

STATE OF WEST VIRGINIA
IN THE SUPREME COURT OF APPEALS
IN VACATION

Office of Lawyer Disciplinary
Counsel, Petitioner

vs.) No. 970059

Patricia A. Bunner, an inactive member of
The West Virginia State Bar, Respondent

On a former day, to-wit, December 19, 1996, came the petitioner, the Office of Lawyer Disciplinary Counsel, by Sherri D. Goodman, its attorney, and presented to the Court its petition for a rule in contempt to issue to show cause why the respondent, Patricia A. Bunner, an inactive member of The West Virginia State Bar, should not be held in contempt of this Court's orders entered on the 8th day of July, 1994, and on the 13th day of July, 1995, in a proceeding styled Hearing Panel of the Committee on Legal Ethics of The West Virginia State Bar vs. Patricia A. Bunner, an inactive member of The West Virginia State Bar, Case No. 22331; and also presented to the Court its request that respondent's license to practice law in the State of West Virginia be annulled, or, in the alternative, that this Court lift the stay on pending disciplinary proceedings entered by this Court on the 13th day of July, 1995, for the reasons stated therein.

Upon consideration whereof, the Court is of opinion to and doth hereby refuse said petition for a rule in contempt to issue without prejudice to re-file. It is further considered and ordered that the stay of the pending disciplinary proceedings be, and it hereby is, lifted. Justice Starcher deemed himself disqualified and did not participate in this matter.

DONE IN VACATION of the Supreme Court of Appeals, this 8th day
of January, 1997.

Honorable Margaret L. Workman, Chief Justice

Honorable Thomas E. McHugh

Honorable Robin Jean Davis

Honorable Elliott E. Maynard

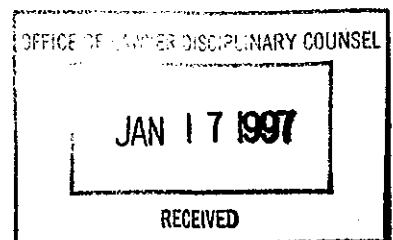
Received the foregoing order this 8th day of January, 1997, and entered
the same in Order Book No. 122.

A True Copy

Attest: _____

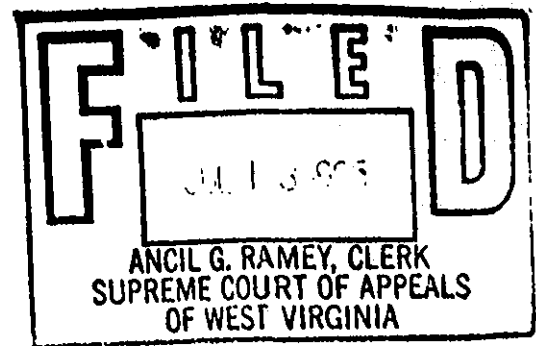
Carmen Bowling

Interim Clerk, Supreme Court of Appeals



Per Curiam

Hearing Panel of the Committee on Legal Ethics
of The West Virginia State Bar,



No. 22331 vs.

Patricia A. Bunner, a Member of the
West Virginia State Bar

The Hearing Panel of the Committee on Legal Ethics recommends that we find attorney Patricia A. Bunner capable of defending legal ethics charges against her and participating in a hearing on those charges. If we find that she is incapable of such participation, the Hearing Panel recommends that we suspend her license to practice law until she is capable of answering the charges against her and that we permit the Hearing Panel to use sworn statements of any witness who is unavailable to testify when the proceedings are resumed.

I.

On February 2, 1994, a Statement of Charges was filed against Ms. Bunner alleging numerous ethical violations including misappropriation of client funds, encouraging a client to avoid arrest, neglecting cases, refusing to refund fees, threatening violence to a clerk, and failing to respond to an ethics complaint. Although a telephonic conference was scheduled for May 19, 1994,

Ms. Bunner requested a continuance due to her lack of a telephone and based upon her therapist's advice to take things slowly. After several attempts to reschedule that hearing and to contact Ms. Bunner regarding a hearing date, the hearing was eventually scheduled for June 2, 1994, at the West Virginia University College of Law (hereinafter "the law school"). Ms. Bunner was also informed that her reliance upon medical limitations should be substantiated by a physician if an additional continuance was to be considered.

On the date of the hearing, Ms. Bunner left a note at the law school informing the Hearing Panel that she had driven to the office of her therapist in an attempt to secure his testimony regarding her condition and her inability to defend herself against ethical charges. Despite telephone conversations among Ms. Bunner, her therapist, Ms. Bunner's brother, who is also an attorney, and Bar Subcommittee Chairperson Alan Moats, a hearing was never held, and depositions of witnesses who had been prepared to testify were taken for later reference.

On June 10, 1994, the Hearing Panel petitioned this Court for an impairment evaluation¹ of Ms. Bunner and the indefinite

¹Specifically, the Hearing Panel petitioned this Court "to determine by examination whether Respondent Patricia A. Bunner is incapacitated by mental infirmity from continuing the practice of law." The Hearing Panel further requested this Court "to order Respondent to submit to a psychological or psychiatric evaluation and that the Court make specific arrangements for the evaluation."

suspension of her license to practice law. On July 8, 1994, this Court ordered that Ms. Bunner be placed on inactive status² and also ordered her to schedule an evaluation at Chestnut Ridge Department of Behavioral Medicine. The order specifically requested a determination of whether Ms. Bunner was incapacitated from the practice of law.

It is important to note that neither the Hearing Panel's request, nor the order of this Court directing an evaluation, specifically sought an opinion on whether Ms. Bunner was suffering from a disability which made it impossible for her to defend the charges against her, despite the fact that she claimed such impossibility prior to the evaluations being sought or directed.

On August 17, 1994, Marc W. Haut, Ph.D., submitted his neuropsychological evaluation of Ms. Bunner, finding that although she had the mental capability to practice law, she was currently unable to function as an attorney due to her "behavioral presentation" and her own admission that she cannot practice. He also diagnosed her as suffering from major depression.

II.

²The Bar requested this Court to place Ms. Bunner on inactive status and to prohibit her from meeting with clients. We found sufficient evidence to justify an evaluation of her capacity to practice and ordered her to be placed on inactive status pending the outcome of expert evaluation. We also specifically prohibited her from meeting with clients or otherwise engaging in the practice of law.

The Hearing Panel's recommendations present two separate questions: first, whether Ms. Bunner is disabled from the practice of law, as addressed in Rule 3.23(a) of the Rules of Lawyer Disciplinary Procedure; second, whether she is suffering from a disability which makes it impossible for her to adequately defend the charges against her, as addressed in Rule 3.23(c).³ The

³Rule 3.23 of the Rules of Lawyer Disciplinary Procedure provides as follows:

Complaint Alleging Disability. (a)

Whenever the Office of Disciplinary Counsel receives a complaint or, after conducting an appropriate investigation, concludes that a lawyer is disabled from continuing the practice of law by reason of mental infirmity or illness or because of addiction to drugs or alcohol, a report shall be filed with the Supreme Court of Appeals to take or direct such action as it deems necessary or proper to determine whether the lawyer is so disabled, including examination of the lawyer by such qualified medical experts as the Court shall designate.

(b) If, upon due consideration of the matter, the Court concludes that the lawyer is disabled from continuing to practice law, it shall enter an order imposing an administrative suspension on the lawyer on the ground of such disability until further order of the Court and any pending disciplinary proceedings against the lawyer shall be held in abeyance. The Court may provide for such notice to the lawyer of the proceedings as is deemed proper and advisable and may appoint counsel to represent the lawyer if he or she is without adequate representation.

(c) If during the course of a disciplinary proceeding, a lawyer contends that he or she is suffering from a disability by reason of mental or physical infirmity or illness, or because of addiction of drugs or alcohol, which makes it impossible for the

(continued...)

Hearing Panel assets that it is possible to be disabled from the practice of law but capable of defending charges in a disciplinary proceeding.

While the language of the rule is somewhat confusing, sections (a) and (b) appear to address situations wherein a complaint that a lawyer is disabled from practicing law due to mental infirmity or drug/alcohol addiction results in a determination that such is the case. In that instance, the rules provide that the Court shall enter an order imposing an administrative suspension until further order of the Court. Section (c), on the other hand, appears to relate to the situation wherein a lawyer contends, during the course of a disciplinary proceeding, that he or she is suffering from a mental or physical infirmity or illness, or an addiction to drugs or alcohol, which makes it impossible for the lawyer to adequately defend against the charges. If the Court finds such to be the case, it shall then enter an order imposing an administrative suspension.⁴

³(...continued)

lawyer to adequately defend the charges against the lawyer, the Court shall enter an order imposing an administrative suspension on the lawyer from the practice of law until a determination is made pursuant to this rule that the lawyer is capable of practicing law. Any proceedings held in abeyance pursuant to this rule upon administrative suspension for disability shall be resumed following an order of reinstatement.

⁴Although a lawyer is disabled from practicing law, it is not necessarily impossible for that lawyer (with the assistance of
(continued...))

Pursuant to Rule 3.23(c), we therefore find that it was incumbent upon Ms. Bunner to demonstrate not only that she was incapable of practicing law but also that her disability made it "impossible for . . . [her] to adequately defend the charges against . . . [her]. However, as earlier stated, our order directing an evaluation by Dr. Haut specified only a determination of her capacity to practice law and did not specifically request a determination of her ability to defend the charges against her, despite her earlier contention that she was unable to adequately defend against the charges. Therefore, we find that Dr. Haut's conclusion that Ms. Bunner is incapable of practicing law is sufficient under these circumstances to hold the disciplinary proceedings in abeyance.⁵

We find Ms. Bunner incapable of practicing law, find that her disability renders it impossible for her to adequately defend the disciplinary charges against her at this time, and order that the pending disciplinary proceedings be held in abeyance until a determination is made that Ms. Bunner is capable of practicing

⁴(...continued)
counsel) to defend against the charges.

⁵In future situations, Bar Counsel and this Court should specifically request an evaluation of the attorney's capacity to practice law and his or her ability to adequately defend disciplinary charges.

law.⁶ The disciplinary proceedings shall be resumed following an order of reinstatement.

The Hearing Panel requests that in order to preserve the testimony of witnesses and the integrity of the portion of the proceedings already initiated, we permit the use of sworn statements already taken rather than personal testimony when the disciplinary proceedings are resumed following reinstatement. We also recognize the necessity of preserving testimony, especially in light of the indefinite period which may elapse between previous and future proceedings. We therefore conclude that the sworn statements rather than personal testimony may be employed during any future hearings on the disciplinary matter. We also emphasize that the administrative suspension given Ms. Bunner in no way affects the civil remedies available to any victims of Ms. Bunner's alleged unethical conduct.

Justice Cleckley, deeming himself disqualified, did not participate in this matter.

It is so Ordered.

⁶Any reinstatement subsequent to administrative suspension for disability shall be made in accordance with Rule 3.24 of the Rules of Lawyer Disciplinary Procedure, providing that the lawyer shall be entitled to petition for reinstatement once a year or at shorter intervals as this Court may direct. The petition is to be granted, pursuant to the rule, upon a "showing by clear and convincing evidence that the lawyer's disability has been removed and that the lawyer is fit to resume the practice of law."