE BAR

IN RE: DAVID A. DOWNES, a member of  
The West Virginia State Bar

I.D. No. 93-042

FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND RECOMMENDED DISCIPLINE OF HEARING SUBPANEL

The following represents the Findings of Fact and Recommendations of the Hearing Subpanel pursuant to a hearing held in the above referenced action at the State Bar Center in Charleston, West Virginia, on March 21, 1994.

FINDINGS OF FACT

The parties stipulated the following findings of fact prior to the March 21, 1994, hearing:

1. David A. Downes (Respondent) is a licensed member of The West Virginia State Bar who practices before the United States District Courts for the Northern and Southern Districts of West Virginia and is subject to the disciplinary jurisdiction of The West Virginia Supreme Court of Appeals and its properly constituted Committee on Legal Ethics of The West Virginia State Bar (Committee).

2. On or about June 13, 1992, Kenneth Varney and his wife Teresa Varney of Mercer County, West Virginia, were arrested and charged with the distribution of cocaine and marijuana and possession of a firearm without authorization.

3. On June 18, 1994, Mr. Varney appeared before the Magistrate for the United States District Court for the

Southern District of West Virginia and was represented by court-appointed counsel. The Magistrate found probable cause to bind the case over to the Grand Jury and ordered Mr. Varney detained.

4. On July 14, 1992, Respondent, who had been retained by a relative to defend Mr. Varney, filed an appeal of the Magistrate's Detention Order in District Court.

5. A hearing was held on July 23, 1992, before the Honorable David A. Faber; at that time, Respondent was officially substituted as counsel for Mr. Varney. This hearing represented Respondent's first physical appearance in the United States District Court for the Southern District of West Virginia.

6. Mrs. Varney, the co-defendant, was present in the audience during the July 23 hearing.

7. Respondent proposed to call Mrs. Varney as a witness for her husband. Her testimony would have related to the ownership of the gun which was the subject of the charge of possession of a firearm. John Parr, the Assistant United States Attorney handling the case, questioned the appropriateness of a co-defendant's testifying in a self-incriminating manner without her counsel present. Judge Faber asked Respondent: "Have you discussed this matter with Mrs. Varney's counsel or have you been in contact with counsel at all?"

The prosecutor commented:

And let me just express that the reason I say that is there isn't a privilege between this attorney and that witness, and I may well call him to testify on her admissions.

The Court responded:

There most certainly is not a privilege between Mrs. Varney and any lawyer other than the lawyer that represents her with regard to this particular charge. That's quite right.

Respondent replied:

Your Honor, I've had a couple of occasions to speak with Debra Kilgore, counsel for Mrs. Varney, and there was never a time mentioned that there was an objection from my speaking with her about this case as a witness. I don't have any problem not calling Mrs. Varney here without Ms. Kilgore present, but as far as my speaking and preparing this case, I think defense counsel becomes really handicapped if we're not at least able to go out and speak with the individuals that may have information pertaining to the case.

8. Judge Faber ruled that Mrs. Varney could not testify for her husband unless and until Respondent made a clear showing that she wished to testify voluntarily and with the advice of counsel.

9. Respondent had not spoken with Ms. Kilgore about her client's testifying; furthermore, he did not obtain her permission to discuss the case with Mrs. Varney or call her as witness at the appeal hearing.

10. In his response to the January 23, 1993, ethics complaint, Respondent said he meant to tell Judge Faber that he spoke with Ms. Kilgore's office, rather than

with Ms. Kilgore, and that he later apologized for "not clearly stating that I did not obtain permission of counsel to speak with my client's wife."

11. Respondent also provided a copy of a telephone slip dated June 29, 1992, which noted the following:

- (a) He had spoken to "Debra Kilgore's secretary;"
- (b) "Kilgore was on vacation all week;" and (c) "No objection to speaking."

12. At no time did Debbie Whited, Ms. Kilgore's secretary, tell Respondent that it was all right to speak to Mrs. Varney or that he had Ms. Kilgore's permission to speak to Mrs. Varney. Ms. Kilgore, in fact, did not grant Respondent permission to speak with her client until September, 1992.

13. No other ethics complaint has been filed against Respondent during his six years of practice in Virginia and West Virginia with the exception of one complaint which was determined to be unfounded and summarily dismissed by the Virginia State Bar.

The Subpanel supplements the parties' stipulated Findings of Fact with the following:

- 1. At all times relevant hereto, Mrs. Varney was represented by Princeton Attorney Debra Kilgore.
- 2. Subsequent to the July 23, 1992, hearing, proceedings were held in Mr. Varney's case on September 8 and September 22, 1992. Respondent appeared on behalf of Mr. Varney on both occasions.



3. At the September 8, 1992, hearing, Assistant United States Attorney Parr informed Judge Faber and Respondent that he intended to file an ethics complaint against Respondent based on Respondent's representations to the Court on July 23, 1992, concerning his communications with Ms. Kilgore. Respondent stated that he considered such action a tactic used to "divide and conquer" counsel for co-defendants but made no effort to correct his July 23 statement.

4. At the September 22, 1992, hearing, Mr. Parr again raised the issue of Respondent's July 23, 1992, representations to the Court. On that occasion, Respondent apologized to the Court for making misleading statements.

5. The notes reflected on Respondent's telephone slip referred to in Paragraph 11 of the parties' stipulated Findings of Fact did not summarize an actual telephone conversation between Respondent and Attorney Kilgore or her office.

#### DISCUSSION

Since Mr. Downes admits that he made the statements which gave rise to the charges against him, the issues to be addressed herein are the intent behind those statements and the efforts made by Respondent to correct them. The State Bar alleges that Mr. Downes intentionally misled the Court by representing that he had spoken with Mrs. Varney's attorney prior to the July 23, 1992, hearing and

that Mrs. Varney's counsel had given him permission to speak with her client. Mr. Downes, on the other hand, claims that his statements were unexpected, unplanned and the result of his attempts to zealously represent his client under exceedingly stressful circumstances.

The Subpanel feels it will benefit the entire Hearing Panel to summarize testimony given by each witness who appeared at the March 21, 1994, hearing.

John Parr

John Parr, Assistant United States Attorney for the Southern District of West Virginia, was the prosecutor appearing at the July 23, 1992, hearing. During the hearing, Mr. Parr observed Mr. Downes conversing on two or three occasions with Mrs. Varney. As noted in the stipulated statement of facts, Mr. Parr raised the issue of Mr. Downes' contacts with Mrs. Varney with Judge Faber.

Following the hearing, Mr. Parr contacted Mrs. Varney's attorney, Debra Kilgore. Kilgore knew nothing of the hearing; furthermore, she had no knowledge that her client was present at the hearing. She knew nothing about Mr. Downes' conversations with Mrs. Varney.

Mr. Parr advised Judge Faber's clerk that he believed Mr. Downes had made a misrepresentation to the Court. Parr subsequently had several conversations with Mr. Downes; in those conversations, Mr. Downes indicated that he had in

fact misspoken and that he had not discussed Mrs. Varney with Attorney Kilgore.

Mr. Parr acknowledged that Mr. Downes' statements had no effect on the administration of justice. Mr. Parr also acknowledged that Mr. Downes made apologies to all parties involved in the matter.

Mr. Parr's opinion is that Mr. Downes knew he had lied to the Court but didn't know how to "get out of it." Mr. Parr did not believe that Mr. Downes' statements represented a mere slip of the tongue.

Debra Kilgore

Debra Kilgore has practiced law in Princeton, West Virginia, for twelve years. Ms. Kilgore was on vacation during the week in which the July 23, 1992, hearing took place. While she was on vacation, she called her office. At that time, her secretary was Debbie Whited. Ms. Whited gave Ms. Kilgore no messages that Mr. Downes had made a request to speak with Mrs. Varney.

Prior to July 23, 1992, Ms. Kilgore had never spoken with Mr. Downes concerning Mrs. Varney's testimony and did not give Mr. Downes permission to speak with her client.

In a conversation which took place between Mr. Downes and Ms. Kilgore after the July 23, 1992, hearing, Mr. Downes claimed that Debbie Whited had told him that he had permission to speak with Mrs. Varney. Ms. Kilgore took

issue with this statement. Mr. Downes responded that no one had objected to his speaking to Mrs. Varney. Apparently, this exchange provoked what Ms. Kilgore called a "loud conversation." The conversation took place in the courthouse, and a courthouse official had to tell them to quiet down.

Ms. Kilgore at no time told Debbie Whited to advise Mr. Downes that it was permissible for him to have Teresa Varney testify. The only disclosure which Ms. Whited was authorized to make to Mr. Downes concerning Mrs. Varney was related to attachments to a search warrant. Prior to the September 22, 1992, hearing on this matter, Mr. Downes consulted Ms. Kilgore and asked for her advice. She advised him to tell the truth.

Debbie Whited

Ms. Whited confirmed that she worked for Debra Kilgore at the time in question. On June 29, 1992, she received a call from David Downes. He asked about attachments to a search warrant. He did not ask her about speaking to Teresa Varney. Ms. Whited put a note in the file which confirmed the conversation concerning the search warrant.

Ms. Whited did not tell Mr. Downes that it was permissible for him to speak to Mrs. Varney or that Ms. Kilgore had agreed that he could speak to Mrs. Varney.

Heather Heiskell Jones

Ms. Jones was called on behalf of the Respondent. She and Respondent were classmates at the T. C. Williams College of Law; she has known Respondent since 1984. She testified that Mr. Downes had a reputation among his classmates for truth and veracity and offered other testimony of his good character and dedication to the profession.

David Downes

Mr. Downes is a graduate of the T. C. Williams Law School at the University of Richmond, Virginia, and has practiced in Front Royal, Virginia, since his 1987 graduation.

Mr. Downes testified that, in addition to his practice of law, he is involved in many community and church affairs. He is President-elect of his county bar association. He performs pro bono and court-appointed work.

Mr. Downes gave a good deal of testimony which related to the stress created by his appearing in a jurisdiction geographically removed from his practice. He noted that he had been retained to represent Mr. Varney only shortly before the hearing in question. He undertook a five-hour trip to arrive in Bluefield, West Virginia, on the day of the hearing. When he arrived at the courthouse, he was confronted by fifteen to twenty friends and relatives of his client. His client was overbearing. The friends and relatives commented that they would blame Respondent if he

failed to obtain a good result for his client. The atmosphere was "utter chaos." To add to the confusion, at some point prior to the commencement of the hearing, Mrs. Varney approached Mr. Downes and said that she was unhappy with her attorney.

Mr. Downes acknowledged that the statements which he made to the Court on July 23 concerning his contacts with Ms. Kilgore were inaccurate and should not have been made. He did not intend to mislead the Court. He has never misled or lied to any court before. He states that when he did not call Teresa Varney as a witness he believed that the whole matter was rendered moot. He realizes now that he should have cleared up the whole matter at the time.

The Honorable David A. Faber

Judge Faber gave testimony by way of deposition on March 30, 1994. He was called on behalf of the State Bar.

During the July 23, 1992, hearing, Judge Faber observed Mr. Downes walk to the spectator section of the courtroom, lean over the rail, and speak to persons seated in that section. One of these persons was Teresa Varney.

After these conversations, Assistant United States Attorney John Parr objected to the conversations and advised Mr. Downes that no privilege would attach to any communications between him and Mrs. Varney. Mr. Parr continued by warning Mr. Downes that if the conversations persisted, Mr. Parr would consider calling Mr. Downes as a witness to

testify to the essence of the conversations between Mrs. Varney and Mr. Downes.

Judge Faber informed Mr. Downes that he agreed with Mr. Parr's position and that the Court would not permit Mr. Downes to have additional discussions with Mrs. Varney without her counsel's express approval; furthermore, Judge Faber advised Mr. Downes that he would not allow Mr. Downes to call Mrs. Varney as a witness.

Prior to the Court's conclusion, Mr. Downes had "volunteered" the statement that he had spoken to Mrs. Varney's counsel and there had been no objection to his speaking with Mrs. Varney. Judge Faber's impression from this statement was that he had obtained permission from her counsel to speak with Mrs. Varney. Shortly thereafter, it became apparent to Judge Faber that Mr. Downes had not obtained permission to speak with Mrs. Varney. Judge Faber noted that what Mr. Downes said was subject to different interpretations; however, he had the initial impression that Mr. Downes was indicating to the Court that he had "cleared it" with Ms. Kilgore.

Later, Judge Faber learned that Mr. Parr had made inquiries of Mrs. Varney's counsel and that Mr. Parr had been informed specifically by Ms. Kilgore that no permission had been given to Mr. Downes to speak to Mrs. Varney. As a result of this information, Judge Faber became concerned that there had been a breach of conduct by Mr. Downes and that Judge Faber was under an obligation to report it to the

appropriate Bar authorities. Judge Faber consulted the Code of Professional Responsibility and concluded that Mr. Downes' conduct represented violations of two provisions of the Code: (1) The prohibition against contacts by one lawyer with a client represented by another attorney without permission; and (2) The prohibition against misrepresentations to the Court. Consequently, Judge Faber reported Mr. Downes' conduct to the West Virginia and Virginia State Bars.

Judge Faber acknowledged that the atmosphere at the July, 1992, hearing was "emotionally charged." He also acknowledged that Mr. Downes' conduct resulted in no prejudice to any party. He noted that Mr. Downes appeared to be under a good deal of pressure generated by his client and his client's family and friends.

#### CONCLUSIONS OF LAW

The Hearing Subpanel concludes that the State Bar has met its burden of proof in establishing that Respondent has violated two rules of the Rules of Professional Conduct. First, Respondent has violated Rule 3.3(a)(1) of the Rules of Professional Conduct which provides that "[a] lawyer shall not knowingly . . . make a false statement of material fact or law to a tribunal," by virtue of his representing to Judge Faber that he had spoken with Attorney Kilgore concerning her client Teresa Varney and that Ms. Kilgore had



no objection to his speaking with Mrs. Varney as a witness in the case.

Next, the Subpanel finds that Respondent violated Rule 4.2 of the Rules of Professional Conduct which provides that "A lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer unless the lawyer has the consent of the other party or is authorized by law to do so," by discussing the case with Mrs. Varney without the prior consent of her attorney. The Subpanel does not believe that Respondent acted intentionally with any predisposition to mislead or deceive the Court. The Subpanel believes that the statements in question were indeed uttered "in the heat of battle" by Respondent. The Subpanel recognizes that litigation, and probably most particularly litigation in the area of criminal law, places lawyers in stress-filled situations in which they are required to act quickly under pressures emanating from competing sources. The circumstances with which Respondent was faced at the time in question appear to have been chaotic and less than favorable in many regards. However, the Subpanel cannot excuse Respondent's utterance of the statements in question because of two areas of concern.

First, the Subpanel believes from the evidence that Respondent knew that the statements in question were inaccurate and should not have been made as soon as they were uttered. However, it was not until the hearing held on

September 22, 1992, when Assistant United States Attorney Parr raised this matter to the Court that Respondent made any effort to correct his misrepresentations. He could have taken this action after the initial misrepresentation on July 23, 1992. In addition, he had an opportunity to do so again at the hearing on September 9, 1992. He knew that the misrepresentations were a matter of concern to the Court and the prosecutor; however, he took no action to correct those statements until, in effect, he was "called on the carpet."

The second area of concern to this Subpanel relates to the telephone slip submitted by Respondent in his response to the January 23, 1993, ethics complaint. That telephone slip contained notes stating that the Respondent had spoken to Attorney Kilgore's secretary; that Ms. Kilgore was on vacation; and that there was "no objection to speaking."

According to testimony given by Ms. Kilgore's secretary, no telephone conversation took place between her and Respondent which could have legitimately resulted in the creation of notes contained in the telephone slip. Regardless of how the telephone slip came into being, the Subpanel is disturbed by the fact that Mr. Downes submitted the telephone slip with his response to the ethics complaint, inasmuch as he knew at that time that at least some of the information contained in the slip was inaccurate.

### RECOMMENDED DISCIPLINE

A lawyer's adherence to the prohibition against making any false statement of material fact or law to a tribunal must be held inviolate. Likewise, a lawyer must honor under all circumstances the interdiction which prevents his or her communicating with another's client without consent. In this case, there is no question that the statements made by Respondent to the Court were false. This Subpanel finds that they were material. Finally, the Subpanel finds that Respondent engaged in an unauthorized communication with a party represented by counsel. This Subpanel, however, finds that the following mitigating factors exist: (1) The Court and the Assistant United States Attorney testified before this Subpanel that the misrepresentations resulted in no prejudice to any party; (2) The Respondent formed no intent to make the misrepresentations; (3) The misrepresentations and unauthorized communication were the result of a misplaced attempt on Respondent's part to zealously represent his client under unfavorable circumstances; and (4) The Subpanel finds no self-serving motivation for Respondent's misconduct.

Based on the foregoing and in view of the mitigating factors cited, it is the recommendation of the

Subpanel that the Respondent be given a public reprimand.  
In addition, it is the recommendation of the Subpanel that  
Respondent be ordered to pay all costs of this proceeding.

Elisabeth H. Rose

Elisabeth H. Rose, Esquire  
Subcommittee Chair

Date:

Alan D. Moats

Alan D. Moats, Esquire

Date:

Debra K. Sullivan

Debra K. Sullivan

Date: 7-16-94