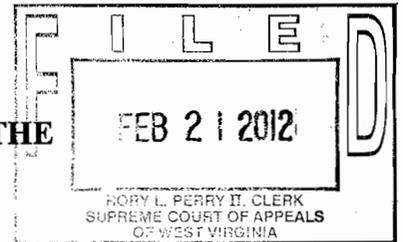


# ARGUMENT DOCKET

BEFORE THE SUPREME COURT OF APPEALS OF THE  
STATE OF WEST VIRGINIA



**LAWYER DISCIPLINARY BOARD,**

**Complainant,**

**v.**

**No. 10-4011**

**MICHAEL S. SANTA BARBARA,**

**Respondent.**

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**REPLY BRIEF OF THE LAWYER DISCIPLINARY BOARD**

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This matter is before the Court pursuant to the "Report of the Hearing Panel Subcommittee" issued on December 2, 2011, wherein the Hearing Panel Subcommittee properly found that the evidence established that Respondent committed multiple violations of Rules 1.3, 1.4(a) and 1.4(b), and single violations of Rules 1.1 and 1.15(a) of the Rules of Professional Conduct. Respondent correctly points out that the Hearing Panel Subcommittee was not of the opinion that Respondent violated Rule 8.1(a) in that they did not find that Respondent lied to the Office of Disciplinary Counsel [hereinafter "ODC"] in his response to the complaint filed against him by Mr. Burris. Moreover, Respondent concedes that he failed to diligently represent the interests of his clients Mr. Burris, Ms. Milanowski, Ms. Clark, and Ms. Thomas and that he also failed in his obligations to keep these clients informed about the status of their cases in violation of Rules 1.3 and 1.4(a) and 1.4(b). Respondent also concedes that he violated Rule 1.15(a) in failing to timely tender and account to Karen Thomas concerning the remaining money from a 2002 settlement which Respondent had allegedly in withheld in his trust account to pay a Medicaid lien. However, Respondent denies that he wrongfully misappropriated and converted those funds despite that the fact that and he could not account for the money and the fact that that his trust account did not contain enough money at the end of January of 2003 to pay Mrs. Thomas. Finally, Respondent continues to deny that he violated any Rules of Professional Conduct with regard Mr. Scencindiver as he again asserts that Mr. Sencindiver was never his client.

Respondent also argues that the Hearing Panel Subcommittee failed to give appropriate weight to his mitigation evidence. Respondent asserts that the Hearing Panel Subcommittee failed to recognize that the combination of the depression and the actions of "disruptive" staff member contributed to a "synergistic effect" which contributed to his lack of attention to his legal practice for a number of years.

At this stage in the proceedings, this Court has held that “[t]he burden is on the attorney at law to show that the factual findings are not supported by reliable, probative, and substantial evidence on the whole adjudicatory record made before the Board.” Lawyer Disciplinary Board v. Cunningham, 195 W.Va. 27, 34, 464 S.E.2d 181, 189 (1995); Committee on Legal Ethics v. McCorkle, 192 W. Va. 286, 290, 452 S.E.2d 377, 381 (1994).

The Rules of Professional Conduct state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. Committee on Legal Ethics v. Keenan, 189 W.Va.37, 40, 427 S.E.2d 471, 473 (1993) (*per curiam*); quoting Syl. Pt. 3, in part, Committee on Legal Ethics v. Tatterson, 173 W.Va. 613, 319 S.E.2d 381 (1984). Furthermore, the Preamble to the Rules of Professional Conduct provides that “[i]n all professional functions a lawyer should be competent, prompt and diligent.” It cannot be said that Respondent’s conduct in this case conforms to the expectations of the profession as stated in the Rules of Professional Conduct. The evidence clearly establishes that Respondent acted in a manner wherein he failed to heed a substantial risk and deviated from the standard of care that a reasonable lawyer, let alone one with Respondent’s considerable experience, would exercise in that situation.

## I. SANCTION

The principle purpose of attorney disciplinary proceedings is to safeguard the public’s interest in the administration of justice. For the public to have confidence in our disciplinary and legal systems, lawyers such as Respondent must be removed from the practice of law for a period of time. Severe sanctions are also necessary to deter other lawyers who are engaging in or may be considering similar conduct.

The Hearing Panel Subcommittee properly found that Mr. Sencindiver was Respondent’s client. Courts have long noted that “[w]hat constitutes an attorney-client relationship is a rather

elusive concept.” Attorney Grievance Comm’n v. Shaw, 732 A.2d 876, 883 (Md. 1999) (*quoting Folly Farms I, Inc., v. Trustees*, 670 A.2d 248, 254 (Md. 1978)). However, this Honorable Court has stated that an attorney client relationship begins as soon as the client has expressed a desire to employ an attorney, and there has been a corresponding consent on the part of the attorney to act for him in a professional capacity. *See State ex rel. DeFrances v. Bedell*, 446 W.Va. 513, 446 S.E.2d 906 (1994). The attorney-client relationship can also be implied from the conduct of the parties. Committee on Legal Ethics v. Simmons, 184 W.Va. 183, 186, 399 S.E.2d 894, 897 (1990) (*per curiam*).<sup>1</sup> Moreover, in the context of attorney disciplinary proceedings, one court noted that “[i]t is not necessary for an attorney to take substantive action and give legal advice in order to establish [an attorney-client] relationship.... However, a client’s perception of an attorney as his counsel is a consideration in determining whether a relationship exists....” In re Lieber, 442 A.2d 153, 156 (D.C. 1982) (*citing In re Russell*, 424 A.2d 1087 (D.C. 1980); In re Fogel, 422 A.2d 966 (D.C. 1980)).

While Respondent may now believe that Mr. Sencindiver did not have valid claim and was thus, not his client, Respondent can not point to any evidence to suggest that he communicated this belief to Mr. Sencindiver until May of 2007 well past the statute of limitation date in Mr. Sencindiver’s case. Moreover, this is not a case in which the attorney-client relationship must be implied. Mr. Sencindiver clearly believed that Respondent had agreed to represent him in the matter. [5/4/11 Trans. p. 15]. Mr. Sencindiver also signed a retainer agreement for Respondent’s

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<sup>1</sup> The Restatement of the Law Governing Lawyers, Third Edition (2001) (hereinafter “Restatement”) emphasizes the point that “[a] tribunal should construe a contract between client and lawyer as a reasonable person in the circumstances of the client would have construed it.” Restatement Section 18(2). The subjective nature of the creation of the relationship is in accord with decisions from a majority of other jurisdictions. *See Bartholomew v. Bartholomew*, 611 So.2d 85 (Fla. 2DCA 1992), which holds that “[t]he test for determining the existence of this fiduciary relationship is a subjective one and hinges upon the client’s belief that he is consulting a lawyer in that capacity and his manifested intention it to seek professional legal advice.” *See also Westinghouse v. Kerr-McGee Corp.*, 580 F.2d 1311 (7<sup>th</sup> Circ. 1978).

representation on or about February 8, 2005, and met with Respondent on at least two occasions to discuss his case. [Exhibit 1, Bates No. 008; 5/4/11 Trans. p. 15]. Mr. Secindiver testified that after his second meeting with Respondent, he was unable to speak to Respondent again and did not receive any correspondence at all from Respondent about his case until he received the May 11, 2007 letter advising him that Respondent had failed to file a claim on his behalf. [5/4/11 Trans. pp. 16-17, ODC Ex. 3, Bates No. 017]. As to Penny Young, Mr. Sencindiver testified that his son and her son went to school together. [5/4/11 Trans. p. 20] However, he also testified that he spoke to other staff members besides Ms. Young in Mr. Santa Barbara's office about his case. [5/4/11 Trans. p. 34]. The fact that Mr. Sencindiver and Ms. Young may have been acquainted with each other at the time Mr. Sencindiver met with Respondent does not, now or then, alleviate Respondent of his duties and obligations under the Rules of Professional Conduct. Finally, the issue of whether Mr. Sencindiver has a valid underlying claim is not an issue properly before the Hearing Panel Subcommittee. In this matter, the Hearing Panel Subcommittee of the Lawyer Disciplinary Board appropriately determined that an attorney-client relationship had been established between Respondent and Mr. Sencindiver and that Respondent failed in his professional obligations under the Rules of Professional Conduct.

The evidence also clearly and convincingly demonstrates that Respondent violated the Rules of Professional Conduct with regard to his representation of Mrs. Thomas. Respondent successfully represented Mrs. Thomas in a slip and fall case against Wal-Mart which was settled in or about August of 2002 for \$50,000.00. After depositing this money into his Michael Santa Barbara Law Office IOLTA account at the Susequehanna Bank, Respondent issued a check in the amount of \$16,650.00 to his law firm in August of 2002. [Exhibit 36, Bates No. 1550]. Respondent then issued three (3) checks in the amounts of \$834.04, \$62.50 and \$1,892.20 for costs and expenses. [Id.]. On or about November 12, 2002, Respondent issued a check in the amount of \$16,000.00 from

his IOLTA account to Mrs. Thomas leaving a balance of \$14,557.26 of her funds remaining in the IOLTA account. [Exhibit 36, Bates No. 1554]. Respondent and Mrs. Thomas both understood that this money was being withheld for a possible Medicaid lien. [5/4/11 Trans. pp. 101-102, 198-199; Exhibit 36, Bates Nos. 1389-1390]. Aside from one telephone contact in or about 2003, Respondent completely neglected the matter until August of 2007 when Mrs. Thomas contacted Respondent again about the status of the money being withheld. [5/4/11 Trans. pp. 103-104] In August 2007, Respondent's IOLTA account had a balance of \$248.87. [Exhibit 40, Bates No. 1642]. Respondent then sent Mrs. Thomas a check in the amount of \$11,000.00 on or about September 6, 2007. [5/4/11 Trans. p. 199; Exhibit 40, Bates No. 1643-4, 1645-6]. Respondent again neglected the matter for almost another year until sending two (2) additional checks to Mrs. Thomas in the amounts of \$4,488.73 and \$511.27 on August 4, 2008, and September 22, 2009, respectively.<sup>2</sup> [Exhibit 36, Bates No. 1509; Exhibit 40, Bates No. 1659; Exhibit 36, Bates No. 1504].

The Hearing Panel Subcommittee was not of the opinion that Respondent intentionally misappropriated Mrs. Thomas' funds. The Hearing Panel Subcommittee noted that the evidence was unclear where the funds had been placed and used when Respondent closed his solo practice office and opened the Santa Barbara Law Offices, P.L.L.C., with his wife, Kathy Santa Barbara in January of 2003.<sup>3</sup> Respondent's neglect of Mrs. Thomas' case spanned a period of nearly five (5) years

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<sup>2</sup> Respondent mistakenly believed that he owed Mrs. Thomas \$5,000.00, not \$4,000.00.

<sup>3</sup> Kathy Santa Barbara testified that because the paperwork for the Santa Barbara Law Offices was not yet approved by the West Virginia State Bar until February of 2003, she was unable to open any bank accounts for Santa Barbara Law Offices and as a result, she and Respondent used Respondent's bank accounts, including the general office account for the Law Offices of Michael Santa Barbara, until they could open the other firm's bank accounts. [5/5/11 Trans. pp. 9-10]. On December 31, 2002, Respondent's IOLTA account for the Law Offices of Michael Santa Barbara held a balance of \$21,862.63. [Exhibit 40, Bates No. 1579]. In January of 2003, Respondent wrote five (5) checks from his Law Offices of Michael Santa Barbara IOLTA account totaling \$27,508.34, including two (2) checks totaling \$18,000.00 payable to the Law Offices of Michael Santa Barbara general account. [Exhibit 40, Bates Nos. 1575-1577]. By February of 2003, Respondent's IOLTA account for the Law Offices of Michael Santa Barbara had an account balance of \$4,354.26. [Exhibit 40, Bates No. 1582].

during which time he could not locate the settlement funds or explain what had happened to the funds he was holding in his IOTLA bank account.<sup>4</sup>

Respondent maintains that he presented extensive evidence that he suffered from a mental disability or impairment but that the Hearing Panel Subcommittee did not give it proper weight in this matter.<sup>5</sup> However, the Hearing Panel Subcommittee found that Respondent suffered from a mental disability (depression) during the time period of the allegations in the Statement of Charges and did consider the same to be mitigating. In Lawyer Disciplinary Board v. Dues, 218 W.Va. 104, 624 S.E.2d 125 (2005), the Supreme Court of Appeals of West Virginia stated that “[i]n a lawyer disciplinary proceeding, a mental disability is considered mitigating when: (1) there is evidence that the attorney is affected by a mental disability; (2) the mental disability caused the misconduct; (3) the attorney’s recovery from the mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and (4) the recovery arrested the misconduct and recurrence of that misconduct is unlikely.” Respondent appeared to be suffering from the effects of depression in or about 2004 and 2005 which the Hearing Panel Subcommittee believed led to his difficulties in communicating with Mr. Sencindiver, Mr. Burriss, Ms. Clark, and Ms. Milanowski and in his neglect of their cases. Contrary to Respondent’s assertions, the Hearing Panel Subcommittee did consider the “synergistic effect “ of Respondent’s depression combined with the office discord created by the “disruptive” employee by noting that Respondent stayed away from his office not only due to the “disruptive” employee but also because of marital issues with his wife who was also his law partner.

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<sup>4</sup> The Hearing Panel Subcommittee found that the circumstances involving the difficulties with Ms. Young may have also contributed to Respondent’s mismanagement and the disappearance of Mrs. Thomas’ funds from his IOLTA account. However, in January of 2003, Ms. Young was not an employee of The Law Offices of Michael Santa Barbara.

<sup>5</sup> Respondent also now argues that he was unable to assist in his own defense due to the depression. However, Respondent was able to file initial responses to the complaints on his own behalf, comply with two in subpoenas for sworn statements, and capably testify at the hearing in May of 2011.

However, the Hearing Panel acknowledged that while Dr. Bernard Lewis, a clinical and forensic psychologist, opined to a reasonable degree of certainty that Respondent suffered from recurring episodes of chronic depression which sometimes reaches levels of severe depression, he also opined that episodes of severe depression sometimes do not impact all of a person's activities, and that Respondent likely was able to handle more routine client matters, while at the same time, lacked sufficient energy to attempt to deal with the more difficult matters. [5/5/11 Trans. p. 154, 155 -162].

The Hearing Panel properly recognized that mitigation evidence should not completely insulate a lawyer who has been found to have violated the Rules of Professional Conduct and caused injury to his clients. The Hearing Panel Subcommittee considered Respondent's depression together with the problems in his law office and made a recommended sanction in this matter to address Respondent's misconduct by suspending him for a period of time and directing that he seek meaningful treatment for his depression.

The recommended sanction also acknowledges that Respondent's difficulty lies in meeting the third requirement in Dues. Respondent history of treatment in this matter does not support that he has recovered from depression by engaging a meaningful and sustained period of successful rehabilitation. Respondent indicated that he believes that he has suffered from three episodes of severe depression during his lifetime. In this third episode which Respondent reported began in or about 2005 or 2006, Respondent did not seek treatment from a psychologist, Dr. Bernard J. Lewis, until September 4, 2008. [Respondent's Exhibit 24].<sup>6</sup> Respondent only went to three appointments with Dr. Lewis on September 4, 2008, September 23, 2008, and October 2, 2008. [Respondent's

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<sup>6</sup> It is noted, however, that Respondent submitted notes from his family physician, Jeffrey DeBord, D.O., which indicate that Respondent had been prescribed some type of antidepressant medication since in or about November of 2003. [Respondent's Exhibit 25]. Respondent said at his December 19, 2008 deposition that he only saw Dr. DeBord "once every three months" for "prescription maintenance" and that he while he "...kept taking these drugs, [he] didn't see any real change, didn't feel like it was working at all." [Exhibit 6, Bates Nos. 132, 140].

Exhibit 24].<sup>7</sup> Dr. Lewis indicated in his Psychological Report dated April 4, 2011, that he had developed a treatment plan dated September 5, 2008, noting a diagnostic impression of a “major depressive disorder, recurrent, as well as alcohol abuse” and that Respondent should undergo individual therapy sessions once a week and referred Respondent to a “Dr. Goshen” for psychiatric evaluation. Dr. Lewis testified that he discussed the treatment plan with Respondent. [5/5/11 Trans. p. 174].<sup>8</sup> Dr. Lewis also said that Respondent was “[n]ot as equipped as I would like for him to be. I still think he has some things that he could learn that could help him to better be prepared to handle [another episode].” [5/5/11 Trans. p. 186]. It is clear from his actions that Respondent did not actively engage in treatment at the earliest signs of depression and did not seek the advice of a psychologist until September of 2008, three to five years into this most recent episode and he did not actively and meaningfully participate in the treatment plan prescribed by Dr. Lewis. It is clear that the Hearing Panel Subcommittee carefully considered this evidence by including in the recommended sanction the requirement that during the period of suspension, Respondent must commence and continue to undergo psychological and/or psychiatric counseling to deal with depression and alcohol abuse issues until such time that it is determined by the treating psychologist or psychiatrist that treatment is no longer necessary.

This Court has “repeatedly advised that ‘[i]n disciplinary proceedings, this Court, rather than endeavoring to establish a uniform standard of disciplinary action, will consider the facts and

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<sup>7</sup> Although, Respondent stated at this December 19, 2003 sworn statement that “I am continuing to see Bernie Lewis.” [Exhibit 6, Bates No. 134].

<sup>8</sup> At the hearing, Dr. Lewis testified however that Respondent did not meaningfully or actively participate in the treatment plan and in fact, did not attend any follow-up appointments beyond the October 2, 2008 appointment even though an appointment was scheduled for October 20, 2008. [Respondent’s Exhibit 24; 5/5/11 Trans. pp. 175-176, 181-182]. Dr. Lewis also testified that he thinks the “treatment of depression, as in this case, involves both [therapy sessions and medication]” and that Respondent would have benefitted from “talk therapy” despite the fact that Respondent termed this type of treatment for depressions as “nonsense talk.” [5/5/11 Trans. pp. 176-177, 179-180. See also Exhibit 6, Bates No. 130].

circumstances [in each case], . . . in determining what disciplinary action, if any, is appropriate.” Lawyer Disciplinary Board v. Brown, 223 W.Va. 554, 678 S.E.2d 60, 66 (2009); *quoting* Syl. pt. 2, [in part] Committee on Legal Ethics v. Mullins, 159 W.Va. 647, 226 S.E.2d 427 (1976); Syl. Pt. 2, [in part], Committee on Legal Ethics v. Higginbotham, 176 W.Va. 186, 342 S.E.2d 152 (1986); Syl. Pt. 4, [in part], Committee on Legal Ethics v. Roark, 181 W.Va. 260, 382 S.E.2d 313 (1989).

Respondent’s complete neglect of these cases for a number of years clearly rises to the level such that he is unworthy of public confidence in his ability to conform to his obligations under the Rules of Professional Conduct. In Committee on Legal Ethics v. Mullins, the Supreme Court of Appeals of West Virginia stated that “[m]isconduct or malpractice consisting of negligence or inattention, in order to justify a suspension or annulment, must be such as to show the attorney to be unworthy of public confidence and an unfit or unsafe person to be entrusted with the duties of a member of the legal profession or to exercise its privileges.” Mullins, 159 W.Va. 647, 652, 226, S.E.2d 427, 430 (1976), *quoting* Syllabus No. 1, In Re Damron, 131 W.Va. 66, 45 S.E.2d 741 (1947). *See also*, Lawyer Disciplinary Board v. Keenan, 189 W.Va. 37, 427 S.E.2d 471 (1993) (indefinite suspension for failure to provide competent representation, failure to act with reasonable diligence, failure to communicate effectively with his clients, and failure to return unearned fees). Furthermore, like most courts, West Virginia holds that absent compelling circumstances, misappropriation or conversion by a lawyer of funds entrusted to his/her care warrants disbarment. Office of Disciplinary Counsel v. Jordan, 204 W.Va. 495, 513 S.E.2d. 722 (1998); and Lawyer Disciplinary Board v. Kupec (Kupec I), 202 W.Va. 556, 561, 505 S.E.2d 619, 631 (1998), *remanded with directions*, *see* Lawyer Disciplinary Board v. Kupec (Kupec II), 204 W.Va. 643, 515 S.E.2d 600 (1999). In this case, the Hearing Panel Subcommittee found that compelling extenuating circumstances exist. While Respondent may be disappointed in the outcome, in reaching its

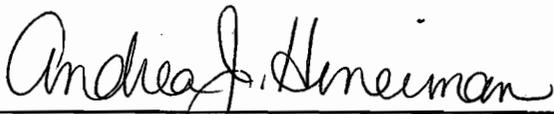
recommendation as to the sanctions, the Hearing Panel Subcommittee considered the evidence as a whole and evaluated the evidence Respondent submitted in mitigation.

## II. CONCLUSION

Therefore, a review of the record clearly indicates that the Hearing Panel Subcommittee properly considered this matter when it made its recommendation to the Court. Wherefore, based upon the forgoing, the Office of Disciplinary Counsel respectfully requests that this Court accept and uphold the following recommended sanctions of the Hearing Panel Subcommittee:

1. That Respondent's law license be suspended for one year;
2. That during the period of suspension that Respondent commence and continue to undergo psychological and/or psychiatric counseling to deal with depression and alcohol abuse issues until such time that it is determined by the treating psychologist or psychiatrist that treatment is no longer necessary, and reports concerning the same shall be submitted to the Office of Disciplinary Counsel every six months;
3. Respondent shall take eight (8) hours of Continuing Legal Education in office management and office practice within the next twenty-four (24) months and provide proof of same to the Office of Disciplinary Counsel;
4. Respondent shall, upon being reinstated, undergo supervised practice for one year; and
5. Respondent shall pay the costs incurred in this disciplinary proceeding.

*Respectfully submitted,*  
The Lawyer Disciplinary Board  
By Counsel



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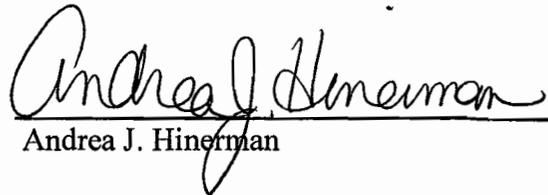
**CERTIFICATE OF SERVICE**

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This is to certify that I, **Andrea J. Hinerman**, Senior Lawyer Disciplinary Counsel for the Office of Disciplinary Counsel, have this day, the 21<sup>st</sup> day of February, 2012, served a true copy of the foregoing "**Reply Brief of the Lawyer Disciplinary Board**" upon Robert H. Davis, Jr., counsel for Respondent Michael S. Santa Barbara, by mailing the same via United States Mail, both certified and regular, with sufficient postage, to the following address:

Robert H. Davis, Jr., Esquire  
121 Pine Street  
Harrisburg, Pennsylvania 17101

  
\_\_\_\_\_  
Andrea J. Hinerman