

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

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.

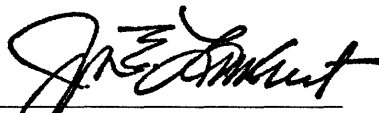
2) Mr. O'Brien is to pay restitution to Mr. White in the amount of \$546.00 within thirty (30) days of the entry of this Opinion and Order.

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

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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