

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 9th day of April, 1992, the following order was made and entered:

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

vs.) No. 20865

Donald L. Pitts, a member of The West
Virginia State Bar, Respondent

On a former day, to-wit, April 6, 1992, came the respondent, Donald L. Pitts, a member of The West Virginia State Bar, by Nathan A. Hicks, Jr., his attorney, and presented to the Court his motion in writing for leave to waive the filing of any further documents and oral argument scheduled for Tuesday, the 7th day of April, 1992, for the entry of an order suspending his license to practice law in the State of West Virginia for a period of sixty days and for the reimbursement of actual and necessary expenses incurred by the Committee on Legal Ethics in the investigation and hearing of this matter.

Upon consideration whereof, the Court is of opinion to and doth hereby grant said motion. Accordingly, it is therefore adjudged and ordered that the respondent, Donald L. Pitts, a member of The West Virginia State Bar, be, and he hereby is, suspended from the practice of law in the State of West Virginia, commencing on the 1st day of May, 1992, for a period of sixty days, until the 1st day of July, 1992. It is further adjudged and ordered that the respondent reimburse the

Committee on Legal Ethics of The West Virginia State Bar the actual and necessary expenses incurred in the investigation of the above-captioned matter. Chief Justice McHugh and Justice Brotherton absent.

Service of a copy of this order upon the respondent by certified mail, return receipt requested, shall constitute sufficient notice of the contents hereof.

A True Copy

Attest:



Clerk, Supreme Court of Appeals

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

IN RE: DONALD L. PITTS, a member of
The West Virginia State Bar

I.D. Nos. 89-088, 88-037
AND 88-076

STIPULATED FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDATION OF DISCIPLINE

The West Virginia State Bar, by Counsel, Maria Marino Potter, and Donald L. Pitts, by Counsel, Nathan A. Hicks, Jr., hereby submit to the Hearing Panel Subcommittee of the Committee on Legal Ethics the stipulations set forth below in lieu of an evidentiary hearing. These stipulations are limited to the factors necessary for resolution of the issues before the Committee and are not intended to be comprehensive.

FINDINGS OF FACT

1. Donald L. Pitts ("Respondent" or where applicable "Defendant") is a licensed member of The West Virginia State Bar, practicing in Raleigh 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 Committee on Legal Ethics of The West Virginia State Bar.

COMPLAINT OF BAR COUNSEL - I.D. NO. 89-088 (COUNT III)

2. On or about March 11, 1983, Xerox Corporation ("Plaintiff") instituted a civil action against Donald L. Pitts in the Circuit Court of Raleigh County, West Virginia in a collection matter.

3. After the initial pleadings were filed, discovery was commenced and this case was set for trial on October 24, 1986. Prior to trial, Plaintiff and Defendant entered into an agreed

judgement order, whereby Defendant confessed judgement in the amount of two thousand five hundred dollars (\$2,500), with interest thereon at the rate of two percent per annum beginning November 1, 1986.

4. The agreed judgement order required that monthly payments be made and further set forth that if such monthly payments were not so made, Plaintiff was entitled to proceed with all means of execution provided under the laws of the State of West Virginia. Said Order was signed by the parties and entered by the Circuit Court of Raleigh County on December 9, 1986.

5. Because the Defendant failed to make payments in accordance with the agreed judgement order, Plaintiff proceeded to execute upon the judgement and suggestions were issued.

6. On October 13, 1988, the First National Bank of Beckley answered a suggestion by indicating that Defendant had an account with the suggestee with a balance of eleven thousand four hundred seventy-eight dollars and thirty-seven cents (\$11,478.37). Pursuant to Plaintiff's Motion for Payment of this suggestion, a hearing was set before the Honorable Thomas B. Canterbury, Judge of the Circuit Court of Raleigh County.

7. At the December 19, 1988 hearing, the Defendant raised the issue that the funds in the account under suggestion were client funds. In response to this, the Court by Order entered January 5, 1989 compelled the First National Bank of Beckley to supply records identifying the title to the account.

8. By letter dated January 10, 1989, Counsel for the First

National Bank of Beckley submitted a signature card. Due to conflicting information contained on the face of this card, Plaintiff asked that its Motion for Payment on the suggestion be granted.

9. By letter dated January 18, 1989, the Court advised the parties that it would hold a hearing in order to obtain evidence regarding the nature and source of monies in the account in question. The Court further set forth within said letter that the Defendant should be prepared to demonstrate to the Court the source of the money in the account and the client or clients who had claim to such money.

10. On January 24, 1989, Plaintiff obtained a tentative hearing date of February 24, 1989, issued a notice of hearing to Defendant and to Counsel for the Bank. Simultaneously, subpoenas duces tecum were requested to be issued, a subpoena was then prepared for the purpose of obtaining records of deposits and withdrawals and also to obtain checks written on this account. This subpoena was served on Defendant's office manager on February 15, 1989.

11. On February 24, 1989, the afore-mentioned evidentiary hearing in Xerox Corporation v. Donald L. Pitts v. The First National Bank of Beckley Civil Action No. 83-C-2297 was held. This hearing was recorded and a certified copy of the hearing transcript is attached to these stipulations and incorporated herein by reference.

12. During the February 24, 1989 hearing, Defendant produced

originals of canceled checks from the account in question. A review of the hearing transcript indicates that said account was an account to which client funds and personal funds were deposited and from which personal expenses and office expenses were paid.

13. Based upon the evidence adduced at the hearing of February 24, 1989, the Plaintiff successfully argued that the account in question was subject to suggestion. By Order of the Circuit Court of Raleigh County entered March 21, 1989, the First National Bank of Beckley, as suggestee, was ordered to "pay over and deliver to the Plaintiff, Xerox Corporation, those amounts in its possession which it holds on account in the name of Donald L. Pitts in the amount of \$3,161.77".

14. By letter dated March 6, 1989, in compliance with Rule 8.3(a) of the Rules of Professional Conduct, the law firm which represented Xerox Corporation in the above-detailed collection matter notified Counsel for The West Virginia State Bar of its belief that Respondent may have violated Rule 1.15(a), as said Rule prohibits the co-mingling of a lawyer's personal funds with those of his client's.

15. Bar Counsel, having been granted permission by the Investigative Panel of the Committee on Legal Ethics to open a complaint in order to investigate the matters of which Bar Counsel had been notified, issued a letter dated March 21, 1989 advising Respondent of the opening of a complaint in the name of Bar Counsel and requesting a written response to said complaint.

16. Respondent did not respond to the above-mentioned request

nor to two (2) subsequent written requests made via letters dated April 24, 1989 and May 9, 1989. Respondent's response was then compelled by subpoena.

17. On June 22, 1989, then Bar Counsel, Cynthia Santoro Gustke, met with Respondent and his Counsel at that time, Belinda Morton, to discuss this complaint. By letter dated June 27, 1989, Bar Counsel confirmed that she had met with Respondent and posed questions to which Respondent was to reply. These questions included inquiries relating to services performed for the clients mentioned in the transcript of the above-detailed Xerox case, and other matters regarding the account upon which Xerox was granted suggestion.

18. On August 7, 1989, a subpoena duces tecum was issued to the First National Bank of Beckley compelling production of "any and all records for the past two years pertaining to bank accounts of Donald L. Pitts, either personal, business or client trust funds". In response to this subpoena, Bar Counsel received all records pertaining to account number 1198295801 entitled "DONALD L. PITTS ESCROW." The Statement Of Charges incorrectly lists the account in question as being numbered 19829500.

19. On September 5, 1989, John M. Bowen, an investigator and former agent for the Internal Revenue Service, was employed by Bar Counsel to conduct an audit of account number 1198295801, and to interview Respondent with regard to receipts and disbursements from said account. Thereafter, an audit was conducted and based upon this audit, questions were posed to Respondent.

20. Attached and hereby incorporated by reference are five (5) ledger sheets which detail all activity in account number 1198295801 for a period of two years beginning on or about August 7, 1987 and ending on or about August 7, 1989, and a summary of the amount and type of deposits and disbursements for 1987, 1988 and 1989. The ledger sheets and summary were prepared by Mr. Bowen.

21. Based upon the audit conducted by Mr. Bowen and questions posed to Respondent, it was determined that the account in question was a non-interest bearing escrow account used by Respondent for both personal and business purposes. In addition to deposits of client funds, Respondent deposited his own funds and the funds of others in account number 1198295801.

22. Disbursements from the account included the payment of both office expenses and personal expenses including, but not limited to, a campaign contribution. Respondent stated that all funds received for or from clients were deposited in this account and his legal fees were withdrawn from this account only after such fees were earned.

23. Although Respondent co-mingled client funds and other funds, there is no evidence whatsoever that Respondent borrowed, misappropriated, or otherwise misused the funds of any client. Further, no personal deposits or disbursements were discovered in that portion of the audit which examined the account activity for 1989.

COMPLAINT OF HELEN R. SMITH PATTERSON, I.D. NO. 88-037 (COUNT II)

24. On October 20, 1987, Helen R. Smith Patterson

("Complainant Patterson") met with Respondent for the purpose of asking him to represent her in the filing of an education employee's grievance against her employer, the Raleigh County School Board. The following day, Complainant Patterson again met with Respondent to discuss the filing of a grievance. Respondent charged Complainant Patterson forty dollars (\$40) for the initial consultation and twenty-five dollars (\$25) for the consultation on the following day.

25. Respondent agreed to represent Complainant Patterson in her education employee's grievance and on November 4, 1987, Respondent asked for and received the sum of one thousand dollars (\$1,000). It was and is the belief of Complainant Patterson that the fee of one thousand dollars (\$1,000) paid to Respondent on November 4, 1987 would be the total compensation due for legal representation up through and including a Level IV grievance proceeding detailed under West Virginia Code §18-29-4. Respondent and Complainant Patterson did not enter into a written fee agreement and no itemized fee statements were ever rendered.

26. Respondent represented Complainant Patterson at a Level I grievance conference on January 21, 1988 and at a Level II grievance proceeding on April 5, 1988. By letter dated June 7, 1988, Respondent sent to Complainant Patterson notices he had received on May 26, 1988 regarding an adverse ruling at the Level II proceeding. Respondent in said letter advised Complainant Patterson to "take whatever action you feel necessary to protect your interest". Further, he stated "I do not know whether or not

the time frame, if any, has elapsed for you to take any action". Additionally, Respondent indicated that he had not responded to the notices and could not do so until they had a conference. Monday, June 13, 1988, at 3:00 p.m., was the date and time suggested for this conference.

27. On June 13, 1988, at 3:00 p.m., Complainant Patterson appeared at Respondent's office assuming that the purpose of this conference was to sign the necessary forms for a Level III grievance. Instead, she was advised by Respondent that she could not hope to win her case and that she should take any job offered by the Board and then begin the grievance procedure again during the 1988-89 school term.

28. Complainant Patterson was then informed that she owed Respondent an additional fee of fifteen hundred dollars (\$1,500). Confused by this, Complainant Patterson issued Respondent a check for five hundred dollars (\$500) prior to leaving his office. On June 28, 1988, the Committee on Legal Ethics of The West Virginia State Bar received a complaint against Respondent questioning the termination of representation at Level II, and the additional fifteen hundred dollar (\$1,500) fee. Complainant Patterson further requested assistance in obtaining her file from Respondent as she wished to continue her grievance.

29. By letter dated October 20, 1988, Respondent answered this complaint by stating that "I charged Mrs. Patterson a one thousand dollar (\$1,000) retainer, and explained to her that the per hour rate would be eighty-five (\$85) dollars (which) would be

charged against that retainer amount. I also explained she would be charged eighty-five (\$85) dollars an hour for any services rendered beyond the retainer amount".

30. With regard to the June 13, 1988 conference, Respondent indicated that he had reviewed with Complainant Patterson the hearing examiner's decision and advised that he disagreed with the ultimate decision being based upon an expiration of time for the filing of the grievance because he believed that there was an otherwise ongoing violation of Complainant Patterson's employment contract.

31. Respondent did however confirm that he had advised Complainant Patterson that she could not prevail in her grievance because it was impossible to contradict the position witnesses had taken against her. For this reason, Respondent offered her the possibility of negotiating a settlement which would allow her to accept a job previously offered by the Board. Then, he could bring a new grievance relating to a continuing violation.

32. In response to Complainant Patterson's request for the return of her file, Respondent refused stating that it was too voluminous to copy and that it was necessary for defense of ethics charges against him by her. On October 20, 1988, then Bar Counsel Cynthia Santoro Gustke received a letter from the attorney retained by the West Virginia Education Association to assist Complainant Patterson with her education grievance because his attempts to get Respondent to return the file in question had been unsuccessful.

33. By letter dated October 24, 1988, Respondent was notified

by Bar Counsel that his failure to return the file in question was a violation of Disciplinary Rule 2-110(A)(2), and that other West Virginia attorneys had been disciplined for such a violation. Respondent was then advised to return the file or copies thereof immediately, and that he was permitted to charge complainant Patterson for the copying of the file.

34. Efforts by Bar Counsel and Complainant Patterson's attorney continued through November to obtain a return of the file. Finally, on December 8, 1988, after payment of a copying charge to Respondent of one hundred forty-three dollars (\$143), the file was returned. Questions were raised regarding the reasonableness of the fee for copying in as much as the file was reproduced by Complainant Patterson's attorney for Bar Counsel at a cost of thirty-nine dollars and sixty cents (\$39.60).

35. Complainant Patterson's attorney was unable to pursue an appeal on her behalf because the period for appeal of the adverse Level II decision had expired. The appeal period had expired prior to the letter of June 7, 1988 from Respondent Patterson. The file obtained from Respondent contains no written documentation to indicate that Complainant Patterson was advised of the period for appeal of the Level II decision.

36. By letter dated January 16, 1990, in response to questions posed by Bar Counsel, Respondent, by Counsel Belinda S. Morton, stated that in the initial interview, Complainant Patterson was informed of the time constraints involved in her case, that at the conclusion of the Level II hearing Respondent informed her of

the time in which an appeal should be filed from an unfavorable decision, and that he also informed her that he would not appeal her case. Respondent did not file a formal document withdrawing from the case.

37. Complainant Patterson paid Respondent a total of fifteen hundred sixty-five dollars (\$1,565) in legal fees and was asked to pay an additional one thousand dollars (\$1,000). Due to confusion regarding the legal services to be performed and the fee for such services, Respondent has agreed to refund on or before May 1, 1991 the sum of seven hundred eighty-two dollars and fifty cents (\$782.50). Respondent further agrees that no additional fees are due.

COMPLAINT OF JUDITH K. GAINES, I.D. NO. 88-076 (COUNT I)

38. On or about March of 1987, Judith K. Gaines ("Complainant Gaines") consulted Respondent regarding the transfer of guardianship of her two minor wards, who were the children of her deceased sister. Complainant Gaines was, at that time, receiving a lack of cooperation from an Ohio law firm which was responsible for administration of the funds the minor wards were receiving as the result of a wrongful death action instituted because of the death of their mother. Prior to employing Respondent, Complainant Gaines had previously consulted with at least two other local attorneys on this matter but was unable to receive assistance from them.

39. Respondent and Complainant Gaines had an oral fee contract, the terms of which required Complainant Gaines to pay

Respondent one-third of any money collected on behalf of the minor wards.

40. Respondent's representation of Complainant Gaines consisted of having Complainant Gaines appointed guardian of her niece and nephew in West Virginia and arranging that payments from a structured annuity belonging to said niece and nephew be disbursed through the Respondent, rather than through the Ohio law firm which had previously been disbursing the funds.

41. Respondent collected twelve thousand dollars (\$12,000) on behalf of Complainant Gaines' minor wards. Respondent then charged Complainant Gaines a one-third contingent fee of four thousand dollars (\$4,000).

42. By collecting a one-third contingency fee without petitioning for court approval of that fee, as required under West Virginia Code §44-10-8, Respondent violated DR2-106(A) of the Code of Professional Responsibility.

43. In response to the charge that Respondent had not complied with the dictates of West Virginia Code §44-10-8, he explained that he believed that the summary proceedings regarding fees in Ohio eliminated the need for separate fee approval in West Virginia. Bar Counsel has no evidence to the contrary.

44. In recognition of the fact that Respondent should have petitioned for approval of his fee in accordance with West Virginia Code §44-10-8, Respondent represents to this Hearing Panel Subcommittee that a petition is currently under preparation for filing in order to comply with said statute. This petition will be

filed in the Circuit Court of Raleigh County on or before May 1, 1991.

CONCLUSIONS OF LAW

By depositing both client funds and personal funds into account number 119895801 and making payments of both office expenses and personal expenses directly from this account during 1987, Respondent violated DR9-102(A) of the Code of Professional Responsibility which states, in pertinent part, the following:

All funds of clients paid to a lawyer ..., other than advances for costs and expenses, shall be deposited in one or more identifiable bank accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer ... shall be deposited therein ...

Thereafter, by continuing the above-referenced practices through 1988, Respondent violated Rule 1.15(a) of the Rules of Professional Conduct which dictates that:

A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account designated as a "client's trust account" in an institution whose accounts are federally insured and maintained in the state where the lawyer's office is situated, or in a separate account elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

With regard to the Complaint filed by Helen Smith Patterson, Respondent's refusal to return Complainant's file constitutes a

violation of DR2-110(A) (2) which provides the following in relation to a withdrawal from employment:

In any event, a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including ... delivering to the client all papers and property to which the client is entitled.

Further, Respondent's failure, upon withdrawal of employment, to protect Complainant's right to appeal the adverse Level II decision is a violation of DR6-101(A) (3) which dictates that "A lawyer shall not neglect a legal matter entrusted to him".

Lastly, by collecting a contingency fee from Complainant Gaines without petitioning for court approval of that fee as mandated under West Virginia Code §44-10-8, Respondent violated DR2-106(A) which states "A lawyer shall not enter into an agreement for charge, or collect an illegal or clearly excessive fee."

RECOMMENDED DISCIPLINE

The parties do hereby respectfully recommend to the Hearing Panel Subcommittee that Respondent receive from the Supreme Court of Appeals of West Virginia a suspension of his law license for a period of ~~thirty (30)~~ ^{sixty (60)} days with automatic reinstatement for the ethics violations previously enumerated. The parties further recommend that Respondent be directed to reimburse costs in the amount of one thousand three hundred twenty dollars and forty-four cents (\$1,320.44) incurred by The West Virginia State Bar on behalf of the Committee on Legal Ethics for investigation of the complaints herein set forth.

Nathan A. Hicks, Jr.

NATHAN A. HICKS, JR., Esquire
Counsel for Respondent Donald L. Pitts

Maria Marino Potter

MARIA MARINO POTTER, Esquire
Counsel for The West Virginia State Bar

Approved:

James H. Brown

John W. Cooper

David M. Harris