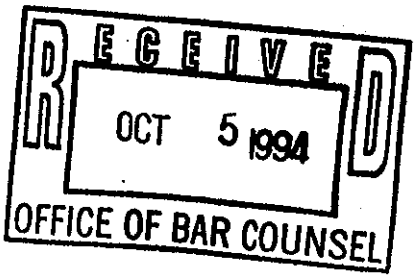
STATE OF WEST VIRGINIA

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. 22470

Thomas Munchmeyer, a member of The West Virginia State Bar, Respondent

On a former day, to-wit, August 31, 1994, came the complainant, the Lawyer Disciplinary Board, by Teresa A. Tarr, its attorney, pursuant to Rule 3.10, Rules of Lawyer Disciplinary Board, and presented to the Court its written recommended disposition in the above-captioned proceeding, together with the record of proceedings before the Board, including the Hearing Panel's adoption of the Subcommittee report; the Subcommittee Report; the original transcript of the hearing held before the Board on January 15, 1991; the transcript of the hearing dated May 16, 1992, the depositions of George Rines and John Burwell Garvey dated September 18, 1991, and a certificate of expenses incurred in the investigation of this matter in the amount of One Thousand Nine Hundred Forty-Three Dollars and Seventy-One Cents ($1,943.71), recommending that: (1) the respondent's license to practice law in the State of West Virginia be suspended for a period of two months, said suspension to be deferred as long as the respondent participates in an out-patient program for alcohol addiction with failure to do so resulting in an automatic two-month suspension; (2) respondent be required to submit a plan for supervision to be approved by the Lawyer Disciplinary Board with failure to implement said plan resulting in an automatic two-month suspension; (3) a public reprimand issue;

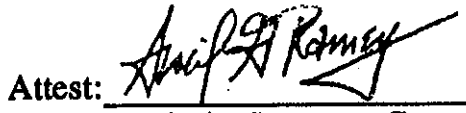
and (4) the respondent reimburse the Lawyer Disciplinary Board for the expenses incurred in the investigation of this matter in the amount of One Thousand Nine Hundred Forty-Three Dollars and Seventy-One Cents ($1,943.71).

There being heard neither consent nor objection from the respondent pursuant to Rule 3.11, Rules of Lawyer Disciplinary Board, 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: (1) the respondent's license to practice law in the State of West Virginia be suspended for a period of two months, said suspension to be deferred as long as the respondent participates in an out-patient program for alcohol addiction with failure to do so resulting in an automatic two-month suspension; (2) respondent be required to submit a plan for supervision to the Lawyer Disciplinary Board, with failure to implement an approved plan resulting in an automatic two-month suspension; (3) a public reprimand issue; and (4) the respondent reimburse the Lawyer Disciplinary Board for the expenses incurred in the investigation of this matter in the amount of One Thousand Nine Hundred Forty-Three Dollars and Seventy-One Cents ($1,943.71).

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: *THOMAS MUNCHMEYER, a member of The West Virginia State Bar* *I.D. Nos. 88-202 89-169 90-079*

HEARING PANEL SUB-COMMITTEE FINDINGS OF FACT CONCLUSIONS OF LAW, STIPULATED MITIGATION AND RECOMMENDED DISCIPLINE

The Hearing Panel Sub-Committee, having reviewed the Proposed Stipulated Mitigation and Recommended Discipline, in this matter, does find them to be acceptable and, consistent with the Proposed Stipulated Mitigation and Recommended Discipline, does make the following Mitigation and Recommended Discipline:

FINDINGS OF FACT

(1) Respondent is a licensed member of the West Virginia State Bar and practices in Wood County. As such, he is subject to the disciplinary jurisdiction of the West Virginia Supreme Court of Appeals and its properly constituted Committee on Legal Ethics.

(2) The Ellison Complaint.

(a) Larry Ellison (hereinafter Mr. Ellison) and Melinda Ellison (hereinafter Mrs. Ellison) were married in 1980 and had one son (Tr. I at 29) In 1986, the Ellisons decided to obtain a divorce based on irreconcilable differences (Tr. I at 29). Mr. Ellison initially contacted Respondent about the matter (Tr. I at 29).

(b) Mr. and Mrs. Ellison then went together to see Respondent at his office (Tr. I at 29). The Ellisons informed Respondent that they had reached an agreement as to marital assets

and joint custody of their son (Tr. I at 29-31). Respondent replied that the Family Law Master did not like to give joint custody (Tr. I at 31). As a result, it was mutually agreed that custody of the son should go to Mr. Ellison (Tr. I at 31, 37).

(c) Respondent then prepared a "pro se" answer for Mrs. Ellison, who was listed as the defendant in the action (Tr. I at 32; SB-Ex. 7). Mrs. Ellison, in turn, signed the answer in the presence of Respondent and her husband (Tr. I at 32). Respondent also prepared the settlement agreement signed by the Ellisons (Tr. I at 32).

(d) Respondent charged approximately $500.00 for his work on the Ellison divorce (Tr. I at 32-33). Mrs. Ellison paid approximately $225.00 or almost half of Respondent's fee[1] (Tr. I at 33, 34).

(e) Importantly, during the events outlined in Paragraphs 1(a) through 1(d), Mrs. Ellison was not represented by other counsel (Tr. I. at 30). In fact, she considered Respondent her attorney (Tr. I at 30-31). As Mrs. Ellison put it, "The way I understood, he was handling everything" (Tr. I at 30). Respondent also never advised or recommended to Mrs. Ellison that she should retain separate counsel (Tr. I at 33).

(f) In May 1989, Mrs. Ellison decided to seek custody of

---

[1] Respondent's records indicate that he gave a receipt to Melinda Ellison on October 26, 1988, showing that she had paid $50.00 in legal fees (Tr. I at 153-154). Another receipt, dated February 22, 1989, was made out to both Mr. and Mrs. Ellison and indicated that $350.00 in legal fees had been paid (Tr. I at 154). Respondent also admitted that Mrs. Ellison paid the majority of his fee for the divorce (Tr. I at 232).

her son and hired Parkersburg Attorney Richard Bush to represent her in court (Tr. I at 33, 50).

(g) Bush filed an amended answer and counterclaim on behalf of Mrs. Ellison (Tr. I at 51; SB-Ex. 7). Respondent did not file any written objections to the amended answer (Tr. I at 51).

(h) A hearing was held before the Family Law Master on June 13, 1989. During the hearing, Respondent stated that the divorce was "all done in my law office -- it was supposedly going to be a one lawyer divorce" (Tr. I at 140; SB-Ex. 6). Respondent also admitted that he did not file a "defensive answer" on behalf of Melinda Ellison (Tr. I at 139; SB-Ex. 6). Respondent also orally objected to the supplemental Answer filed by Bush on behalf of Mrs. Ellison because she had already submitted a "pro se" answer (Tr. I at 57, 61). The "pro se" answer, in which Mrs. Ellison admitted all of the allegations contained in the complaint, was the one that had been prepared by Respondent in 1986 (SB-Ex. 7).

(i) Following the hearing, the Family Law Master recommended to the Circuit Court of Wood County that "the settlement agreement be set aside, and the basis for the ruling was that based upon the testimony of the witnesses and the statements made by the attorneys, . . . that . . . the agreement was reached at a time when both parties were represented by the same attorney" (Tr. I at 143).

(j) On July 5, 1990, the trial court ordered the Ellisons divorced from one another on the grounds of irreconcilable differences and awarded custody of the couple's son to Mrs.

Ellison[2] (SB-Ex. 7).

(3) The Rines Complaint.

(a) In 1985, George Rines lived in Philippi, West Virginia, and worked as a lineman for A & S Able Power Company (hereinafter Able) (Deposition of George Rines, hereinafter SB-Ex. 9, at 5). On July 30, 1985, Mr. Rines was seriously injured while building a new power line in Lancaster, Ohio, for South Central Power Company (hereinafter South Central) (SB-Ex. 9 at 5-6, 25-26, 36-37). Able was often hired by South Central to do work on its Ohio power lines (SB-Ex. 9 at 10, 22).

(b) In Fall 1985, Mr. Rines met with and hired[3]

---

[2] Part of the lengthy delay in the divorce proceedings was Respondent's pronouncement that he would not bring the case for final hearing until it had been paid for by the Ellisons (Tr. I at 139, 175). Respondent was originally charged with violations of DR 5-101(A) and Dr 7-101(a)(2) of the Code of Professional Responsibility for refusing to proceed to final hearing due to non-payment of fees (SB-Ex. 1). However, the charges were dropped on January 15, 1991, when it was revealed that both Ellisons understood from the beginning that Respondent would not proceed to final hearing until full payment of his fee (Tr. I at 24). This is distinguishable from LEI 84-4, styled "Refusal to File Final Divorce Decree Unil Payment of Fees." In LEI 84-4, the Committee held that a lawyer could not withhold entry of a final order in a divorce proceeding until full payment of his fee. This is because the case has already moved to final judgment. In the instant proceeding, the case had not yet moved to final judgment. A final hearing is not a final judgment.

[3] At hearing, Respondent stated that he had never been employed by Mr. Rines (Tr. II at 55). Respondent testified that he informed Mr. Rines that while he would review the case, he would not be able to represent Mr. Rines (Tr. II at 55). Respondent contended that he could not do so because it was an Ohio matter, and he was not licensed to practice law in that State (Tr. II at 55). However, Mr. Rines does not recall Respondent telling him that he was not licensed in Ohio (SB-Ex. 9 at 23). Respondent also kept a file marked "Rines, George H., 85-2136" which contained numerous documents including original Workers' Compensation reports and medical bills (Tr. II at 78-84, 90-91; Committee Ex. 1). Some

Respondent to represent him in a potential personal injury lawsuit against South Central (SB-Ex. 9 at 7). During the meeting, Respondent outlined his fees:

> Q. Did you and he discuss money, as in Mr. Munchmeyer's attorney's fee? . . .
>
> A. [Respondent] told me that it would -- there'd be no fee right up front. It would come up when I got the settlement. Then all the phone bills, his fee and everything would come out of that, what was left.
>
> Q. Did you and he talk about how much his fee would be?
>
> A. It would be 30 percent if it didn't go to court. It would be 40 percent if it did go to court.
>
> Q. [W]as there any writing on the subject?
>
> A. No.
>
> Q. Was there any written fee agreement --
>
> A. No.
>
> Q. -- or representation agreement?
>
> A. No.

(SB-Ex. 9 at 8-9). Mr. Rines also asked Respondent to wait a while before filing suit because he still worked for Able and was afraid his employer might retaliate if he brought a lawsuit against a customer (SB-Ex. 9 at 9-10).

(c) In January 1986, Mr. Rines again met with Respondent at his office (SB-Ex. 9 at 11). At that time, Rines told Respondent to proceed with the lawsuit because he was leaving

---

of the documents were dated as late as March 1986 (Tr. II at 92-93; Committee Ex. 1). Respondent never returned these documents to Mr. Rines (Tr. II at 87). Respondent also told the Hearing Panel that he has been involved in litigation where he has been affiliated with an Ohio attorney (Tr. II at 60-61).

Able's employ (SB-Ex. 9 at 11-12). The two also discussed the amount of damages that should be requested in the suit and settled on a figure of $100,000.00 (SB-Ex. 9 at 11-12).

(d) At some point following the second meeting, Mr. Rines provided Respondent, at Respondent's request, with a written statement of the events surrounding his accident (SB-Ex. 9 at 10, 13).

(e) Mr. Rines met with Respondent on one or two occasions in Spring 1986 (SB-Ex. 9 at 14, 28). Each time, Respondent told Mr. Rines that his lawsuit had been filed in circuit court (SB-Ex. 9 at 14).

(f) Mr. Rines had no contact with Respondent after the events described in Paragraph (3)(e):

> Q. After that meeting, what other contacts did you have with Mr. Munchmeyer?
>
> A. Not too much after that one -- [I'd] call his office or get his secretary and then I could never make contact with him; it didn't seem like, anyway. I'd write to him and I would never get any information back or my wife wrote registered letters. I read them and signed them and sent them to him and never got any response on those or nothing.

(SB-Ex. 9 at 15).

(g) In March 1987, Mr. Rines moved to New Hampshire (SB-Ex. 9 at 15-16). Mr. Rines promptly called Respondent's office and left his new address and telephone number (SB-Ex. 9 at 17, 34).

(h) After the move, Mr. Rines continued to telephone Respondent in an effort to discuss the lawsuit with him (SB-Ex. 9 at 16). However, Respondent was never available to speak to Mr. Rines and did not return any of his telephone calls (SB-Ex. 9 at

16-17). Mr. Rines also sent three registered letters to Respondent from New Hampshire[4] (SB-Ex. 9 at 18). Respondent failed to reply to any of these letters (SB-Ex. 9 at 17).

(i) In April 1988, Mr. Rines met with New Hampshire Attorney John Garvey and expressed concern over his inability to contact Respondent (Deposition of John Garvey, hereinafter SB-Ex. 8, at 5-6; SB-Ex. 9 at 16-17). As a result of the meeting, Mr. Garvey wrote a letter to Respondent on Mr. Rines' behalf (SB-Ex. 8 at 6-8). The letter provided in pertinent part:

> Mr. Rines is quite concerned about the status of his case. He indicated to me that he contacted you on several occasions, but that you have not returned telephone messages. Further, he indicated that he sent a registered letter to you several months ago, but that he received no response. I realize that misunderstandings can often arise between lawyers and clients. However, Mr. Rines has requested that I receive a status report, on his behalf, so that I can verify for him that his interests are being protected.

(SB-Ex. 8, Deposition Exhibit 1).

(j) When Mr. Garvey did not receive a reply to this missive, he sent a second letter to Respondent via certified mail[5]

---

[4] Respondent actually acknowledged receipt of at least one of the certified letters by signing a green return receipt requested card (Tr. II at 64-66; SB-Ex. 15). The letter was received in January 1988 (Tr. II at 65; SB-Ex. 15).

[5] Mr. Garvey sent the letter to the following address: 331 Juliana Street, P.O. Box 381, Parkersburg, West Virginia 26101 (SB-Ex. 8, Deposition Ex. 2). At hearing, Nellie Hershberger, Superintendent of Postal Operations at the Parkersburg Branch of the United States Post Office, testified that where an envelope has both a street address and a P.O. Box number listed, it is standard operating procedure to send the letter to whatever is directly above the city/state line (3/16/92 Hearing Transcript, hereinafter Tr. II, at 22-23). Thus, Mr. Garvey's letter was sent to P.O. Box 381, Parkersburg, West Virginia 26101. P.O. Box 381 was Respondent's correct Post Office Box in 1988 (Tr. II at 29, 118).

100, 132-133). Mr. Waters, in turn, telephoned Respondent to find out why the report and order had not been prepared (Tr. I at 100, 132-133).

(g) Ms. Jacobs also wrote a letter to the Family Law Master on October 13, 1988, which stated that "I spoke with my attorney Tom Munchmeyer, yesterday (October 12, 1988). He is to supply you the form tomorrow so my divorce papers can be signed by next week" (SB-Ex. 4). However, Respondent never prepared the report and final order[8] (Tr. I at 100-101).

(h) Finally, on June 1, 1989, Ms. Jacobs filed a complaint against Respondent with the Committee (SB-Ex. 2). The basis of her complaint was Respondent's failure to prepare the report and order (SB-Ex. 2).

(i) Assistant Bar Counsel Cynthia Santoro Gustke sent a letter and a copy of Ms. Jacobs' complaint to Respondent on June 1, 1989 (Tr. I at 115; SB-Ex. 2). The letter asked Respondent to reply to the complaint in writing[9] within three weeks (SB-Ex. 2).

(j) When Respondent failed to reply to the June 1, 1989

---

[8] At hearing, Respondent admitted that he never had the final order entered in Jacob's case (Tr. I at 206-207, 216). Respondent also stated that "I should have probably had it entered" (Tr. I at 208). However, Respondent also said that he had "valid reasons" for not having the order entered (Tr. at 216).

[9] Respondent apparently spoke to Ms. Gustke on the telephone on two or three occasions about the complaint (Tr. I at 125). On each occasion, Ms. Gustke told Respondent that he must respond in writing to the complaint (Tr. I at 126). The purpose of a written response by the Respondent is to have something to send to the Complainant, who can then respond further, if necessary (Tr. I at 127). It also affords a reviewing member of the investigative panel an opportunity to examine the attorney's position with respect to the complaint (Tr. I at 126).

letter, Ms. Gustke sent a second letter asking him to respond to the complaint (Tr. I at 115-116; SB-Ex. 2). The letter was sent on July 11, 1989, and set forth a two week response deadline (Tr. I at 115-116; SB-Ex. 2).

(k) On July 31, 1989, Ms. Gustke sent Respondent a third letter warning him that he must promptly reply to Ms. Jacobs' complaint or be subpoenaed to appear before Counsel for the Committee (Tr. I at 115-116; SB-Ex. 2).

(l) When Respondent failed to reply to this third letter, he was subpoenaed to appear before Ms. Gustke on August 18, 1989 (Tr. I at 116-117; SB-Ex. 3). Respondent honored the subpoena, and, at that time, he admitted to Ms. Gustke that he had not filed the final order:

> [Respondent] gave me several reasons why the final order had not been prepared. Mr. Munchmeyer said that he did not prepare the final order because he wanted to appeal or to file a motion for reconsideration.[10] . . . He also told me that he did not prepare the final order because the tape of the final hearing, the Family Law Master's tape of the proceedings, had malfunctioned and his notes and Mr. Munchmeyer's notes were unclear.[11]

(Tr. I at 118-119).

(m) Meanwhile, Ms. Gustke helped Ms. Jacobs secure another attorney (Tr. I at 101,117-118; SB-Ex. 4). Robert Tebay prepared

---

[10] However, when later questioned by Ms. Gustke, Respondent conceded that an appeal cannot be taken or a motion for reconsideration heard until after a final order has been entered by the circuit court (Tr. Vol. I at 119-120).

[11] Interestingly, Respondent never contacted the Family Law Master to see if he could recall his ruling or review his notes (Tr. I at 133). Yet, when the attorney who ultimately drafted the report and order contacted the Family Law Master, he received a detailed letter outlining the ruling (Tr. I at 132; SB-Ex. 4).

the Family Law Master's report and final order in Ms. Jacobs' divorce (Tr. I at 101). The report was signed by Mr. Waters on September 18, 1989, and soon thereafter, the final order was signed by the trial court and entered into the record (SB-Ex 4).

(5) Evidence of Alcohol Impairment.

(a) In addition to his legal practice, Respondent also owns a bar called "Pub 47" (Tr. I at 97, 163). In fact, the Ellisons and Donna Jacobs met and ultimately hired Respondent because of their patronage of the bar (Tr. I at 46-47, 97).

(b) At hearing, Ms. Jacobs testified that she often stopped by Pub 47 during the early afternoon hours to see Respondent and try to obtain a copy of the final order in her divorce case (Tr. I at 98-99). Jacobs testified:

> Q. When you say that you would catch him at Pub 47, was that in person or by telephone?
>
> A. In person.
>
> Q. How would you know he was there? . . .
>
> A. I've seen him.
>
> Q. Did you just routinely check?
>
> A. His car was there, you know, it was always parked, you know.
>
> Q. When you saw him in person at Pub 47 in the afternoon, on those occasions was Mr. Munchmeyer drinking?
>
> A. Yes.[12]

[12] At hearing, Respondent admitted going to the bar during office hours; however, he said he was there on business and denied drinking at those times (Tr. at 171).

Q. Would you say he was drunk?

A. At times, yes.

(Tr. I at 99).

(c) Ms. Jacobs also testified that she went to Pub 47 every night and that Respondent was almost always there (Tr. I at 103-104). Ms. Jacobs further testified:

Q. Did you see Mr. Munchmeyer drinking?

A. Yes.

Q. Was he drunk?

A. Yes.

Q. Most of the time?

A. Yes.

(Tr. I at 104).

(d) On July 31, 1990, Respondent was arrested in Wood County and charged with First Offense Driving Under the Influence pursuant to W. Va. Code 17C-5-2(d) (1986) (Tr. I at 171; SB-Ex. 10). Apparently, Respondent had gone out to his bar during the afternoon hours to meet with the manager and was arrested by police after he pulled out of the Pub 47 parking lot (Tr. I at 171-172). On November 20, 1991, Respondent pled guilty to the offense charged and was sentenced to 24 hours in the county jail and fined one hundred dollars ($100) (SB-Ex. 10).

CONCLUSIONS OF LAW

(1) The West Virginia State Bar has the burden of proving by full, preponderating and clear evidence that Respondent committed

ethical violations. Syl. Pt. 1, Committee on Legal Ethics v. Pence, ___ W. Va. ___, 216 S.E.2d 236 (1975).

(2) DR 5-105(A).

In the instant case, Respondent violated DR 5-105(A) of the Rules of Professional Conduct when he represented both Mr. and Mrs. Ellison in their divorce. DR 5-105(A) provides in pertinent part:

> A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests. . . .

DR 5-105(A) is designed to prevent a lawyer from representing clients when there is a conflict of interest. See Committee on Legal Ethics v. Rockwell, slip op. No. 17679 (W. Va. Dec. 17, 1987) (Rule violated where respondent represented beneficiary's husband in a divorce action seeking equitable distribution of marital property, and he or his law partner had earlier represented other parties against beneficiary in litigation over marital property or drafted a trust instrument on beneficiary's behalf which involved the marital property). Likewise, the Rule also encompasses situations where a lawyer represents both the husband and wife in an uncontested divorce.

In Legal Ethics Inquiry 77-7 (hereinafter LEI 77-7), which is styled "Representing Both Spouses in Irreconcilable Differences Divorce," the Committee stated:

> [I]t would be improper for a lawyer to represent both husband and wife at any stage of a marital problem, even

> with full disclosure and informed consent of both parties. The likelihood of prejudice is so great in this type of matter as to make adequate representation of both spouses impossible, even where the separation is "friendly" and the divorce uncontested.

Id. at 2. The Committee also recognized the dangers associated with one-lawyer divorces:

> [T]he situations in which [divorcing] parties have identical interests is so rare as to be exceptional. For example, the division of support payments between alimony and child support has long-term financial implications for each of the parties. What is good for the husband is not necessarily good for the wife, and vice versa. The client who insists that the lawyer represent both parties frequently has an axe to grind. The lawyer who represents both clients runs an ever-increasing risk that he will eventually be the defendant in a malpractice suit brought by a disappointed spouse.

Id. at 4-5, quoting Walzer, The Role of the Lawyer in Divorce, 3 Fam. L.Q. 212, 217 (1969).

Recently, the State Supreme Court reiterated the Committee's pronouncements against one-lawyer divorces in Walden v. Hoke, ___ W. Va. ___, 429 S.E.2d 504 (1993) (lawyer representing plaintiff wife in an uncontested divorce action improperly prepared documents, including answer, for defendant husband even though there was no agreement that attorney would represent him). In Syllabus point 4, the Court quoted almost verbatim the Committee's holding in LEI 77-7 that a lawyer cannot represent both spouses in a divorce proceeding because of the substantial likelihood of prejudice. Id. The Court also held that "a plaintiff's lawyer should not prepare an answer for the defendant in any divorce, regardless of whether the divorce is uncontested and simple." Syl. pt. 5, Walden.

The evidence adduced at hearing demonstrates that Respondent represented both parties in the divorce. Mrs. Ellison testified that Respondent handled the entire divorce. Importantly, Respondent admitted that he represented both Ellisons in the proceeding (Tr. I at 140; SB-Ex. 6). There is also strong evidence that Mrs. Ellison paid Respondent at least half of his $500.00 fee.

Unquestionably, Respondent represented differing interests in acting as attorney for both Mr. and Mrs. Ellison in their divorce, and the exercise of his professional judgment was adversely affected by such representation. This is evidenced by the following: (a) Respondent preparing a "pro-se," non-defensive answer for Mrs. Ellison; (b) the settlement agreement; (c) Respondent maneuvering the Ellisons to forego joint custody in favor of the father; and (d) Mrs. Ellison's subsequent pursuit to gain custody of her son.

Accordingly, the State Bar has established by clear and convincing evidence that Respondent violated DR 5-105(A) of the Rules of Professional Conduct. Furthermore, it is an aggravating factor that LEI 77-7 had been in effect for at least nine years prior to the initiation of the Ellison divorce.

(3) DR 1-102(A)(4).

DR 1-102(A)(4) provides that "[a] lawyer shall not . . . [e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation." This provision covers many forms of lawyer misconduct. For example, the State Supreme Court has found violations of the Rule where an attorney failed to make full

disclosure of all of the relevant conditions surrounding a loan and where a lawyer improperly withheld funds from a settlement and lied to the client about the use of the funds. Committee on Legal Ethics v. Dennis, 176 W. Va. 753, 349 S.E.2d 919 (1986); Committee on Legal Ethics v. Tatterson, 173 W. Va. 613, 319 S.E.2d 381 (1984). The Court has also held that a lawyer who intentionally altered a date on a judicial order in an effort to avoid missing an appeal deadline violated DR 1-102(A)(4). Committee on Legal Ethics v. Thompson, 177 W. Va. 752, 356 S.E.2d 623 (1987).

Likewise, a lawyer who lies to a client about the status of a case is also guilty of misconduct. The evidence in the instant case reveals that Respondent agreed to represent Mr. Rines in his personal injury case. Mr. Rines instructed Respondent in January 1986 to file suit. Each time Mr. Rines met with Respondent in Spring 1986, Respondent told him that his lawsuit had been filed in circuit court (SB-Ex. 9 at 14). Importantly, the evidence at hearing revealed that Respondent never filed any lawsuit on behalf of Mr. Rines (SB-Ex. 8 at 20-21). Accordingly, Respondent violated DR 1-102(A)(4) by lying to Mr. Rines about the status of his case.

(4) **DR 6-101(A)(3).**

Generally, "[t]he Disciplinary Rules of the Code of Professional Responsibility state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." Committee on Legal Ethics v. Woodyard, 174 W. Va. 40, ___ , 321 S.E.2d 690, 693 (1984) quoting Tatterson, supra. DR 6-101(A)(3) provides that "[a] lawyer shall not . . .

[n]eglect a legal matter entrusted to him." In other words, t
attorney-client relationship is "of the highest fiduciary natu
calling for the utmost good faith and diligence on the part
[the] attorney." Syl. pt. 3, Committee on Legal Ethics v. Comet
— W. Va. —, 430 S.E.2d 320 (1993).

The evidence is clear that Respondent was not diligent in
representation of Mr. Rines. Mr. Rines retained Respondent in F
1985 for the express purpose of filing a lawsuit in connection w
the injuries he suffered while working as a lineman for Able.
January 1986, Mr. Rines instructed Respondent to file suit
circuit court. However, Respondent never filed Mr. Rines' lawsu
Therefore, Respondent violated DR 6-101(A)(3) by failing to f
suit on behalf of his client, Mr. Rines.

The record is also replete with evidence that Respondent
guilty of neglect by failing to communicate with Mr. Rines or
attorney, Mr. Garvey, about the status of the case. In fa
between Spring 1986 and the filing of the ethics complaint in
1988, Mr. Rines never heard from Respondent despite repe
telephone calls and letters requesting information concerning
status of his case. Mr. Garvey's letters and telephone calls
went unheeded. These actions are in direct contravention of D
101(A)(3).

Finally, the Rule was violated when Respondent neglecte
prepare and enter a final order in Ms. Jacobs' divorce c
Respondent was hired by Ms. Jacobs in late 1987. The final hea
was held before the Family Law Master on July 5, 1988.

[n]eglect a legal matter entrusted to him." In other words, the attorney-client relationship is "of the highest fiduciary nature, calling for the utmost good faith and diligence on the part of [the] attorney." Syl. pt. 3, Committee on Legal Ethics v. Cometti, ___ W. Va. ___, 430 S.E.2d 320 (1993).

The evidence is clear that Respondent was not diligent in his representation of Mr. Rines. Mr. Rines retained Respondent in Fall 1985 for the express purpose of filing a lawsuit in connection with the injuries he suffered while working as a lineman for Able. In January 1986, Mr. Rines instructed Respondent to file suit in circuit court. However, Respondent never filed Mr. Rines' lawsuit. Therefore, Respondent violated DR 6-101(A)(3) by failing to file suit on behalf of his client, Mr. Rines.

The record is also replete with evidence that Respondent was guilty of neglect by failing to communicate with Mr. Rines or his attorney, Mr. Garvey, about the status of the case. In fact, between Spring 1986 and the filing of the ethics complaint in July 1988, Mr. Rines never heard from Respondent despite repeated telephone calls and letters requesting information concerning the status of his case. Mr. Garvey's letters and telephone calls also went unheeded. These actions are in direct contravention of DR 6-101(A)(3).

Finally, the Rule was violated when Respondent neglected to prepare and enter a final order in Ms. Jacobs' divorce case. Respondent was hired by Ms. Jacobs in late 1987. The final hearing was held before the Family Law Master on July 5, 1988. Instead of

immediately preparing the Family Law Master's Report and final order, Respondent let the case languish for over a year. In fact the final order was not entered until September 18, 1989, or after Bar Counsel had intervened and helped Ms. Jacobs secure another attorney. Interestingly, at the disciplinary hearing, Respondent admitted that he had never had the final order entered in the Jacobs' case and that he "should have probably had it entered." Thus, Bar Counsel has proved the violation of the Rule by clear and convincing evidence.

(5) **Rule 8.1(b).**

Rule 8.1(b) of the Rules of Professional Conduct provide in pertinent part: "[A] lawyer in connection with a . . . disciplinary matter, shall not . . . knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority. . . ." A violation of this Rule is not conditioned upon the issuance of a subpoena but may result from the attorney's mere failure to respond to a request for information in conjunction with the investigation of an ethics complaint. Cometti, supra.

In the instant proceeding, the evidence demonstrates that Respondent repeatedly failed to respond to requests for information concerning the Jacobs matter. Bar counsel made such requests to Respondent by mail on June 1, July 11, and July 31, 1989. Bar Counsel also clearly informed Respondent that all replies must be in writing. However, Respondent ignored all requests for information. He only replied with such requests after he was subpoenaed to appear before Bar Counsel. Accordingly, Respondent

violated Rule 8.1(b).

(7) **Pattern and Practice.**

In Count IV of the Statement of Charges, Respondent was accused of displaying a "pattern and practice" of neglect in his representation of Mrs. Ellison, Mr. Rines and Ms. Jacobs. A review of the evidence reveals that this is not a case involving one isolated incident of inappropriate behavior on the part of a lawyer with an otherwise perfect record.[13] As with all other charges, the State Bar has proved this accusation by clear and convincing evidence. See generally, Committee on Legal Ethics v. Farber, 185 W. Va. 522, 408 S.E.2d 274 (1991). Accordingly, Respondent is guilty of displaying a systematic pattern of neglect with respect to Mrs. Ellison, Mr. Rines and Ms. Jacobs.

STIPULATED MITIGATION

1. Respondent has continued to maintain an active law practice since the institution of proceedings in the above-captioned matter. There have been no ethics complaints filed concerning Respondent's activities subsequent to 1990.

2. During the time frame covering the above-captioned matters Respondent was a sole practitioner who had his own office located at 4th and Juliana Streets, Parkersburg, West Virginia. In August 1992, Respondent began sharing office space with Parkersburg

[13] Respondent has been the subject of numerous complaints over the years. With the exception of the instant charges, all other complaints have been closed. However, it should be noted that Respondent received admonishments for actions similar to the instant charges in Case Nos. 87-383 and 88-202.

Attorneys James Simonton and Roger Redmond. When Respondent changed offices, he also instituted a new calendar system which allowed him to keep an accurate accounting of all deadlines in his cases.

3. In Spring 1993, Respondent closed his bar called "Pub 47" and has been trying to sell the business. He now devotes himself exclusively to the practice of law.

4. Respondent admits that he had problems with alcohol consumption during the time period covering the above-captioned matters. In 1992, Respondent stopped drinking hard liquor because of medical problems, including a hiatal hernia and shrinking esophagus. Respondent admits to drinking intoxicating beer on one occasion in January 1994. However, Respondent has not had any beer since that time and now only drinks non-intoxicating beer.

RECOMMENDED DISCIPLINE

It is agreed and stipulated by the parties hereto:

1. That the Respondent will be suspended from the practice of law for two (2) months. The suspension will be deferred as long as the Respondent participates in an out-patient program for alcohol addiction. Upon successful completion of the out-patient program, Respondent will no longer be subject to a two-month suspension. Should respondent fail to successfully complete the program or miss therapy sessions without good cause he will be automatically suspended from the practice of law for two months. As evidence of the Respondent's participation in the out-patient program, he will have his counselor provide monthly reports to the

State Bar informing us of his attendance and progress.

2. Respondent will be supervised by another attorney who is licensed to practice law in West Virginia. Respondent is required to submit a plan for supervision, and upon approval by Disciplinary Counsek, implement said plan. If Respondent fails to implement and/or comply with the plan, he shall be suspended from the practice of law for a period of two months.

3. Respondent will receive a public reprimand.

4. Respondent will pay all costs associated with the instant proceeding by a proposed payment schedule agreed upon by both parties.

G. CHARLES HUGHES, CHAIRMAN

DATE: 7/31/94

JAMES K. BROWN, ESQUIRE

DATE: 8/3/94

KATHARINE B. BECKER

DATE: 8/24/94