

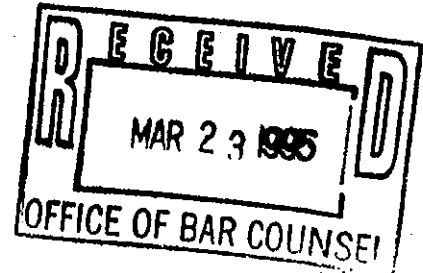
STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 22th day of March, 1995, the following order was made and entered:

Lawyer Disciplinary Board, Complainant

vs.) No. 22451

William A. O'Brien, a member of The West Virginia State Bar, Respondent



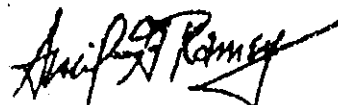
On a former day, to-wit, March 20, 1995, came the complainant, the Lawyer Disciplinary Board, by Teresa A. Tarr, its attorney, pursuant to Rule 3.10, Rules of Lawyer Disciplinary Procedure, and presented to the Court its written recommended disposition in the above-named proceeding, recommending a public reprimand of the respondent, William A. O'Brien, a member of The West Virginia State Bar.

There being heard no objection from neither the respondent nor the Chief Disciplinary Counsel pursuant to Rule 3.11, Rules of Lawyer Disciplinary Procedure, it is hereby ordered that the written recommended disposition of the Lawyer Disciplinary Board be, and it hereby is, adopted. It is therefore ordered that the respondent, William A. O'Brien, a member of The West Virginia State Bar, be, and he is hereby, publicly reprimanded for violations of Rules 1.3 and 1.7(a) of the Rules of Professional Conduct. Judge Fred L. Fox, II, sitting by temporary assignment. Justice Brotherton absent.

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

A True Copy

Attest:



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Clerk, Supreme Court of Appeals

BEFORE THE LAWYER DISCIPLINARY BOARD  
FOR THE STATE OF WEST VIRGINIA

IN RE: WILLIAM A. O'BRIEN  
a member of the West Virginia  
State Bar

I.D. No. 92-03-121

**FILE COPY**

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HEARING PANEL SUBCOMMITTEE REPORT  
FINDINGS OF FACTS, CONCLUSIONS OF LAW,  
MITIGATION AND RECOMMENDED DISCIPLINE

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The Hearing Panel Subcommittee, having reviewed the Stipulated Findings of Fact, Conclusions of Law, and Recommended Discipline in this matter, does find them to be acceptable and, consistent with the Stipulated Findings of Fact, Conclusions of Law, Mitigation, and Recommended Discipline does make the following Findings of Fact, Conclusions of Law and Recommended Discipline:

**FINDINGS OF FACTS**

1. William A. O'Brien, ("Respondent") is a licensed member of the West Virginia State Bar who practices law in Martinsburg, Berkeley County, West Virginia, and, as such, is subject to the disciplinary jurisdiction of the Supreme Court of Appeals of West Virginia and its properly constituted Lawyer Disciplinary Board. Respondent was admitted to the bar on May 27, 1975.

2. On June 30, 1990, George D. Walker ("Complainant") contacted and visited Respondent O'Brien to discuss his financial situation. During the interview,

Complainant told Respondent that he wanted to file Bankruptcy in order to keep his home located at Route 1, Box 210, Hedgesville, West Virginia 25427.

a. At the meeting, Complainant indicated he was concerned about the potential loss of his home as he was then approximately four months in arrears on his mortgage payments to GMAC, which held the first lien on his house. Mr. Walker further advised Respondent that he had been in contact with the Veterans Administration ("VA"), which was the loan guarantor, and with GMAC in an attempt to work out his problem in being so far behind in his payments. Respondent explained to Complainant Walker the option of filing a Chapter 13 Bankruptcy Petition for the purpose of stopping foreclosure and attempting to cure the default by paying the arrears he owed GMAC through a plan of approximately three (3) years' duration.

b. Complainant Walker promised to provide Respondent with correspondence received from the Veterans Administration and GMAC concerning his missed payments.

c. At the time of the meeting, no notice was provided Respondent indicating that a foreclosure was then in process.

d. During the meeting, Respondent told Complainant that the fee and costs for filing the Chapter 13 bankruptcy proceeding totalled \$2,125.00, and the entire amount had to be paid in full prior to the filing of the Petition. Respondent also explained that the Petition in Bankruptcy could not be filed until all necessary information was provided by Walker.

3. Thereafter, Respondent received documents from Mr. Walker during the period June 30, 1990, through August 27, 1990, although there were no face-to-face meetings between the two during that time period. Respondent kept in touch with Complainant by telephone calls he initiated and by receipt of documents left at his offices or mailed to him by Walker.

4. Further, during the period June 30, 1990, through August 27, 1990, there were telephone requests from Respondent O'Brien to Walker for additional documentation of his case. Also during that period, Walker provided checks on July 26, 1990, in the amount of \$1,000 and on August 12, 1990 in the amount of \$1,000 in payment of nearly all of the fee and costs required by Respondent O'Brien. Further, in a letter by Complainant Walker to Respondent dated August 12, 1990, which enclosed the second check, Complainant indicated "I have also enclosed the letter from VA about the foreclosure sale and GMAC. Please get this taken care of."

The letter from the VA indicated that Complainant's property was scheduled to be sold at a foreclosure sale on August 30, 1990 but was not a formal foreclosure notice. GMAC also requested an inspection and appraisal of the property and asked Walker's cooperation. At that time, Respondent O'Brien had been in contact by telephone and letter during July and August with representatives of the Veterans Administration in an attempt to convince the VA to help him stop any foreclosure so that a private sale or private financing might be arranged, and Respondent contacted potential local sources of private financing.

5. Complainant Walker met with Respondent O'Brien on August 27, 1990, at his office in Martinsburg, WV. At that time, Complainant paid the remaining

balance of \$125.00 for fees and costs. Complainant also reminded Respondent that his house was scheduled for foreclosure sale on August 30, 1990, and expressed concern that the Bankruptcy Petition had not yet been filed. In response, Respondent indicated that he had been in contact with VA and GMAC and that "everything was known by all of the parties about him handling [the] bankruptcy and there was no need to worry."

6. Upon receipt of the final fee and costs payment on August 27, 1990, Respondent O'Brien produced a Bankruptcy Petition and all supporting schedules in final form and placed it in the United States Mail for filing with the bankruptcy court in Wheeling, West Virginia. The Petition was filed on August 31, 1990, one day late. Complainant's home was sold at the foreclosure sale of August 30, 1990 for the sum of \$104,500 and the purchaser was the Secretary of Veterans Affairs. At the time, Respondent believed that the petition would be timely filed and that the normal delay in the tender of the trustee's deed for filing would result in stopping the foreclosure. The decision to depend on the filing of the petition through the mail was a mistake, which was compounded when the trustee took the somewhat unusual course of filing the trustee's deed on the day of the sale, August 30, 1990, instead of waiting one to three weeks after the foreclosure to do so, as is customary practice in the area.

7. Respondent represented Complainant Walker in the foreclosure, hoping to save it from foreclosure. During the same time period, on or about August 2nd of 1990, Respondent was contacted by the Charleston, West Virginia law firm of Hereford & Hereford to perform a lien check and to provide an update on the

property of Complainant Walker. That firm could not proceed with a foreclosure on behalf of GMAC without a title examination from the date of the deed of trust to the date of the foreclosure. Attorney Joe Hereford contacted Respondent, as he had on other occasions, because Martinsburg is approximately 310 miles from Charleston and it is impractical for the Hereford & Hereford firm to search the records themselves. Joe Hereford did not indicate that he was the substitute trustee or that the request related to a foreclosure. Through inadvertence and bad office procedures, Respondent did not realize that the property record he was to check from public records was also the property involved in the Walker foreclosure. Respondent performed two unrelated updates requested during the August 2, 1990 telephone request and was paid \$75.00 for doing them by the Hereford & Hereford firm.

8. Subsequently Respondent filed a Motion to Set Aside the Sale in Bankruptcy Court. Respondent also named GMAC as an additional defendant to the proceeding. In the unsuccessful action to set aside, Respondent sought to have the sale set aside because: (1) Complainant had not received proper notice of the trustee's sale; (2) the Notice of Substitution of trustee Hereford was never properly recorded prior to the sale; (3) the trustee should not have proceeded with the sale as he was put on notice of the intended filing of a bankruptcy by Respondent's attempted filing by mail on August 27, 1990 and his letter giving notice of the filing to GMAC and the VA dated August 28, 1990; and (4) the trustee's sale constituted a voidable preferential transfer just before the filing of the bankruptcy. GMAC filed a counterclaim against Complainant, claiming that the sale by the trustee was proper

on the basis that he had performed the title update for Joe Hereford and that Respondent had "assisted the trustee in the foreclosure sale." Ultimately the Bankruptcy Court denied the Motion to Set Aside the Sale. Respondent represented Mr. Walker through the conclusion of the Bankruptcy proceeding.

### CONCLUSIONS OF LAW

9. By not insuring that the bankruptcy petition made it to the United States Bankruptcy Court in Wheeling by the August 30, 1990 deadline, Respondent violated Rule 1.3 of the Rules of Professional Conduct which provides "A lawyer shall act with reasonable diligence and promptness in representing a client."

10. By inadvertently assisting Joe Hereford in preparation of the foreclosure sale for GMAC upon the home of his client, Walker, while having, at the same time, a duty to Walker to take steps, including the filing of the Bankruptcy, to aid Walker in retaining possession of the property, by naming GMAC in the Motion to Set Aside Sale after having performed the title search, and by representing Mr. O'Brien until the bankruptcy proceeding concluded all without notice or consent from either GMAC or his client, Walker, Respondent violated Rule 1.7(a) of the Rules of Professional Conduct which provides:

[A] lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless: (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and (2) each client consents after consultation.



## MITIGATION

11. Respondent O'Brien has no previous disciplinary record and cooperated fully in the investigation of the complaint of this matter by the Office of Disciplinary Counsel.

12. Respondent would be able, if this matter were taken to hearing, to produce a number of citizens and members of the bar in Berkeley County, West Virginia, who know his character and would testify that he is possessed of good character. Further, Respondent is prepared to produce credible testimony by lawyers in the Berkeley County, West Virginia area, or from adjoining counties, who would testify that they are experienced and knowledgeable in the law of foreclosure and the filing of bankruptcy matters and that the normal procedure for the filing of trustee's deeds in Berkeley County by bar members practicing there is to file such deeds from one of three weeks after the foreclosure sale by the trustee and that Respondent's attempt to file the Walker bankruptcy petition by mail, while a mistake of judgment, was not gross neglect, negligence nor unethical neglect of a client matter.

13. Respondent has been the subject of a malpractice claim raised by Complainant Walker based upon the facts of this proceeding. The matter has been settled and Respondent has paid the settlement in full.

14. As a result of the filing of the complaint in this matter, Respondent has sought counsel as to improvement of his office procedures so as to properly check for client conflicts in the future.

DISCIPLINARY DISPOSITION

15. The Respondent shall receive a public reprimand for violating Rules of Professional Conduct 1.3 and 1.7(a).

16. The Respondent shall pay all costs of this proceeding by a reasonable payment schedule agreed upon by both parties.

*Respectfully submitted,*

Hearing Panel Subcommittee of the  
Lawyer Disciplinary Board

Alan D. Moats  
ALAN D. MOATS, CHAIRPERSON

DATE: 3 1 8 1 9 5

Elisabeth Rose  
ELISABETH ROSE, ESQUIRE

DATE: 3 1 1 0 1 9 5

Priscilla Haden  
MRS. PRISCILLA HADEN

DATE: 3 1 1 4 1 9 5