

OCT 22 1997

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 16th day of October, 1997, the following order was made and entered:

Lawyer Disciplinary Board, Complainant

vs.) No. 23561

Glen R. Stotler, a member of The West
Virginia State Bar, Respondent

On a former day, to-wit, June 24, 1997, came the Hearing Panel Subcommittee of the Lawyer Disciplinary Board, by R. Kemp Morton, its chairperson, pursuant to Rule 3.10, Rules of Lawyer Disciplinary Procedure, and presented to the Court its written recommended disposition in the above-captioned matter recommending that the charges filed against the respondent, Glen R. Stotler, be dismissed.

Upon consideration whereof, the Court is of opinion to and doth hereby adopt the recommendation of the Hearing Panel Subcommittee of the Lawyer Disciplinary Board. It is therefore ordered that the charges filed in the above-captioned proceeding be, and they hereby are, dismissed.

A True Copy

Attest:


Clerk, Supreme Court of Appeals

**BEFORE THE LAWYER DISCIPLINARY BOARD
STATE OF WEST VIRGINIA**

**In re: Glen R. Stotler, a member of
The West Virginia State Bar**

FILED
JUN 24 1997**I.D. Nos. 95-01-372****ANCIL G. RAMEY, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA****Sup. Ct. No. 23561**

**FINDINGS OF FACTS, CONCLUSIONS OF LAW,
AND RECOMMENDED DISCIPLINE**

FINDINGS OF FACT

1. Glen R. Stotler ("Respondent") herein is a licensed member of the West Virginia State Bar, who maintains his practice of law in Berkeley Springs, Morgan County, West Virginia, and, as such, is subject to the disciplinary jurisdiction of the Supreme Court of Appeals of West Virginia and its properly constituted Lawyer Disciplinary Board. Respondent was admitted to the West Virginia State Bar on June 5, 1990.

2. Dale A. Perry retained Respondent to represent her in an auto injury case in February 1994.

3. Sometime during July 1994, Dale A. Perry consulted with Respondent concerning custody of her child, Yvette Boles.

4. On August 19, 1994, Dale A. Perry again consulted Respondent about custody of her child. Ms. Perry informed Respondent that she was moving to the State of Washington and asked "whether or not I could take Yvette out of the state with me to Washington state". (Tr. 2/28/97 hearing, p. 14). Dale A. Perry also informed Respondent that she was taking Yvette to the State of Washington with her. (Tr. 2/28/97 hearing, p. 34). Respondent told her that she "had every legal right to do that". (Tr. 2/28/97 hearing, p.14).

5. On August 19, 1994, Dale A. Perry signed a verification form for a child custody petition at Respondent's office. (Tr. 2/28/97, hearing p. 14).

6. Yvette became ill in the moving van on the day of Dale A. Perry's departure to the State of Washington and she agreed to leave Yvette with her father, Kevin Boles, conditioned upon Mr. Boles agreement to bring Yvette to Washington, in a few weeks. Mr. Boles did not bring Yvette to the State of Washington. (Tr. 2/28/97 hearing, pp. 15-16).

7. On August 22, 1994, Kevin Boles filed a motion for ex parte relief asking that he be granted ex parte custody of his daughter, Yvette Boles pending a full hearing on the matter, which at that time was scheduled for October 20, 1994. On August 22, 1994, the Court granted Kevin Boles' motion and gave him custody of Yvette pending the October 20, 1994 hearing. (Exhibits H and I attached to Respondent's Response to the Statement of Charges 7/10/96). On September 12, 1994, in the State of Washington, Dale A. Perry was served with the ex parte order from West Virginia granting temporary custody to Mr. Boles and with a notice of an October 20, 1994 hearing. (Tr. 2/28/97 hearing, p. 17, ODC Exhibit 10, p. 2).

8. On or about September 13, 1994, Dale A. Perry talked with Respondent on the telephone. (Complainant's Complaint dated 9/26/95). Respondent was told about the papers "that I was served and asked him what happened, [h]e said, 'well, I don't know what happened, let me get back to you'". (Tr. 2/28/97 hearing, p. 18).

9. Dale A. Perry never told the Respondent in that conversation that she did not have her child, Yvette, with her in the State of Washington. (Tr. 2/28/97 hearing, p.33).

10. Dale A. Perry contends that after the brief call she tried to contact the Respondent, but that no one answered her calls. (Tr. 2/28/97 hearing, pp. 18-21, 40).

11. On September 15, 1994, the Family Law Master served upon Dale A. Perry, a "Notice of Recommended Order", which set a September 28, 1997 deadline for filing objections to the Masters recommended ex parte order. (Tr. 2/28/97 hearing, p. 19; ODC Exhibit 9).

12. On September 18, 1994, Dale A. Perry hired Mr. Paul Lane to represent her. (Tr. 2/28/97 hearing, p. 27). She never told Respondent she hired Mr. Lane to represent her and she never told Mr. Lane to tell Mr. Stotler that she had hired Mr. Lane. (Tr. 2/28/97 hearing, p. 56).

13. On September 14, 1994, Respondent moved the Family Law Master to set aside the temporary ex parte order dated August 22, 1994. A hearing was set for September 22, 1994. Respondent appeared at the hearing and learned for the first time that Yvette was in West Virginia with her father, Kevin Boles, for this reason, the Family Law Master continued temporary custody of Yvette with Kevin Boles pending the October 20, 1994 hearing.

14. Dale A. Perry only filed this complaint against the Respondent, when she ultimately lost custody of her daughter, after a decision of the Circuit Court of Morgan County, West Virginia granting custody of Yvette to Kevin Boles and that, "if she had gotten custody, [she] wouldn't be filing it now . . .". (Tr. 2/28/97 hearing, p. 43).

15. Dale A. Perry also filed an ethics complaint as a result of the same incident against April Dowler, Family Law Master, which has been dismissed as unsubstantiated. (Tr. 2/28/97 hearing, pp. 44, 45).

16. Respondent in his response to the Statement of Charges states, "between September 13, 1994 and September 22, 1994 he attempted to call [Ms. Perry] but was unable to reach her, and she did not call [Respondent's] office. (Response p. 5).

17. On April 26, 1996, the Investigative Panel of the Lawyer Disciplinary Board found that there was probable cause that Respondent violated Rule 1.4(a) of the Rules of Professional Conduct.

18. A hearing was held on February 28, 1997, before a hearing subpanel and after the Lawyer Disciplinary Board rested its case in chief against the Respondent, the Respondent by counsel made a motion to dismiss the charges on the grounds that they have not been proven by clear and convincing evidence that the Respondent has violated Rule 1.4(a) of the Rules of Professional Conduct. (Tr. 2/28/97 hearing, p. 84). The hearing subpanel took the motion to dismiss under advisement.

CONCLUSIONS OF LAW

Respondent is charged with a violation of Rule 1.4(a) of the Rules of Professional Conduct, the rule reads as follows:

"Rule 1.4 Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information."

"[I]n order to recommend to [the West Virginia Supreme Court of Appeals] the imposition of discipline of any lawyer, the allegations of the statement of formal charges must be proven by clear and convincing evidence." *Lawyer Disciplinary Board v. Hatcher*, No. 22429 Filed February 21, 1997, p. 1, citing Syl.Pt. 1; *Lawyer Disciplinary Board v. McGraw*, 194 W.Va. 758, 461 S.E.2d 850 (1995).

The Lawyer Disciplinary Board has not proven the charges against the Respondent by clear and convincing evidence. Essentially, we are confronted with the unsubstantiated allegations of Dale A. Perry that she tried to contact Respondent on numerous occasions from September 13, 1994 until September 22, 1994, which Respondent denies, stating he attempted to contact Dale A. Perry before the hearing on his motion to reverse the recommended ex parte

custody order and Dale A. Perry never contacted him. No telephone records concerning this matter were produced by either party.

Essentially when confronted with a swearing match and an evidentiary standard of clear and convincing evidence to prove the charges, the party with this higher burden of proof does not discharge its responsibility. Wherefore, no determinations concerning the credibility of the testimony need be made, nor need the various contradictions in the testimony be relied upon. Therefore, assuming everything that Dale A. Perry says is true and correct, it does not sustain the burden of proving a violation of the Rules of Professional Conduct by clear and convincing evidence, not to mention the fact that these charges were filed because Dale A. Perry lost a litigious custody battle, which Respondent had nothing to do with.

CONCLUSION

Wherefore, in view of the foregoing failure to prove the charges by clear and convincing evidence, the subpanel grants the Respondent's Motion to Dismiss the charges filed against him in this matter, no costs to be taxed.

R. Kemp Morton
R. Kemp Morton, Chairperson

June 23, 1997
Date

Claudia W. Bentley
Claudia Bentley

June 18, 1997
Date

Priscilla M. Haden
Priscilla Haden

June 17, 1997
Date