

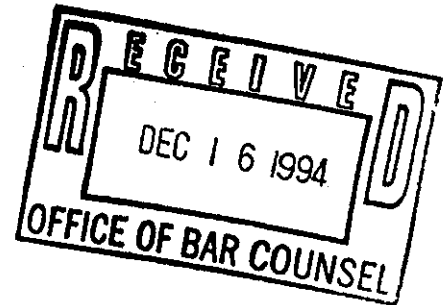
STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 6th day of December, 1994, the following order was made and entered:

Lawyer Disciplinary Board, Complainant

vs.) No. 22463

**Honorable Mark A. Karl, Judge of the
Second Judicial Circuit, an inactive
member of The West Virginia State Bar,
Respondent**



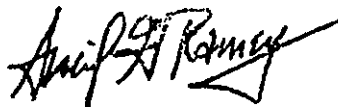
On a former day, to-wit, November 18, 1994, came the complainant, the Lawyer Disciplinary Board, by Teresa A. Tarr, its attorney, and presented to the Court its written recommended disposition pursuant to Rule 3.10 of the Rules of Lawyer Disciplinary Procedure, together with a certificate of expenses in the amount of Five Hundred Fifty-Three Dollars and Four Cents (\$553.04), the record of proceedings before the Board, including the Hearing Panel's adoption of the Subcommittee Report, and the Subcommittee's Findings of Fact, Conclusions of Law and Recommendations Concerning Discipline, recommending that the respondent, Mark Karl, an inactive member of The West Virginia State Bar, be required to perform not less than twenty hours of community service to be completed on or before June 30, 1995; that respondent's service be related to his professional knowledge and areas of expertise; that respondent be required to submit a report regarding the aforesaid service to Disciplinary Counsel and to the Clerk of the Supreme Court; and that respondent be required to reimburse the Lawyer Disciplinary Board for costs and expenses incurred in the investigation of this matter.

Previously, on the 17th day of November, 1994, came the respondent, Mark Karl, by Vincent J. King, his attorney, pursuant to Rule 3.11 of the Rules of Lawyer Disciplinary Procedure, and presented to the Court his concurrence to the written recommended disposition. It is therefore ordered that the respondent be required to: (1) perform not less than twenty hours of community service to be completed on or before June 30, 1995, said service to be related to his professional knowledge and areas of expertise; (2) submit a report to Disciplinary Counsel and the Clerk of the Supreme Court detailing the aforesaid service; and (3) reimburse the Lawyer Disciplinary Board for costs and expenses incurred in the investigation of this matter. Justice Cleckley deemed himself disqualified. Chief Justice Brotherton absent.

Service of a copy of this order shall constitute sufficient notice of the contents herein.

A True Copy

Attest:



Clerk, Supreme Court of Appeals

**BEFORE THE HEARING PANEL
OF THE
LAWYER DISCIPLINARY BOARD**

IN RE: MARK A. KARL, a member of
 The West Virginia State Bar

I.D. No. 93-03-454

**FULL HEARING PANEL ADOPTION OF
FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED DECISION**

This matter came on for deliberation by the Full Hearing Panel of the Lawyer Disciplinary Board for the State of West Virginia at its November 12, 1994, meeting in Charleston, West Virginia, a quorum being present. After consideration of the Subcommittee Report, the full Hearing Panel voted 10 for, 0 against with 0 abstaining, to adopt the FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION CONCERNING DISCIPLINE.

Signed this 12th day of November, 1994.


R. KEMP MORTON, CHAIRMAN
Hearing Panel
Lawyer Disciplinary Board

BEFORE THE LAWYER DISCIPLINARY BOARD
STATE OF WEST VIRGINIA

IN RE: THE HONORABLE MARK A. KARL,
Judge of the 2nd Judicial Circuit
and an inactive member of The
West Virginia State Bar

I.D. No. 93-03-454

REPORT OF HEARING PANEL SUBCOMMITTEE

This matter came on for hearing on the 28th day of October, 1994, before a Hearing Panel Subcommittee of the Lawyer Disciplinary Board comprised of C. Blaine Myers, Chairman, R. Kemp Morton, and Priscilla Haden, Lay Member. Upon consideration of the evidence adduced by the West Virginia State Bar and the Respondent, and upon consideration of the arguments of counsel thereon, the Hearing Panel Subcommittee does hereby make the following Findings of Fact, Conclusions of Law and Recommendations:

Findings of Fact

1. Respondent, Mark A. Karl, is an inactive member of the West Virginia State Bar who currently is Judge of the 2nd Judicial Circuit of the State of West Virginia, and prior to January 1, 1993, practiced law in Marshall County, West Virginia. As such, Respondent is subject to the disciplinary jurisdiction of the Supreme Court of Appeals of West Virginia and it's properly constituted Lawyer Disciplinary Board of the West Virginia State Bar. Respondent was admitted to the West Virginia State Bar on May 17, 1971.

2. On November 3, 1992, the general election was held at which Respondent was elected Judge for the 2nd Judicial Circuit of the State

of West Virginia, with his term to begin on January 1, 1993.

3. On November 27, 1992, after the general election but prior to when Respondent was sworn into office, the Complainant, Michael Acree, retained Respondent to represent him in a criminal proceeding before the Magistrate Court of Wetzel County, and in a license revocation proceeding before the West Virginia Department of Motor Vehicles. At the time, Complainant was charged with second offense DUI and driving left of center.

4. At the time of the initial consultation, Respondent advised Complainant that his required fee would be in the sum of \$1,500.00 to involve proceedings in the Magistrate Court and the suspension of Complainant's license. Respondent advised Complainant that the required retainer would not include any appeal or other proceedings before the Circuit Court of Marshall County.

5. Complainant retained Respondent and on November 27, 1992, gave Respondent a \$500.00 payment on the retainer. On December 2, 1992, Complainant paid the remaining \$1,000.00 owed on the retainer fee.

6. Based upon his prior experience in representing persons charged with offenses similar to that with which the Complainant was charged, and his knowledge and acquaintance with the arresting officers, Respondent had a reasonable basis to believe that all proceedings involving Complainant's case could be completed prior to January 1, 1993, when Respondent would be sworn in as Judge of the 2nd Judicial Circuit, and after which he was not eligible to continue the private practice of law.

7. Although there had been considerable publicity in the Marshall and Wetzel County areas regarding Respondent's election to Judge, Complainant testified he had no actual knowledge at the time he retained Respondent that Respondent would be unable to represent him beyond December 31, 1992.

8. Complainant testified that Respondent did not advise him until December 23, 1992, that Respondent would be unable to represent Complainant beyond the end of the calendar year. Respondent testified that although he did not so advise Complainant at their initial consultation on November 27, 1992, that he believed he had informed Complainant of such circumstances sometime in early December, 1992.

9. A pretrial conference was held on the criminal charge on December 23, 1992. Respondent had worked out a plea agreement with the State of West Virginia, whereby Complainant would plead to the reduced charge of first offense DUI, and the charges of second offense DUI and driving left of center would be dismissed. When Complainant became aware that the State would recommend a thirty day incarceration, he declined to plea in accordance with the agreement. Because the parties could not come to an agreement, the matter was rescheduled for sometime after January 1, 1993.

10. Because Respondent could not represent Complainant beyond the end of the calendar year 1992, he referred Complainant to Marshall County attorney J. Thomas Madden.

11. Complainant testified that he was satisfied with the services of Mr. Madden, that the case was resolved in a manner

substantially in accordance with the original plea agreement worked out by Respondent, but that he had been required to pay Mr. Madden an additional retainer of \$1,500.00.

12. Prior to April 27, 1993, Complainant attempted to contact Respondent by telephone concerning the refund or partial refund of his retainer paid to the Respondent. Complainant was unable to reach Respondent directly and did not receive return telephone calls. On April 27, 1993, Complainant sent Respondent a letter referencing a conversation that had taken place in December 1992 with regard to a refund Complainant would receive. Respondent did not reply to the letter or provide Complainant at that time with a partial refund.

13. On July 6, 1993, Complainant sent Respondent a second letter asking him to resolve the matter. Respondent did not reply to this letter nor did he refund any money at that time to Complainant. On September 13, 1993, Complainant sent a third letter to Respondent by certified mail advising that if he did not receive a refund within fifteen days of the letter that he would forward all previous correspondence to the West Virginia State Bar. Respondent did not reply to this letter.

14. Respondent finally wrote Complainant on December 3, 1993, after Complainant had contacted disciplinary counsel of the West Virginia State Bar. In the correspondence, Respondent advised Complainant that he would review the file and determine the matter of a refund by December 10, 1993.

15. When Respondent failed to get back in touch with Complainant as indicated in his letter of December 3, 1993, a formal ethics complaint was filed by the Complainant on December 22, 1993. Chief Disciplinary Counsel sent a letter and a copy of the Complaint to Respondent on January 19, 1994, and asked that he reply to the allegations within three weeks. Respondent did not reply to the Chief Disciplinary Counsel's request for information within the three weeks as requested.

16. Respondent finally replied to Chief Disciplinary Counsel on March 18, 1994, in which he stated: "I do believe Mr. Acree is entitled to a partial refund and I have forwarded a check to him in the sum of \$600.00."

17. Complainant testified that he did in fact receive the \$600.00 refund from the Respondent.

CONCLUSIONS OF LAW

The West Virginia State Bar alleges that Respondent has violated three separate rules of professional conduct, as follows:

1. It is alleged that by not informing Complainant when he agreed to represent him that he could only do so until December 31, 1992, Respondent violated Rule 1.2(c) of the Rules of Professional Conduct which provides that "a lawyer may limit the objectives of the representation if the client consents after consultation."

With respect to this charge, the Subcommittee believes that the aforementioned Rule was intended to apply to the scope and nature of representation, and not to circumstances under which such representation

may be required to be terminated after a specific period of time. Even if the Rule were so intended, there is no basis upon which this Subcommittee could find that the Respondent did not have a reasonable basis to believe that the representation could not be completed prior to December 31, 1992, at the time he was retained. The Subcommittee therefore finds that the West Virginia State Bar has failed to prove by clear and convincing evidence that the Respondent violated the Rule cited above.

2. It is alleged by not promptly refunding an unearned portion of the \$1,500.00 retainer fee after he ceased to represent Complainant, Respondent violated Rule 1.16(d) of the Rules of Professional Conduct which states that "upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests such as...refunding any advance payment of fee that has not been earned."

Respondent acknowledged that Complainant was entitled to a refund of a portion of the retainer. The Subcommittee believes, however, that the Rule cited above contemplates that refunding an advance payment of a fee that has not been earned should be made within a reasonable time after representation has terminated. To the contrary, Respondent failed several times to respond to reasonable requests by Complainant for a refund, and only provided the refund after a formal complaint had been filed with the West Virginia State Bar, and more than fourteen months after the representation had been terminated by Respondent's assuming office as Judge of the 2nd Judicial Circuit.

Respondent himself acknowledged that there was an inappropriate delay in responding to Complainant's request.

Accordingly, the Subcommittee finds that the West Virginia State Bar has proven by clear and convincing evidence that Respondent violated Rule 1.16(d) of the Rules of Professional Conduct by failing to refund unearned portion of an advance payment of fee within a reasonable time after representation had terminated.

3. It is further alleged that by not responding to Chief Disciplinary Counsel's January 19, 1994 letter within three weeks as set forth therein, Respondent violated Rule 8.1(b) of the Rules of Professional Conduct which provides in pertinent part that a lawyer in connection with a disciplinary matter shall not "knowingly fail to respond to a lawful demand for information from...disciplinary authority...."

Although Respondent did reply on March 19, 1994, such reply was not within the time within which such a response was required, and accordingly this Subcommittee finds that the West Virginia State Bar has met it's burden of proof by clear and convincing evidence that Respondent violated Rule 8.1(b) of the Rules of Professional Conduct.

Recommendations Concerning Discipline

Although Respondent failed to refund the unearned portion of Complainant's retainer within a reasonable time, the Subcommittee finds that there was no evidence that Respondent's conduct was malicious, willful, or intentional, but instead represented an inexcusable oversight in failing to promptly address Complainant's request.

Respondent's conduct was more reflective of negligent inattentiveness rather than dishonesty.

Although Respondent did reply to the request of Chief Disciplinary Counsel for information approximately two months after the request was received, this Subcommittee is nonetheless of the view that the obligation of lawyers to promptly respond to such requests for information within the time constraints set forth must be taken seriously, and accordingly this Subcommittee found that Respondent violated the applicable rule even though he ultimately provided the information requested.


The Subcommittee believes based upon all of the circumstances surrounding this matter, that the violations committed by Respondent do not rise to the level that suspension of the Respondent is necessary to the administration of justice or to protect the public. Although the West Virginia State Bar has asserted that Respondent's prior suspension is an aggravating factor to be considered, the Subcommittee finds that Respondent's prior violations involved matters and conduct unrelated to the charges in this case and taken in their totality do not justify imposition of greater discipline.

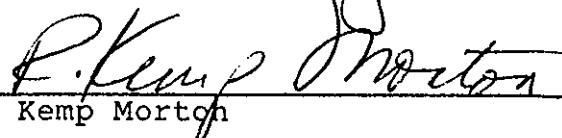
This Subcommittee therefore recommends that Respondent be required to perform not less than twenty hours of community service to be completed on or before June 30, 1995. The community service should be related to Respondent's professional knowledge and areas of expertise. The plan of community service and performance of same shall be reported to the Chief Disciplinary Counsel and the Clerk of the West

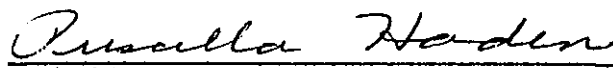
Virginia Supreme Court of Appeals to determine compliance.

This Subcommittee further recommends that Respondent be required to reimburse the West Virginia State Bar for all expenses incurred in this proceeding.

Dated this 12th day of November, 1994.


C. Blaine Myers


R. Kemp Morton


Priscilla Haden

**BEFORE THE LAWYER DISCIPLINARY BOARD
STATE OF WEST VIRGINIA**

**IN RE: MARK A KARL, a member of
 The West Virginia State Bar**

I.D. No. 93-03-454

CERTIFICATE OF EXPENSES

I, Teresa A. Tarr, Disciplinary Counsel for the Lawyer Disciplinary Board do hereby certify that the following ordinary and reasonable expenditures were incurred by the Lawyer Disciplinary Board and the Office fo Disciplinary Counsel in the investigation and litigation of the above-captioned matter:

Transcript:

Prehearing 10/10/94	\$ 56.00
Hearing 10/28/94	260.00

Witness travel/lodging/meals and fee:

Lodging	51.23
Travel	56.70
Meals	15.94
Fee	20.00

Panel Expenses:

Travel	67.00
Meal	22.92

Coping charges:

State of WV vs. Acree, Case File 92-M-444 (13 page @ 25¢ per page)	3.25
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TOTAL EXPENSES: \$ 553.04

DATE: - 11 / 18 / 94


TERESA A. TARR
Disciplinary Counsel