

**STATE OF WEST VIRGINIA**

**At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 3rd day of April, 1996, the following order was made and entered:**

**Lawyer Disciplinary Board,  
Complainant**

**vs.) No. 23031**

**Thomas E. Esposito, an active member  
of The West Virginia State Bar,  
Respondent**

**On a former day, to-wit, March 28, 1996, came the Lawyer Disciplinary Board, by Steven Johnston Knopp, its attorney, pursuant to Rule 3.10, Rules of Lawyer Disciplinary Procedure, and presented to the Court the Hearing Panel Subcommittee's written recommended disposition in the above-captioned proceeding, recommending that the respondent be publicly reprimanded and that he be required to reimburse the Lawyer Disciplinary Board for the costs and expenses incurred in the investigation of this matter.**

**There being heard neither consent nor objection from either the Office of Disciplinary Counsel or 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 Hearing Panel Subcommittee be, and it hereby is, adopted. It is therefore ordered that the respondent be, and he hereby is, publicly reprimanded. It is further ordered that the respondent reimburse the Lawyer Disciplinary Board for the costs and expenses incurred in the investigation of this matter.**

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

A True Copy

Attest:   
Clerk, Supreme Court of Appeals

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

**IN RE: THOMAS E. ESPOSITO, a member of  
The West Virginia State Bar**

**I.D. No. 95-02-225  
Supreme Court No. 23031**

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**FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND RECOMMENDED DISCIPLINE  
SUBMITTED BY HEARING PANEL SUBCOMMITTEE**

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The Subcommittee Hearing Panel of the Lawyer Disciplinary Board, having duly reviewed the foregoing matters and consulted, makes the following findings of fact and conclusions of law, and recommends discipline.

**FINDINGS OF FACT**

1. Thomas E. Esposito (hereinafter Respondent) is a licensed member of The West Virginia State Bar who practices in Logan, Logan County, West Virginia, and, as such, is subject to the disciplinary jurisdiction of the Supreme Court of West Virginia and its properly constituted Lawyer Disciplinary Board. Respondent was admitted to the West Virginia State Bar on May 16, 1978.
2. Larry Browning and Wilma Browning came to the offices of Respondent on January 5, 1995, seeking a no fault divorce.
3. The Complainant alleged that she was not aware that the Respondent was to represent only her husband, Larry Browning.

4. Respondent states that he believed he represented only Mr. Browning in the divorce.
5. A fee of \$750.00 was agreed upon. A check in that amount was written from a joint account and signed by Complainant, Wilma L. Browning.
6. At a meeting on January 5, 1995, in Respondent's office, both Complainant and her husband remained in the room with Respondent. Respondent believed that the parties had reached an agreement purporting to settle all the issues in the divorce before arriving at his office.
7. After January 5, and prior to February 2, 1995, Complainant repeatedly called Respondent's office wanting to know when the papers would be prepared.
8. A Complaint for Divorce on behalf of Larry Browning was filed on February 2, 1995.
9. The Complaint was served upon Complainant on February 2, 1995 in Respondent's law office by Respondent's secretary.
10. On that same date, February 2, 1995, Complainant signed an answer on a form provided by the Logan County Circuit Clerk before Respondent's secretary and left the Answer in the Respondent's office to be filed in the Circuit Court of Logan County, West Virginia.
11. Respondent Noticed a Hearing for March 30, 1995. The Certificate of Service for the hearing states:

I, THOMAS E. ESPOSITO, Counsel for the Defendant, do hereby certify that I served a true copy of the foregoing NOTICE OF HEARING upon the Defendant, Wilma Leigh Browning, by placing a true copy thereof in the United States mail, postage prepaid, to her at her address of 512 Greenshoals Road, Ferrellsburg, West Virginia 25524, on this [9th] day of [February], 1995.

The Certificate of Service was signed by Respondent as Counsel for Plaintiff. The phrase "Counsel for the Defendant" constitutes only a typographical error in the notice.

12. The Agreement was entered January 5, 1995, and executed February 1, 1995, by both parties to the divorce.

13. The Agreement gives Mr. Browning, the Plaintiff, custody of the child, the marital residence, the 1992 vehicle, and made Plaintiff responsible for the marital debts. Complainant herein, Defendant in the divorce matter, received a 1988 vehicle, \$200.00 per month rehabilitative alimony for one year, and waived all rights to any pension.

14. Complainant asserts that she relied upon Respondent's and Plaintiff's statements that the Plaintiff had to have custody of the child in order to maintain health insurance.

15. Respondent asserts he is not aware of the circumstances whereby the Complainant decided to allow her husband to have custody of their child, who is sixteen years old. Respondent asserts that Complainant's decision was not based upon any representation made by the Respondent to her, and Respondent does not know what discussion that the husband had with Complainant that may have influenced her in this regard.

16. On March 20, 1995, a Motion to Set Aside Separation Agreement was filed on behalf of Complainant by Marcelle St. Germain for Appalachian Research and Defense Fund, Inc.

17. Upon learning of the Complainant's question regarding the Settlement Agreement, the Respondent encouraged his client, Mr. Browning, to agree to set aside the settlement and Respondent moved to withdraw from the representation of Mr. Browning after the hearing on the Motion to Set Aside.

18. By Order dated May 25, 1995, the Separation Agreement was set aside, and the parties were restored to their former positions.

## CONCLUSIONS OF LAW

Respondent was charged with violations of Rules 1.7(a), 4.3, and 8.4(d) of the West Virginia Rules of Professional Conduct. The Respondent and Disciplinary Counsel have stipulated that by providing an answer for the defendant while representing a plaintiff in a divorce action, Respondent has violated Rule 1.7(a). Rule 1.7(a) provides:

**RULE 1.7 Conflict of Interest: General Rules**

**(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client. . . .**

In a formal opinion, L.E.I. 77-7, which was published by the Committee on Legal Ethics in the Fall, 1977, *State Bar Journal*, and reprinted in the January 1991 edition of *The West Virginia Lawyer*, it was the Opinion of the Committee that dual representation was improper and should be avoided. Among the Committee's reasons for prohibiting dual representation was the possibility for such problems as have arisen in the instant case, when the parties to an agreement suddenly disagree. The Committee determined that it was not possible for an attorney to represent both parties to a divorce, even if full disclosure were made. Additionally, the attorney for one party was cautioned not to prepare an answer for the unrepresented opposing party. The likelihood of prejudice was felt to be so great in these matters, that even with a friendly separation and an uncontested divorce, adequate representation for either spouse was impossible.

The same issues of dual representation in an irreconcilable differences divorce were later discussed by the West Virginia Supreme Court of Appeals in *Walden v. Hoke*, 429 S.E. 2d 504 (W.Va. 1993). The Court held in *Walden, Id.*, that the practice was impermissible, specifically holding ". . . 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. . ." *Walden, Id.*, at 509. The

Respondent's acts contrary to the Opinion of the Committee on Legal Ethics and the published case of *Walden v. Hoke, Id.*, clearly constitute a violation of Rule 1.7(a) of the Rules of Professional Conduct. That Rule provides that [a] lawyer shall not represent a client if the representation will be directly adverse to another client. This violation is the key to the Statement of Charges returned against the Respondent. The Respondent and Disciplinary Counsel have agreed that the violation has occurred, and have so stipulated.

Consequently, the Office of Disciplinary Counsel has met its burden of proof, and the charges have been proven by clear and convincing evidence. *Committee on Legal Ethics v. Beveridge*, 459 S.E. 2d 542 (W.Va. 1995).

#### RECOMMENDATION CONCERNING DISCIPLINE

Clearly, the Respondent's admitted conduct contrary to the standards set in Rule 1.7(a), *Walden v. Hoke, Id.*, and of L. E. I. 77-7, stipulated to by the parties, is of sufficient gravity to call for the application of a penalty for the violation. In deciding upon the appropriate disciplinary action for ethical violations, this Hearing Panel Subcommittee must consider 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. *Committee on Legal Ethics v. McCorkle*, 452 S.E.2d 377 (W.Va. 1994), at *Syl. pt. 4*.

In another matter involving similar violations of Rule 1.7(a), the Supreme Court of Appeals has also imposed a penalty of a Public Reprimand. See, *Committee on Legal Ethics v. Frame*, 189 W.Va. 641, 433 S.E.2d 579 (1993). This recommendation is appropriate to the instant Respondent, as well. The facts in the instant case support a sanction less severe than an outright suspension

from practice. The application of lawyer discipline based on the particular facts of the case, as well as any particular issues of mitigating facts and circumstances, is called for by *Committee on Legal Ethics v. Hobbs*, 439 S.E.2d 629 (W.Va. 1993), at Syl. pt. 3.

The facts in this matter are not in dispute and the violation is stipulated. Additional facts, not contained within the stipulations, are relevant to the analysis of penalty. For example, Disciplinary Counsel has noted that in the instant matter, the Respondent has cooperated fully in the investigation and has remained forthright about the nature of his conduct. The Respondent, although the subject of prior complaints in the past, has not been the subject of a Statement of Charges, and he has not received any formal discipline from the Committee on Legal Ethics or the Lawyer Disciplinary Board during his nearly twenty years of practice. Finally, and consistent with his attitude of cooperation and compliance, he has voluntarily initiated changes to his practice, prior to the Statement of Charges, to eliminate the possibility of a repeat violation of the Rule. Prior to the filing of the Complaint, he worked with his client to restore each party to the status quo prior to the questioned activity and has withdrawn from further participation in the matter, making refund of his fee. The Respondent, while denying any intent to commit a violation, acknowledges the existence and nature of the violation, and has accepted responsibility for the unintended effects upon both the party whom he believed to be his client and the other affected party. These facts have been considered by the Hearing Panel Subcommittee.


Prior discipline of an attorney is a very significant factor in determining an appropriate sanction against the same attorney in a pending disciplinary proceeding. *Committee on Legal Ethics v. Tatterson*, 352 S.E. 2d 107 (W.Va. 1986). The prior good record of the Respondent herein, and the lack of a previous instance of discipline for the same offense or any other, as well as his attitude



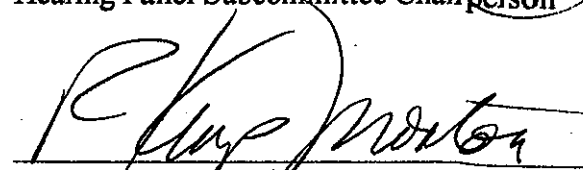
of contrition, distinguish this Respondent from others currently and similarly charged. The purpose of lawyer discipline is to protect the public, reassure the public as to the integrity of attorneys and safeguard the administration of justice. *Committee on Legal Ethics v. Keenan*, 450 S.E. 2d 787, 789 (W.Va. 1994). The Subcommittee believes that these objectives are met with the proposed discipline.

Accordingly, the Subcommittee recommends that the Respondent receive a Public Reprimand from the Supreme Court of Appeals of West Virginia, and further, that the Respondent be required to reimburse the Committee on Legal Ethics for the cost of these proceedings.

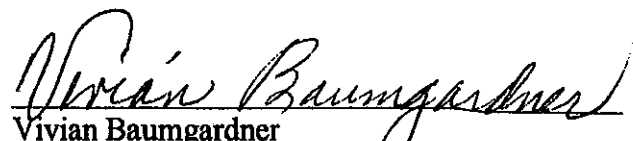
3/8/96  
Date

  
Dwane L. Tinsley, Esquire  
Hearing Panel Subcommittee Chairperson

3/24/96  
Date

  
R. Kemp Morton, Esquire  
Hearing Panel Subcommittee Member

Mar. 18, 1996  
Date

  
Vivian Baumgardner  
Hearing Panel Subcommittee Lay Member

