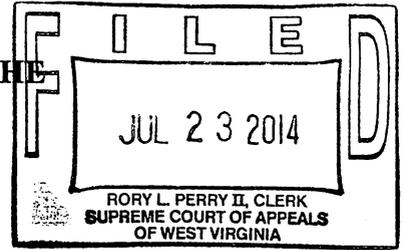


**BEFORE THE SUPREME COURT OF APPEALS OF THE
STATE OF WEST VIRGINIA**



LAWYER DISCIPLINARY BOARD,

Complainant,

v.

No. 11-0728

JOHN C. SCOTCHEL, JR.,

Respondent.

REPLY BRIEF OF THE LAWYER DISCIPLINARY BOARD

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I. REPLY TO RESPONDENT'S BRIEF

This matter is before the Court pursuant to the "Report of the Hearing Panel Subcommittee" issued on April 16, 2014, wherein the Hearing Panel Subcommittee properly found that the evidence established that Respondent committed violations of Rules 1.5(a), 1.5(b), 1.5(c), 1.15(b), 8.1(b), 8.4(c), and 8.4(d) of the Rules of Professional Conduct. 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). 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 which was intentional and knowing and deviated from the standard of care that a reasonable lawyer, let alone one with Respondent's considerable experience, would exercise in that situation.

To further explain the investigation into Respondent's misconduct and the issue with the signature on the complaint, the Office of Disciplinary Counsel would point out additional facts. As set out in Disciplinary Counsel's brief, the Office of Disciplinary Counsel received a complaint on or about April 6, 2009 listing the Complainant as Lewis Snow Sr, against Respondent John C.

Scotchel. ODC's Ex. 1, 0001-0002. The two page complaint was written in blue ink and made allegations that Respondent took a large amount of money from Complainant after the sale of Complainant's sanitation business. Id. Complainant indicated that a meeting had occurred around March 21, 2009, wherein he was informed that there was no more money left and that Respondent's assets were frozen. Id. The signature of Lewis Snow Sr appears on the second page of the complaint. Id. at 0002. The signature of notary Jeanne R. Russell appears below the Lewis Snow Sr. signature and shows the date of April 3, 2009. Id. This notary signature is also in blue ink and includes the notarial seal. Id.

Upon receipt of the complaint, and under Rule 2.4 of the Rules of Lawyer Disciplinary Procedure¹, the complaint was docketed and opened for investigation. ODC's Ex 2, 0003-0004. On or about April 8, 2009, Respondent was sent a copy of the complaint, along with instructions to follow in responding to the complaint. Id. On or about May 1, 2009, Respondent sent a fax asking for an extension to file his response. ODC's Ex 3, 0005-0015. In the May 1, 2009 letter to Disciplinary Counsel, Respondent did question whether Complainant signed the complaint. Id. at 0006. Respondent also indicated that he had met with Complainant on or about March 21, 2009 to discuss various issues, the same of which was eluded to in the original complaint. Id. at 0008. Respondent also indicated that a virus had attacked his computer system, Id., a common excuse for attorneys who do not want to provide documentation, and indicated he had been a victim of identity theft. Id. On or about May 4, 2009, Disciplinary Counsel sent a letter to Respondent giving Respondent an extension to file his response. ODC's Ex 4, 0016. Because Respondent was worried about divulging attorney client information, Disciplinary Counsel advised Respondent to send the

¹Rule 2.4 states in the pertinent part that "[i]f the information alleges facts that, if true, would constitute a violation of the Rules of Professional Conduct, the Office of Disciplinary Counsel shall docket a complaint and conduct an investigation."

response only to Disciplinary Counsel for determination of whether to send the response to Complainant.² Id.

On or about May 8, 2009, Allan N. Karlin, Esquire, sent a letter to Disciplinary Counsel indicating that he represented Complainant and that he “understand[s] [Complainant] has a complaint filed with the Lawyer Disciplinary Board against John Scotchel.” ODC’s Ex 5, 0017. Mr. Karlin stated that his role was “to obtain monies owed to [Complainant] from [Respondent].” Id. Mr. Karlin further said Deborah Robinson “prepared” the complaint for Complainant.³ Id. On or about May 12, 2009, Disciplinary Counsel responded to Mr. Karlin’s letter and advised him that confidentiality requirements did not allow the Office of Disciplinary Counsel to provide a copy of the complaint to him. ODC’s Ex 6, 0018. On or about May 15, 2009, Complainant contacted the Office of Disciplinary Counsel and requested that a copy of a complaint he filed against Respondent be mailed to him and the same was sent to Complainant that same day. ODC’s Ex 7 & 8, 0019, 0020. There was no further contact or correspondence from Complainant at any time in the investigation process alleging that he did not file the complaint and that he did not consent to the complaint.

On or about May 29, 2009, Respondent sent his response to the complaint to Disciplinary Counsel. ODC’s Ex 9, 0021-0070. Respondent stated that he

“questioned the authenticity of the complaint as it is obviously written in third person and the signature is questionable. Since [Complainant] has retained separate counsel and has waived attorney client privilege and has further acknowledged that the complaint filed was filed with [Complainant’s] consent, there is no longer a need to question the authenticity of the complaint.”

² When any attorney makes an issue of attorney client privilege regarding their response, Disciplinary Counsel will allow Respondents to supply the response only to Disciplinary Counsel. While it is stated in the original letter in opening the complaint to send a copy of the response to Complainant, it is not required under the Rules of Lawyer Disciplinary Procedure.

³ There is no requirement in the Rules of Lawyer Disciplinary Procedure for the Complainant to prepare and fill out the complaint.

Id. at 0021. Respondent listed the legal work he performed for Complainant over the years.⁴ Id. at 0022-0025. It was clear from the listing of the legal fees that these were unreasonable fees and the Respondent would have to provide proof that he earned such fees. Respondent provided a copy of the response to Complainant and Mr. Karlin. Id. at 0028. Because of the information produced from the complaint and the response filed by Respondent, Disciplinary Counsel issued a subpoena on July 7, 2009, for Respondent to appear for a sworn statement and to provide the complete file pertaining to the representation of Complainant. ODC's Ex 11, 0075. The sworn statement was originally scheduled for August 11, 2009 Id., but was rescheduled to September 3, 2009. ODC's Ex 16, 0083-0084.

On or about July 28, 2009, Mr. Karlin provided a reply to Respondent's response. ODC's Ex 12, 0077-0078. Mr. Karlin indicated that "[Complainant] expressly denies that he ever agreed to or approved of a fee of \$145,000.00." Id. at 0077. Mr. Karlin also indicated the fees charged by Respondent were unreasonable and that the fees charged by Respondent were contingent fees

⁴The listing is as follows: "1. October of 2002 until January of 2003, Respondent "began work on sales package-Flat fee \$25,000-No charge." 2. January 2003 until December 1, 2003, Respondent "began work on 3 criminal cases filed against Mr. Snow and his related sanitation business. Case numbers 03M-225,226,318." Respondent stated "Flat fee charged \$40,000 reduced to \$25,000" 3. November of 2004 until October 26, 2005, Respondent worked on Mr. Snow's case before the West Virginia Public Service Commission, PSC Case 04-2003-MC-19A. Respondent stated Mr. Snow's attempt to increase rates lead to violations filed by the PSC in Case No. 04-2003-MC-19A. Respondent stated "Final Ordered [sic] entered October 26, 2005-no fines or jail time-no loss of license-\$50,000 reduced to \$35,000." 4. October 2005-October 2006, Respondent stated he began "preparation of comprehensive package to sell business." Respondent stated "Flat Fee \$25,000 no sale after preparation." Respondent then stated he investigated "potential multiple violations regarding IRS and WV State Tax Dept." Respondent went on to say "Flat Fee \$25,000." 5. June of 2006 until October of 2006, Respondent stated "Walls violations of Mr. Snow's territory-Flat fee \$2,500 reduced to \$1,500." Respondent referenced Public Service Commission case 04-2003-MC-19A. 6. October 2, 2006 until May 8, 2007, Respondent stated he worked on "06M-3447-4 criminal charges." Respondent stated "Flat Fee \$40,000 reduced to \$25,000." 7. July 11, 2007 until August 21, 2007, Respondent stated he worked on "WV Ins Commission - Workers Comp issues-felony issues" which resulted in no jail time. Respondent stated "Flat Fee \$10,000 This required immediate resolution in order for Mr. Snow to stay in business and out of jail. Summary of above Flat Fee to Reduced Fee 1. \$25,000-\$0.00 2. \$40,000-\$25,000 3. \$50,000-\$35,000 4. \$50,000-\$50,000 - sale and transfer of business-Plus potential civil and criminal tax liability issues 5. \$2,500- \$1,500 6. \$40,000-\$25,000 7. \$10,000-\$10,000 no reduced Total \$217,500 reduced to \$146,500 This above was rounded down to \$145,000 as agreed to by Mr. Snow as reflected on June 12, 2008 agreement. 8. November of 2007 until June 12, 2008, Respondent worked on the "sale and transfer of Mr. Snow's sanitation business \$25,000 as agreed to by Mr. Snow on February 21, 2008." 9. June 12 of 2008 until June 19, 2008, Respondent prepared an "amended separation agreement-\$5,000 flat fee not paid." 10. June 20, 2008 until August 8, 2008, Respondent prepared agreements to disburse money to Mr. Snow's four (4) children. Respondent stated "\$5,000 -not paid." 11. June 18, 2008 until December of 2008, Respondent stated that he worked on "issue with son not signing agreement dragged on." [ODC's Ex 9, 0022-0025]

without any fee agreements. Id. at 0078. A copy of that letter was forwarded on to Respondent for any response on or about August 3, 2009. ODC's Ex 13, 0079. On or about August 10, 2009, Respondent provided additional correspondence indicating that he wanted to file a response to Mr. Karlin's July 28, 2009 letter but he was scheduled for surgery that required six (6) weeks away from work. ODC's Ex 17, 0086-0088. On or about August 10, 2009, Disciplinary Counsel gave Respondent an extension to file the response until October 9, 2009, and cancelled the sworn statement set for September 9, 2009. ODC's Ex 18, 0089. Disciplinary Counsel indicated that she would contact Respondent at a later date to reschedule the sworn statement. Id.

The sworn statement was rescheduled with Respondent to January 7, 2010, at the Respondent's office. ODC's Ex 21, 0130; ODC's Ex 22, 0133-0134; ODC's Ex 24, 0143. While Respondent stated in that sworn statement that he believed someone else wrote the complaint, he never stated that he believed Complainant did not sign the complaint.⁵ ODC's Ex 25, 0193-0194. Respondent also indicated in the sworn statement that he discovered his identity had been stolen on March 20, 2009, the day before he met with Complainant [Id. at 0172-173], which appeared to be another excuse to explain his finances. Respondent also said he had water damage in his office where he keeps his old files [Id. at 0183-0184], which is another excuse often used by attorneys. Respondent also agreed that Complainant had acknowledged making the complaint in this matter. Id. at 0193-0194. Respondent stated that his "common practice" was to have written fee agreements for the different issues that he handled for clients, but it was the exception in Complainant's matters to not have written fee agreements. Id. at 0199. Respondent also indicated that he shredded a lot of documents in Complainant's matters because of the potential "liability" contained in the documents

⁵ In fact, that issue regarding Complainant's signature on the complaint was never brought up again by Respondent at any other point in the investigation since he acknowledged the authenticity of the complaint.

and that he could not keep them confidential. Id. at 0162-0163. Respondent only sued Complainant regarding the unearned fees because Complainant sued him and Respondent said he lost “thousands and thousands of dollars.” Id. at 0230. In essence, Respondent is indicating that he deserves the additional fees for the matters he handled for Complainant. Disciplinary Counsel made issue of the condition of Respondent’s office because of the disarray that was quite apparent to any observer. Id. at 0310.

On or about January 12, 2010, Respondent sent a letter to Disciplinary Counsel. Respondent stated “[i]n [Complainant’s] matters, the first time I received a written agreement regarding fees was received in my office sometime after February 21, 2008. Before receiving the February 21, 2008 letter, [Complainant] would not agree to sign any fee agreement.” ODC’s Ex 26, 0348-0354. On or about January 13, 2010, Disciplinary Counsel sent a letter to Respondent confirming the information requested during the sworn statement, which included “[a] copy of [Respondent’s] complete file in the Snow matter; [a]ny notes regarding the fees in the Snow matter; and [t]ime receipts/bills/invoices of [Respondent’s] work in the Snow matter from October 2002 until March 2009.” ODC’s Ex 27, 0356. On or about January 14, 2010, Disciplinary Counsel responded to Respondent’s January 12, 2010 letter. ODC’s Ex 28, 0357-0358.

On or about January 19, 2010, Disciplinary Counsel sent a subpoena for Respondent’s bank records from June of 2008 until the present. ODC’s Ex 29, 0359-0362. On or about January 20, 2010, Disciplinary Counsel requested complete, certified files on the Magistrate Cases that Respondent had eluded to in his responses and his sworn statement. ODC’s Ex 30, 0363-0364. The Magistrate Court records were received on or about January 25, 2010, and were not massive files. ODC’s Ex 32, 0367-0483. The bank records were received by Disciplinary Counsel in February of

2010. ODC's Ex 33, 0484-0812. The bank records reflected a deposit of \$275,000.00 on June 12, 2008, into Respondent's IOLTA checking account 8284. Id. at 0495. There are various withdrawals from that account between the sale of Complainant's business and March of 2009 showing payments to Respondent without any reference to which account and/or client those funds are associated. Id. at 0495-0663. In fact, by the end of February of 2009, that account reflected a balance of \$45.49. Id. at 0663. This reflects the statement that Complainant and Respondent made that there was no longer any money in the account.

On or about February 19, 2010, Respondent's counsel in the civil action filed by Complainant sent a letter to Disciplinary Counsel that enclosed Respondent's "original file concerning his representation of [Complainant]." ODC's Ex 34, 0813-2369. This contained just over 1,500 pages of documents. While that appears to be a large number of pages, there are multiple copies of the same documents throughout the file.

On or about June 3, 2010, Mr. Karlin provided to Disciplinary Counsel some documents he received in the civil matter. ODC's Ex 36, 2371-2388. On or about September 27, 2010, Mr. Karlin sent Disciplinary Counsel a letter regarding the loss of the originals of the February 21, 2008, and June 12, 2008 fee agreements. ODC's Ex 37, 2389. On or about December 3, 2010, Disciplinary Counsel requested a docket sheet in the civil matter filed by Complainant against Respondent in the Monongalia County Circuit Court. ODC's Ex 38, 2390-2391. The docket sheet was received the same day. ODC's Ex 39, 2392-2394. On or about December 7, 2010, Disciplinary Counsel requested an update from Mr. Karlin on the civil matter. ODC's Ex 40, 2395. On or about December 22, 2010, Disciplinary Counsel requested another subpoena on Respondent for second sworn statement. ODC's Ex 41, 2396-2399. On or about December 27, 2010, Disciplinary Counsel received Mr. Karlin's

December 16, 2010 letter indicating that the civil matter was still in litigation. ODC's Ex 42, 2400-2576. Mr. Karlin provided a transcript of Respondent's deposition in that matter that began but was not completed. Id. at 2401-2457. Respondent's testimony during the deposition started with questions as to why he was wearing sunglasses for the video deposition. Id. at 2405. Respondent indicated that he was afraid that Complainant or Mr. Karlin would upload the video to the internet and wearing sunglasses would "distort facial recognition programs." Id.

On or about February 9, 2011, Disciplinary Counsel took Respondent's second sworn statement. ODC's Ex 52, 2597-2750. Disciplinary Counsel sought clarification regarding several fees charged by Respondent because the paperwork from his own client file did not support the fee charged. Respondent was unable to provide any explanation that would be believable as to his fee.

Upon review of the entire information obtained in this case, it was clear that Respondent committed several violations of the West Virginia Rules of Professional Conduct. A Statement of Charges was issued by the Investigative Panel were issued on April 6, 2011, and filed with the Supreme Court of Appeals of West Virginia on April 27, 2011. The Statement of Charges included violations of Rule 1.5(a), 1.5(b), 1.5(c), 1.15(b), 8.1(b), 8.4(c), and 8.4(d) for, but not limited to, his unreasonable fees, failure to get the fee agreements in writing, failure to provide an accounting, and failure to respond to disciplinary counsel.

On or about November 14, 2011, depositions were taken of Complainant and Deborah Robinson. Respondent's Ex 2 & 3. Complainant had clear trouble with his memory regarding certain details of his own life including the year that he was born and the names of all of his children. Respondent's Ex 2, page 44, 6. Complainant also could not see any documents that were placed in front of him and he could not identify the complaint filed in this matter when it was placed in front

of him. Id. at 7-8. Complainant could not recall filling out the complaint, signing it, or appearing in front of a notary. Id. at 9. Mr. Karlin appeared at the deposition and made the statement on the record that there has been "a significant deterioration in [Complainant's] ability to focus on and answer questions." Id. at 9-10. Complainant did testify that he did not know of anyone that he authorized to make a complaint against Respondent. Id. at 17. Complainant did also state that he never authorized a payment of \$170,000.00 to Respondent. Id. at 22-23. However, Complainant specifically remembered going to McDonald's to get some money from Respondent and Respondent told him the money was gone. Id. at 26-27. Complainant was clear that he agreed to pay Respondent \$25,000.00 without any leading question. Id. at 29.

On or about January 24, 2012, the deposition of the Teresa Brewer was taken regarding her preparation of taxes for Complainant in 2008. As part of preparing the taxes, Ms. Brewer contacted Respondent to obtain his legal fees in the sale of Complainant's business at the request of Complainant and Ms. Robinson. Ms. Brewer needed the information for the taxes and Complainant and Ms. Robinson indicated to her that they could not get an answer from Respondent. Ms. Brewer was also unable to get an answer out of Respondent and she did not list any legal fees in the 2008 tax documents for Complainant.⁶ Ms. Brewer said she could file an amended tax return for the State of West Virginia to get an additional refund for Complainant if she knew the amount of attorney's fees even at this late date.

Jeanne R. Russell's deposition was taken on or about April 4, 2012. R's Ex. 24. Ms. Russell was the notary public who notarized Mr. Snow's signature on the complaint filed with the Office of Disciplinary Counsel. Ms. Russell stated several times throughout the deposition that Mr. Snow

⁶ It is Disciplinary Counsel's belief that Respondent believed the attorney fees were listed in the 2008 tax documents and was hoping to show that Complainant provided the amount of attorney fees to Ms. Brewer.

signed the document. Further, Ms. Russell said that if another person signed for Mr. Snow, such would have been indicated in her log to show that there was a power of attorney. R's Ex. 24, p. 11-12. Ms. Russell stated that there was no power of attorney indicated in her log and she maintained that she witnessed Mr. Snow sign the complaint for the disciplinary board. R's Ex. 24, p. 9.

A. COMPLAINANT SIGNED THE COMPLAINT FILED WITH THE OFFICE OF DISCIPLINARY COUNSEL

In this case, the notary signature was an original as witnessed by the blue ink on the original complaint. There was no question that the complaint was notarized and that it was an original notary signature. Further, from the testimony of Ms. Robinson and Ms. Russell, both Complainant and Ms. Robinson appeared in front of the notary and notary acknowledged the Complainant's signature that had been signed in her presence. Therefore, Complainant followed the proper procedure to file a complaint with the Office of Disciplinary Counsel.

While Respondent brought up the issue of whether the signature on the complaint was Complainant's in his first correspondence with Disciplinary Counsel, he later acknowledged the complaint on several occasions and Respondent made no other issue regarding the signature. Further, Complainant called and requested a copy of the complaint he filed with our office on May 15, 2009. Subsequently, Complainant filed a civil lawsuit against Respondent alleging the same allegations contained in the complaint filed with our office.⁷ Further, Respondent's explanations as to the issues raised in the complaint are clearly not supported by his client file nor could he provide any proof of the exorbitant fees he claimed he earned. The various excuses regarding a computer virus and a sprinkler problem caused concern about Respondent's misconduct. The disarray of Respondent's office that was apparent during the first deposition taken by Disciplinary Counsel at his office and

⁷ The civil case filed by Complainant against Respondent was settled in favor of Complainant.

Respondent's failure to provide information as requested by Disciplinary Counsel caused issues with Respondent's candor. Further, Respondent's awkward behavior during the video deposition with Mr. Karlin showed additional concerns about Respondent.

Respondent also failed to alert the forensic document examiner, who testified at the hearing in this matter, that the original of Mr. Snow's signature on the complaint existed at the Office of Disciplinary Counsel. The document examiner requested the original signature on several occasions and Respondent never informed her about the original signature on the complaint that was housed at the Office of Disciplinary Counsel. The actual document with the original signature was in existence and Respondent failed to have it examined. Respondent now wants to rely on the document examiner's opinion on a copy of the signature when the document examiner testified that the original would have been the best evidence to work with and she could not give a categorical opinion about the signature without the original. 2/27/13 Hrg. Trans. p. 182.

Respondent's issues with the signature on the original complaint do not rise to level of a due process violation. In Committee on Legal Ethics of West Virginia State Bar v. Smith, 184 W.Va. 6, 399 S.E.2d 36 (1990), the attorney raised "several procedural arguments in his defense, the important of which is that the Committee's consideration of the alleged retaliatory threats made by [the attorney] to the heir/complainants violated a due process requirement of notice and an opportunity to be heard." Committee on Legal Ethics of West Virginia State Bar v. Smith, 184 W.Va. 6, 10, 399 S.E.2d 36, 40 (1990). The original complaint filed in the case by Complainants dealt with the administration of an estate but the Statement of Charges included the retaliatory threats made by the attorney. At some point during the investigation, Complainants sought to have the complaint withdrawn but the complaint continued to be investigated. The Supreme Court found that

“[t]he investigation of a legal ethics complaint is not under the direction and control of the original complainant. Rather the Investigative Panel, with its goal of protecting the public, must consider the issues raised by the complainant and any attendant issues. See In re Daniel, 153 W.Va. 839, 173 S.E.2d 153 (1970; Syllabus Point 3, Daily Gazette Co., Inc. v. Committee on Legal Ethics, 174 W.Va. 359, 326 S.E.2d 705 (1984). The decision by the Investigative Panel to issue formal charges, after the requests to withdraw the complaint, on the neglect issue and the disruption of the investigatory process is not an abuse of discretion and does not show disparate treatment of [the attorney]. . . . The Statement of Charges gave notice to [the attorney] of both the charges and record indicates that [the attorney] vigorously defended himself against both the charge of neglect and the charge of using his position as administrator to interfere with the legal ethics complaint process. We find that [the attorney] had adequate notice of the charges against him and was given the opportunity to defend himself against the charges.”

Smith, 184 W.Va. at 10, 11, 399 S.E.2d at 40, 41. It is clear from the Smith case that any additional misconduct that arises during the investigation of a complaint can be included in the Statement of Charges and such does not need to be contained within the original complaint. Further, once an investigation is opened, Complainant cannot withdraw the complaint until a proper investigation has been completed. In this case, additional charges against Respondent were included in the Statement of Charges including Respondent’s failure to respond to a request of Disciplinary Counsel and failure to have a contingency fee in writing. The clear statement out of the case is that Respondent was granted due process by being given notice of the charges against him and he vigorously defended himself against the charges during the hearing in this matter.

Further, it has been clear over the years that the Supreme Court of Appeals has repeatedly stated that “[t]he general rule is that absent compelling extenuating 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); 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). See also

Lawyer Disciplinary Board v. Wheaton, 216 W.Va. 673, 610 S.E.2d 8 (2004). Respondent tried to explain the amount of fees in order to keep most of the funds obtained by the sale of Complainant's sanitation business, but his excuses and explanations were flimsy at best.

B. RESPONDENT, AS AN ATTORNEY, HAS THE BURDEN TO PROVE THAT HE EARNED HIS FEE

“It may be that lawyers who do work under a contingency fee contract do not keep time records. It should be obvious from this case that keeping good time records would be the more prudent course. The burden of proof is always upon the attorney to show the reasonableness of the fees charged. The same burden to prove reasonableness remains with the attorney under any fee structure. Attorneys who fail to effectively document their efforts on behalf of a client run the risk of being unable to convince a reviewing court, based on their word alone, of the reasonableness of the fee charged or, in cases where it applies, the full and proper value of fees to be awarded on a *quantum merit* basis.”

Bass v. Rose, 216 W.Va. 587, 592, 609 S.E.2d 848, 853 (2004) (citing Syl. Pt. 2, Committee on Legal Ethics of West Virginia State Bar v. Tatterson, 177 W.Va. 356, 352 S.E.2d 107 (1986)). In Bass, the attorney had indicated that she did not keep time records for contingency cases. Id. Respondent asserted that he had records to show his work in the matters he handled for Complainant but had shredded such records. The Bass case makes clear that the burden of proof to prove the reasonableness of Respondent's fee lies with Respondent and in this case he cannot effectively document those efforts. Even if Respondent actually did shred documents, the burden still lies with him to offer some proof of his work in earning the fees.

Further, Complainant's incompetency at the hearing in this matter does not relieve Respondent of his burden. This Court has previously disbarred an attorney for conversion of client funds that involved the client's estate in Lawyer Disciplinary Board v. Barton, 225 W.Va. 111, 690 S.E.2d 119 (2010). In that case, the attorney had commingled and misappropriated funds due to his client from a personal injury settlement. Id. When the client passed away, the estate executrix sought information about the settlement funds. Id. The attorney provided a response that indicated that all

money had been paid to the client during her lifetime and he then charged the estate a fee to provide an accounting. Id. The estate executrix filed the ethics complaint against the attorney. Id. It is clear that even though the client had passed away in that case, this Court properly found that the attorney had mishandled the settlement and charged an excessive fee for a fraudulent accounting. There was no opportunity for the attorney in that matter to question his client during the hearing because of her passing away, but this Court still found cause to disbar that attorney. Attorneys cannot be allowed to skirt their duties to their clients after a client has passed away or been found incompetent. While such matters may end up with the estate, the attorney is still not relieved of his duties under the Rules of Professional Conduct by such events. To hold otherwise, may encourage attorneys to take advantage of incompetent or deceased clients.

This Court has also stated that “[t]he Rules of Professional Conduct cannot be waived by a client, so as to permit a lawyer to do that which the Rules prohibit, unless the Rules themselves provide a specific exception allowing waiver. The Rules reflect the high standards by which all lawyers must abide regardless of the wishes of a client.” Lawyer Disciplinary Board v. Ball, 219 W.Va. 296, 633 S.E.2d 241 (2006). This again stresses that the burden is on Respondent to prove that he earned the fee he charged. The facts in the Ball case involved anonymous information being supplied to the Office of Disciplinary Counsel about wills prepared by the attorney. Id. Obviously, there was no verified complaint filed in the matter but the investigation nonetheless proved that the attorney had violated the Rules of Professional Conduct. The attorney in Ball had drafted two (2) wills naming himself as the executor with a high percentage of the total gross estate to be the executor’s compensation. Id. This Court found that the calculated compensation was a violation of Rule 1.5(a) of the Rules of Professional Conduct. Id. In that case, the client likewise could not be questioned because the client had passed away. In no way was the client’s choices in signing the will held against the client. The duty is always with the attorney to follow the Rules of Professional

Conduct. The Ball case also stated that even if the clients “insisted that [the attorney] violate the Rules, [the attorney’s] willingness to do so would demonstrate a self-serving motive to enrich himself . . .” Id. at 307, 252. The fact that a client may have agreed to an excessive fee does not negate an attorney’s violation of the Rules of Professional Conduct. Respondent owed a duty to Complainant as his client to not charge an excessive fee. Further, Respondent has never been able to produce any evidence to support the excessive fee he charged to the Complainant.

C. THERE IS CLEAR AND CONVINCING EVIDENCE THAT RESPONDENT VIOLATED THE RULES OF PROFESSIONAL CONDUCT

The evidence in this case shows that Respondent kept most of the money from the sale of Complainant’s sanitation business. Respondent and Complainant made a contingent agreement that Respondent would received Twenty-Five Thousand Dollars (\$25,000.00) if the sanitation business was sold and never put that agreement into writing until February of 2008. As stated above, the burden is upon Respondent to prove that he earned the additional fees in the matter and Respondent has been unable to prove those excessive fees. Respondent also failed to produce an itemized accounting of the work he performed in the cases with references to specific work.

II. CONCLUSION

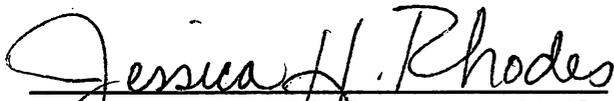
In reaching its recommendation as to sanctions, the Hearing Panel Subcommittee considered the evidence, the facts and recommended sanction, the aggravating factors and mitigating factors. For the reasons set forth above, the Hearing Panel Subcommittee recommended the following sanctions:

- A. That Respondent’s law license be annulled;
- B. That upon reinstatement, Respondent’s practice shall be supervised for a period of two (2) years by an attorney agreed upon between the Office of Disciplinary Counsel and Respondent;

- C. That Respondent shall complete twelve (12) hours of CLE in ethics in addition to such ethics hours he is otherwise required to complete to maintain his active license to practice, said additional twelve (12) hours to be completed before he is reinstated; and
- D. That Respondent be ordered to pay the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

Accordingly, the Office of Disciplinary Counsel urges that this Honorable Court uphold the sanctions recommended by the Hearing Panel Subcommittee.

Respectfully submitted,
The Lawyer Disciplinary Board
By Counsel

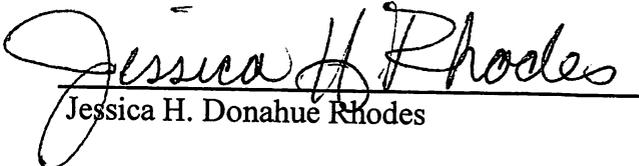


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CERTIFICATE OF SERVICE

This is to certify that I, Jessica H. Donahue Rhodes, Lawyer Disciplinary Counsel for the Office of Disciplinary Counsel, have this day, the 23rd day of July, 2014, served a true copy of the foregoing "**Reply Brief of the Lawyer Disciplinary Board**" upon J. Michael Benninger, Esquire, counsel for Respondent John C. Scotchel, Jr., by mailing the same via United States Mail, both certified and regular, with sufficient postage, to the following address:

J. Michael Benninger, Esquire
Post Office Box 623
Morgantown, West Virginia 26507


Jessica H. Donahue Rhodes