See also 22524

STATE OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS

IN VACATION

Lawyer Disciplinary Board, Complainant

vs.) No. 22637

William E. Kiger, a member of The West Virginia State Bar, Respondent

On a former day, to-wit, November 18, 1994, came the complainant, the Lawyer Disciplinary Board, by Sherri D. Goodman, its attorney, pursuant to Rule 3.10 of the Rules of Lawyer Disciplinary Procedure, and presented to the Court its written recommended disposition recommending that the respondent's license to practice law in the State of West Virginia be suspended for a period of six months and that he reimburse the Lawyer Disciplinary Board for the costs and expenses incurred in the investigation of this matter in the amount of Three Thousand Nine Hundred Sixty-Five Dollars and Sixty-One Cents ($3,965.61). Thereafter, on the 3rd day of January, 1995, came the respondent, William E. Kiger, by Joseph M. Brown, his attorney, pursuant to Rule 3.11 of the Rules of Lawyer Disciplinary Procedure, and presented to the Court his written concurrence to the aforesaid written recommended disposition.

Upon consideration whereof, the Court is of opinion to and doth hereby adopt the written recommended disposition of the Lawyer Disciplinary Board. It is therefore ordered that the license to practice law in the State of West Virginia of the respondent, William E. Kiger be, and it hereby is, suspended for a period of six months

effective on the 16th day of January, 1995, and that the respondent reimburse the Lawyer Disciplinary Board for the costs and expenses incurred in the investigation of this matter in the amount of Three Thousand Nine Hundred Sixty-Five Dollars and Sixty-One Cents ($3,965.61). Justice Brotherton absent. Judge Fred L. Fox, II, sitting by temporary assignment.

DONE IN VACATION of the Supreme Court of Appeals, this 6th day of January, 1995.

Honorable Richard Neely

Honorable Thomas E. McHugh

Honorable Margaret L. Workman

Honorable Franklin D. Cleckley

Honorable Fred L. Fox, II

Received the foregoing order this 6th day of January, 1995, and entered the same in Order Book No. 116.

A True Copy

Attest: _____

Clerk, Supreme Court of Appeals

BEFORE THE SUBCOMMITTEE ON LEGAL ETHICS OF THE WEST VIRGINIA STATE BAR

IN RE: WILLIAM E. KIGER, a member of The West Virginia State Bar **I.D. NO. 90-01-362**

PROCEEDINGS

A Statement of Charges alleging violations of Rules 1.6(a), 1.7(a) and 1.9 of the Rules of Professional Conduct was filed on September 30, 1994 and mailed to William E. Kiger, Respondent herein, on September 29, 1994. Respondent timely filed an Answer. A telephonic Pre-Hearing Conference was held on November 17, 1994 as duly noticed. A hearing, as duly noticed, was held on December 1, 1994, in Parkersburg, West Virginia. Respondent waived the hearing before a subcommittee of three members, but stipulated that the third member, Dwane L. Tinsley, Esquire, read the transcript in deciding the matter herein. (Transcript of the December 1, 1994 hearing "Tr.I", p. 3). Those present for the hearing were R. Kemp Morton, Esquire, Hearing Panel Subcommittee Chairman; Ms. Debra K. Sullivan, Hearing Panel Subcommittee member; Ellen F. Golden, Lawyer Disciplinary Counsel; William E. Kiger, in person and by counsel, Joseph M. Brown, Esquire. Ronald A. Ross and Respondent testified at the hearing. It was stipulated that the mitigating and aggravating factors as testified in Lawyer Disciplinary Board v. William E. Kiger, I.D. No. 91-02-0865, may be considered by the Subcommittee.

FINDINGS OF FACT

Mr. Ronald A. Ross was in an automobile accident on March 10, 1990, which involved Mr. Davis and Mr. Mitchell. Mr. Ross was given citations for driving under the influence

Q And would not the extent of what somebody had drunk while operating a vehicle be a factor in determining whether or not to seek punitive damages?

A That would be an important factor.

p. 54. In order for Respondent to have adequate information on which to base a claim for punitive damages, he would had to have known more than what is revealed in public records. Mr. Ross confided in Respondent in seeking advice and possible representation.

When asked what was his purpose for going to Mr. Kiger, Mr. Ross stated, "Mainly just to seek legal advice on what could be done or if anything could be done: "And as far as the accident went, I was sort of puzzled on who was at fault . . .. I was just seeking legal advice and what could be done, if anything." (Tr.I, pp. 9, 10, 16, 30). At the time Mr. Ross first met with Respondent, Mr. Ross did not know whether he wanted to hire a lawyer, which decision was dependent upon what Respondent would say. (Tr., p. 30).

Mr. Ross asked about the law applicable to his situation and Respondent answered Mr. Ross' questions. (Tr., pp. 15, 23). Mr. Ross took copies of the accident report, the blood alcohol level, the citation for left of center and other papers that the police had given him. (Tr., pp. 11, 18-19). Mr. Ross showed these to Respondent. (Tr., pp. 11, 18). Respondent noted *"No problem w/Fox,"* the investigating officer. (Respondent's Exhibit 1 and Disciplinary Counsel's Exhibit 3). Respondent asked questions of Mr. Ross and Mr. Ross answered the questions. (Tr., p. 11). Mr. Ross revealed to Respondent about how much he had to drink that evening, where he had been drinking and that he had no prior arrests or trouble with the law. (Tr., pp. 11, 18, 20-21). Though Respondent denies knowing where Mr. Ross drank or how much, Respondent testified that Mr. Ross told Respondent that he, Mr. Ross, was "severely or

a conflict of interest. Id. Mr. Ross testified that he had no idea what "conflict of interest" meant. Id. It is agreed that Ms. Romanowski prepared a letter protesting the Department of Motor Vehicles' ruling at the direction of Respondent. (Tr., pp. 13, 28, 38). The letter was typed on plain paper with Mr. Ross' address and was sent certified mail. (Disciplinary Counsel's Exhibit 5; Respondent's Exhibit 2). Mr. Ross testified that Ms. Romanowski mailed the letter. (Tr., pp. 14, 24-25, 28).

In 1990, Respondent was attempting "to break into the personal injury side of our profession" because "they can be very lucrative cases." (Tr., pp. 44, 45). Respondent realized in a civil case against Mr. Ross that his insurer, State Farm, would provide Mr. Ross' defense. Respondent also recognized that had he represented Mr. Ross it would only have been in defense of the criminal matter and the administrative matter before the DMV. (Tr., pp. 43).

The criminal complaint that Mr. Ross had with him indicated that Mr. Ross was arrested for DUI with injuries, thus Respondent was informed personal injuries were involved. (Tr., p. 42). Respondent claimed to have gained the information from Mr. Davis and Mr. Mitchell and from the police report which was obtained from the Magistrate Court. (Tr., p. 40). There is no evidence that Mr. Ross had any previous contact with Mr. David or Mr. Mitchell. The only way Respondent could have had information with which to cross-examine Mr. Ross or to base punitive damages is from his meeting with Mr. Ross. Respondent testified on cross-examination that the social security number and date of birth found in his notes of the meeting with Mr. Ross are needed in order to obtain records from the DMV. (Tr., p. 47). The hash marks in Respondent's notes indicate that the information below the marks was gained in conversation with Mr. Ross: ". . . so we've got the hash marks, that means now I'm talking to him." (Tr.,

exists is not determined by the *Rules of Professional Conduct*." *State ex rel. DeFrancess* at 446 S.E.2d 910. In *State ex rel. DeFrancess*, the Court referred to the Scope of the Rules which state in relevant part:

> Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that may attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

The Court has looked to the facts and circumstances of the case to determine whether a lawyer-client relationship existed in *Committee on Legal Ethics v. Rockwell,* Slip O. No. 17679 (W.Va. December 17, 1987), *Committee on Legal Ethics v. Simmons,* 184 W.Va. 183, 399 S.E.2d 894 (1990), *State ex rel. McClanahan v. Hamilton*, 189 W.Va. 290, 430 S.E.2d 569 (1993) and *State ex rel. DeFrancess v. Bedell*, 446 S.E.2d 906 (W.Va. 1994). In *State ex rel. DeFrancess*, the Court relied upon *Green v. Montgomery County, Ala.*, 784 F.Supp. 841, 845-847 (M.D.Ala. 1992), in which it found that a preliminary consultation can create a fiduciary relationship although employment does not result where there was a "reasonable expectation" that the client's disclosures would be confidential. *State ex rel. DeFrancess*, 446 S.E.2d at 911. An attorney-client relationship was found in *Herbes v. Graham*, 180 Ill.Dec. 480, 483, 536 N.E.2d 164, 167 (1989), because it was likely that the client, representatives of a township, spoke freely with the lawyer concerning all aspects of the matter being in which they were consulting a lawyer. *State ex rel. DeFrancess*, 446 S.E.2d at 911.

Similarly, in *Westinghouse Electric Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311 (7th Cir.

In *State ex rel. Taylor Associates*, the Court found under the *Code of Professional Responsibility* an apparent conflict of interest or appearance of impropriety. The Court found that the potential client initially contacted the lawyer, as her lawyer, to represent her in litigation and that she alleged to have revealed to the lawyer all the information she possessed in connection with the litigation. Those same facts are present in the case before the Subcommittee. Mr. Ross contacted Respondent in his capacity as a lawyer, to possibly represent him in a criminal matter and before the DMV, and Mr. Ross told Respondent all that he knew in connection with the legal matters.

An attorney-client relationship was not found in *State ex rel. DeFrancess*. The facts in *State ex rel. DeFrancess* differ from the present facts. Mr. Olean met with the lawyer, Mr. Steptoe, as arranged by Mr. Olean's brother who was also present at the meeting. Information about estate planning was requested. Mr. Olean did not appear interested in what Mr. Steptoe had to say, was not talkative and kept the holographic will executed prior to the meeting with Mr. Steptoe. Mr. Steptoe stated no confidential information was given, that he did not practice in wills and estates and would have informed Mr. Olean of the services offered by his firm.

In the present case, Respondent did practice in the area of criminal law and practiced before the DMV. (Tr., p. 36, 44). Mr. Ross sought legal advice and received legal advice including the conclusion that Mr. Ross would be found guilty. Mr. Ross sought representation but decided against representation based upon Respondent's advice during the initial conference. Mr. Ross answered Respondent's questions, revealing information in the belief that he was consulting Respondent as a lawyer in relation to the accident. Mr. Ross gave information he would not have given had he known Respondent was going to represent plaintiffs against Mr.

> Once a potential or actual client discusses proposed litigation with a lawyer, a court doesn't need to inquire into the receipt of confidential information; communication of confidential information is presumed and is covered by the lawyer-client privilege . . .. A lawyer who is the recipient of a potential client's confidence is thereafter disqualified from acting for any other person interested adversely in the same general matter, however slight such adverse interest may be.

Id. cites omitted. Two (2) of the fiduciary obligations of a lawyer are confidentiality and loyalty to the extent of not engaging in a conflict of interest. The ethical duty of confidentiality differs from the evidentiary privilege though the terms are often interchanged. The ethical rule states in relevant part:

> (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

The exceptions in paragraph (b) are to prevent a criminal act from being carried out or to establish a claim or defense for the lawyer based upon the client's conduct or representation of the client. The evidentiary privilege prevents the lawyer from being compelled to testify about the information of the privileged communication. The ethical rule prevents a lawyer from talking about a client in most contexts. As stated in the Comment to Rule 1.6:

> The confidentiality rule applies not merely to matters communicated in confidence by the client but also <u>to all information relating to the representation, whatever its source</u>. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.

(emphasis added). The evidentiary privilege applies only to communications which are communicated between the client and lawyer with the expectation that the communication will remain confidential. The fiduciary relationship between Mr. Ross and Respondent imposed upon

Mr. Ross felt betrayed and angry in discovering Respondent's representation of persons against Mr. Ross.

The Court concluded that:

> once the former client establishes that the attorney is representing another party in a substantially related matter, the former client need not demonstrate that he divulged confidential information to the attorney.

Id., 430 S.E.2d at 573. The Court will not inquire into the nature and extent of the confidential communication in order to preserve the absolute fidelity. *Id.*

D. There are no procedural bars to bringing the charges against Respondent herein.

Laches does not apply to the present case. In *Committee on Legal Ethics v. Pence*, 161 W.Va. 240, 240 S.E.2d 668 at 672 (1978), the Court stated that to consider whether laches apply to disciplinary matters the Respondent must show that the delay must be prejudicial such as to place one at a disadvantage. Prejudice may be shown, for example, if witnesses have died or material evidence has been lost to Respondent's detriment. *Id.* There are not such facts herein. It is unfortunate that Ms. Romanowski could not be present, but her testimony was not material to the determination of this matter.

Rule 2.14 of the Rules of Lawyer Disciplinary Procedure went into effect on July 1, 1994, and refers to the time between the complainant knowing, or in the exercise of reasonable diligence should have known, of the existence of a violation of the Rules of Professional Conduct. That rule is not applicable.

It is reasonable to charge the Respondent with the costs of this proceeding should he be

Ross in a matter substantially related to the matters for which Mr. Ross sought advice and possible representation; and

3. Respondent breached Rule 1.6, confidentiality, by using, without Mr. Ross' permission, information gained in Mr. Ross' seeking legal advice and possible representation.

The Subcommittee recommends that there be added to the Respondent's current suspension and additional three (3) months suspension for the violations of Rules 1.6 and 1.9 and the Respondent be ordered to pay the costs of these proceedings.

1/26/95
Date

R. Kemp Morton, Chairman

1/30/95
Date

Debra Sullivan

1/31/95
Date

Dwane L. Tinsley, Esquire

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