

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 6th day of June, 1991, the following order was made and entered:

The Committee on Legal Ethics of The West  
Virginia State Bar, Complainant

vs.) No. 20134

William C. Forbes, a member of The West  
Virginia State Bar, Respondent

On a former day, to-wit, May 17, 1991, came the respondent, William C. Forbes, by Leo Catsonis, his attorney, and presented to the Court his motion in writing to waive the hearing on the rule to show cause set for Tuesday, the 2nd day of July, 1991, and the necessity of filing memoranda prior thereto by the parties and to expedite disposition of this proceeding, for the reasons stated therein. Thereafter, on the 19th day of April, 1991, again came the respondent, William C. Forbes, by Leo Catsonis, his attorney, and presented to the Court his answer to the complaint filed by the Committee on Legal Ethics of The West Virginia State Bar, on the 3rd day of April, 1991, wherein the respondent requests that this Court adopt the findings and recommendations of the complainant, issue a public reprimand charging respondent with violation of DR 6-101(A)(3) of the Code of Professional Responsibility and require the reimbursement of the costs incurred in the above-captioned matter.

Upon consideration whereof, the Court is of opinion to and doth hereby sustain said motion. It is therefore ordered that the hearing on the rule to show cause set for Tuesday, the 2nd day of July, 1991, and the filing of memoranda prior thereto, be, and they hereby are, waived.

It is further considered and ordered that a public reprimand doth hereby issue against the respondent, William C. Forbes, and that the respondent, William C. Forbes, reimburse the Committee on Legal Ethics the sum of \$123.20 for costs incurred in this proceeding. Justice Brotherton would refuse.

A True Copy

Attest:

  
Clerk, Supreme Court of Appeals

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

IN RE: WILLIAM C. FORBES, ESQ., a member of I.D. No. 88-040  
the West Virginia State Bar

FULL HEARING PANEL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND RECOMMENDATION CONCERNING DISCIPLINE

This matter came on for deliberation by the Full Hearing Panel of the Committee on Legal Ethics of The West Virginia State Bar at its meeting on August 18, 1990, in Charleston, West Virginia. After review of the report entitled "Findings of Fact, Conclusions of Law and Recommended Discipline" submitted by the Hearing Subcommittee which had been assigned to the hearing of the matter, the Hearing Panel entered upon deliberations of the matter and, after consideration of the record in the Hearing Subcommittee Report voted unanimously, a quorum being present, to make the following Findings of Fact, Conclusions of Law, and Recommendation Concerning Discipline:

FINDINGS OF FACT

The Hearing Panel has carefully reviewed the outline of evidence presented by the Hearing Subcommittee as found on pages 1 through 5 of the Hearing Subcommittee Report. The Full Hearing Panel determined that the 27 Findings of Fact with regard to the allegations against Attorney William C. Forbes in I.D. No. 88-040 as set forth on pages 6 through 10 of the Hearing Subcommittee Report are supported by full and clear preponderance of the evidence and are adopted as Findings of Fact by the Full Hearing Panel of the Committee on Legal Ethics.

CONCLUSIONS OF LAW

The Full Hearing Panel of the Committee on Legal Ethics determined that the Conclusions of Law listed on page 10 of the Hearing Subcommittee Report were appropriate in this matter and voted to adopt the Conclusions of Law recited in the Hearing Subcommittee Report as those of the Full Hearing Panel of the Committee on Legal Ethics.

RECOMMENDATION OF DISCIPLINE

The Full Hearing Panel determined that the Recommendation of Discipline, as contained on page 11 of the Hearing Subcommittee Report, is appropriate and it will present a formal recommendation to the Supreme Court of Appeals of the State of West Virginia that Respondent William C. Forbes receive a public reprimand and that he be required to pay the costs incident to the investigation and prosecution of this matter.

HEARING PANEL, COMMITTEE ON LEGAL ETHICS  
OF THE WEST VIRGINIA STATE BAR

  
Arthur M. Recht, Chairman

DATE:

August 24 1990

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

IN RE: WILLIAM C. FORBES,            )  
a member of the West Virginia    ) I.D. #88-040  
State Bar                                )

FINDINGS OF FACT, CONCLUSIONS OF  
LAW AND RECOMMENDED DISCIPLINE

I.

PROCEDURAL BACKGROUND

Lawyers for the State Bar and the Respondent, agree to dispense with a formal hearing before the Hearing Subcommittee, and instead elected to submit the matter upon stipulated Findings of Fact and Conclusions of Law and a Recommended Decision. The Subcommittee, while not discouraging this protocol, does not deem itself bound by the Conclusions of Law and the Recommended Decision. It does accept as true the stipulated facts upon which the Subcommittee, unencumbered by the conclusions to be derived from those factual stipulations, make the following Findings of Fact, Conclusions of Law and Recommended Decision:

II.

FACTUAL BACKGROUND

Respondent is a licensed member of the West Virginia State Bar, practicing at Kanawha County, West Virginia, since his graduation in 1980 from the District of Columbia School of Law (formerly Antioch School of Law). The Respondent is currently serving as prosecuting attorney of Kanawha County, however, the events which shape the

underlying ethical charges occurred prior to his assuming this public office.<sup>1</sup>

The Complainant, John D. Burgess (herein "Complainant") was arrested on March 24, 1988 and charged with the offense of driving a motor vehicle under the influence of alcohol (herein "the Offense"). The Complainant retained Alfred B. McCuskey, II, a licensed member of the West Virginia State Bar to represent his interests in defending the offense.

While the stipulation of facts are somewhat thin, it would appear that the underlying criminal charge was dismissed upon motion of the Prosecuting Attorney's office of Cabell County. This dismissal occurred on April 29, 1988 while the Complainant was represented by Mr. McCuskey.

Mr. McCuskey had also timely requested an administrative hearing challenging the administrative revocation of the Complainant's driving privileges.<sup>2</sup>

The administrative hearing was ultimately scheduled for May 24, 1988. However, approximately twenty-four (24) hours prior to the hearing, the Respondent was requested by Mr. McCuskey's legal assistant to undertake the Complainant's representation during the administrative hearing since Mr.

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<sup>1</sup> The statement of charges contain two distinct counts, however, during a pre-hearing conference, the remaining charge (88-113) was severed and will be the subject of a subsequent disposition.

<sup>2</sup> There is no evidence in this record as to the legal basis for this challenge.

McCuskey underwent an emergency kidney transplant procedure.<sup>3</sup>

With only 24 hours notice, the Respondent assumed the Complainant's representation without the payment of a fee or any agreement for future compensation. Presumably the representation was undertaken as an act of friendship and compassion by the Respondent to Mr. McCuskey.<sup>4</sup>

During the course of the administrative hearing a dispute arose as to the results of the breathalyzer test. The results in possession of the Complainant were an alcohol content of .05, however, the results in the possession of the arresting officer was an alcohol content of .059. The significance to this disparity lies in the presumption created by the two measurements. The former (.05) is prima facie evidence that a person was not under the influence of alcohol and the latter (.059) is relevant evidence in indicating whether a person was under the influence of alcohol.

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<sup>3</sup> Again, the stipulation is not entirely clear on this point, but presumably Mr. McCuskey had been awaiting a kidney donor for sometime prior to the emergency which prompted the Respondent to be retained.

<sup>4</sup> No issue is advanced as to whether an attorney-client relationship existed between the Respondent and the Complainant. However, there is competent authority that recognizes that an attorney-client relationship is not dependent upon payment of a fee. The relationship is sufficiently established when it is shown that advice and a lawyer's assistance are sought and received. The representation during the administrative hearing clearly demonstrates that legal advice was sought, rendered and received.

The decision in the administrative hearing was adverse to the Complainant with a finding that the blood alcohol content was .059 and further, that a timely challenge had not been made to the results of the breathalyzer test.<sup>5</sup>

It was the avowed intention of the Complainant to seek judicial review of the adverse administrative decision pursuant to the provisions of W.Va. Code, Ch. 29A, Art. 5, §4(b). Obviously, one of the grounds for the review would be the disparity between the tests measuring the blood alcohol level. That review is triggered by the filing of a petition, either in the Circuit Court of Kanawha County or the Circuit Court located in the county of the Complainant's residence within thirty (30) days after the date upon which the Complainant received notice of the decision of the Commissioner of Motor Vehicles. Accordingly, the Petition for Review should have been filed on or before October 21, 1988. The Respondent failed to file a timely Petition for Review despite repeated assurances that it would be done. The Respondent does not recall giving these assurances, however, the Subcommittee finds that because of the adverse impact upon the loss of driving privileges upon the Complainant, it is more credible to believe the testimony of the Complainant that a request was made to seek a review of

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<sup>5</sup> The gravamen of the charge is the neglect of the Respondent of a legal matter entrusted to him in violation of DR 6-101(A)(B). There are no charges pending against Mr. McCuskey, the attorney who ostensibly could have filed any challenge to the test within five (5) days prior to the administrative hearing. There obviously can be no finding of neglect against the Respondent for failure to perform some act prior to his being retained.



the decision since this was the only legal method for the Complainant's driving privileges to be restored as quickly as possible.

The Respondent's explanation of the failure to file a timely Petition for Review is that he was, during this period of time, engaged in a political campaign seeking the position of Prosecuting Attorney of Kanawha County. The Respondent was not only conducting a political campaign, but simultaneously, he was attempting to dispose of more than 300 cases of a variety primarily of the type similar to those involving the Complainant. While this explanation is worthy of consideration, it fails to acknowledge the vice associated with not only failing to file a timely Petition for Review, but not doing so after repeated assurances were made that it would be done. It is this latter course of conduct that prompts the Subcommittee to find:

(A) That the State Bar has established, by a clear, convincing and preponderating evidence, that the Respondent has violated DR 6-101(A)(3) by failing to file a timely Petition for Review of an administrative decision; and,

(B) That failure occurred after repeated assurances that a Petition would be filed. Further, the Subcommittee finds that the Respondent has violated DR6-101(A)(3) by failing to return to the Complainant, after repeated requests, his file which contained important documents necessary for an attempted successful presentation of the review of the administrative proceeding.

Accordingly, the following Findings, Conclusions and Recommended Decisions are made:

FINDINGS OF FACT

1. William C. Forbes ("Respondent" herein) is a licensed member of The West Virginia State Bar, practicing in Kanawha County, West Virginia, and is subject to the disciplinary jurisdiction of the Supreme Court of Appeals of West Virginia and its properly constituted Committee on Legal Ethics of The West Virginia State Bar.

2. On March 24, 1988, John D. Burgess (herein "Complainant") was arrested for driving under the influence of alcohol. The print-out from the intoxilyzer-alcohol analyzer ("Breathalyzer Test") showed an alcohol level of .05. A copy of the print-out was given to Complainant.

3. Complainant retained attorney Alfred B. McCuskey, II, to represent him on this matter and paid him a fee.

4. On March 31, 1988, the Department of Motor Vehicles issued an Order of Revocation to Complainant, revoking his driver's license for driving while under the influence of alcohol.

5. On April 11, 1988, Mr. McCuskey wrote to the Department, requesting an administrative hearing and requesting that the hearing be held in Kanawha County.

6. On April 14, 1988, the Department scheduled an administrative hearing for April 25, 1988 and sent Complainant a temporary driving permit. On May 4, 1988, the

Department rescheduled the hearing for May 24, 1988 at the Huntington State Police Detachment.

7. On April 29, 1988, Mr. McCuskey appeared with Complainant before the Magistrate Court of Cabell County. The Assistant Prosecuting Attorney assigned to the case moved to dismiss the criminal charge on the grounds of insufficient evidence.

8. Shortly before the May 24, 1988 administrative hearing was to be held, a kidney donor was found for Mr. McCuskey and a transplant operation was performed immediately.

9. At the request of Coleen McCuskey, who is Mr. McCuskey's legal assistant and wife, Respondent agreed to represent Complainant at the administrative hearing without fee approximately 24 hours prior to the hearing.

10. Prior to the administrative hearing, Complainant, the McCuskeys and Respondent understood that the intoxilyzer-alcohol analyzer results showed an alcohol content of .05%. Pursuant to W.Va. Code Sec. 17C-5-8(a) evidence that there was .05% of alcohol in a person's blood is prima facie evidence that the person was not under the influence of alcohol.

11. Coleen McCuskey gave Respondent Complainant's file prior to the administrative hearing.

12. Respondent and Complainant appeared at the hearing on May 24, 1988. It was the intention of the Respondent not to call the Complainant as a witness since the test results,

as represented by the print-out in his possession, was prima facie evidence that the Complainant was not intoxicated.

13. At the hearing the arresting officer submitted into evidence a print-out of the intoxilyzer-alcohol analyzer that had the number "9" hand-written after the test result of ".05". The officer testified that the test result was .059%. Pursuant to West Virginia Code, Ch. 17C, Art. 5, §8(b), evidence that there was more than .05% and less than .10% is relevant evidence, but is not given prima facie effect in indicating whether the person was under the influence of alcohol.

14. Respondent was surprised by the altered test result and questioned its validity. He introduced into evidence Complainant's copy of the print-out, which showed a test result of .05%. Respondent believed that under those circumstances, Complainant would prevail.

15. However, on September 21, 1988, the Commissioner of the Department issued Findings of Fact. He found that the results of the test were .059%. He also found that Complainant had not filed a timely written notice of intent to challenge the results of the test, which is five (5) days prior to the hearing. The Commissioner revoked Complainant's license effective immediately.

16. Pursuant to W.Va. Code Sec. 29A-5-4(b), Complainant had a right of review by the Circuit Court of Kanawha County of the Commissioner's decision within 30 days of receipt of the decision.

17. Pursuant to W.Va. Code Sec. 17C-5A-2(m), an appeal does not stay enforcement of the license revocation. The Circuit Court may grant a stay only upon motion and hearing and a finding by the court upon the evidence presented, that there is a reasonable probability that the appellant shall prevail upon the merits and suffer irreparable harm if the order is not stayed.

18. Upon receiving the Commissioner's decision, Complainant telephoned Respondent's office several times but was unable to speak with Respondent. Respondent did not return the telephone calls.

19. Complainant later came to Respondent's office without an appointment and spoke with Respondent. Complainant explained that if he did not receive a stay of the revocation, he would lose his job. He was extremely upset. Respondent agreed to file an appeal for Complainant, again without charge.

20. Respondent left for a week's vacation without filing the appeal. The appeal time had not yet expired upon his return.

21. Coleen McCuskey visited Respondent's office while he was away and attempted unsuccessfully to locate a form for an appeal on the computer disks.

22. The McCuskeys recall speaking to Respondent several times about getting the appeal filed and that he assured them it would be taken care of. Respondent does not recall such conversations.

23. Complainant called Respondent's office several times while Respondent was on vacation to ask for his file back.

24. Complainant continued to call Respondent's office after Respondent returned to get his file. Respondent did not return the calls, but directed his staff to look for the file. The file was not located.

25. Respondent did not file a Petition for Review and the time period for filing that Petition has expired.

26. The Respondent did not return to the Complainant his file containing notices, warrants and correspondence.

27. During the time period that the Respondent represented the Complainant's interest, he was a candidate for the office of Prosecuting Attorney of Kanawha County and simultaneously was attempting to dispose of more than 300 criminal cases, most of which involved cases similar to the Complainant's. As a result of the Respondent's political activities, he was unable to return many of his telephone calls from clients.

#### CONCLUSIONS OF LAW

1. The failure to file a timely Petition for Review, despite repeated assurances that one would be filed, and the failing to return the client's file, constitutes a violation of DR 6-101(A)(3) of the Code of Professional Responsibility, which states:

"A lawyer shall not: neglect a legal matter entrusted to him."


RECOMMENDED DISCIPLINE

Because of the serious nature of the failure to file a timely Petition for Review from an adverse administrative decision, despite assurances to the client that this action would be taken, and thereafter the failure to return to the client the file containing important documents necessary for an attempted successful presentation of a Petition for Review, it is the recommendation that the Respondent receive a public reprimand.

Respectfully Submitted,

THE WEST VIRGINIA STATE BAR

  
Arthur M. Reicht, Chairman

  
G. Charles Hughes

  
David Harris