

Per Curiam

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

No. 21424 v.

Theodore R. Dues, Jr., a member of
The West Virginia State Bar,
Respondent

FILED

DEC 11 1992

Ann [Signature]
CLERK OF THE
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

In this proceeding, the Committee on Legal Ethics of the West Virginia State Bar (the Committee) recommends that this Court suspend for three months the license to practice law of Theodore R. Dues, Jr. We find that the facts do not justify suspending Mr. Dues' license, but do warrant a public reprimand.

On September 11, 1990, Mr. Dues pled guilty to one count of the misdemeanor offense of willful failure to file an income tax return for the calendar year 1985 in violation of 26 U.S.C. § 7203 (1989). Mr. Dues' sentence was suspended and he was placed on probation for five years, during which time he was required to perform 150 days of public or community service work.

On August 3, 1991, the Committee charged Mr. Dues with a violation of DR 1-102(A)(6) of the Code of Professional Responsibility as a result of his conviction.¹ DR 1-102(A)(6)

¹Because the alleged ethical violation occurred before January 1, 1989, the effective date of the new Rules of Professional Conduct, Mr. Dues was charged under the former Code of Professional Responsibility. See, e.g., Committee on Legal Ethics v. Roark, 181

reads: "(A) A lawyer shall not . . . (6) Engage in any conduct that adversely reflects on his fitness to practice law." Subsequently, a hearing was held before three members of the Committee.

Mr. Dues testified that from 1979 through 1986, he had to deal with several serious hardships which placed a severe strain on his finances. In 1979, while working as a solo practitioner, Mr. Dues became seriously ill from complications associated with sickle-cell anemia. As a result of his illness, Mr. Dues was bedridden for approximately six months and was unable to run his office or to generate any income. Since 1979, Mr. Dues continues to suffer many of the symptoms of his illness and has to do a large portion of his work at home. In addition, from 1984 through 1986, Mr. Dues' wife underwent two life-threatening surgeries. Some, but not all, of the medical costs associated with Ms. Dues' extensive medical treatment were paid by insurance.

After recovering from his serious bout with sickle-cell anemia, Mr. Dues timely filed tax returns for the years 1980 through 1983. In 1984, when he was unable to pay his taxes, Mr. Dues contacted the Internal Revenue Service (IRS) and requested that a payment schedule be set up. The IRS refused to assist Mr. Dues and instead confiscated his bank accounts. Already suffering from bad credit because of his health problems, Mr. Dues could not

W. Va. 260, 262 n.3, 382 S.E.2d 313, 315 n.3 (1989).

obtain a loan to pay his personal and business debts. Instead of losing his law practice, Mr. Dues decided to pay his creditors with any incoming funds and to delay paying his taxes.

Mr. Dues also testified that he worked as a hearing examiner for the West Virginia Human Rights Commission from 1982 through 1984. During this time period, he earned approximately \$1,000 per month for his services. At the time the hearing was held, Mr. Dues still had not been paid his legal fees by the State.

Despite these financial constraints, Mr. Dues devoted a substantial amount of his time doing pro bono work. He was a board member of several organizations, including the Charleston Legal Aid Society, the Appalachian Research and Defense Fund, the National Association for the Advancement of Colored People, and a member of the Board of Governors of the West Virginia State Bar Association. Mr. Dues also handled pro bono cases for the Legal Aid Society and for elderly members of his church. Finally, as a member of the Mountain State Bar Association, he actively pursued funding for scholarships for underprivileged minority law students.

In a report dated August 15, 1992, the full hearing panel of the Committee adopted the findings of facts, conclusions of law, and recommendations concerning discipline proposed by the subcommittee. The Committee found that Mr. Dues willfully failed to timely file an income tax return for the tax years 1984, 1985,

and 1986, even though he only pled guilty to failing to file a timely return for the year 1985. The Committee further found that Mr. Dues was in total compliance with his plea agreement. The Committee recommended that Mr. Dues' license to practice law be suspended for three months.

On appeal, Mr. Dues admits that he was convicted of violating 26 U.S.C. § 7203 and that a conviction under this statute constitutes a violation of DR 1-102(A)(6). However, he takes exception to the sanction recommended by the Committee, which he believes is excessive when considering the mitigating factors surrounding the case. Specifically, Mr. Dues argues that the combination of his poor health, his wife's poor health, and the failure of the State to pay him for his services placed a severe financial strain on his business and he simply was unable to meet his tax obligations. Because he is a solo practitioner, Mr. Dues argues that suspending his license for three months would substantially destroy his law practice.

Although recommendations of the Committee are given substantial deference, this Court is the final arbiter and "must make the ultimate decision about public reprimands, suspensions, and annulments of attorneys' licenses to practice law." In re L.E.C., 171 W. Va. 670, 672, 301 S.E.2d 627, 629 (1983). See also Committee on Legal Ethics v. Blair, 174 W. Va. 494, 327 S.E.2d 671 (1984), cert. denied, 470 U.S. 1028, 105 S. Ct. 1395, 84 L. Ed. 2d

783 (1985); State ex rel. Sowa v. Sommerville, 167 W. Va. 353, 280 S.E.2d 85 (1981). "Thus, while according respect to the recommendations of the Committee on Legal Ethics, we remain free to mould the sanction." Committee on Legal Ethics v. Blair, 174 W. Va. at 497, 327 S.E.2d at 675. In Syllabus Point 2 of Committee on Legal Ethics v. Mullins, 159 W. Va. 647, 226 S.E.2d 427 (1976), we held:

"In disciplinary proceedings, this Court, rather than endeavoring to establish a uniform standard of disciplinary action, will consider the facts and circumstances in each case, including mitigating facts and circumstances, in determining what disciplinary action, if any, is appropriate, and when the committee on legal ethics initiates proceedings before this Court, it has a duty to advise this Court of all pertinent facts with reference to the charges and the recommended disciplinary action."

See also Committee on Legal Ethics v. Higinbotham, 176 W. Va. 186, 342 S.E.2d 152 (1986); Committee on Legal Ethics v. Blair, supra.

The present proceedings are similar to those in Committee on Legal Ethics v. Scherer, 149 W. Va. 721, 143 S.E.2d 141 (1965). Mr. Scherer was convicted of two counts of violating 26 U.S.C. § 7203. Following Mr. Scherer's conviction, the Committee recommended that Mr. Scherer's law license be suspended for one year. We found that a conviction under 26 U.S.C. § 7203 was indeed evidence of professional misconduct; however, we felt that the sanction proposed by the Committee was unduly harsh in light of the deaths of Mr. Scherer's mother, father, and wife during the time

the offenses were committed. We believed a more appropriate sanction was to suspend Mr. Scherer's law license for one month.

Recently, in Committee on Legal Ethics v. Higinbotham, supra, the Committee recommended that we suspend Mr. Higinbotham's law license for six months based on the finding that he had failed to pay his income taxes for nine consecutive years. Mr. Higinbotham argued that the proposed penalty was too severe. However, the mitigating factors shown were related to his criminal punishment: his five-month incarceration, imposition of a \$10,000 criminal fine, an increased workload at his law office, and his cooperation with the IRS. We found that his imprisonment and fine were not mitigating factors and adopted the Committee's recommendation.

In this case, there is a direct causal relationship between Mr. Dues' health, his wife's health, the State's failure to pay him substantial attorney's fees, and his ability to promptly pay his taxes. Moreover, when Mr. Dues first realized that he would not be able to comply with his tax obligation in 1984, he contacted the IRS and tried to work within the system. Instead of working with Mr. Dues, the IRS seized his bank accounts, causing him even more of a financial strain. Finally, since 1987, Mr. Dues has taken effective measures to keep his financial affairs straight and has timely filed his tax returns.

For the foregoing reasons, we refuse to adopt the Committee's recommendation that Mr. Dues' license be suspended for three months. Instead, we believe the appropriate sanction is to publicly reprimand Mr. Dues.

Justice Brotherton dissents.