

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

Lawyer Disciplinary Board, Complainant
vs.) No. 22899

Lawrence W. Burdette, Jr., a member of The
West Virginia State Bar, Respondent

On a former day, to-wit, August 8, 1995, came the complainant, the Lawyer Disciplinary Board, by Sherri D. Goodman, its attorney, and presented to the Court the written recommended findings and conclusions of the Investigative Panel of the Lawyer Disciplinary Board recommending that charges in I. D. No. 95-02-045 against the respondent, Lawrence W. Burdette, Jr., in the above-captioned proceeding, be dismissed for the reasons stated therein.

Upon consideration whereof, the Court is of opinion to and doth hereby adopt the written recommended findings and conclusions of the Lawyer Disciplinary Investigative Panel. It is therefore ordered that the charges brought against the respondent, Lawrence W. Burdette, Jr., in I. D. No. 95-02-045 be, and they hereby are, dismissed. Justices Brotherton, Cleckley, Recht and Judge Fred L. Fox, II, sitting by temporary assignment, absent.

DONE IN VACATION of the Supreme Court of Appeals,
this 9th day of August, 1995.

Honorable Thomas E. McHugh, Chief Justice
Honorable Margaret L. Workman

Received the foregoing order this 9th day of August,
1995, and entered the same in Order Book No. 118.

A True Copy

Attest:



Clerk, Supreme Court of Appeals

**BEFORE THE INVESTIGATIVE PANEL
OF THE LAWYER DISCIPLINARY BOARD**

In re: LAWRENCE W. BURDETTE, JR.,
a suspended member of the
West Virginia State Bar

I. D. No. 95-02-045

**RECOMMENDED FINDINGS AND CONCLUSIONS
OF THE INVESTIGATIVE PANEL**

On the 21st day of July, 1995, came the Lawyer Disciplinary Board, by counsel Sherri D. Goodman, Chief Lawyer Disciplinary Counsel, and the respondent lawyer in person and by counsel, Barbara H. Allen, for a hearing on the charges set forth in the within complaint.

Whereupon the panel, consisting of R. Kemp Morton, Esq., Chair, Cheryl L. Henderson, Esq. and Priscilla Haden, lay member, heard the testimony of the following witnesses:

David W. Johnson, Esquire;
Lawrence W. Burdette, II;
Arden J. Curry, II, Esquire; and
D. Michael Fewell, Esquire.

The panel further considered the exhibits tendered by the Lawyer Disciplinary Board, all admitted without objection.

The Lawyer Disciplinary Board withdrew its charge brought against the respondent lawyer under R.P.C. 3.4(b), whereupon the parties' counsel made their closing arguments with respect to the remaining charges under R.P.C. 3.4(a), 8.4(c) and 8.4(d).

The panel, having retired to consider its decision, thereafter announced the following unanimous findings and conclusions:

1. Under the theory of the case upon which the Lawyer Disciplinary Board proceeded, the panel would have to find, by clear and convincing evidence, that the respondent lawyer intentionally withheld certain documents in *Lafferty v. Rite-Aid*, C/A No. 94-C-77 (Circuit Court of Wyoming County) from his successor counsel at the time he turned the representation over to her.

2. Although the circumstantial evidence presented could support an inference of intent, such inference, even if drawn, does not rise to the level of clear and convincing proof necessary to sustain any of the charges in the complaint in light of all the other evidence in the case.

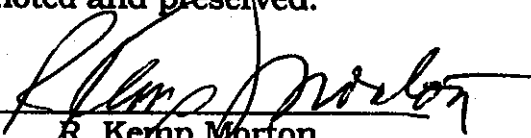
3. The panel expressed some concerns about the respondent lawyer's internal office procedures which resulted in his failure to turn the documentation over to successor counsel, but concluded that such concerns can be appropriately addressed in the reinstatement proceedings.

Accordingly, the panel recommends that the charges brought against the respondent lawyer in I.D. No. 95-02-045 be DISMISSED. The objection of the Lawyer Disciplinary Board is noted and preserved.

7-26-95
Date

7-28-95
Date

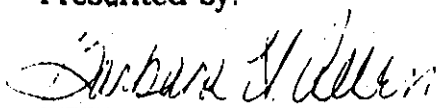
7-31-95
Date


R. Kemp Morton


Cheryl L. Henderson


Priscilla Haden

Presented by:

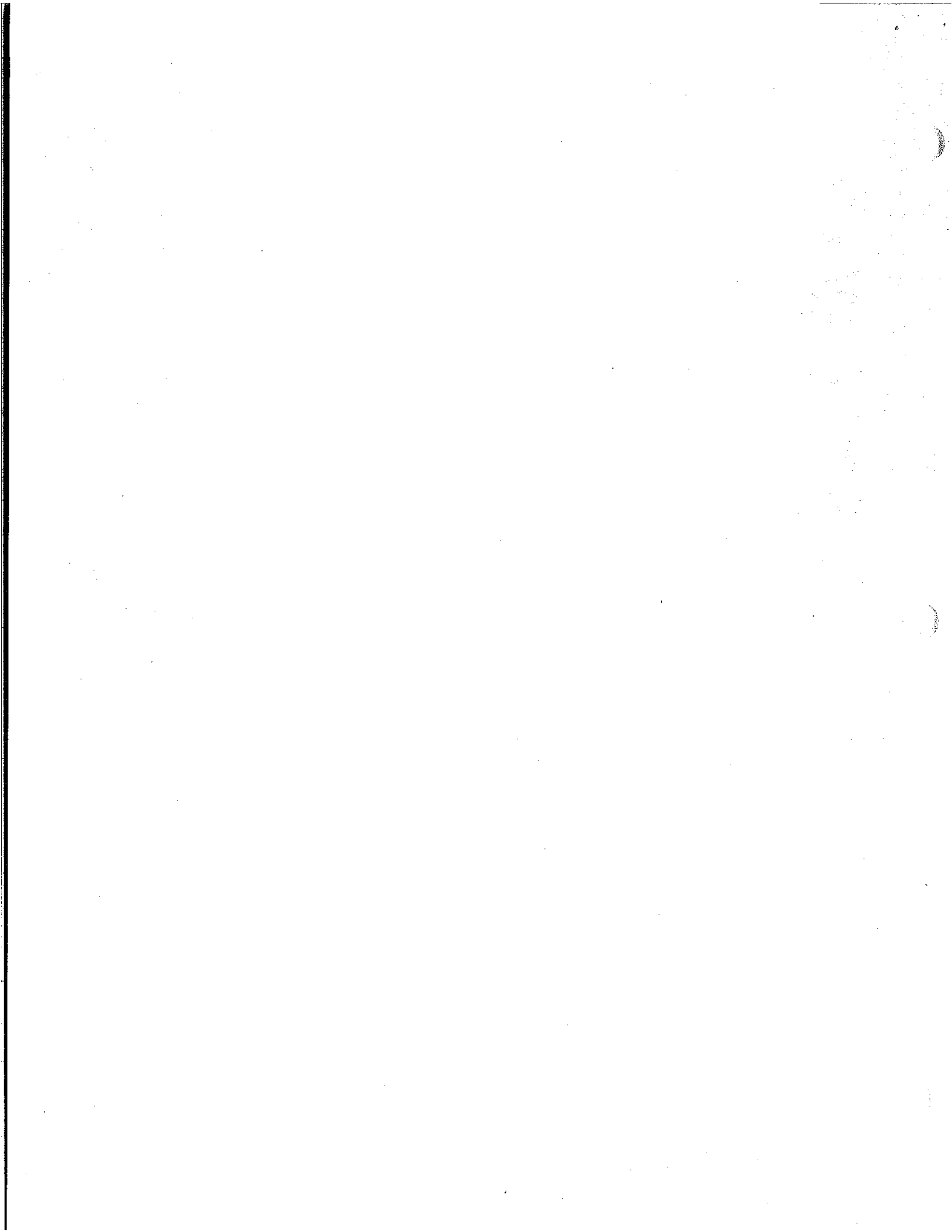


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4. On March 25, 1993, Ms. Wright sent Respondent a three-page summary and documentation. According to Ms. Wright, in early December of 1992, Mr. Lafferty brought in a bottle from Rite Aid for Capoten which had been filled by Rite Aid on November 2, 1992. Since there were no refills listed on the bottle, Ms. Wright called the doctor's office to okay the refill. Ms. Wright went ahead and filled the prescription because she could not get through to the doctor promptly. However, later that day she talked with the doctor, and that is when Rite Aid's error was discovered. According to Ms. Wright, she had Mr. Lafferty come back in to get Cytoxan. She noted that Mr. Lafferty had also received Cytoxan from her pharmacy on October 15, 1992 and November 3, 1992. There was sufficient Cytoxan from the Oceana pharmacy for Mr. Lafferty to last until November 18, 1992.

5. Ms. Wright stated in her letter that when Mr. Lafferty came in to pick up his Cytoxan medicine and bring back the Capoten, she expressed concern about whether he had missed doses of Cytoxan while he was taking the Capoten. According to Ms. Wright, Mr. Lafferty responded "he really didn't miss any because he doesn't take them as often as he should anyway because they make him so sick and he still had some left." Apparently Ms. Wright sent a bill for \$320.00 along with her report.

6. Ms. Wright's information had the potential to harm Mr. Lafferty's claim of damages which was based on the presumption that Mr. Lafferty had taken the Capoten on a daily basis in lieu of Cytoxan. Oceana's records showed that Mr. Lafferty had enough Cytoxan during the month of November, 1992, from its pharmacy, and the admission that the client did not regularly take his Cytoxan anyway could harm his claim that he was deprived of Cytoxan by virtue of Rite Aid's mistake.

7. Respondent wrote back to Ms. Wright the following short memo:

All correspondence from me to you & you to me on this matter is covered by Federal Confidentiality Law. It is also MY Attorney Work Product and is to be given to no one or discussed with anyone, it is the property of Mr. Lafferty & as stated, my Attorney Work Product. Accordingly, by return mail, please return to me all correspondence from me to you, and you to me, and keep no copies of either, everything is to be returned to me. On receipt of all copies & originals of correspondence between us I will immediately forward you the requested \$320 -- fee. If there are any questions feel free to call.

8. Ms. Wright did not respond, and Respondent again wrote on June 14, 1993. Respondent stated that Ms. Wright's letter was not to become part of Mr. Lafferty's pharmaceutical record or to be given to third parties. He stated that he would forward her requested fee once she returned the correspondence.

9. Respondent filed a lawsuit in the Circuit Court of Wyoming County in 1994 against Rite Aid, alleging that Mr. Lafferty suffered damages from the taking of Captopril and from the lack of Cytosan.

10. Respondent's law license was suspended on May 20, 1994. He turned this case over to attorney Barbara Allen. None of the correspondence between Respondent and Ms. Wright or the Oceana records were part of the file. Respondent kept that correspondence in what he termed a "shadow file" in his own office.

11. Rite Aid's counsel, David Johnson, submitted interrogatories which Ms. Allen answered. Interrogatory No. 7 asked:

Please state the names and addresses of all persons known to you who saw the incidents complained of in your complaint filed in this action either in whole or in part.

Interrogatory No. 8 asked:

Please state the name, current home and business address, current home and business telephone number and current place of employment of all persons known to you who have or may have knowledge of any of the information, facts or circumstances in connection with this case, and who you have not listed in response to Interrogatory No. 7.

12. Because Ms. Allen did not have the correspondence between Respondent and Ms. Wright or have knowledge of it, she did not disclose Ms. Wright's name as someone who had information and who was a fact witness.

13. Interrogatory No. 24 stated:

Please identify all documents in your possession relating to the facts, investigation and conclusions surrounding the incident referred to in your complaint.

Although Ms. Allen disclosed a computer printout from Rite Aid, she did not have in her possession and, therefore, did not disclose the existence of Mr. Lafferty's Oceana pharmacy records or Ms. Wright's letter.

14. Interrogatory No. 26 stated:

Please identify all documents taken from any witnesses who observed any part of the incident referred to in the plaintiffs' Complaint.

Ms. Allen replied that no one took any documents from witnesses, because she did not have Ms. Wright's correspondence and attachments or have knowledge of them.

15. Mr. Johnson contacted Oceana Pharmacy after it was mentioned in passing by Mr. Lafferty in his deposition. Ms. Wright was no longer there, and Mr. Johnson had a great deal of difficulty communicating with her because she is a student at the Osteopathic School of Medicine in Lewisburg. When he finally spoke with Ms. Wright, she provided him with this information and documentation.

16. Respondent violated Rules 3.4(a), (b) and (f) of the Rules of Professional Conduct, which state:

RULE 3.4 Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

17. Respondent also violated Rules 8.4(c) and (d) of the Rules of Professional Conduct, which provide:

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.

18. As an aggravating factor, Respondent's law license was suspended for one year on May 20, 1994, in *Committee on Legal Ethics v. Burdette*, 191 W. Va. 346, 445 S.E. 2d 733 (1994), for collecting attorney fees in excess of the amount prescribed by the Workers' Compensation Act.

Pursuant to Rule 2.9(d) of the Rules of Lawyer Disciplinary Procedure, the Investigative Panel has found that good cause exists to hold a hearing with respect to the charges described hereinabove and has issued this Statement of Charges.

As provided by Rules 2.10 through 2.13 of the Rules of Lawyer Disciplinary Procedure, you have the right to file a verified written response to the foregoing charges within 30 days of service of this Statement of Charges. Failure to file a response shall be deemed an admission of the factual allegations contained herein.

Dated this 24th day of May, 1995.

Alison Jones
SECRETARY
INVESTIGATIVE COMMISSION
Lawyer Disciplinary Board

