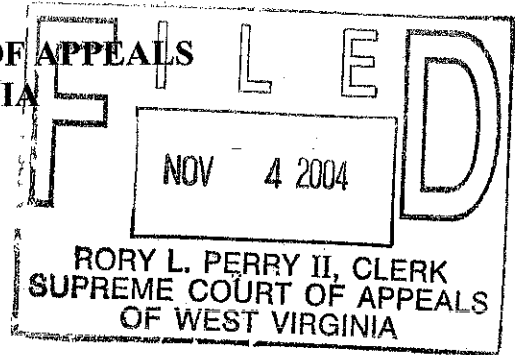


**BEFORE THE SUPREME COURT OF APPEALS
STATE OF WEST VIRGINIA**



**LAWYER DISCIPLINARY BOARD,
Complainant,**

vs.

No. 31511

**GERALDINE ROBERTS, a member of
The West Virginia State Bar,
Respondent.**

BRIEF OF THE LAWYER DISCIPLINARY BOARD

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PROCEDURAL HISTORY

Formal charges were filed against Respondent Geraldine Roberts with the Clerk of the Supreme Court of Appeals on or about July 31, 2003. The Clerk obtained service of process upon Respondent by certified mail on August 4, 2003. Over 30 days elapsed since the mailing of the Statement of Charges to Respondent and she failed to file any responsive pleading. On August 25, 2004, pursuant to Rule 3.4 of the Rules of Disciplinary Procedure, the Office of Disciplinary Counsel properly filed its mandatory discovery. A telephonic conference was held on September 5, 2003 wherein, pursuant to Rule 2.13 of the Rules of Lawyer Disciplinary Procedure, the Chairperson of the Hearing Panel Subcommittee granted Respondent until September 12, 2003 to file her initial responsive pleading in this matter. Respondent failed to file an answer.

Accordingly, the Office of Disciplinary Counsel moved that the formal charges be deemed admitted and set this Motion to be heard on November 4, 2003. On October 24, 2003, Disciplinary Counsel received Respondent's "Response to Statement of Charges". The Certificate of Service for the same was dated October 21, 2003, but the envelope was postmarked for October 23, 2003. Therefore, on October 27, 2003, the Office of Disciplinary filed a Motion to Strike Respondent's "Response to the Statement of Charges". A telephonic pre-hearing took place on November 3, 2003 wherein Respondent appeared without counsel of record. The Hearing Panel Subcommittee ordered the telephonic hearing be continued to November 10, 2003.

Respondent then retained John E. Busch, Esquire to represent her interests in this proceeding. Shortly before the November 10, 2003, pre-hearing Respondent's counsel advised Disciplinary Counsel of Respondent's psychological and physical impairments. During the November 10, 2003 hearing and pre-hearing, the parties represented to the Hearing Panel Subcommittee due to Respondent's impairment, both Respondent and Disciplinary Counsel would be jointly seeking an administrative suspension by the West Virginia Supreme Court of Appeals which was ultimately filed on November 14, 2003. It was requested that the December 1, 2003 hearing date be continued until such time as Respondent is able, by Order from the West Virginia Supreme Court of Appeals, to defend the current Statement of Charges and resume the practice of law. It was agreed that the Office of Disciplinary Counsel's pending motions be held in abeyance until the stay of the proceedings was lifted by the Supreme Court of Appeals. The Hearing Panel granted these oral motions and continued the December 1, 2003 hearing date pending further order of the Supreme Court.

On or about December 31, 2003, Respondent filed a Petition for Reinstatement with the Supreme Court of Appeals. Disciplinary Counsel did not object to the requested relief. On or about January 16, 2004, by order of the Supreme Court of Appeals, Respondent was granted reinstatement with the condition that she be supervised for a period of one year.

On April 27, 2004, a telephonic prehearing was held in this matter. Pending before the Hearing Panel Subcommittee for ruling were: (1) "Disciplinary Counsel's Motion to Deem Admitted the Factual Allegations in the Statement of Charges"; (2) Respondent's

“Response to the Statement of Charges”; and (3) “Disciplinary Counsel’s Motion to Strike Respondent’s Response to the Statement of Charges”. The parties represented to the Panel that stipulations as to facts, rules violated and recommended discipline had been reached and they were in the process of preparing the final version for signature by the parties. Based on this representation, the Hearing Panel advised the parties by Order the prior motions of Disciplinary Counsel’s were deemed moot and were both denied. [See Exhibit 21.]

Respondent Geraldine Roberts, by counsel John E. Busch, and the Office of Disciplinary Counsel, by Rachael L. Fletcher, Disciplinary Counsel, jointly submitted their “Admitted Findings of Fact, Stipulated Conclusions of Law and Stipulated Recommended Sanction” regarding the final disposition of this matter. [See ODC Exhibit 1.] These stipulations were presented to the Hearing Panel Subcommittee at the hearing on May 25, 2004. At that hearing, Geraldine Roberts, Teresa Lucente Rollins and Gary Roberts testified for the Panel, and Exhibits 1-21 were presented by the Office of Disciplinary Counsel and admitted into evidence.

On or about August 2, 2004, the Hearing Panel Subcommittee filed its “Report of the Hearing Panel Subcommittee” with this Honorable Court. By an order dated September 30, 2004, the Honorable Court rejected the recommendations and ordered both parties to file briefs.

RULE VIOLATIONS

The Hearing Panel Subcommittee, after reviewing the evidence and considering the stipulations in this matter, found that Respondent committed multiple violations of the Rules

of Professional Conduct. The Hearing Panel Subcommittee found with respect to Count One that:

1. Because Respondent failed to appear in person at hearings before the Court in which she was properly noticed and therefore failed to adequately represent the interests of the Complainant in the post divorce proceedings, 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.

2. Because Respondent failed to keep Complainant adequately informed as to the status of the matter, failed to return the telephone calls of Complainant, failed to respond to multiple requests for information and/or documentation from Complainant, and failed to advise her of hearing dates, Respondent violated Rule 1.4 of the Rules of Professional Conduct which states:

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.

3. Because Respondent failed to abide by the Complainant's decisions concerning the objectives of the representation, Respondent violated Rule 1.2(a) of the Rules of Professional Conduct which states:

Rule 1.2. Scope of Representation.

(a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d) and (e) and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to entered, whether to waive a jury trial and whether the client will testify.

4. Because Respondent failed to act with reasonable diligence and promptness in representing the interests of Complainant in the matter and failed to timely prepare the Order as directed by the court, Respondent violated Rule 1.3 of the Rules of Professional Conduct, which states:

Rule 1.3. Diligence.

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

5. Because Respondent failed to timely return the unearned portion of the retainer supplied by Complainant, Respondent violated Rule 1.16(d) of the Rule of Professional Conduct which states:

Rule 1.16. Declining or terminating representation.

(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.

Additionally, the Hearing Panel Subcommittee found with respect to Count Two that:

1. Because Respondent repeatedly failed to respond to several requests from the Office of Disciplinary Counsel, Respondent violated Rule 8.1(b) of the Rules of Professional Conduct which states:

Rule 8.1. Bar admission and disciplinary matters.

[A] lawyer in connection with . . . a disciplinary matter, shall not:

(b) . . . knowingly fail to respond to a lawful demand for information from . . . disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

AGGRAVATING FACTORS

There are aggravating factors present in this case. The Hearing Panel Subcommittee found that Respondent committed multiple violations of the Rules of Professional Conduct. By failing to diligently represent her clients and by failing to adequately communicate with her clients she breached duties to her clients and her duty to the legal profession. Her actions, more specifically, her inaction, had the potential to cause serious, irreparable harm to the Complainant listed in the Statement of Charges. Moreover, her willful refusal to

participate in these proceedings should aggravate any sanction imposed by this Honorable Court.

The Hearing Panel Subcommittee found that Respondent exhibited a pattern and practice of failing to communicate with her clients, failing to diligently pursue cases on behalf of clients and failing to respond to the requests of the Office of Disciplinary Counsel. This pattern and practice was exhibited in the case charged in this Statement of Charges and in another complaint that can be considered by the Investigative Panel.

Although Respondent did not have any other open complaints, she acted as counsel in another ethics complaint (I.D. No. 01-02-304 – Plymale v. Morton). A complaint was filed against an attorney on or about July 3, 2001. The complaint was sent to the attorney on or about July 18, 2001.

By letter dated August 7, 2001, the attorney indicated that he would need additional time to prepare a more complete response because of an injury he sustained. Subsequently, the attorney retained Respondent to represent him in this matter. By letter dated January 28, 2002, Respondent indicated that she was assisting the attorney in responding to the complaint and asked for permission to directly contact the Complainant in an effort to resolve the estate matter. Permission to speak to the Complainant was given by Disciplinary Counsel on or about January 29, 2002.

After receiving no response, Disciplinary Counsel sent a letter to Respondent on or about June 26, 2002 requesting a response to the complaint within 20 days of receipt of the

letter. On or about July 22, 2002 Respondent called and requested an extension to respond to the allegations contained in the complaint until August 30, 2002.

After receiving no response for a period of several months, a subpoena for the Respondent was issued in this matter and a sworn statement set for March 24, 2003. The subpoena was returned to Disciplinary Counsel on or about March 4, 2003. The Sheriff of that county stated that the attorney was in poor health and had been hospitalized. Due to the poor health of the attorney, the complaint was stayed by order of the Investigative Panel of the Lawyer Disciplinary Board at the request of Disciplinary Counsel on or about April 10, 2003. Respondent never contacted the Office of Disciplinary Counsel to discuss any aspects of this matter, never filed a response to the original allegations lodged against the attorney, never contacted the Office of Disciplinary Counsel to request the matter be stayed because of the attorney's health, never indicated that she is no longer acting as counsel for the attorney in this matter, and never resolved the underlying matter with the Complainant.

The Hearing Panel Subcommittee recommended Respondent to properly withdraw as counsel in this matter so it could finally be resolved. After the hearing, Respondent advised Disciplinary Counsel that she no longer represented the attorney and Disciplinary Counsel confirmed the same. Two members of this Honorable Court objected to this provision of the recommended sanction. However, this provision is now moot as on or about October 8, 2004, the Investigative Panel closed this complaint. (See Exhibit A).

MITIGATING FACTORS

There are mitigating factors in this case. Respondent has practiced law since 1977 and has not received any prior discipline from the Lawyer Disciplinary Board or the Supreme Court of Appeals of West Virginia. Additionally, Respondent demonstrated that she was suffering from both physical and psychological stress due to certain personal situations, and that said condition was a contributing cause of her actions. Accordingly, the presence of these factors mitigate any sanctions imposed by this Honorable Court.

Specifically, Respondent had a series of surgeries over a period of years, totaling five different procedures on the back and neck that have left Respondent in pain and discomfort. As of result of repeated surgeries, Respondent suffers from chronic pain syndrome, which created a physical and emotional impact on her ability to practice law.

She sought treatment from psychologists at West Virginia University and Nashville, Tennessee to enable Respondent to better deal with stress, chronic pain, and other related effects. In addition, during this relevant time period, Respondent had significant stress due to the termination of her marriage and her responsibilities at her law office. However, it is noted that at no time did Respondent advise Complainant that her health conditions limited her ability to practice law.

Subsequent to the filing of the Statement of Charges, on November 4, 2003, Respondent voluntarily agreed to an eight to nine week absence from her law office for the purpose of medical treatment and rehabilitation. Said treatment included pain clinic evaluation and review by physicians in physical medicine and rehabilitation. Respondent

also had a series of lumbar and cervical epidural injections easing pain, which helped Respondent focus on the practice of law and to allow an appropriate response to her clients' needs and demands. As a condition to reinstatement from her administrative suspension in January 2004, the Supreme Court of Appeals ordered that Respondent undergo one year of supervised practice.

The Hearing Panel Subcommittee does not dispute that the evidence provided by Respondent should mitigate the imposed sanction. However, the existence of these factors and the acknowledgment of the same should not have the affect of diminishing the wrongful nature of Respondent's conduct. Moreover, Respondent also recognized that but for the presence of the mitigating factors that the recommended sanction could be much more severe given the nature of her conduct. Hearing Transcript at 40-41.

RECOMMENDED SANCTION

The Hearing Panel Subcommittee recommended the following sanctions to the Supreme Court of Appeals:

- a. That Respondent be reprimanded for her conduct;
- b. That Respondent would undergo one (1) additional year of supervised practice, for a total of two years of supervised practice. The supervisor would be nominated by Respondent and approved by ODC. The supervised practice is to be governed by a written agreement between the supervisor, Respondent and ODC;
- c. That the supervising attorney be an attorney outside of Respondent's law firm;

- d. That Respondent properly refund Ms. Teresa Lucente Rollins with an itemized statement of her billing and issue the return of the un-earned funds;
- e. That if Respondent and Complainant do not agree to the amount of funds to be refunded, they voluntarily agree to make a good faith effort to resolve the fee dispute through the West Virginia State Bar Voluntary Fee Dispute Resolution Program;
- f. That Respondent properly withdraw as counsel for an underlying case with the Office of Disciplinary Counsel (I.D. No. 01-02-304) wherein she is listed as counsel for another Respondent;
- g. That Respondent maintain a good psychiatric/psychological state and provide assurances to the Office of Disciplinary Counsel that these problems do not effect her ability to practice;
- h. That for a period of one year, Respondent undergo comprehensive psychological counseling and provide evidence of the same to the Office of Disciplinary Counsel upon request. The Hearing Panel Sub-committee recommended that Respondent undergo treatment at a minimum of once a month for the first year of her supervised practice and provide evidence of the same to the Office of Disciplinary Counsel;
- i. That Respondent agrees that willful failure to fully and timely respond to ethics complaints during her two years of supervised practice will result in an

- immediate ninety (90) day suspension from the practice of law upon motion of the Office of Disciplinary Counsel to the West Virginia Supreme Court; and
- j. Respondent be ordered to reimburse the Lawyer Disciplinary Board the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure in the amount of \$528.20.

DISCUSSION

The principle purpose of attorney disciplinary proceedings is to safeguard the public's interest in the administration of justice. Syl. pt. 3, Daily Gazette v. Committee on Legal Ethics, 174 W.Va. 359, 326 S.E.2d 705 (1984); and Syl. pt. 2, Lawyer Disciplinary Board v. Hardison, 205 W.Va. 344, 518 S.E.2d 101 (1999). A sanction is to not only punish the attorney, but should also be designed to reassure the public confidence in the integrity of the legal profession and deter other lawyers from similar conduct. Syl. pt 2, Committee on Legal Ethics v. White, 189 W.Va. 135, 428 S.E.2d 556 (1993);. Syl. pt 3, Committee on Legal Ethics v. Walker, 178 W.Va. 150, 358 S.E.2d 234 (1987); Syl. pt 5, Committee on Legal Ethics v. Roark, 181 W.Va. 260, 382 S.E.2d 313 (1989); Syl pt. 3, Lawyer Disciplinary Board v. Friend, 200 W.Va. 368, 489 S.E.2d 750 (1997); and Syl pt. 3, Lawyer Disciplinary Board v. Keenan, 208 W.Va. 645, 542 S.E.2d 466 (2000).

Respondent, like all members of the Bar, should be held accountable for her admitted violations of the Rules of Professional Conduct. The recommended sanction appropriately holds Respondent accountable for her transgressions; creates a framework to prevent similar

conduct in the future; deters other lawyers from similar conduct; and attempts to reassure the public confidence in the integrity of the profession.

On or about, September 30, 204, the Honorable Court issued an order rejecting the Hearing Panel's Recommended Findings of Fact, Conclusions of Law and Recommended Sanction. The opinion noted that members of the Court took issue with the provisions that required the supervising attorney be an attorney outside of Respondent's law firm; that Respondent properly withdraw as counsel for an underlying case with the Office of Disciplinary Counsel; and that willful failure to fully and timely respond to ethics complaints during her two years of supervised practice would result in an immediate ninety (90) day suspension from the practice of law upon proper motion of the Office of Disciplinary Counsel to the West Virginia Supreme Court.¹

The first specified provision required that Respondent's supervising attorney be someone outside of Respondent's firm. Complainant testified during the hearing that throughout her relationship with Respondent she attempted to speak to several other members of Respondent's law firm about Respondent's lack of communication and lack of diligence in her case. She testified that she specifically spoke to Attorney McMunn and Attorney Varner (two named partners in Respondent's law firm) about the significant

¹It is assumed that the remaining provisions of the recommended sanction were acceptable to this Honorable Court and thus will not be discussed in detail.

problems she was having with Respondent and no action was taken to remedy her complaints. Hearing Transcript at 77.

In light of the undisputed testimony, the Hearing Panel Subcommittee determined that in order to address the internal issues, the supervising attorney should be outside of Respondent's law firm. Attorney Todd Twyman, Chair of this Hearing Panel Subcommittee, stated "we pause for that concern from the testimony of Mrs. Rollins that, according to her testimony, that she tried to make issues known to members of the firm, and as far as her testimony was concerned, they didn't take appropriate steps to try to correct the problem." Hearing Transcript at 90.

The spirit of supervised practice is to protect the public from acts similar to those past acts of Respondent's which were in violation of the Rules of Professional Conduct and to improve the quality and effectiveness of Respondent's law practice to the extent that the sanctioned behavior is not likely to recur. The evidence indicates that key members of Respondent's law firm were aware of Respondent's actions with respect to Complainant, but failed to take any remedial steps until after Respondent sought her administrative suspension from the practice of law. Respondent stated after her reinstatement her firm took actions to relieve her of supervisory responsibilities and attempted to help her manage her caseload with efficiency. However, no action was taken to address the problems even subsequent to formal charges being filed with this Honorable Court. Therefore, the Hearing Panel Subcommittee appropriately reasoned that in order to adequately ensure that similar instances

of misconduct would not reoccur that an attorney outside of Respondent's firm should be charged with her supervision.

The second specified provision regarding Respondent's proper withdrawal as counsel of record in the ethics complaint *Plymale v. Morton* (I.D. No. 01-02-304) is now effectively moot. As stated previously in this memorandum, the complaint was closed by the Investigative Panel at its October 2, 2004 meeting.

The third specified provision stating that if Respondent willfully failed to fully and timely respond to ethics complaints during her two years of supervised practice that she understood that the Office of Disciplinary Counsel would immediately file a motion seeking a ninety (90) day suspension from the practice of law. That provision does not provide that such suspension would be automatic. The disposition of the motion for her suspension would still be determined by this Honorable Court after a proper review of the evidence.

The rationale of this provision was to provide an additional incentive to ensure compliance with her duty under the Rules of Professional Conduct to timely respond to lawful demands for information from the Office of Disciplinary Counsel. It is undisputed that Respondent willfully and repeatedly failed to comply or respond to repeated requests for information during the investigation of these matters. It is clear from Respondent's repeated actions that her obligation under the Rules was not enough incentive to require compliance. Throughout the investigation of these complaints, Respondent was reminded of her duty to respond to lawful requests for information and reminded that failure to comply could result

in appropriate discipline. Regardless, Respondent continued to disregard requests for information and her behavior was uncooperative, if not disingenuous at times. This provision was recommended to promote future compliance with her duty to respond and to provide a foreseeable consequence if the sanctioned behavior should occur again during the period of supervised practice.

The remaining recommended provisions of the sanction, including the reprimand and the repayment of costs expended, are reasonable in reviewing the record in this matter in its totality. Absent the mitigating circumstances previously outlined in this brief, the recommended sanction in this case could have been much more severe in nature. Respondent's conduct in Complainant's case was egregious in nature and aggravated by her continued refusal to communicate with Complainant.

Respondent violated her duties to her clients, her duties to the profession and her duties to the courts/tribunals of this state. Her course of conduct caused her client anguish. A review of relevant portions of Complainant's testimony during the hearing makes it clear how Respondent's misconduct has affected her life and her perception of the legal system:

What about my mental stress and aggravation for six miserable years. And like I said, thank God for Gary [Rollins]. How could I sit here? I can't even give you – like I said, I'm so stressed with all this nonsense. You try to put it out of your mind, but it wasn't fair.

I use to not go to sleep at night because of her. "Wait, Teresa, I'll call you in two days." No, six days. Like I said, he [Gary Rollins] almost divorced me. That's not fair. That's not fair.

Hearing Transcript at 78. Finally, Complainant stated:

Like I said, for six years that's what's been going inside of me and all the stress— like I said, how can you go six years with every couple of days somebody promises you and nothing happens. There's no excuse for this. I can't express that enough.

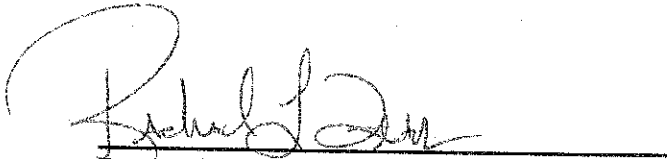
Hearing Transcript at 83.

It is finally noted that Respondent and Disciplinary Counsel submitted stipulations to the Hearing Panel Subcommittee which included a recommended sanction that was substantially similar to the recommended sanction submitted by the Hearing Panel Subcommittee.² Each of the provisions of the recommended sanction, including those added by the Hearing Panel Sub-Committee, were thoroughly explained and agreed to by Respondent during the May 25, 2004 hearing. Hearing Transcript at 37-40. Additionally, Respondent's counsel stated "I believe the sanctions are appropriate or we would not have agreed to the sanctions. I think the enactment of the sanctions that we recommend and what this Committee has done is to help protect the public from other incidents of this nature by Ms. Roberts. But, more importantly this helps Ms. Roberts be a better lawyer." Hearing Transcript at 87-88.

² The Hearing Panel Sub-Committee added the provisions that the supervising attorney be an attorney outside of Respondent's law firm and that Respondent was required to seek professional counseling for a period of one year and provide evidence of the same to the Office of Disciplinary Counsel.

In conclusion, the recommended sanction appropriately holds Respondent accountable for her transgressions; creates a framework to prevent similar conduct in the future; deters other lawyers from similar conduct; and attempts to reassure the public confidence in the integrity of the profession. Thus, the Lawyer Disciplinary Board requests this Honorable Court to adopt the recommended sanctions as proposed by the Hearing Panel Subcommittee.

Lawyer Disciplinary Board
By counsel

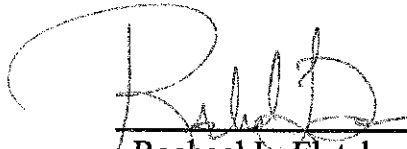


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CERTIFICATE OF SERVICE

This is to certify that I, **Rachael L. Fletcher**, Lawyer Disciplinary Counsel for the Office of Disciplinary Counsel, have this day, the 4th day of November, 2004, served a true copy of the foregoing "**Brief of the Lawyer Disciplinary Board**" upon Respondent's Counsel by mailing the same via United States Mail, with sufficient postage, to the following address:

John E. Busch, Esquire
Counsel for Respondent
Post Office Box 1819
Elkins, West Virginia 26241



Rachael L. Fletcher