

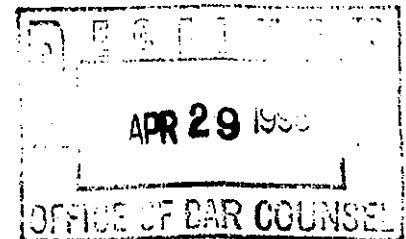
**STATE OF WEST VIRGINIA**

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 25th day of April, 1996, the following order was made and entered:

**Lawyer Disciplinary Board,  
Complainant**

vs.) No. 23030

**Bennett R. Burgess, a suspended member  
of The West Virginia State Bar,  
Respondent**



On a former day, to-wit, April 2, 1996, 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 proceeding, recommending that the respondent's license to practice law in the State of West Virginia be suspended for a period of two years with one year actual suspension and the remaining year's suspension deferred while the respondent undergoes a one-year period of supervision following his reinstatement, said supervision to be approved and monitored by the Office of Lawyer Disciplinary Counsel. It is further recommended that respondent be required to petition for reinstatement and 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 respondent or the Office of Disciplinary Counsel, pursuant to Rule 3.11, Rules of Lawyer Disciplinary Procedure, the Court is of opinion to and doth hereby adopt the written recommended disposition of the Hearing Panel Subcommittee of the Lawyer Disciplinary

Board. It is therefore ordered that the respondent's, Bennett R. Burgess, license to practice law in the State of West Virginia be, and it hereby is, suspended for a period of two years with one year actual suspension and the remaining year's suspension deferred while the respondent undergoes a one-year period of supervision following his reinstatement, said supervision to be approved and monitored by the Office of Lawyer Disciplinary Counsel. It is further ordered that the respondent petition for reinstatement and 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 shall constitute sufficient notice of the contents herein.

A True Copy

Attest:



\_\_\_\_\_  
Clerk, Supreme Court of Appeals

**FILED**

**APR - 2 1996**

ANCIL G. RAMEY, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

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

Bennett R. Burgess, a member of  
The West Virginia State Bar

I.D. Nos. 94-01-205  
95-01-106  
Sup. Ct. No. 23030

**FILE COPY**

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

**APR 29 1996**

Assistant Disciplinary Counsel and the Respondent agreed that the matter would be presented to the Hearing Panel on stipulations. Assistant Disciplinary Counsel prepared the proposed stipulations and submitted a copy to the Respondent. The Chairman of the Hearing Panel communicated with the Respondent in writing addressed to his last known address.

The Chairman gave the Respondent the opportunity to comment or proposed amendment or modifications to the stipulation. The Respondent has not submitted any comment to the proposed stipulations and attempts to contact Respondent have been unsuccessful. Wherefore, the Hearing Panel has determined to proceed to consider the proposal as submitted by Assistant Disciplinary Counsel.

The Hearing Panel Subcommittee, having reviewed the proposed Stipulated Findings of Fact, Conclusions of Law, Mitigation, and Recommended Discipline in this matter, does find them to be acceptable and, does adopt the Stipulated Findings of Fact, Conclusions of Law, Mitigation, and Recommended Discipline, attached hereto.

1. Bennett R. Burgess ("Respondent" herein) is a licensed member of The West Virginia State Bar who practices in St. Albans, Kanawha County, West Virginia, and as such, is subject to the disciplinary jurisdiction of the West Virginia Supreme Court of Appeals and its properly constituted Lawyer Disciplinary Board. Respondent was admitted to the West Virginia State Bar on June 3, 1958.

#### COUNT I

2. Respondent represented Dannie B. Taylor in a wrongful discharge case.

3. On July 15, 1993, Respondent filed suit in the Circuit Court of Kanawha County, *Dannie B. Taylor v. Bedway Security Agency, Inc.*, Civil Action 93-C-4870.

4. The summons was returned, being served, on July 19, 1993.

5. The docket of *Taylor v. Bedway* next shows a letter from Judge Lyne Ranson to Respondent dated September 7, 1993. The letter stated that an answer has not been filed nor has a Motion for Default Judgment been filed and asked Respondent to advise the Judge's office concerning this matter.

6. An Order dismissing the matter was entered on October 31, 1994. By its terms, the Order was sent to counsel of record.

7. In March 1994, Mr. Taylor met with Respondent. At that time, Respondent asked Mr. Taylor what the lowest amount he would be willing to accept in order to settle the case. Respondent asked Mr. Taylor to call on April 1, 1994, in order to determine the results of the negotiations.

8. Mr. Taylor called every day for one week beginning April 1, 1994.

9. Mr. Taylor began calling Respondent again the following week. Mr. Taylor was not contacted by Respondent.

10. Mr. Taylor filed an ethics complaint with the Office of Disciplinary Counsel, I.D. No. 94-01-205. The complaint was conveyed to Respondent by letter dated July 26, 1994. The letter required Respondent to mail a verified response within 10 days, pursuant to Rule 2.5 of the Rules of Lawyer Disciplinary Procedure. Respondent failed to respond.

11. A second letter was sent to Respondent on September 23, 1994, asking for a response and citing *Committee on Legal Ethics v. Martin*, 187 W. Va. 240, 419 S.E.2d 4 (1992) for the proposition that failure to respond was an ethics violation. The letter asked for a written response on or before October 7, 1994. Respondent did not reply until October 18, 1994.

12. Respondent's letter of October 18, 1994, states in part:

I have met with Mr. Taylor, as he has stated, to ascertain damages which is essentially lost income. I am preparing affidavits which will support a default claim which Mr. Taylor will have to review and sign.

If he is still interested in my representing him, I will have these documents available at his call. I can then file them, with a proper motion, for judgment. This issue will then be to collect money.

13. Respondent was subpoenaed on two occasions for failure to respond to Disciplinary Counsel. On one of those occasions, Respondent was asked about the present matter. At that meeting, on

May 15, 1995, Respondent stated that by the end of the week he would write to Mr. Taylor.

14. By letter to Mr. Taylor from Respondent dated May 23, 1995, Respondent stated as follows:

Do you now have the records you were seeking on this case. Please let me know the status. If I don't hear from you by the end of this month I'll proceed with what I have.

Thank you for your prompt attention in this matter.

15. Mr. Taylor has attempted to call Respondent since the May 1995 letter without success.

#### COUNT II

16. On March 22, 1995, the Office of Disciplinary Counsel received another ethics complaint against Respondent, I.D. No. 95-01-106, from Complainant Charles Bradley.

17. Respondent agreed to represent Charles Bradley and his family in a matter regarding undue influence of their father into making a will.

18. Mr. Bradley in March 1992, went to Respondent's office to discuss the lawsuit. Mr. Bradley and his family took all their documents to Respondent who agreed to take the case.

19. Nothing was ever done on their behalf.

20. Mr. Bradley and his family have tried many times unsuccessfully to reach Respondent to get their documents back.

21. The telephone was not answered and the office was closed when Mr. Bradley and his family members tried to reach Respondent.

22. Respondent did not respond initially to the complaint filed against him with the Office of Disciplinary Counsel.

Disciplinary Counsel subpoenaed Respondent and he appeared before Disciplinary Counsel on May 15, 1995 at 1:30 p.m. This was the second time that Respondent had to be subpoenaed to respond to a complaint.

23. Respondent answered that "this was a difficult case," that his "investigation of the facts to be applied against the law was such that" it would not win, and that he had telephone conversations with Mr. Bradley explaining this.

24. Respondent had no written retainer nor other documentation in this matter.

25. Respondent does not presently deny that he did not return telephone calls in a timely fashion, and thus admits such fact.

26. Respondent presently admits that Mr. Bradley requested the return of his paperwork and Respondent did not return it.

27. On May 19, 1995, after appearing before Disciplinary Counsel, Respondent returned the paperwork to Mr. Bradley with a cover letter that had a short, four sentence explanation of why he thought the case would be unsuccessful.

28. Respondent presently admits that he took no legal action.

29. In July, 1993 Respondent took a full-time position as clerk with the City of St. Albans and kept his "office open simply for the purpose of trying to wrap up some of these cases." Respondent presently admits that the clerkship is getting in the way of his legal practice.

## CONCLUSIONS OF LAW

30. By Respondent taking Mr. Bradley's case when he was not in a position to devote time and attention needed to the matter Respondent violated Rule 1.1 of the Rules of Professional Conduct which states:

### **RULE 1.1 Competence**

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

31. Respondent's admission that he failed to bring the legal matter to default judgment, settlement, or to trial with respect to Mr. Taylor, and failed to take any action on Mr. Bradley's case proves he violated Rule 1.3 of the Rules of Professional Conduct which provides:

### **RULE 1.3 Diligence**

A lawyer shall act with reasonable diligence and promptness in representing a client.

32. By Respondent failing to return Mr. Taylor's telephone calls, failing to forward the Order of Dismissal in Mr. Taylor's case, and by failing to respond to Mr. Bradley's requests for information and return of his file, Respondent violated Rule 1.4(a) and 1.4(b) of the Rules of Professional Conduct which provide:

### **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.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.



33. By failing to return Mr. Bradley's file when requested, Respondent violated Rules 1.16(a)(3) and 1.16(d) of the Rules of Professional Conduct which state:

**RULE 1.16 Declining or Terminating Representation**

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(3) the lawyer is discharged.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.

34. Respondent violated Rules 8.4(c) and 8.4(d) of the Rules of Professional Conduct by stating in a letter to Mr. Taylor dated May 23, 1995, almost five (5) months after the Order dismissing the case, that he will "proceed with what I have."

**RULE 8.4 Misconduct**

It is professional misconduct for a lawyer to: . . .

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice; . . .

35. By failing to respond to lawful demands for information from Disciplinary Counsel on both complaints, and by making representations which implied that the civil case on behalf of Mr. Taylor was ongoing, Respondent violated Rule 8.1(b) of the Rules of Professional Conduct which states in pertinent part:

**RULE 8.1 Bar Admission and Disciplinary Matters**

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

**MITIGATION**

Respondent, by accepting responsibility for his actions has shown that he may be rehabilitated in the future. Such fact should be considered in mitigation.

**RECOMMENDED DISCIPLINE**

36. The Respondent shall be suspended by Order of the Supreme Court of Appeals of West Virginia for a period of twenty-four (24) months, of which suspension Respondent shall serve twelve (12) months actual suspension upon entry of the Supreme Court's decision. The twelve-month balance of the suspension shall be deferred while Respondent undergoes a period of supervision following his reinstatement. However, Respondent must petition for reinstatement pursuant to Rule 3.32 of the Rules of Lawyer Disciplinary Procedure.

37. Respondent will be supervised for a period of one (1) year by another attorney who is licensed to practice law in West Virginia. Respondent is required to submit a plan of supervision to Disciplinary Counsel. Upon approval by Disciplinary Counsel, Respondent shall implement the plan. Upon the entry of an Order by

the Supreme Court of Appeals, Respondent will provide Disciplinary Counsel with names of lawyers who are active and in good standing to practice law in West Virginia to serve as "supervisor."

38. The supervisor which is approved by Disciplinary Counsel shall provide Disciplinary Counsel, at the beginning of each month, reports concerning Respondent's practice habits as fully set forth in the Plan of Supervision.

39. If Respondent fails to implement and/or comply with the terms of the plan and/or to successfully complete the period of supervision, he shall be subject to suspension for the additional period of suspension which was deferred. Upon notice to the Respondent of its allegations of failure to implement or complete the period of supervision, Disciplinary Counsel shall present facts supporting the charge of failure to implement and/or comply with the plan to the Subcommittee Hearing Panel. After a full and fair hearing, the Panel shall report its finding and recommendation for action directly to the Supreme Court of Appeals which may enter its immediate order for the suspension of Respondent for the remaining twelve (12) months or may take such additional action as it deems appropriate. Upon successful completion of the twelve (12) period of supervision Respondent shall no longer be subject to the additional period of suspension.

40. Respondent shall pay all costs associated with the investigation and litigation of this proceeding.

41. These Proposed Findings of Fact, Conclusions of Law, Mitigation and Recommended Discipline are made in lieu of a hearing

on the Statement of Charges and Amended Statement of Charges in the above-captioned matter and upon the claim of Respondent for mitigation which hearing is waived by both parties, provided the Proposed Findings of Fact, Conclusions of Law, Mitigation and Recommended Discipline are accepted by the Lawyer Disciplinary Board's Hearing Panel Subcommittee. In the event of rejection of such, Respondent shall have the opportunity to a hearing de novo before another Hearing Panel, unless the Subcommittee, in rejecting the Proposed Findings of Fact, Conclusions of Law, Mitigation and Recommended Discipline, recommends a more lenient sanction than proposed.

42. Respondent stipulates to these Proposed Findings of Fact, Conclusions of Law, Mitigation and Recommended Discipline willingly. Respondent and Disciplinary Counsel have read, understand and agree to the Proposed Findings of Fact, Conclusions of Law, Mitigation, and Recommended Discipline. The Proposed Findings of Fact, Conclusion of Law, Mitigation, and Recommended Discipline contain the entire agreement and there are no promises, stipulations, offers or any type of inducements by the parties hereto or by any other person. The parties have entered these Proposed Findings of Fact, Conclusions of Law, Mitigation, and Recommended Discipline of their own free will without any fraud, duress or any manner of coercion.

March 26, 1996  
Date

R. Kemp Morton  
R. Kemp Morton, Chairperson

March 19, 1996  
Date

Cheryl L. Henderson  
Cheryl L. Henderson, Esquire

March 25, 1996  
Date

Priscilla M. Haden  
Mrs. Priscilla Haden

