

Supreme Court of Kentucky

TO BE PUBLISHED

FINAL

2008-SC-000550-KB

DATE NOV 5, 08 ELLA G. GRIFFIN D.C.

KENTUCKY BAR ASSOCIATION

MOVANT

V.

IN SUPREME COURT

DAVID S. O'BRIEN

RESPONDENT

OPINION AND ORDER

A trial commissioner appointed pursuant to SCR 3.230 has returned a report in the current disciplinary proceedings against Respondent, David S. O'Brien, who was admitted to practice law in Kentucky on October 21, 1976, whose Bar Roster Address is 125 South 6th Street, Louisville, Kentucky 40202, and whose KBA Member Number is 52223. The trial commissioner recommends that Respondent be suspended for 30 days, make restitution to his client, and be required to attend remedial ethics education.

The charge against Respondent stems from his representation of Austin Merriweather Sr. in a child support matter. The Charge against O'Brien included three counts: (1) that he violated SCR 3.130-1.3 when he failed to take action in his client's case, (2) that he violated SCR 3.130-1.4(a) when he failed to respond to his client's inquiries and failed to contact his client, and (3) that he violated SCR 2.130-8.1(b) when he failed to respond to three demands for information sent by the disciplinary authority in the form of letters dated November 23, 2004, December 3, 2004, and January 5, 2005 .

Respondent acknowledged that the client paid him a \$100 retainer to review Jefferson County court records and to relay any information therein regarding a child-support arrearage, if any existed. He claimed to have reviewed the relevant files and found that the client appeared to owe child-support arrearages. He also claimed that he advised the client of the arrearage and that he believed he kept the client reasonably informed and spoke with the client on the telephone multiple times. O'Brien also admitted that he received correspondence from bar counsel and was remiss in failing to respond.

The trial commissioner was appointed and a hearing was held at which the client, a deputy bar counsel, and Respondent testified and several exhibits were admitted. Based on the evidence presented, the trial commissioner entered the following findings of fact:

1. The respondent was paid \$100.00 by Austin Merriweather, Sr. to investigate whether he owed child support arrearages and if so, how much was the arrearage.
2. The retainer received was not unreasonable.
3. There was no written fee agreement or contract between Respondent and Mr. Merriweather.
4. The Respondent did investigate on behalf of Mr. Merriweather whether he had an arrearage, if so how much, and [whether] the alleged arrearage was accurate.
5. The Respondent did not keep his client reasonably informed about the status of the matter and did not properly comply with reasonable requests for information.
6. The Respondent in connection with a disciplinary matter, failed to respond to a lawful demand for information from an admissions or disciplinary authority, having failed to respond to three letters from the Office of Bar Counsel requesting information about his handling of Mr. Merriweather's legal matters.

The trial commissioner concluded that Respondent did not violate SCR 3.130-1.3, but that he did violate SCR 3.130-1.4(a) by failing to respond to his client's inquiries

and SCR 3.130-8.1(b) by failing to respond to demands for information from the Office of Bar Counsel.

In recommending a sanction, the trial commissioner also reviewed Respondent's prior discipline, which included a suspension for CLE non-compliance and nonpayment of dues in 1990, a private admonition in 2002, and a 90-day suspension in 2006.

Neither Respondent nor Bar Counsel Respondent appealed the trial commissioner's determination, so the matter came directly to this Court (rather than to the Board of Governors) pursuant to SCR 3.360(4). Because the trial commissioner's findings and conclusions are supported by the record and the law, and because the sanction recommended is appropriate in light of Respondent's history of prior discipline, this Court elects not to review them as allowed under to SCR 3.370(9). The decision of the trial commissioner is therefore adopted pursuant to SCR 3.370(10).

Respondent therefore is found to have violated SCR 3.130-1.4(a) by failing to respond to his client's inquiries and SCR 3.130-8.1(b) by failing to respond to demands for information from the Office of Bar Counsel.

ACCORDINGLY, IT IS HEREBY ORDERED THAT:


- (1) Respondent, David S. O'Brien, is suspended from the practice of law in the Commonwealth of Kentucky for 30 days from the date of the entry of this order.
- (2) Respondent shall make restitution to Austin Merriweather, Sr., in the amount of \$100.
- (3) Respondent shall attend the next Ethics and Professional Enhancement Program offered by the Office of Bar Counsel. Respondent will not apply for CLE credit of any kind for his attendance at the Ethics and Professional Enhancement Program, and is required to furnish a release and waiver to the Office of Bar Counsel to review his

records in the CLE department that might otherwise be confidential, with such release to continue in effect for one year after completion of the remedial education, in order to allow the Office of Bar Counsel to verify that Respondent has not reported any hours to the CLE Commission that are taken as remedial education.

(4) In accordance with SCR 3.450, Respondent is directed to pay all costs associated with these disciplinary proceedings against him, said sum being \$399.59, for which execution may issue from this Court upon finality of this Opinion and Order.

All sitting. All concur.

Entered: October 23, 2008.


CHIEF JUSTICE

AS CORRECTED: NOVEMBER 29, 2006
TO BE PUBLISHED

Supreme Court of Kentucky **FINAL**

2006-SC-000571-KB

DATE 1-25-07 Ellie A. Grant, D.C.

KENTUCKY BAR ASSOCIATION

APPELLANT

V.

IN SUPREME COURT

DAVID S. O'BRIEN
KBA MEMBER NO. 52223

APPELLEE

OPINION AND ORDER

Respondent, David S. O'Brien, was admitted to the practice of law in Kentucky in October of 1976. His bar roster address is 125 South Sixth Street Louisville, Kentucky, 40202. In May 1990, he was suspended from the practice of law for CLE noncompliance and nonpayment of Bar dues, but was reinstated in June of 1990. Prior to the disciplinary proceeding here, in January 2002, he received a private admonition from the Inquiry Commission for receiving \$100.00 from a client to modify child support but not performing the work. After the client filed a bar complaint, he returned the \$100.00 and filed a motion to modify child support, which was granted.

The complaint in this proceeding arose when Mr. O'Brien was paid \$546.00 in cash from his client, Mr. White, to have his criminal record expunged. O'Brien did not perform any work for Mr. White and he did not respond to two certified letters mailed to him by Mr. White. Thereafter, Mr. White filed a bar complaint against O'Brien.

On August 8, 2005, O'Brien was served with a copy of the complaint. He did not respond. On September 14, 2005, he was again served a copy of the complaint. He

did not file a response. On November 10, 2005, O'Brien was served with a copy of a warning letter of a bar complaint. He did not file a response. On December 8, 2005, O'Brien was served with another copy of the warning letter. He did not respond.

On January 30, 2006, the Inquiry Commission issued a five-count charge against O'Brien charging him with violations of SCR 3.130-1.3 (diligence), SCR 3.130-1.4 (communication), SCR 3.130-1.16(d) (failure to refund unearned fees), SCR 3.130-8.1(b) (knowingly failing to respond to a lawful demand for information from disciplinary authority) and SCR 3.130-8.3 (conduct involving dishonesty, fraud, deceit or misrepresentation).

On March 6, 2006, O'Brien was served with a copy of the charge by the Jefferson County Sheriff's Office. O'Brien failed to answer the charge.

The case was submitted to the Board of Governors as a default on May 19, 2006. Its findings of fact, conclusions of law, and its recommendations were filed on August 9, 2006. The Board of Governors found O'Brien guilty by a vote of 14 to 0 of each counts I, II, III, and IV. The Board voted 14 to 0 that O'Brien was not guilty of count V.

However, the Board was divided equally, a vote of 7 to 7, regarding the appropriate sanction. Seven board members recommended a ninety (90) day suspension with full restitution to the client. The other seven members of the Board voted for a punishment consisting of a fifty-nine (59) day suspension and full restitution to the client. A sanction of less than sixty-one (61) days would not require the Respondent to notify his clients of his misconduct under SCR 3.390. The primary basis for the split vote centered around the weight given to the prior discipline O'Brien had received.

Therefore, after review of the Board of Governor's recommendations and applicable law, the appropriate discipline in this matter is a ninety (90) day suspension.

Thus, it is ORDERED that:

1). Mr. O'Brien is hereby suspended from the practice of law for ninety (90) days. This period of suspension shall commence upon the date of entry of this Opinion and Order.

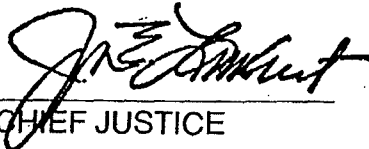
2) Mr. O'Brien is to pay restitution to Mr. White in the amount of \$546.00 within thirty (30) days of the entry of this Opinion and Order.

3) In accordance with SCR 3.450, Mr. O'Brien shall pay the certification of costs in the amount of \$216.00, from which execution may issue from this Court upon finality of the Opinion and Order.

4) In accordance with SCR 3.390, Mr. O'Brien shall, within ten (10) days from the entry of this Opinion and Order: (a) to the extent possible, cease and desist any advertising activities in which he is engaged; and (b) notify, in writing, all courts in which he may have matters pending, and all clients, of his inability to provide further legal services for the period of suspension, and furnish the Director of the Kentucky Bar Association with a copy of all such letters.

All concur.

ENTERED: November 22, 2006


CHIEF JUSTICE

Supreme Court of Kentucky

2006-SC-000571-KB

KENTUCKY BAR ASSOCIATION

APPELLANT

V.

IN SUPREME COURT

DAVID S. O'BRIEN
KBA MEMBER NO. 52223

APPELLEE

ORDER OF CORRECTION

The Opinion and Order entered November 22, 2006, is hereby corrected on its face by substitution of the attached pages 1, 2 and 4 in lieu of the original pages 1, 2 and 4 of the Opinion and Order. The purpose of this Order of Correction is to correct a typographical error and does not affect the holding of the original Opinion and Order.

ENTERED: November 29, 2006.


CHIEF JUSTICE