

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 8th day of July, 1993, the following order was made and entered:

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

vs.) No. 21717

Abishi C. Cunningham, a member of The West
Virginia State Bar, Respondent

On a former day, to-wit, July 6, 1993, came the complainant, the Committee on Legal Ethics of The West Virginia Bar, by Sherri D. Goodman, its attorney, and also came the respondent, Abishi C. Cunningham, a member of The West Virginia State Bar, by Ronald D. Hassan, his attorney, and presented to the Court their joint motion in writing for leave to waive the oral argument scheduled for Tuesday, the 6th day of July, 1993, for the entry of an order issuing a public reprimand of the respondent, Abishi C. Cunningham, and requiring reimbursement to the Committee on Legal Ethics of The West Virginia State Bar in the amount of Two Thousand Two Hundred Forty-Seven Dollars and Sixty-Seven Cents (\$2,247.67), the amount of the actual and necessary expenses incurred by the Committee on Legal Ethics in the investigation and hearing of this matter.

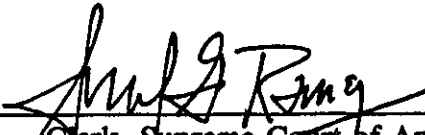
Upon consideration whereof, the Court is of opinion to and doth hereby order that a public reprimand of the respondent doth hereby issue. It is further ordered that respondent reimburse the Committee on Legal Ethics of The West Virginia State Bar for the costs incurred in the investigation and hearing of this matter in the

amount of Two Thousand Two Hundred Forty-Seven Dollars and Sixty-Seven Cents
(\$2,247.67).

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

A True Copy

Attest:


Clerk, Supreme Court of Appeals

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

In Re:

Abishi C. Cunningham, a
member of the West
Virginia State Bar

I.D. Nos. 87-367 & 88-058

RECOMMENDATION OF HEARING PANEL

Jurisdiction and Venue

Abishi C. Cunningham ("Cunningham") is an attorney at law who has been and is duly licensed to practice law in West Virginia. Cunningham has practiced law in Welch, McDowell County, West Virginia for more than 40 years. As a licensed attorney in West Virginia, Cunningham is subject to the disciplinary jurisdiction of the Supreme Court of Appeals of the State and the Legal Ethics Committee of the West Virginia State Bar.

Venue in this matter is in McDowell County, West Virginia, where an initial hearing was held on June 22, 1992. The West Virginia State Bar ("State Bar") was represented by Maria M. Potter, Esquire and Cunningham was represented by Ronald D. Hassan, Esquire.

The sub-hearing panel was comprised of James K. Brown, Chairman, and John C. Skinner, Jr., Lawyer Members, and David Harris, Lay Member. The State Bar and Cunningham expressed no objection to the members of the sub-hearing panel or the jurisdiction of the Ethics Committee. By agreement of the parties,

a second and final hearing was held in Charleston, West Virginia on August 4, 1992 before James K. Brown only.

Nature of Complaints

The State Bar statement of charges against Cunningham derived from two separate and distinct complaints.

The first complaint (I.D. No. 88-058) is by Henry McBride. McBride complains that he consulted Cunningham for approximately 30 minutes on April 6, 1987 because he was concerned that he might be personally liable for debts of Tophill Coal Mining, Inc. ("Tophill"). McBride had invested \$10,000 in Tophill and understood that he was a stockholder although he had not received any stock certificate or other evidence of his investment. Tophill was experiencing financial difficulty. Apparently, the other stockholders were the wives of Carl Richardson and Les Stout, who were the active managers of Tophill. Cunningham advised McBride that McBride would not be personally liable for the corporation's obligations. On May 5, 1987, a magistrate court summons was served on McBride in a legal action commenced by George Serra against Richardson, Stout and McBride seeking recovery of unpaid amounts approximating \$2,025.00 owed him by Tophill for trucking services. McBride, in mistaken reliance on the meaning of Cunningham's advice, believed he need not, and therefore did not answer the complaint. He made no contact with Cunningham. On June 9, 1987, Serra executed a "default judgment affidavit" respecting his action against McBride. Stout and Richardson denied

liability and on June 24, 1987 Cunningham appeared in behalf of Serra and obtained a continuance of a scheduled trial of Serra's claims against Richardson and Stout. Cunningham testified that he did not take note of McBride because McBride had already defaulted and thus he did not perceive any possible conflict. It appears likely to the hearing panel that Cunningham simply did not recall enough details of his brief consultation with McBride to associate that consultation with the Serra representation. Judgment was apparently entered in Magistrate Court on July 9, 1987 against Richardson and Stout after a hearing and automatically against McBride upon his earlier default. Richardson and Stout appealed and Cunningham testified that judgment was subsequently entered against them in the Circuit Court of McDowell County. McBride was not aware of the default judgment against him until he noticed \$63.00 had been withheld from his pay through a suggestee execution served on his new employer in January, 1988. He then engaged other counsel who apparently succeeded in getting the default judgment set aside and the case against McBride dismissed. McBride suffered the loss of the \$63.00 withheld from his wages.

The charge made by the State Bar against Cunningham with respect to the McBride complaint is under DR 4-101(B)(1) and (3) in effect that Cunningham improperly revealed a confidence or secret of his client McBride and used confidential or secret information received from McBride in attorney-client relationship for the advantage of himself or a third person without McBride's consent.

The Committee finds that the evidence adduced does not support this charge and recommends that this charge be dismissed.

The Second Complaint

The second complaint (I.D. No. 87-367) is that Cunningham violated DR 6-101(A)(3) and DR 1-102(A)(4) by neglecting a legal matter entrusted to him by Timothy and Darryl Wilson and misrepresenting his performance through dishonest, fraudulent and deceitful communications to them concerning the status of such matter.

Findings of Fact

Jacob Wilson, Jr. ("Jacob") was the father of Timothy Wilson ("Timothy") and Darryl Wilson ("Darryl"). In August or September, 1982, Jacob voluntarily entered the Huntington State Hospital, owned and operated by the State of West Virginia ("State Hospital"). His purpose was to obtain treatment for alcoholism. While a patient, Jacob consumed alcohol, lapsed into a coma and died on September 16, 1982. During this period, and at all material times, Timothy was a resident of Boston, Massachusetts and Darryl was a resident of Wisconsin or Illinois. Timothy visited Jacob at the Hospital and before Jacob's death consulted two Charleston, West Virginia lawyers respecting his belief that Jacob's terminal illness was the result of medical malpractice at the State Hospital. One lawyer gave Timothy general advice concerning medical malpractice claims but declined any

representation because of a possible conflict. The other lawyer simply declined to consider the matter. In 1983 Darryl entered law school at the University of Wisconsin. In August, 1984 Darryl or Timothy contacted Cunningham by telephone and sought his advice concerning a possible malpractice claim arising from Jacob's treatment and death at the State Hospital. Cunningham agreed to consider the matter and requested that any available medical records be forwarded to him for review. Under date of August 31, 1984, Timothy wrote Cunningham and forwarded to him via United States mail "my father's post-mortem report of 16, September 1982." Apparently other medical records relating to Jacob were also furnished to Cunningham. It is unclear whether these records were furnished by Timothy or Darryl. Cunningham was advised that Timothy would handle the matter for the family because of Darryl's heavy time commitment to his law studies. There was no legal action commenced and any such action was probably barred by the statute of limitations on or about September 16, 1984. Cunningham retained the records which had been delivered to him until late 1987 or early 1988 when they were returned to Timothy after intervention by the State Bar office due to a complaint made by Timothy. Some or all of the records were returned through the State Bar office. Some may have been returned by Cunningham via United States mail. Between August, 1982 and December, 1987 Timothy and Cunningham had several telephone conversations respecting this matter. These calls were all initiated by Timothy. During this period Darryl had one telephone conversation with

Cunningham. This call was initiated by Darryl. A written communications from Timothy to Cunningham under date March 24, 1986 was introduced into evidence. In this communication, Timothy relates:

On 14, September 1985 I requested information pertaining to the filing of the claim we have discussed since September 1984. I have yet to receive this information. In January of this year you said it would be forthcoming.

Therefore, I consider this a third request for this basic information in reference to your case.

There were references in the hearing to other written communications including one from Cunningham to Timothy in which Timothy testified "he in fact wrote me that it [a legal action] had been filed and was being taken care of." (Tr. p. 20).

However, neither this alleged writing nor any other writing from Cunningham to Timothy and/or Darryl was offered in evidence. No written communications from Timothy or Darryl to Cunningham were offered except those of August 31, 1984 and March 24, 1986 described above.

At some unspecified time, Timothy consulted a Charleston law firm concerning a possible legal malpractice action against Cunningham. The law firm requested certain documentation from Timothy. Timothy was late in providing this documentation and was advised that any such action was barred by the applicable statute of limitations.

Cunningham testified that he received Jacob's medical records from Darryl and Timothy, reviewed the records and promptly, and thereafter repeatedly advised Timothy, and advised Darryl that there was no basis for any legal action against the State Hospital.

Timothy testified that Cunningham agreed to accept the matter on a contingent fee basis and reported in sequential communications that he had obtained an extension of the statute of limitations, planned to file an action in the Circuit Court of Mercer County at Princeton, had filed such an action and in all communications that the case was "looking good."

Darryl testified that in his single telephone conversation with Cunningham after Cunningham had agreed to review the medical records Cunningham stated that the case was "looking good."

Cunningham denied all of these assertions by Timothy and by Darryl.

Applicable Law

The State Bar has the burden of establishing its charges against Cunningham of neglect, dishonesty, fraud, deceit and misrepresentation by full, clear and preponderating evidence. Committee on Legal Ethics of the West Virginia State Bar v. Daniel, 160 W. Va. 388, 235 S.E.2d 369 (1977). The testimony in this proceeding is flatly contradictory on all essential points. Were this the only evidence the State Bar could not be found to have met the burden required of it. The credibility of the testimony tested

against what might reasonably and usually be expected of the interested parties in the context of their relationship as well as any other circumstances which point in one direction or the other can be sufficient to overcome an apparent testimonial equilibrium and fulfill the requisite burden of proof even of fraud or criminal conduct. Hetzel v. Kemper, 102 W. Va. 567, 135 S.E. 667 (1926); Berry v. Calhoun, 65 W. Va. 493, 64 S.E. 636 (1909); Michie's Jurisprudence, Evidence, Volume 1B, §§ 281 and 285, pp. 532 et seq.

The context here is that of two young and relatively inexperienced potential clients in a hurried search for a lawyer to take whatever action was necessary to preserve and realize upon what they thought to be a valid legal claim about to be barred by a statute of limitations. On the other side, we find a capable lawyer of long experience who in light of the short time available before a time bar would arise, quite understandably, could have simply declined to consider the matter. This he did not do. Had Cunningham concluded that the potential claim was lacking in merit and he would not pursue it and had he so advised Timothy, as he testified he did, the reasonable and usual conduct one would expect would have been a written communication to such effect and a return of the documents he had accepted for review. Such conduct by a lawyer especially would have been expected in light of the imminent time bar which all recognized and the critical importance that such advice not be misunderstood by these young and relatively inexperienced clients.

These things Cunningham also did not do. Not only did he fail to write but also he retained Jacob's medical records for more than three years and cooperated in their return only after the intervention of the State Bar.

In light of these circumstances, we find that the State Bar has established by full, clear and preponderating evidence that Cunningham violated DR 6-101(A)(3) by neglecting a legal matter entrusted to him by Timothy and Darryl Wilson.

However, due to the flatly contradictory nature of the testimony concerning the content of oral communications by Cunningham to the Wilsons and the lack of circumstantial evidence sufficient to overcome the testimonial equilibrium in this regard, we do not believe that the State Bar has satisfied the evidentiary burden it must meet to establish the DR 1-102(A)(4) charge.

Conclusions of Law

1. This disciplinary proceeding is within the jurisdiction of the West Virginia State Bar Committee on Legal Ethics and was conducted in full conformity with the applicable disciplinary rules;

2. An attorney-client relationship was entered into between Timothy and Darryl Wilson and Abishi C. Cunningham;

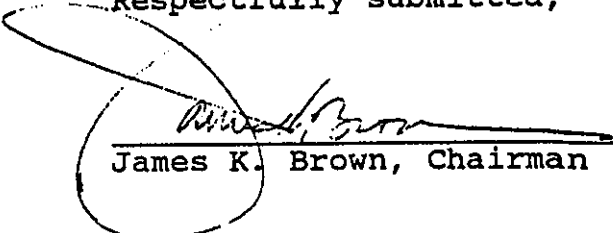
3. The West Virginia State Bar has proven by full, clear and preponderating evidence that Abishi C. Cunningham neglected a legal matter entrusted to him in violation of DR 6-101(A)(3). The West Virginia State Bar has not so proven the

charge of violation of DR 1-102(A) (4) and that charge should be dismissed.

Recommended Discipline

The Committee recommends that Abishi C. Cunningham be suspended from the practice of law for one (1) month for this neglect with automatic reinstatement and that he be required to reimburse the Committee on Legal Ethics for its costs expended in these proceedings.

Respectfully submitted,



James K. Brown, Chairman

John C. Skinner, Jr.

David Harris

April 1, 1993
ABB02B43

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