

BEFORE THE SUPREME COURT OF APPEALS
STATE OF WEST VIRGINIA

LAWYER DISCIPLINARY BOARD,

Complainant,

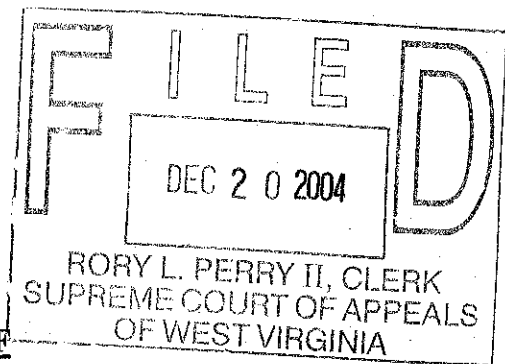
vs.

No. 31511

GERALDINE ROBERTS, a member of
The West Virginia State Bar,

Respondent.

RESPONDENT'S BRIEF



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PROCEDURAL HISTORY

The Office of Disciplinary Counsel (hereafter "ODC") has filed with its brief a procedural history. Except as hereafter noted, the Respondent, Geraldine Roberts (hereafter "Roberts") makes no objection to the procedural history as set forth.

RULE VIOLATIONS

By the agreement of Roberts to the ODC stipulation, she chose not to contest the charges filed. Roberts, for reasons identified herein under Mitigating Factors, put an emphasis on acknowledging the violations of rules represented to have occurred by ODC. Had Roberts chosen to make the proceedings more adversarial, she would have argued concerning the violations of Rule 1.2. Roberts and Rollins, the complaining witness (hereafter "Rollins" or "Client") generally agreed upon the client's desires and objectives, and the client was frustrated because her objectives were denied by appropriate Court Orders in the pending proceedings. Roberts took the position that, rather than attack the accuser, she would strive to control the events that caused her current difficulties, acknowledge substandard performance in providing legal services to the client, and cooperate fully with ODC and bring to closure promptly this unfortunate chapter of her life. As Roberts noted on page 33 of the proceedings before the investigatory committee, "I know when she came to me (Rollins) she had had many problems with the divorce and had lots of things to deal with personally. I certainly never, in any way, meant to compromise my ability to assist her or any way to harm her or anybody else with regard to that."

At the hearing before the Hearing Panel Subcommittee (hereafter "HPS"), held May 25, 2004, it was represented by bar counsel, Rachael Fletcher, that she did not intend to call the complaining party as a witness. Bar counsel had notified Rollins of the hearing, and she and her

husband attended. Rollins and her husband, at the opportunity presented by the hearing panel, used the occasion to fervently grieve about the disappointment in Rollins' divorce outcome and how Roberts had affected six years of her life.¹ Roberts, in negotiation with the ODC, did not at any time act to minimize the charges and complaints, but focused entirely upon a resolution of the first-time complaints filed after over 25 years of practice in her profession. What counsel presents to this Court is that Roberts did not respond in her usual appropriate and effective way to the complaints of a lady who could not have been satisfied with anything short of all of the relief that might be in any manner possible in a difficult and longstanding divorce. Roberts was dilatory in this regard and could have communicated better and is committed to doing so in the future. However, should this Court find insufficient the agreed sanctions upon which Roberts has relied in good faith and this matter is reopened for further evidence, Roberts represents that the evidence would show her substantial efforts to comply with the unrelenting demands of Rollins and additional matters that mitigate or least help explain Roberts' responses to the emotional and self-serving lament of Rollins.

Prior to Roberts' commencement of representation of Rollins, at least three lawyers, Tom Dyer, Cornelia Reep and Susan Riffle, all reputable attorneys, failed to satisfy Rollins.² Further, attorney Riffle appealed the decisions adverse to Rollins to this Court, and relief was denied.

Roberts agreed to represent Rollins on December 17, 1996 and received a \$500 retainer. For nearly three years thereafter, Roberts was besieged by telephone calls, requests for information, and demands to be accessible when the complaining party would appear at Roberts' office without an appointment. Roberts did all of this work, without billing any amount in excess of

¹Note the quote from Ms. Rollins' testimony set forth in the ODC brief.

²See attached Docket Sheet, Exhibit 1.

the retainer, and refunded all but the costs incurred after Rollins filed these proceedings and discharged Roberts from further representation.

Roberts was under severe stress, tension and overload caused by the demands of her practice; a long domestic struggle with her now ex-husband; and significant physical pain from surgeries and procedures on her neck, back and spine. Not surprisingly, there was significant emotional distress with these aggravations, and Roberts was treated by physicians and psychologists at West Virginia University and at Oasis Rehabilitation Services in Morgantown, West Virginia, at the Pain Clinic at United Hospital Center in Clarksburg, West Virginia, and at Doyle Counseling Service in Memphis, Tennessee. The outpatient psychological and medical treatments predated and postdated the filing of the disciplinary proceedings.

Roberts, after consultation with counsel, chose not to fill the record with denials when Roberts and ODC had agreed on an appropriate stipulated series of sanctions that appeared appropriate. Should this Court, in its inherent responsibility to make an independent decision concerning the issues, feel the punishment and sanctions acknowledged and agreed to by Roberts are inadequate, it is respectfully requested that Roberts have the opportunity on remand to present further evidence concerning both the issue of her failure to satisfy Rollins' demands and additional mitigating factors.

STANDARD OF REVIEW

The standard of review in this case is set forth in Lawyer Disciplinary Board v. Scott, 213 W. Va. 209, 579 S.E.2d 550 (W. Va. 2003). Scott recites that; "This court is a final arbiter of legal ethics problems and must make the ultimate decisions about public reprimands, suspensions, or annulment of the attorney's license to practice law." This Court further "gives respectful

consideration to the Board's recommendations while ultimately exercising its own independent judgment." Substantial deference is given to the Board's findings of fact, unless such findings are not supported by reliable, probative, and substantial evidence on the whole record.

The oral complaint of Rollins at the subpanel hearing, as recited in the brief of the ODC, is not "reliable, probative and substantial evidence" but is simply the argument of a disgruntled divorce client. There having been an appropriate stipulation to acknowledge rule violations caused counsel for Roberts to defer a confrontation with the obviously distraught witness at the Subcommittee hearing.

The case of Lawyer Disciplinary Board v. McGraw, 194 W. Va. 788, 461 S.E.2d 850 (1995) requires ODC to prove its allegations by clear and convincing evidence. Roberts admitted to ethical violations, but such admission falls far short of causing Rollins the grief she asserts. The unhappy litigant's failure to prevail in the Courts may be the real motivation to punish somebody for the six years of stress caused by a divorce, remarriage, and resentment that her ex-husband was not forced to comply with alleged financial responsibilities. Rollins complains Roberts caused her an undefined Three Thousand, Eight Hundred Dollars (\$3,800.00) loss. There is absolutely no proof in any of the proceedings, including the hearing, to verify the claimed loss. Indeed, a civil action by Rollins in Magistrate Court for this unsubstantiated loss was dismissed. It was only after that event that the ethics complaint was filed.

AGGRAVATING FACTORS

The ODC states that "there are aggravating factors". First, the ODC asserts that Roberts' conduct had the "potential to cause serious, irreparable harm." However, the undisputed facts

demonstrate that, in actuality, Rollins suffered no serious or irreparable harm. Second, the ODC characterizes Roberts' omissions as "willful" with respect to "these proceedings." [See Bar brief, page 6] Again, the undisputed facts refute this characterization. Roberts' omissions were clearly a product of the temporary impairment which she suffered as set forth at greater length in the Mitigating Factors section of this brief. Actions by Roberts were in no way "willful" as is further evidenced by Roberts' prior 25 years of an unblemished record in the practice of law. Indeed, in keeping with her 25 year pattern and practice of ethical and responsible law practice, in an effort to address her awareness of her growing impairment, Roberts had spoken with a psychologist prior to any proceedings being filed. She had become aware of the stress, overload of work, physical pain, and the inability to perform her work adequately by reason of the combination of factors discussed in greater detail in the Mitigating Factors section of this brief. To suggest that Roberts was guilty of willful neglect or misconduct is inconsistent both with the facts and the stipulation between ODC and Roberts. Only during the period of Roberts' impairment has she experienced any problems. There is no pattern of misconduct, but for a limited period in which Roberts was seeking help, and certainly no willful misconduct.

MITIGATING FACTORS

Roberts incorporates the mitigating factors discussion by the ODC. These factors must be considered and certainly diminish the wrongful nature of Roberts' conduct. Roberts continued to work regularly even though she was in emotional distress and extreme pain. Roberts undertook to represent a disgruntled divorcee for virtually no fee, whose case seemed to the client to be an absolute

priority and who was extremely demanding. Roberts acknowledged her response to the client had been dilatory but the rights of the client were not impaired.

Lawyer Disciplinary Board v. Scott, earlier cited, sets forth a series of considerations to be used by the Court in determining an appropriate sanction for violation of the Rules of Professional Conduct. Using those criteria, the Court is respectfully requested to review the conduct of Roberts in regard to the criteria set forth in Scott.

1. **Absence of a dishonest or selfish motive.** Roberts had no selfish motives. She took a retainer fee of Five Hundred Dollars (\$500.00), and refunded most of that notwithstanding the fact that Roberts did provide legal services, so obviously her interest could not have been pecuniary. No dishonesty is alleged or even alluded to by complainant.

2. **Personal or emotional problems.** Roberts' personal and emotional problems are mentioned herein and in the mitigating factors section of the ODC brief. As noted in the ODC brief Roberts had, at the time of the events here concerned, chronic pain syndrome, which "created a physical and emotional impact on her ability to practice law" and had a series of surgeries, totaling "five different procedures on the back and neck which have left Roberts in pain and discomfort." The ODC brief further notes psychological treatment for stress "due to the termination of her marriage and her responsibilities at her law office."

3. **Full and free disclosure to disciplinary board or cooperative attitude towards proceedings.** Roberts and her counsel have been fully cooperative with ODC. Counsel jointly drafted the Stipulated Findings of Fact and Conclusions of Law. Counsel provided, before the hearing in this matter, exchange of medical information and psychological reviews and records, and negotiated an administrative suspension of Roberts' law practice during the months of

November and December 2003 to allow Roberts to regroup, and receive care and treatment appropriate to her condition. Roberts was conciliatory, as opposed to combative, in acknowledging her disability.

4. **Physical or mental disability or impairment.** Counsel for the parties agreed, as above noted, to an interim administrative suspension, and provided for the voluntary delivery to ODC psychological records and reports from psychologist Don Doyle, all of which were received and reviewed by ODC prior to the Motion for Reinstatement, which this Court granted without opposition. In November, 2003 Roberts agreed to an eight to nine week absence from her office for the purpose of medical treatment and rehabilitation, including a pain clinic evaluation and treatment from Dr. Don Doyle, a psychologist who had treated Roberts for some eight to nine years. Roberts had been also seen by Dr. Jeanne Sperry, of Oasis Treatment Center in Morgantown and is currently released from further regular treatment. She is also being treated by the United Hospital Pain Management Clinic where she routinely receives epidural nerve blocks and prescription medications that assist with the management of pain (p. 44).

5. **Absence of a prior disciplinary record.** Roberts has practiced law since 1977. No complaint or matter has been brought to the ethics committee other than the issue here involved, including the Plymale case. Both incidents occurred during the same time frame. In both cases there were delays in trying to accomplish the litigation objective, which coupled with Roberts' own physical and mental struggles, created dilatory responses to unhappy clients. Roberts tried unsuccessfully to negotiate an agreed settlement between the warring brothers or brothers-in-law in the *Plymale* matter.

6. **Character or reputation.** A summary of the *pro bono* and professional accomplishments and services of Roberts is attached and incorporated herein as "Exhibit 2". Should the Court believe that the sanctions here set forth are not sufficient, then Roberts would ask permission to reopen this matter for additional inquiry into her character and reputation, as well as additional facts pertaining to the allegations and mitigation. Roberts is a person with a well-deserved reputation for hard work and commitment to the judicial system and the rule of law.

7. **Internal rehabilitation.** Counsel for Roberts strongly contests any alleged indifference by Roberts' law firm of McNeer, Highland, McMunn and Varner (MHMV). Following the disclosure of the ethics committee complaint, MHMV hired counsel for Roberts, spoke with Roberts concerning ways, means and methods to better control her practice, and reduced her caseload. James Varner talked with Roberts about ways and means to better satisfy the apparently insatiable Rollins.

The ODC brief suggests that the law firm has failed to step up to the plate and make appropriate arrangements for supervision. Rollins testified that she tried to speak to members of the MHMV firm, who did not take appropriate steps to try to correct the problem. The complaints of that nature were offered as part of the self-serving statement of Rollins, and are without substantiation. As a result of MHMV inquiries as set forth above, a change in the structure of the firm and of the supervisory oversight of the practice was instituted not only to more efficiently maintain controlled litigation, but also to relieve stress and pressure on Roberts.

Roberts testified during the ODC hearing, that the program set up by her law firm had "enough protections in place to assure" that Roberts would not be in situations of overwork or overstress. Roberts also noted there is a plan in place for supervision, and that there are always two

and many times three attorneys on a file in each case, so each client can have a knowledgeable attorney covering the case who can take over and continue to represent the client's best interest.

8. **Imposition of other penalties or sanctions.** Roberts has not objected to the two-year term of mandatory supervision. That sanction may well be above the norm. ODC understandably desires a supervisory committee or person(s) to overview the law practice of Roberts. Roberts will work with her firm, outside counsel, or any arrangement this Court desires.

9. **Remorse.** Roberts acknowledged, (Transcript, page 55) that "The chronic pain syndrome and your psychological problems caused by your divorce were not an excuse or they didn't excuse what happened to Mrs. Rollins' case?" Roberts replied, "Absolutely." The following question followed, "So is it fair to say that you agree the sanction is proper. Regarding the mitigating factors, do you believe the sanction that we proposed was proper?" Roberts answered, "I believe I have a professional obligation and even more than that, a moral obligation." During Roberts' testimony, she was frequently in tears and, to this day, has great difficulty discussing this matter without emotion.

RECOMMENDED SANCTIONS

The sanctions upon which the ODC and Roberts have agreed are appropriate to this case. As noted by this Court in Lawyer Disciplinary Board v. Kupec, 202 W. Va. 556, 505 S.E.2d 619 (W. Va. 1998), the American Bar Association Model Standards for Imposing Lawyer Sanctions (the "ABA standards") are persuasive in applying the appropriate sanction to ethics rule violations. When actions of a lawyer are negligent, ABA standards suggest reprimand or admonishment, the sanction agreed to by ODC and Roberts. See Kupec, 505 S.E.2d at 632. This sanction is also compatible with existing West Virginia case law. For instance, just as in this case, this Court addressed Rule 8.1(b) in

Committee on Legal Ethics v. Martin, 187 W. Va. 340, 419 S.E.2d 4 (1992). In Martin, the attorney failed repeatedly to respond to the requests of Bar counsel concerning allegations of disciplinary misconduct in violation of Rule 8.1(b). This Court determined that the appropriate discipline was a public reprimand and payment of costs by the respondent. This Court specifically found that failure to respond to written and oral requests for information by the Bar warrants a public reprimand.” Martin, 419 S.E.2d at 8.

In Committee on Legal Ethics v. Morton, 410 S.E.2d 279 (W. Va. 1991), this Court addressed violations of Rule 1.4. In Morton, the attorney failed in three cases to keep her clients informed. Again, this Court held that a public reprimand was the appropriate sanction. With respect to a combination of violations of Rules 1.1, 1.2, 1.3 and 1.4(a), this Court has found that it is imperative to consider whether the lawyer violated a duty; whether the lawyer acted intentionally or negligently; the amount of actual injury caused by the misconduct and the existence of aggravating or mitigating factors. Lawyer Disciplinary Board v. Cunningham, 195 W. Va. 27, 464 S.E.2d 181, 191 (1995). In Cunningham, this Court further found that where there were no previous violations and under the circumstances of that case which were more egregious than the circumstances at bar, the appropriate emphasis should be “on remedial measures rather than punitive measures.” Id. Thus, the sanction imposed was a public reprimand, supervised practice for two years and the costs of the disciplinary proceeding. In accord, see also, Lawyer Disciplinary Board v. Keenan, 208 W. Va. 645, 542 S.E.2d 466 (2000)(violations of Rules 1.3, 1.4(a) and 1.16 warranted a form of public censure rather than suspension).

Finally, Committee on Legal Ethics v. Gallaher, 180 W. Va. 322, 376 S.E.2d 346 (1988) this Court found that even in an excessive fee case (no such pecuniary misconduct is alleged as a Rule

violation against Roberts), where there have been no prior disciplinary sanctions and there are mitigating factors, a public reprimand, plus costs, is the appropriate sanction. Gallaher, 376 S.E.2d at 350. Certainly, any more extreme a sanction is not warranted under Roberts' circumstances. See Office of Disciplinary Counsel v. Battistelli, 193 W. Va. 652, 457 S.E.2d 652 (1995). (Temporary suspension procedure should not be used except in the most extreme cases of lawyer misconduct.)

Roberts was impaired by the stress and emotional conditions set forth in Mitigating Factors but which are important in understanding that her conduct was not willful, nor was there a pattern of misbehavior; but there was at most a negligent response to a client's demands. Reprimand or admonishment is therefore appropriate under both West Virginia law and ABA standards. See, generally, ABA/BNA Lawyers Manual of Professional Conduct, Section 10.801 (1992), quoted in Lawyer Disciplinary Board v. Kupec, 515 S.E.2d 600 (1999).

RESPONSE TO THE SUPREME COURT ORDER OF SEPTEMBER 30, 2004³

Roberts agrees with the sub-committee's recommended sanctions (a) and (b), and Roberts is willing to undergo a reprimand, and one additional year of supervised practice. Roberts is willing to be supervised by an attorney outside Respondent's law firm, which should not reflect upon her partners at McNeer, Highland, McMunn & Varner. The suggestion of an outside supervisor was raised during oral argument before the disciplinary sub-committee hearing in this matter, with a suggestion by the committee that counsel for Roberts might be an appropriate person to provide supervision. In fact, the question was put to counsel if he would be willing to oversee the supervision of Roberts. The response was "if I can help her continue to recover I want to contribute my time to do that." The undersigned knows the concern and desire of Roberts' firm to control her practice,

³ See Order attached as Exhibit 3.

conscientiously meet all ethical obligations, and provide quality legal services. Roberts is amenable to any form of supervision that is satisfactory to this Court, including inside or outside supervision, or a combination thereof.

Roberts agrees with the findings of paragraphs d and e (fee issues). The complaining party has already been paid the unearned funds, and if those were determined not satisfactory to the complaining party, Roberts would be glad to enter into a fee dispute resolution program. The total fees involved were Five Hundred Dollars (\$500.00) as retainer, a substantial portion of which was repaid to the complaining party.

Roberts acknowledges that paragraph f (Plymale's withdraw of counsel) has been mooted. The Respondent certainly agrees with paragraph g (stable psychiatric/psychological state) in that she desires to maintain a good psychological/psychiatric state and to submit assurances of counseling to ODC by sharing with ODC, under seal, records of treatment and observation.

Paragraph h (continuing psychological supervision) is agreeable to Roberts except as it relates to the minimum psychological treatment being monthly. Treatment should be as prescribed or directed by the attending psychologist/psychiatrist, and the forwarding of those records to ODC should be sufficient compliance. Obviously, the mental health of Roberts is most important to her. She will seek such care as her caregivers recommend without the restraints of artificial deadlines or treatment frequencies as set out by the ODC order.

Roberts objects to the conditions of paragraph i (response to additional complaints of ethical violations), insofar as it holds her to a different standard than those imposed on the bar generally. Roberts surely is aware that a second offense or misbehavior would be dealt with more harshly. Roberts is willing to submit to the supervision and restrictions herein proposed. The public is protected, and their interest is served by the existing disciplinary regulations. It is again noted that after

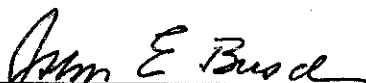
many years of practice, only two complaints have been made against Roberts. Roberts has been fully cooperative with ODC since the employment of counsel and, more importantly, has a renewed commitment to regular evaluation and treatment.

CONCLUSION

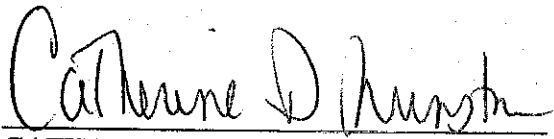
The record and stipulations demonstrate that Roberts has been a responsible and diligent attorney, committed to the ethical practice of law for over 25 years. Due to circumstances beyond her control, she suffered an impairment caused by extreme physical and psychological pain. She sought help and continues to undergo treatment. During that interval of impairment, certain omission occurred, for which Roberts has immediately and fully accepted responsibility, resulting in stipulations and sanctions with rehabilitation requirements upon which Roberts has relied in good faith. Roberts remains committed to this program in order to restore her to her prior level of practice. Acceptance of the recommended sanctions by this Court would meet the dual objectives of preserving public confidence in the legal profession and judicial process, as well as preserving for the legal community the great asset which Roberts represents. However, should this Court find the recommended disciplinary actions upon which Roberts has relied to be insufficient, Roberts respectfully requests that this case be remanded for further evidence with respect to the allegations and mitigating factors.

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CERTIFICATE OF SERVICE

I, Catherine D. Munster, one of counsel for Respondent, Geraldine Roberts, do hereby certify that on this date I served a true copy of the foregoing **RESPONDENT'S BRIEF** upon counsel of record by depositing said true copy into the United States Mail, postage paid, in an envelope addressed as follows:

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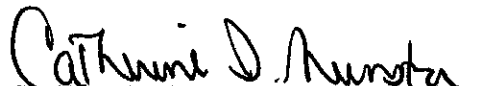
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Dated this 17th day of December, 2004.


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