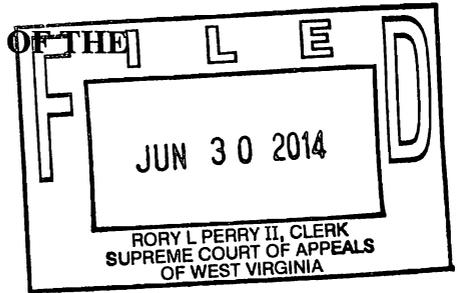


BEFORE THE SUPREME COURT OF APPEALS OF THE
STATE OF WEST VIRGINIA



LAWYER DISCIPLINARY BOARD,

Complainant,

v.

No. 12-1172

BENJAMIN F. WHITE,

Respondent.

BRIEF OF THE OFFICE OF DISCIPLINARY COUNSEL

Rachael L. Fletcher Cipoletti [Bar No. 8806]
Chief Lawyer Disciplinary Counsel
Office of Disciplinary Counsel
City Center East, Suite 1200C
4700 MacCorkle Avenue SE
Charleston, West Virginia 25304
(304) 558-7999
(304) 558-4015 – facsimile
rfcipoletti@wvdc.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
I. STATEMENT OF THE CASE	1
A. NATURE OF PROCEEDINGS	1
B. FINDINGS OF FACT OF THE HEARING PANEL SUBCOMMITTEE	3
C. HEARING PANEL CONCLUSIONS OF LAW	25
1. A finding of a violation of Rule 1.15(a) is supported by the evidence ..	26
2. A finding of a violation of Rules 8.4(c) and Rule 8.4(d) is supported by the evidence	27
II. SUMMARY OF ARGUMENT	28
III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION	29
IV. ARGUMENT	29
A. STANDARD OF PROOF	29
B. ANALYSIS OF SANCTION UNDER RULE 3.16 OF THE RULES OF LAWYER DISCIPLINARY PROCEDURE	30
1. Whether Respondent has violated a duty owed to a client, to the public, to the legal system or to the legal profession.	31
2. Whether the lawyer acted intentionally, knowingly, or negligently.	31
3. The amount of actual or potential injury caused by the lawyer's misconduct.	31
4. The existence of any aggravating factors.	31
5. The existence of any mitigating factors.	31
V. SANCTION	32
VI. CONCLUSION	37

TABLE OF AUTHORITIES

Cases:

<u>Committee on Legal Ethics v. Blair</u> 174 W.Va. 494, 327 S.E.2d 671 (1984)	29
<u>Committee on Legal Ethics v. Hess</u> 186 W.Va. 514, 413 S.E.2d 169 (1991)	34
<u>Committee on Legal Ethics v. Karl</u> 192 W.Va. 23, 449 S.E.2d 277 (1994)	29
<u>Committee on Legal Ethics v. McCorkle</u> 192 W.Va. 286, 452 S.E.2d 377 (1994)	30
<u>Committee on Legal Ethics v. Morton</u> 186 W.Va. 43, 410 S.E.2d 279 (1991) <i>Per Curiam</i>	37
<u>Committee on Legal Ethics v. Roark</u> 181 W.Va. 260, 382 S.E.2d 313 (1989)	33
<u>Committee on Legal Ethics v. Tatterson</u> 173 W.Va. 613, 319 S.E.2d 381 (1984)	37
<u>Committee on Legal Ethics v. Walker</u> 178 W.Va. 150, 358 S.E.2d 234 (1987)	33,37
<u>Committee on Legal Ethics v. White</u> 189 W.Va. 135, 428 S.E.2d 556 (1993) <i>Per Curiam</i>	33
<u>Cook v. Lilly</u> 158 W.Va. 99, 208 S.E.2d 784 (1974)	36
<u>Daily Gazette v. Committee on Legal Ethics</u> 174 W.Va. 359, 326 S.E.2d 705 (1984)	33,37
<u>General Electric Credit Corp. V. Timbrook</u> 170 W.Va. 143, 291 S.E.2d 383 (1982)	36
<u>Grievance Administrator v. Mark J. Tyslenko</u> 12-17-GA (ADB 2013)	34

<u>In Re Jeffrey F. Renshaw</u> 298 P.3d 1216 (Ore. 2013)	35
<u>In Re Todd J. Thompson</u> 991 P.2d 820 (Colo. 1999)	34
<u>Lawyer Disciplinary Board v. Askintowicz,</u> Supreme Court No. 33070	33
<u>Lawyer Disciplinary Board v. Cunningham</u> 195 W.Va. 27, 464 S.E.2d 181 (1995)	30
<u>Lawyer Disciplinary Board v. Coleman</u> 219 W.Va 790, 639 S.E.2d 882 (2006) <i>Per Curiam</i>	34
<u>Lawyer Disciplinary Board v. Ford</u> 211 W.Va. 228, 546 S.E.2d 438 (2002)	34
<u>Lawyer Disciplinary Board v. Daniel,</u> Supreme Court Nos. 32574 & 32613	33
<u>Lawyer Disciplinary Board v. Friend</u> 200 W.Va. 368, 489 S.E.2d 750 (1997) <i>Per Curiam</i>	33
<u>Lawyer Disciplinary Board v. Hardison</u> 205 W.Va. 344, 518 S.E.2d 101 (1999) <i>Per Curiam</i>	33,37
<u>Lawyer Disciplinary Board v. Keenan</u> 208 W.Va. 645, 542 S.E.2d 466 (2000) <i>Per Curiam</i>	33
<u>Lawyer Disciplinary Board v. Kupec</u> 202 W.VA 556, 505 S.E. 2d 619 (1998)	34
<u>Lawyer Disciplinary Board v. McGraw,</u> 194 W.Va. 788, 461 S.E.2d 850 (1995)	29,30
<u>Lawyer Disciplinary Board v. Scott,</u> 213 W.Va. 209, 579 S.E. 2d 550 (2003)	31,32
<u>Lawyer Disciplinary Board v. Taylor,</u> 192 W.Va. 139, 451 S.E.2d 440 (1994) <i>Per Curiam</i>	28
<u>Lawyer Disciplinary Board v. Wade,</u> 217 W.Va. 58, 614 S.E.2d 705 (2005) <i>Per Curiam</i>	33

<u>Office of Disciplinary Counsel v. Jordan,</u> 204 W.Va. 495, 513 S.E.2d. 722 (1998)	30,33
<u>Roark v. Lawyer Disciplinary Board,</u> 201 W.Va. 181, 495 S.E.2d 552 (1997) <i>Per Curiam</i>	30
<u>State of Nebraska ex rel. Counsel for Discipline of the Nebraska Supreme Court v. Sundvold</u> 844 N.W. 2d 771 (Neb. 2014)	36

West Virginia Statutes and Rules:

R. Law Disc. Proc.	Rule 3.11	3
R. Law Disc. Proc.	Rule 3.15	3,32,38
R. Law Disc. Proc.	Rule 3.16	30,32
R. Law Disc. Proc.	Rule 3.28	37
R. Law Disc. Proc.	Rule 3.7	29
R. Professional Conduct	Rule 1.15	28
R. Professional Conduct	Rule 1.15(a)	26,27,29,33
R. Professional Conduct	Rule 1.15(b)	26,27,28,29,33
R. Professional Conduct	Rule 1.15(c)	26,27,28,29,33
R. Professional Conduct	Rule 3.4	26
R. Professional Conduct	Rule 3.4(a)	26
R. Professional Conduct	Rule 8.4(c)	26,27,28,29,33
R. Professional Conduct	Rule 8.4(d)	26,27,28,29,33
R. 19 Revised Rules of Appellate Proc.		29

Other:

ABA Model Standards for Imposing Lawyer Sanctions, § 9.21	32
---	----

Uniform Commercial Code, Article 9, Section 503 35

I. STATEMENT OF THE CASE

A. NATURE OF PROCEEDINGS

This is a disciplinary proceeding against Respondent Benjamin F. White, (hereinafter “Respondent”) arising as the result of a Statement of Charges issued against him and filed with the Supreme Court of Appeals of West Virginia on or about October 9, 2012. The charges were served upon Respondent on or about October 11, 2012. Disciplinary Counsel filed her mandatory discovery on or about November 1, 2012, with supplements filed on May 15, 2013 and June 25, 2013. Respondent filed his Answer to the Statement of Charges on or about November 26, 2012. Respondent provided his mandatory discovery on or about February 4, 2013, with a supplement on November 6, 2013.

Thereafter, this matter proceeded to hearing in Charleston, West Virginia, on May 28, 2013. The Hearing Panel Subcommittee was comprised of Debra A. Kilgore, Esquire, Chairperson, Paul T. Camilletti, Esquire, and William R. Barr, layperson. Rachael L. Fletcher Cipoletti, Chief Lawyer Disciplinary Counsel, appeared on behalf of the Office of Disciplinary Counsel. Respondent appeared with counsel, Sherri D. Goodman, Esquire. The Hearing Panel Subcommittee heard testimony from David Hendrickson, Esquire; Scott Long, Esquire; Stephen Hastings, Esquire; Richard Fisher; and J. Miles Morgan, Esquire, on May 28, 2013. In addition, on Day One of the hearing, ODC Exhibits 1-19, and Exhibit 20 Under Seal, as well as Respondent’s Exhibits 1-5, and Exhibit 6 Under Seal were admitted into evidence.

On or about June 28, 2013, Respondent filed a “Motion of Respondent for Subpoena.” On or about July 2, 2013, the Office of Disciplinary Counsel filed its response thereto. On or about July 3, 2013, the Hearing Panel Subcommittee granted Respondent’s Motion. On or about July 5, 2013, J. Miles Morgan, Esquire, on behalf of Hendrickson and Long, PLLC, filed a “Motion to Quash

Subpoena.” On or about July 8, 2013, the Hearing Panel Subcommittee denied Hendrickson and Long’s Motion.

The Hearing in this matter continued on July 8, 2013. Testimony was heard from J. Miles Morgan, Esquire, and Respondent. In addition, Respondent’s Exhibits 13-14 and 16-19, 21 and 22 were admitted into evidence. On or about July 9, 2013, the Office of Disciplinary Counsel filed a “Motion for Issuance of Subpoena.” On or about July 11, 2013, Respondent filed its Response thereto. On or about July 19, 2013, the Office of Disciplinary Counsel filed its reply to Respondent’s response. On or about July 26, 2013, the Hearing Panel Subcommittee granted, in part, the Office of Disciplinary Counsel’s Motion.

On or about November 6, 2013, the Office of Disciplinary Counsel filed a “Motion to Exclude Testimony of Undisclosed Witnesses and use of Untimely Disclosed Documents.”

This matter further proceeded to hearing on November 7, 2013. Testimony was heard from Rita Keaton, Laura Dyer, Esquire, and Respondent. In addition, ODC Exhibit 23, as well as Respondent’s Exhibit 22 were admitted into evidence.

It was noted that ODC objected to any reference to the records in Respondent’s proposed Exhibit 23 provided to ODC the day prior to the November 7, 2013 hearing. The same was rife with errors that despite ODC’s best efforts to resolve the same with Respondent, the parties had not been successful. These records have not been stipulated to by the parties, and accordingly, ODC contends the same have not been properly admitted into evidence.

On or about January 16, 2014, the Office of Disciplinary Counsel filed its “Proposed Findings of Fact Conclusions of Law and Recommended Sanctions.” On or about January 23, 2014, the Office of Disciplinary Counsel filed a “Motion to Exclude Proposed Findings of Fact, Conclusions of Law, and Recommended Sanctions.” On or about February 3, 2014, Respondent’s

counsel requested an extension of time to file the pleading until February 18, 2014. The Office of Disciplinary Counsel agreed to the extension and the same was filed on or about February 19, 2014.

On or about April 18, 2014, the Hearing Panel Subcommittee issued its “Report and Recommendation of the Hearing Panel Subcommittee.” The Panel recommended that Respondent be 1. reprimanded for his conduct; 2. be required to take an additional six (6) hours of Continuing Legal Education with focus on law office management and legal ethics; and 3. that he be ordered to pay the costs of this proceeding pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

On or about May 5, 2014, Respondent filed his “Consent to Recommended Disposition by the Hearing Panel Subcommittee.” On or about May 15, 2014, the Office of Disciplinary Counsel filed its formal objection to the Hearing Panel Subcommittee’s Recommendation pursuant to Rule 3.11 of the Rules of Lawyer Disciplinary Procedure.

On or about May 29, 2014, with no objection by Respondent’s counsel, the Office of Disciplinary Counsel filed a “Motion to Extend Briefing Schedule.” By Order entered June 2, 2014, this Honorable Court granted the Motion and extended the Briefing schedule by seven (7) days.

B. Findings of Fact of the Hearing Panel Subcommittee

Although ODC disputes some of the factual findings made by the Hearing Panel Subcommittee, ODC asserts that regardless of the factual findings, its primary basis for its objection to the recommended decision is that the conclusions of law and the recommended sanction do not comport with the findings made by the Hearing Panel Subcommittee or the relevant law in West Virginia.

Benjamin F. White, the Respondent, is a lawyer practicing in Chapmanville, in Logan County, West Virginia. Respondent was admitted to The West Virginia State Bar after successful

passage of the bar exam on November 2, 2005, and, as such, is subject to the disciplinary jurisdiction of the Supreme Court of Appeals of West Virginia and its properly constituted Lawyer Disciplinary Board.

Prior to attending law school, Respondent held various jobs involving marketing. After earning an MBA, he operated a charter air service and flight school. After that he purchased a golf course. (Tr. Vol. II p. 33.) Respondent's first employment as a lawyer was with attorney Jan Dils, who maintained a practice focused on representing social security claimants (Tr. Vol. II pp. 33-34.) Respondent received a base salary and bonuses. In 2007, Respondent grossed \$172,820.48, with a base salary of \$160,000.00. He expected to receive an increase in salary and bonuses in 2008. (Tr. Vol. II pp. 34; ODC Ex. 17, Bates 655.) Respondent signed an authorization allowing the firm to deposit Social Security Administration (SSA) fee award checks issued in his name directly in the firm's operating account without his signature. (Tr. Vol. III pp. 88-90.)

Attorney fees are highly regulated by the SSA. First, a claimant must complete a form appointing the attorney to act as representative. The SSA only accepts the name of one individual attorney per form; law firms may not be named. *See* <http://www.ssa.gov/online/ssa-1696.pdf>. The client may sign a written contingent fee agreement with the attorney that charges 25% of past due benefits up to a fixed dollar amount. During the pertinent time period, it was \$5,300.00. The fee agreement must be submitted to the SSA prior to a favorable decision being rendered; otherwise, an attorney must submit a fee petition. If the fee is approved, the SSA, which withholds a certain amount from the past due benefits, will issue a check made payable in the name of the individual attorney named as a representative.

While working for Jan Dils' firm, Respondent ran into Steve Hastings, from the Charleston law firm of Hendrickson & Long (H&L), who asked Respondent if he would refer personal injury

claims of his social security clients to H&L. Respondent referred one case and following the successful resolution of that case, Mr. Hastings began discussing with Respondent about affiliating with Hendrickson & Long. (Tr. Vol. II pp. 35-37.) Respondent testified that he was not interested in working for another law firm, but instead wanted to develop his own social security practice. He testified he made this clear to Mr. Hastings. (Tr. Vol. II pp. 38-39.) Therefore, despite contrary assertions by H&L, the Hearing Panel Subcommittee concluded that the discussions with Mr. Hastings were centered around H&L providing Respondent an office and resources for him to develop his social security practice. In return, Respondent testified it was his understanding that he would refer any and all personal injury claims arising out of social security disability claims to H&L. (Tr. Vol. II pp. 39-40.)

Respondent created a spreadsheet March 17, 2008, showing the growth of his practice with Jan Dils during the time he was there. The purpose was to demonstrate to H&L the potential number of clients, the time it takes to build a social security practice, and how the fees “trail”. (Tr. Vol. II pp.40-43; Respondent Exhibit 18.) Respondent and his wife attended a dinner at David Hendrickson’s house. The only persons present during the discussion about joining H&L were Mr. Hendrickson and Scott Long, who are the only equity partners in the firm, and Respondent and his wife.¹ (Tr. Vol. I p. 8; Vol. II pp. 47-48.) At this meeting, according to Respondent, he and his wife told Mr. Hendrickson and Mr. Long that Respondent could not join H&L for less than what he was currently earning which was \$160,000.00 per year. Mr. Hendrickson said other associate attorneys in the firm did not make that amount of money; nevertheless, the discussion focused on how to achieve this. (Tr. Vol. II pp. 48-49.) Respondent testified Mr. Hendrickson proposed to pay a salary

¹ Respondent’s wife did not testify at the disciplinary hearings.

of \$80,000.00 per year plus provide a loan of \$80,000.00 that “could be paid back from bonuses and a split [of social security fees].” Respondent testified that he understood he would receive a salary of \$80,000.00 per year and a loan of \$80,000.00 every year until he was “self-sustaining” and he didn’t need a loan, “and we would split that [social security] fee to pay back the \$80,000.00....” Nothing was written or signed at that time. (Tr. Vol. II p. 49.) David Hendrickson did not testify about the substance of the discussions or negotiations with Respondent that occurred at the meeting at his house, but he did testify that the parties reached a verbal agreement “that eventually got memorialized into a letter by our office manager Rick Fisher.”² (Tr. Vol. I pp. 9, 11.) Scott Long also did not testify to the substance of the negotiations or discussions with Respondent that occurred during the meeting at Mr. Hendrickson's home, except he recalled “discussion about what [Respondent's] compensation historically had been.” (Tr. Vol. I pp. 84-85.)

Rick Fisher, H&L's office manager, testified Mr. Hendrickson advised him of the terms of Respondent's employment. He then prepared and signed a letter to Respondent dated March 25, 2008, which he calls a “term sheet.” (Tr. Vol. I pp. 191-192, 308-309.) The March 25, 2008 letter offers Respondent the position of “Associate Attorney” as an at-will employee, with employment to begin “on or around the first of April 2008.” The “terms of employment” are listed as follows:

1. Your beginning salary will be \$80,000.00 per year; plus a loan amount up to \$80,000.00 per year, to be paid back from your bonus amounts. Terms of the loan will be under a separate agreement to be worked out mutually.
2. You will be eligible for the firm's Quarterly bonus;
3. You will be reviewed each July, starting in 2009 with the rest of the staff for a raise;
4. You will be entitled to enroll with our profit sharing plan pursuant to the terms and conditions established by that plan;
5. We will pay your parking;

² This employment term letter does not reflect that any SSA fees would be subject to division by Respondent and H&L.

6. We will pay your reasonable CLE expenses;
7. We will pay your West Virginia Bar dues and other related dues as approved;
8. We will offer you health care in a health plan consistent with the rest of our staff;
9. We will offer you the disability and life insurance plans consistence [sic] with the staff;
10. You will be given vacation and personal time consistent with a beginning employee....

(ODC Exhibit 6, Bates 221-222.)

Mr. Hendrickson testified the agreement with Respondent required him to turn over to the firm all social security fees he earned (Tr. Vol. I pp. 18-19). The Panel noted that the March 25, 2008 letter says nothing about social security fees³. The March 25, 2008 letter refers to bonuses and states the annual loan of up to \$80,000.00 is to be paid back from Respondent's "bonus amounts," there is no testimony anyone explained to Respondent prior to or at the start of his employment how H&L's bonus plan was structured. Mr. Hendrickson testified Respondent's employment with the firm was the same as other associates. That is, Respondent would be paid a salary and the firm would pay for parking and a percentage of health care benefits. His CLE's would be paid by the firm, he could participate in the firm's profit sharing plan, and he would share in the bonus plan. Respondent was also provided office equipment, supplies and secretarial help. Mr. Hendrickson expected, as with all other associates and members of the firm, the fees Respondent earned belonged to the firm. (Tr. Vol. I pp. 11-19.) Further, Mr. Hendrickson testified the \$80,000.00 loan was to help Respondent "until he started participating in the bonus pool, and then we were hoping it would be paid back." Once Respondent started generating an income "[h]e could pay that note back, and then share in a bonus pool and he would also have a salary." (Tr. Vol. I p. 14.)

³ As Respondent was an employee of the law firm, it would seem axiomatic that the fees generated from that employment situation and its resources would be firm fees.

The March 25, 2008 letter provides the terms of the loan “will be under a separate agreement to be worked out mutually.” (ODC Ex. 9, Bates 221.) Respondent understood this language to mean that how the loan was to be paid back would be determined later. Despite no written language in the March employment terms, Respondent testified that he understood that the loan was not just to be paid back with bonuses, but also by a split of the social security fees between him and H&L, which split would be determined later. (Tr. Vol. II pp. 50-51.) Eventually, he would not need a salary or a bonus from the firm. (Tr. Vol. II pp. 199-201.) Respondent began working at H&L April 2008. He received a bi-monthly check reflecting a yearly salary of \$80,000.00 with appropriate deductions. He also received bi-monthly checks of \$3,333.34 as loan draws. (Tr. Vol. I pp. 192-194; ODC Ex. 17, Bates 559.)

Because the SSA issues attorney fee payments in the name of the individual attorney, not the firm name (Tr. Vol. II p. 85.), as social security checks began coming in to the firm in Respondent's name, Respondent would endorse the checks and return them to the office manager, Mr. Fisher. Respondent testified that he believed that these checks were intended by him as payments on the loan balance. (Tr. Vol. II pp. 62-63.) Mr. Fisher testified Respondent told him the social security fee checks had to be made out to the responsible attorney, not the firm. Mr. Fisher verified this with another attorney in the firm. Thereafter, when the fee checks came to the firm, Mr. Fisher had them delivered to Respondent to be endorsed. (Tr. Vol. I pp. 207-208.)

On September 30, 2008, Respondent signed a Line of Credit Promissory Note for \$80,000.00. The document recited that Respondent may borrow up to \$80,000.00 from the firm in regular installments not to exceed \$3,333.33 to be drawn only on the fifteenth day and the last day of each calendar month until December 31, 2009 at no interest. The principal was to be paid in full by May 1, 2011, or within one year of the date Borrower ceased to be an employee of H&L, whichever came

first. The principal was also to be paid in full no later than May 1, 2011, if H&L ceased to operate as an active business through merger, sale or otherwise. The note further provided that “all bonuses, as calculated under the Hendrickson and Long, P.L.L.C. employee bonus program, to which Borrower may be entitled shall be applied to any outstanding principal under this note rather than being paid over to Borrower.” He could also prepay all or any part of the note over and above any such bonus amount without penalty. (ODC Ex. 9, Bates 219-220).

The Hearing Panel Subcommittee noted that the terms of the promissory note differed from the “term” letter of March 25, 2008. Mr. Fisher testified he requested Steve Schwartz, an attorney in the firm, to prepare the note. Mr. Fisher told the attorney the substance of the terms. The letter stated that H&L would loan Respondent \$80,000.00 “annually” and the loan would be paid back through bonuses. However, the note provided for a line of credit in the amount of \$80,000.00 available until December 31, 2009. Further, Respondent was required to repay by May 1, 2011, or within one year from termination of employment, whichever is earlier, regardless of whether he earned sufficient bonuses. Respondent testified he was given no opportunity to negotiate the terms of the promissory note. But, Mr. Fisher testified that he presented it to Respondent three or four times and that Respondent did not want to sign the note. At Respondent’s request, H&L made “small changes” to the agreement and it was presented to him on pay day, September 30, 2008, by Mr. Fisher who told him if he didn’t sign he couldn’t have his check. (Tr. Vol. II pp. 66-67.) He could not explain why the term letter he prepared provided for an \$80,000.00 loan “per year” and the note had an \$80,000.00 line of credit available until December 2009. He denied the promissory note was prepared in connection with an impending merger. (Tr. Vol. I pp. 211-214, 256-297.)

As Mr. Hendrickson was out of town, prior to signing the same, Respondent talked to Scott Long about the proposed promissory note and told Mr. Long that this was not their original

agreement. According to Respondent, Mr. Long told him he could not remember what the agreement was, but “Scott just assured me, that, Ben, this doesn’t change the relationship.” (Tr. Vol. II p. 68.) At this time, H&L was exploring a merger with the Pittsburgh, Pennsylvania law firm Eckert Seamans Cherin and Mellot (Eckert Seamans), and according to Respondent, Mr. Long told him the promissory note was needed for H&L's records because the firm was being reviewed by Eckert Seamans “and they find that your pay is unusual and they need documentation that they're not going to be stuck with... this \$80,000.00.” (Tr. Vol. II p. 68.) Respondent signed the note because of Mr. Long's assurances and because he believed if he didn’t sign, he would not receive a check. (Tr. Vol. II pp. 208-209.) Mr. Long testified he met with Respondent about the promissory note, but he can't recall what was said. (Tr. Vol. I p. 80.) Mr. Long also did not explain why the promissory note provides for a line of credit for fifteen months up to \$80,000.00 when the March 25, 2008 letter provided for an annual loan of \$80,000.00. (Tr. Vol. I pp. 86-87.)

Respondent testified that in October of 2008 he learned how the H&L bonus program worked when Mr. Fisher presented him with a notebook called “WIP” for work in progress. This was a calculation of the overhead costs attributed to Respondent's practice. In order to be eligible for the bonus, his practice had to be profitable. Respondent learned at this time that \$100,000.00 in overhead was attributed to him. According to Mr. Fisher, all fees he earned had to first be applied to Respondent’s overhead before he would receive a bonus. Respondent asked Mr. Fisher how much of his social security fee splits were being credited to repayment of his loan and Mr. Fisher told him he did not know what he was talking about. (Tr. Vol. II pp. 69-73.)

At the disciplinary hearing, Mr. Fisher explained the firm's quarterly bonus program. Essentially, if any attorney is to receive a bonus, first the whole firm has to be profitable and then that individual attorney has to be profitable. (Tr. Vol. I pp. 194-197.) Respondent never received a

quarterly bonus because “[h]e was never profitable.” (Tr. Vol. I p. 254.) The quarterly bonus program is also set forth in a document titled “Hendrickson and Long Bonus Plan.” Respondent contends it was never presented to him until obtained by subpoena during the disciplinary proceedings. (Tr. Vol. II p. 215; ODC Exhibit 20, Bates 801-804.)

Respondent began conducting intake and having claimants hire him as their representative May 1, 2008. During May 2008, all of the clients but one were former clients of Jan Dils whose cases he had previously worked on. (ODC Ex. 17, Bates 636 - 638; Respondent Ex. 6.) On these cases, Jan Dils had the opportunity to claim a portion of the fee through the SSA. Respondent did not begin to obtain clients through advertising until June 20, 2008. (ODC Ex. 17, Bates 639; Respondent Ex. 6.) It wasn’t until February, 2009 that advertising accounted for the majority of clients. (ODC Ex. 17, Bates 647; Respondent Ex. 6.)

The first fee award check that Respondent recalled receiving was for a favorable decision in the case of T. A. Clark. It was issued on September 9, 2008, in the amount of \$5,221.00. (Respondent Ex 16.) Respondent did not endorse the back of the check; it only contains a For Deposit Only stamp for the H&L bank account at Huntington National Bank. A deposit slip subpoenaed from Huntington National Bank established that it was, in fact, deposited into H&L’s account on September 16, 2008. (Respondent Ex. 22.) The first check Respondent actually received was on behalf of Elizabeth Myers. It was issued on August 14, 2008, in the amount of \$5,300.00. (See ODC Ex. 20, Bates 834.) Thereafter, Respondent endorsed all of the fee award checks that were delivered to him and returned them to H&L for deposit until approximately February 9, 2009. These checks were:

R.C.	10/01/2008	\$ 447.65
J.R.	10/06/2008	\$ 282.74
O.S.	10/16/2008	\$4,051.25

P.N.	10/27/2008	\$2,187.50
D.H.	10/28/2008	\$2,540.15
B.S.	10/28/2008	\$2,037.00
K.S.	11/05/2008	\$5,221.00
M.B.	11/06/2008	\$5,221.00
Y.F.	11/10/2008	\$1,262.00
M.M.	01/29/2008	\$3,601.75

(ODC Ex. 17, Bates 607; ODC Ex 20, Bates 807- 808.)

During the months leading up to January 1, 2009, H&L was in the process of merging with Eckert Seamans. Mr. Hendrickson insisted that as part of the merger, Eckert Seamans would have to employ all persons at H&L, including Respondent. (Tr. Vol. I p. 20.) During the transition period in December 2008, Respondent filled out the personnel forms provided by Eckert Seamans, such as direct deposit, health insurance, etc. (Respondent Ex. 8.) He was listed as a new associate in Eckert Seamans' Legal Update for Winter 2009. (Respondent Ex. 10.) After H&L's merger with Eckert Seamans on January 1, 2009, H&L continued in its existence. As Eckert Seamans was still evaluating Respondent's practice, it asked H&L to continue to pay Respondent while Eckert Seamans reimbursed H&L for his salary and expenses. Mr. Fisher informed Respondent of this arrangement late January 2009. (ODC Ex. 1, Bates 2; Tr. Vol. I pp. 217-220.) Stephen Hastings was an H&L attorney who became employed by Eckert Seamans with the merger. According to him, Eckert Seamans did not offer a quarterly bonus program like H&L, instead his salary was increased. (Tr. Vol. I pp. 165-166.)

Beginning February 2009, Respondent began holding the social security fee checks that were delivered to him. He testified:

David would not talk to me. The folks at Eckert Seamans wouldn't talk to me about it. I had called them on some other issues and was advised not to call them ever again. And in between there, Eckert Seamans had told Rick to pay me with an H&L check and send them an invoice and they would reimburse my salary. And I didn't

want to keep giving those monies without an understanding of getting those credited towards the loan because the loan had changed, the terms of it and now we have a new entity that owned the assets of H&L, and they purchased those and I was terribly confused with if I gave it to H&L, was it going into their account and be used for something else and not credited towards me [or] should it go to Eckert Seamans to be credited towards the \$80,000.00. And no one would talk to me. It was just like I was not important and it didn't matter.

So I made a decision to keep those checks. I kept them in my desk drawer until late May with no intent on cashing them. (Tr. Vol. II pp. 76-77.)

During this time period when Respondent's position with Eckert Seamans was uncertain, he began paying for advertising himself in the Yellow Pages and on television in late January, early February. He paid for an additional assistant, which he needed to continue the practice's development. (Respondent Ex. 11; Tr. Vol. II pp. 80-83.) He used the draws from the loan/line of credit money for these expenses⁴, foregoing some of his personal financial obligations. (Tr. Vol. II pp. 84-85.) He revisited the business plan, or pro forma, that he originally prepared in March 2008 and submitted it to Eckert Seamans in March 2009 as a business proposal for funding his practice. (Tr. Vol. II pp. 88-89; Respondent Ex. 7.) Mr. Fisher reviewed the proposal and sent a memo to Mr. Hendrickson, Mr. Long and three attorneys from Eckert Seamans with certain suggestions for revisions. (Tr. Vol. I pp 222-224; ODC Ex. 20, Bates 823.)

At some point in April 2009, Eckert Seamans determined that Respondent's practice did not fit its business model. Mr. Fisher told Respondent on April 15, 2009 that Eckert Seamans decided not to include him with the merger. (Tr. Vol. I pp. 224-225.) Mr. Fisher also told Respondent that Mr. Hendrickson was going to ask Eckert Seamans to pay Respondent another 30 days. (Tr. Vol. I p. 225; Vol. II pp. 90-92.) Respondent then began preparations to move from the H&L offices and

⁴ A term of the ultimate settlement agreement required H&L to pay all outstanding advertising expenses up to Respondent's termination date of May 15, 2009. (ODC Ex. 17, Bates 685 and 716 [typewritten version])

establish his own firm. He entered into a lease agreement for an office around the corner from the Charleston Social Security district office on May 4, 2009, and paid a security deposit of \$3,000.00. (Respondent Ex. 19.) The space was not ready for occupancy. However, H&L was prepared to let Respondent work out of its office until the remodeling was complete. (Tr. Vol. I p. 228; Vol. II pp. 227-231.)

Shortly before May 20, 2009, Mr. Fisher grew concerned about the lack of SSA fee checks from Respondent. He was aware of three checks that had been delivered to Respondent, but not returned for deposit. He went into Respondent's office at 6 a.m. on May 19, 2009, with an IT person to access Prevail, the software program designed for social security work, on Respondent's computer. Mr. Fisher found scanned copies of SSA fee checks in the approximate amount of \$46,000.00. He made a mirror image or copy of the hard drive. He also saw a notebook binder titled "Favorable Decisions" and took that with him. (Tr. Vol. I pp. 235- 237, 285-286, 295.)

That same day, Mr. Fisher came to Respondent's office and asked him to sign an SSA Form 3288, which is a Consent for Release of Information.⁵ Mr. Fisher did not mention anything about the checks he had discovered. He had been directed by Mr. Hendrickson to try to get an accounting. (Tr. Vol. I pp. 236-238.) Mr. Fisher placed Respondent's name in the blank as the individual authorizing the SSA to release information or records about him to Mr. Hendrickson and for purposes of "Accountability to Employer." The information sought to be released was on an attached list. The list contained 323 names and their Social Security numbers on the attached list, it read:

⁵ Mr. Fisher mistakenly referred to the form number as 2322 during his testimony. (Tr. Vol. 1 p. 238.)

The list below represents B. F. Whites [sic] clients that is approved to give Richard L. Fisher or David K. Hendrickson per form SSA-3288, any and all information including copies of checks that attorney's fees were paid to Benjamin F. White between the dates of April 21, 2008 and May 15, 2009.

(ODC Ex. 20, Bates 812-818). Mr. Fisher testified at the hearing he added this language after first presenting it to Respondent to satisfy the latter's objections. He said he obtained the form from the SSA Charleston office from an employee at the window. (Tr. Vol. 1 pp. 237-238, 276, 294.) Respondent refused to sign the form because it would not accomplish what Mr. Fisher intended. He said a form would be needed for each client individually and would have to be signed by each individual claimant. (Tr. Vol. I p. 237; Vol. II p. 96.; ODC Ex. 20, Bates 812.) Respondent had to leave the office to attend a hearing in Huntington, but said he'd discuss this later. Mr. Fisher confirmed this point in his testimony. (Tr. Vol. I pp. 238-239.) While in Huntington, Sonya, one of Respondent's two assistants, sent a text to him that they had been ordered to leave H&L premises. Because Sonya rode into work with Respondent from Logan County, she had to wait until he returned around 6 p.m. for Respondent. When he returned, he went into the office and retrieved the fee award checks that were in his drawer. He also received a communication from Mr. Fisher that Mr. Hendrickson wanted to meet with him in the office conference room at 9 a.m. the next day, May 20, 2009. (Tr. Vol. I pp. 238-239; Vol. II pp. 96-98.) At the 9 a.m. meeting on May 20, 2009, Mr. Hendrickson showed Respondent copies of the checks they had found on the computer and demanded to be given the checks. Respondent testified that he tried to explain his position and offered to place the checks in escrow.⁶ According to Respondent, Mr. Hendrickson screamed at him

⁶ Mr. Hendrickson testified on this point and denied that Respondent made any such offer. (Tr. Vol. 1 at 30)

and threatened him with prosecution for embezzlement. Mr. Fisher asked him again to sign the SSA Form 3288. Again, Respondent refused because it would not accomplish what they were seeking. (Tr. Vol. II pp. 98-99.)

Respondent testified that he and Mr. Fisher “ultimately” called the SSA office in Charleston, although the timing was unclear. One of the administrators provided the same answer as Respondent had: Form SSA-3288 would not work. (Tr. Vol. II p. 99.) Mr. Fisher confirmed that at a later date, he spoke to or met with the Deputy Director of the SSA Charleston office who told him “they never had the information available that I wanted, period.” (Tr. Vol. I p. 306.) At the disciplinary hearing, David Hendrickson was still insisting that Respondent should have signed Form 3288 and it was his understanding the form would have provided the information he wanted. (Tr. Vol. I pp. 27-28, 69.) However, Mr. Fisher testified that in the Fall of 2009, approximately 3 1/2 years prior to the disciplinary hearing, he told Mr. Hendrickson the Deputy Director of the SSA Charleston office had advised the form would not accomplish the accounting they wanted. (Tr. Vol. I pp. 324-326.) Mr. Fisher was also insisting in his direct testimony that “to date” Respondent never delivered to H&L an executed copy of Form 3288 (Tr. Vol. I pp. 247-248); yet, as set forth above, Mr. Fisher conceded in cross-examination that he had learned much earlier, in the Fall of 2009, the form would not have accomplished what H&L wanted.

At any rate, the May 20, 2009 meeting ended with Respondent being told to immediately leave the premises and not to return. He was not permitted to take any files, nor did he have access to his client data base. (Tr. Vol. II pp. 98-99.) Thereafter he met Mr. Fisher on May 27, 2009, in the alley behind H&L offices where Mr. Fisher provided copies of Respondent's files to him. Mr. Fisher also had a social security fee check which he requested Respondent endorse. Respondent endorsed

the check perceiving he had to sign the check to receive his files.⁷ (Tr. Vol. II pp. 99-100.) Mr. Fisher sent Respondent an undated letter that appears to have been sent on May 21, 2009. It confirms Respondent was terminated effective May 15, 2009, and demanded an accounting of all fees received by Respondent from April 21, 2008, to May 15, 2009, as well as any un-reimbursed expenses he thought were attributable to the firm. (ODC Ex. 1, Bates 9-10.) He sent another letter dated June 11, 2009, which recited that he had enclosed another Form SSA-3288 for Respondent to sign with his May 21, 2009, letter and further recited that he had sent Respondent another Form SSA-3288 on May 27, 2009. The June 11 letter demanded that he immediately sign and return Form SSA-3288 and immediately inform the firm in writing as to when the prompt accounting would be delivered. (ODC Ex. 1, Bates 7-8.)

By letter dated June 29, 2009, David Hendrickson wrote to the ODC claiming Respondent had misappropriated fees belonging to H&L; that Respondent still had not accounted for all social security fees he received during his employment; and that he refused to sign SSA Form 3288. (ODC Ex. 1, Bates 1-5.) H&L's ethics complaint was forwarded to Respondent by letter dated July 15, 2009. (ODC Ex. 3, Bates 14-15.) Respondent responded by verified statement, which included an accounting of all social security fee checks he held from H&L from February 2009 to May 15, 2009. (ODC Ex. 4, Bates 34-58.) Respondent also sent this accounting to H&L by letter dated August 20, 2009. (ODC Ex. 20, Bates 832-833.)

⁷ The undisputed facts are as Mr. Hendrickson testified that despite the conflict regarding the checks, there was a decision made by H&L to continue the efforts to assist Respondent transition into his own solo practice. [Tr. Vol. 1 at 31]. Mr. Hendrickson further testified that the firm gave Respondent his computer as well as the specialized Prevail software they had purchased for him and sent the firm's computer technician to Respondent's new office to assist him in installing the same. [Tr. Vol. 1 at 32].

On the first day of the disciplinary hearing, David Hendrickson stated he still believed Respondent had not provided a full accounting of the checks he had kept from H&L. (Tr. Vol. I p. 31.) Mr. Fisher also testified he never received a full accounting and that he had discovered in the “Favorable Decision” notebook taken from Respondent's office that there were clients for whom fee checks should have been issued and turned over to H&L. (Tr. Vol. I pp. 248, 285-286, 326-330.) As a result of this testimony, Respondent and his counsel, along with counsel for ODC attempted to obtain additional information from the SSA. From utilizing his own prevail records, Respondent was able to obtain copies of social security fee checks corresponding to the favorable decisions contained in the notebook, as well as two other checks H&L disputed they had received. (Tr. Vol. II pp. 92-95; Respondent Ex. 13, 16, and 17.) The record in this case contains voluminous exhibits and testimony about individual social security fee checks, when they were issued, and in to which account deposited. ODC also subpoenaed Respondent’s personal bank account records which demonstrated no social security fee checks prior to December 31, 2009, were deposited in Respondent's personal account that he shared with his wife. (ODC Ex. 23; Tr. Vol. III pp. 73-74.)

The Hearing Panel Subcommittee was satisfied with Respondent’s accounting which shows from February 2009 to May 15, 2009, he diverted eighteen fee award checks totaling \$46,326.69. (ODC Ex. 20, Bates 808.) Prior to the May 20, 2009 meeting where Respondent was terminated, he cashed five (5) of checks, totaling \$5,607.41. The first was cashed April 28, 2009, Respondent testified this money was used as a security deposit for office space, and to purchase bricks for the renovation of the office, a computer server and software. After May 20, 2009, despite full knowledge of the H&L’s claimed interest in the fees, Respondent cashed the remaining checks on separate dates. (Respondent Ex. 13.; Tr. Vol. II pp. 116-120.)

On October 30, 2009, H&L filed a lawsuit against Respondent and his PLLC in the Circuit Court of Kanawha County alleging breach of duty, conversion, fraud and/or misrepresentation and breach of fiduciary duty. (ODC Ex. 17, Bates 272-277.) H&L later filed an amended complaint for default upon the promissory note. (ODC Ex. 17, Bates 329-335.) H&L was represented by J. Miles Morgan, and Respondent represented himself. Before and during this litigation, H&L received four more SSA fee checks made payable to Respondent after his termination: (1) check for representation of Leonard Gibson in the amount of \$1,462.00 issued on September 24, 2009; (2) check for representation of Nona Carte in the amount of \$5,917.00 issued October 1, 2009; (3) check for representation of Robert Thompson in the amount of \$3,824.50 issued on October 1, 2009; and (4) check for representation of William Anderson in the amount of \$5,105.25 issued on January 20, 2010. (ODC Ex. 17, Bates 742-743.) Respondent testified that he was not advised by the firm, and although these checks were, at some point, turned over to Mr. Morgan, the checks had gone stale. During the litigation, Respondent learned from Mr. Morgan about three of the four checks. He did not know about the fourth until it was brought up in mediation on April 8, 2011. (Tr. Vol. II pp. 126-127.)

The parties mediated the civil action on April 8, 2011, with attorney Vincent King serving as mediator. They reached the following agreement which was reduced to writing:

1. Defendant will pay \$5,000 cash today.
2. Defendant will go to Social Security with Plaintiff today and will thereafter cooperate with reissuance and assignment and/or other provisions as may be necessary to transfer all rights to checks issued in the amount of \$16,308.25 (attached).
3. Defendant will pay an additional \$10,000 within 120 days.
4. Following final payment the parties will execute mutual releases of any and all claims and jointly move the Court for dismissal with prejudice. Said releases are not limited to just claims already pled, but any and all claims by either party saving only the following provisions.

5. With respect to any outstanding advertising expense, any expense up to May 15, 2009 will be the responsibility of Hendrickson and Long and anything thereafter will be the responsibility of Ben White.
6. With respect to the 800 BF White phone number, Hendrickson and Long will assign any rights and release any claim with respect thereto.

(ODC Ex. 17, Bates 685 and 716 [typewritten version].)

Following mediation, Respondent paid \$5,000.00 and he and Mr. Fisher went to the social security offices with the 4 stale checks and requested they be reissued. (Tr. Vol. I pp. 343-344, 347; Vol. II pp. 126-128.) Respondent's payment of \$10,000.00 pursuant to the agreement was due August 6, 2011. He failed to make the payment on this date. Instead, on August 3, 2011, Respondent purchased a cashier's check in the amount of \$17,379.00. He prepared a cover letter explaining that the cashier's check represented the \$10,000.00 payment due August 6, 2011 and the monies for Nona Carte's check in the amount of \$5,917.00 and for Leonard R. Gibson in the amount of \$1,462.00 (ODC Ex. 21, Bates 854-856.) He took the letter and check to Charleston and met with Mr. Fisher. He said that as soon as the firm took the steps necessary to release Respondent's 1-800-BFWHITE number, he would tender the check. According to Respondent, Mr. Fisher said that he had forgotten about the phone number and he would try to get it done. (Vol. II, 129-130.)⁸

Transferring the 800 number from H&L's phone company to Respondent's phone company apparently was not a simple process. It required cooperation by both parties as well as their respective releases and authorizations to the phone companies. Eventually, this issue was resolved in September 2011 and H&L was paid \$10,000.00 plus the money for two issued checks for Nona Carte and Leonard Gibson. (ODC Ex. 21, Bates 857-1053.)

⁸ According to Mr. Morgan, the BFWHITE phone number delay was not that Mr. Fisher forgot the term of the settlement agreement, it was difficult to separate the 800 number from H&L's land line. (Vol. II, 10-12).

In the meantime, Judge Webster of the Circuit Court of Kanawha County contacted Mr. Morgan about the status of the settlement and the execution of the releases. Judge Webster scheduled the matter for hearing and instructed Mr. Morgan to include language in the notice that H&L is to bring an executed release relating to the transfer of the 800 phone number and Respondent is to bring cash for the remaining funds. The hearing was scheduled for October 10, 2011, but came on for hearing October 13, 2011. (Tr. Vol. I pp. 354-356; ODC Ex. 17, Bates 677; and ODC Ex. 17, Bates 679.) At the hearing Mr. Morgan represented to the Court all items in the settlement agreement had been carried out with the exception of one fee check that SSA needed to reissue. He explained he had a draft release, but until the last check was reissued, the release could not be signed. He suggested the parties call SSA and “chase down” the last check. The Court requested that it receive a dismissal order or a status report within 30 days. (ODC Exhibit 19, Bates 792-794, 798.)

The remaining check came from Respondent’s representation of ~~William Anderson~~. A print-out from Respondent’s Prevail program indicates that Respondent went to the SSA Charleston office on October 13, 2011, after the hearing. He spoke to a woman at the middle window, who advised the check had been reissued and mailed on July 22, 2011, to 214 Capitol Street--H&L’s address. She said she would put a trace on the check to determine if it had been cashed and would forward the results to Mr. Morgan and Respondent. (Tr. Vol. II pp. 138-140; Respondent Ex. 3, entry for October 13, 2011.) Respondent e-mailed Vincent King and Mr. Morgan that same day with the information. (ODC Ex. 17, Bates 746-747.)

The Office of Disciplinary Counsel sent a letter to Respondent dated January 10, 2012, asking for the status of the civil litigation. (ODC Ex. 13.) Respondent responded by letter dated January 15, 2012. With respect to the four checks, he said these items were “completed and ongoing as described below.” After listing the check for William Anderson in the amount of \$5,105.25, he

wrote, "According to the Social Security Administration during a visit to the Charleston Social Security Office with Miles Morgan, a check was reissued and mailed to Hendrickson & Long at 214 Capitol Street on July 22, 2011." (ODC Ex. 14.)

On February 1, 2012, Mr. Fisher e-mailed Respondent asking about two checks: Robert Thompson and William Anderson. (ODC Ex. 17, Bates 744.) Respondent did not respond. He testified that he had set up his e-mail so that messages relating to the civil litigation would go in a particular e-mail folder. In the past months, he didn't check it because he believed the litigation had ended. (Tr. Vol. II pp. 146-147.) As set forth in Respondent's January 18, 2012 response to ODC, the Thompson check had been delivered to H&L and cashed by H&L. A copy of the check showing deposit into H&L's account was included with the letter. (ODC Ex. 14, Bates 246, 251.)

On April 18, 2012 at 2:17 p.m. Mr. Fisher e-mailed Respondent to ask him about the Anderson check. Mr. Morgan also e-mailed Respondent at 5:08 p.m. the same day to say that the Court had called last week requesting a status update. (ODC Ex. 17, Bates 746.) Respondent did not see these e-mails immediately for the same reason he did not see the February e-mail from Mr. Fisher. On April 23, 2012 at 4:56 p.m., Mr. Morgan e-mailed Respondent again. He recited that Respondent had not responded to the e-mails he and Mr. Fisher had sent the week before as well as a voice message he left on an unspecified date. He informed Respondent that the Court had been calling about a status report and is now threatening to hold both parties in contempt as of April 25 for failing to respond to her request for a status update. Mr. Morgan explained to the Court that "we had been trying to get in touch with [Respondent] to no avail." The e-mail concluded:

Please call. I am afraid that the consequences may be dire if there is no response. If I do not hear from you by tomorrow at noon I will tender a letter to Judge Webster outlining our attempts to contact you and collect this outstanding amount to no avail.

Thanks. My cell is xxx-xxx-xxxx. I gave them your 800 number to get in touch with you directly as well.

(Respondent Ex. 1, Bates 1121.)

At 7:51 p.m. on April 23, 2012, Respondent responded to Mr. Morgan while traveling:

Which check and what amount?

My records show that all checks have been tendered to H&L and believe all have been deposited into an H&L account. If you can tell me which check you believe you do not have, I will follow up with the SSA immediately.

(Respondent Ex. 1, Bates 1121.)

Mr. Morgan responded on Tuesday, April 24, 2012 at 8:52 a.m.:

First, thanks for responding and please stay in touch until we resolve this to Judge Webster's satisfaction. You will recall that you and I needed to go to Social security last fall to have the Anderson check reissued. Rick is sending his full name and amount separately. You will recall that fee had not been cashed or negotiated as it was stale. So social security was going to re-issue to you directly. We never received the Anderson fee from you or social security. As I mentioned before, Rick has checked and double checked. You and I both went to social security and confirmed that it hasn't been cashed and you asked that it be reissued. They would only reissue to you. If you have different information please provide [sic] it asap. And feel free to [sic] call. My cell again is xxx-xxx-xxxx. The judge has every right to be relentless at this juncture so let's finish this once and for all. Thanks.

Respondent's Prevail history on William Anderson's claim shows that on April 24, 2012, at 2:45 p.m. he called the SSA and was told the fee award for this claim had been approved for \$3,548.50, not \$5,105.25, and it was being processed. (Respondent Ex. 3, Bates 1085.) Mr. Morgan testified that Respondent called him at some point and left a message on his cell phone that the fee had been reduced from around \$5,000 to \$3,000.00. (Tr. Vol. I p. 387.)

Mr. Morgan filed a Motion for Entry of Judgment for the Breach of Settlement Agreement on April 25, 2012⁹. In paragraph 8, he represented to the Court: "Since the hearing, at the Court's

⁹ The Panel's findings reflect a date of April 25, 2011.

request, Plaintiff's counsel has repeatedly requested defendants report on the status of the payment, on or about February and April, 2012, to no avail. See Exhibit B." (ODC Ex. 17, Bates 681-683.) Exhibit B included Mr. Morgan's and Mr. Fisher's e-mails to Respondent on April 18, 2012, Mr. Morgan's e-mail of April 23, 2012, to Respondent, and Mr. Fisher's e-mail to Mr. Morgan of April 24, 2012. Mr. Morgan did not include Respondent's e-mail response of April 23, 2012, or Mr. Morgan's April 24, 2012 e-mail back to Respondent. (ODC Ex. 17, Bates 688-690.)

When asked at the disciplinary hearing on cross-examination why he did not disclose to the Court that Respondent had responded by email of April 23, 2012, Mr. Morgan answered that he was justified in omitting Respondent's e-mail response because he thought "it was not responsive" to the issue of where the Anderson check was. Mr. Morgan considered Respondent's inquiry about which check Mr. Morgan was looking for as "completely nonresponsive" and "didn't deserve to be part of [the motion]." (Tr. Vol. I pp. 390-392.) Mr. Morgan mailed a copy of the motion to Respondent and also e-mailed it as a pdf. Respondent testified that he did not know about the motion being filed. He never received the hard copy and the e-mail had gone to the junk folder. He did not discover this fact until after the first day of the disciplinary hearing. Upon hearing Mr. Morgan testify about the e-mail, he checked his junk folder and found it. (Tr. Vol. II pp. 151-152.)

Since Respondent did not respond to the motion, Mr. Morgan prepared an Order for the Court granting entry of judgment for the breach of the settlement agreement. The Court entered judgment in the amount of \$5,105.25 on June 25, 2012. (ODC Ex. 17, Bates 773-776.) The Clerk's Office attempted to mail a copy of the Order twice, but it was returned both times as undeliverable. (ODC Ex. 18.)

Unaware of these proceedings, Respondent continued to check on the status of the Anderson check. On June 1, 2012, he called and was told the check was still being processed. On July 17,

2012, he visited the SSA and was told that the check was sent to Jan Dils. He wrote to Ms. Dils about the matter. (Respondent Ex. 3, Bates 1085.) In the meantime, as Respondent failed to communicate these efforts to Mr. Morgan, H&L filed a Suggestion on July 23, 2012, and served it upon Logan Bank and Trust Company. The Court directed Logan Bank to take \$5,205.25 from Respondent's bank account to pay H&L on August 22, 2012. (ODC 17, Bates 779-783.) Respondent received the Anderson check from the SSA issued on October 1, 2012, in the amount of \$3,548.50. (Respondent Ex. 15.)¹⁰

There was never a release executed by the parties. (Tr. Vol I, p. 396). On May 28, 2013, H&L issued an Internal Revenue Service Form 1099-C to Respondent in the amount of \$48,607.25 as cancellation of debt during 2012. (Respondent Ex. 20.)

C. HEARING PANEL CONCLUSIONS OF LAW

Even taking the facts in the most favorable light to Respondent, the Hearing Panel Subcommittee found that Respondent knew, or should have known, H&L also claimed an interest in the social security fees. It is undisputed Respondent failed to notify H&L in February 2009 when he began withholding the checks. The Hearing Panel Subcommittee found the evidence clear and convincing that Respondent violated Rule 1.15(b) by failing to give prompt notice he was holding the checks. Moreover, again taking the most favorable position towards Respondent, the Hearing Panel concluded that Respondent and H&L both claimed interests in the social security fees and it is undisputed Respondent failed to keep this property separate until the dispute was resolved. Instead, he cashed the checks and used the money to fund and establish his new practice. Therefore, the

¹⁰ Pursuant to the parties' settlement agreement, Respondent was only to cooperate with the issuance and assignment of 4 checks, one of which was the Anderson check which was originally issued in the amount of \$5,205.25. H&L obtained the original amount per its August 2012 Suggestion, but the SSA later reduced the amount in October 2012 to \$3,548.50.

Hearing Panel Subcommittee found that the evidence was clear and convincing that he violated Rule 1.15(c) of the Rules of Professional Conduct.

However, the Hearing Panel found that the evidence did not meet the standard for violations of Rules 1.15(a), 8.4(c), 8.4(d), and 3.4(a); and recommended that these charges should be dismissed. This is a faulty application of the law to the facts and ODC objects to the recommendation that the violations of 1.15(a); 8.4(c) and 8.4(d) should be dismissed and asserts that it met its burden on these charges.¹¹

1. A finding of a violation of Rule 1.15(a) is supported by the evidence.

The Hearing Panel Subcommittee's reasoning that it was unsure if after the merger, if H&L had a legitimate claim to the fees is contradictory of its findings in violations of 1.15(b) and 1.15(c). At a minimum, again even in the light most favorable to Respondent, both H&L and Respondent, a third party¹², had a legitimate interest in the fee award and thus Respondent was under an obligation to hold the fees separate from his own property. The Rule language requires Respondent to place property that he and a third party have an interest in to be kept in a separate account that is federally insured and maintained in West Virginia, not Respondent's desk drawer. The only exception under the Rule is to place the money in a separate account, with the consent of the third party, and since H&L was completely unaware that Respondent diverted the fees, it was clearly unable to consent. The Hearing Panel Subcommittee concluded that Respondent knew or should have known that H&L had a legitimate interest in the fees and instead knowingly and intentionally deposited the fee award checks before the dispute had resolved, and had done so in violation of Rule

¹¹ Although, it does not believe Respondent's negligence excuses his conduct in the civil suit, as it is not able to establish that the conduct was **knowingly** ODC does not assert it met its clear and convincing burden on a violation of Rule 3.4 of the Rules of Professional Conduct.

¹² The rule includes property that lawyers, clients or third persons claim an interest.

1.15(b) and 1.15(c). (HPS Report at 32;33;34; and 36.) Because, the Hearing Panel Subcommittee acknowledged that H&L had at least a legitimate interest in the SSA fee awards, and attributed that knowledge to Respondent, because Respondent failed to put the fees in a separate account and instead later deposited the same into his own account, the evidence requires that there must be a finding of a violation of Rule 1.15(a) of the Rules of Professional Conduct.

2. A finding of a violation of Rules 8.4(c) and Rule 8.4(d) is supported by the evidence.

The HPS based their recommendation to dismiss these charges on the faulty determination that Respondent “never misled or misrepresented the fact that he was holding the social security checks and he has made an accounting of all checks he held and cashed” and argues that Respondent did not “convert” the funds as he reasonably believed he had a legitimate interest and claim to the fees. First, the Hearing Panel Subcommittee’s finding that there was no deceitful conduct by Respondent is simply not based on the findings of facts. Respondent was in a position to utilize his training as a lawyer to seek legal redress, instead as he testified, he decided to stop turning over the SSA fee awards and put the same in his desk drawer. The facts demonstrate that Respondent, as an associate attorney at H&L had fiduciary obligations and in breach of those obligations, Respondent diverted fees, failed to advise H&L of the same, and actively engaged in the continued diversion until he was confronted by the office manager– this is deceitful behavior. Respondent does not now deny these behaviors, but he certainly failed to advise H&L of his actions. The fact that he admitted the same when confronted with undisputable evidence of the deception does not negate the deceitful activity. This pattern of behavior is in violation of Rule 8.4(c) of the Rules of Professional Conduct.

Second, Rule 1.15 sets forth Respondent’s duties to notify a third party of receipt of funds, to safeguard and segregate property that he and a third party have an interest in, and keep that property separate until that dispute has resolved. The findings of facts and conclusions of law by the

Hearing Panel Subcommittee hold that Respondent failed in all of these duties. Indeed, Respondent, both before and after detection, in violation of these duties deposited the diverted SSA fee awards into his own personal account. The Hearing Panel Subcommittee's reasoning that Respondent can convert funds that he *knows* a third party has legitimate interest in *if he simply believes he also has an interest* in eviscerates Rule 1.15 of the Rules of Professional Conduct. If Respondent and a third party both have legitimate claims to a portion of the fees, and Respondent's actions deprive the third party of their entire ownership interest, then Respondent has converted the fee interest owned by H&L. As such, Respondent's actions in this case do amount to conversion or misappropriation of the fee interest of H&L and are in violation of Rule 8.4(c) and Rule 8.4(d) of the Rules of Professional Conduct.

II. SUMMARY OF ARGUMENT

The Supreme Court has long recognized that attorney disciplinary proceedings are not designed solely to punish the attorney, but also to protect the public, to reassure the public as to the reliability and integrity of attorneys, and to safeguard its interests in the administration of justice. Lawyer Disciplinary Board v. Taylor, 192 W.Va. 139, 451 S.E.2d 440 (1994).

The Hearing Panel Subcommittee of the Lawyer Disciplinary Board found that Respondent violated Rules 1.15(b) and 1.15(c) of the Rules of Professional Conduct and recommended that Respondent be reprimanded; that he undergo an additional six (6) hours of Continuing Legal Education; and that he pay the costs of the disciplinary proceeding.

Respectfully, the Office of Disciplinary Counsel asserts that there was error by the Hearing Panel Subcommittee in the application of the law to the facts, specifically, that in addition to the findings of the violations of Rule 1.15(b) and 1.15(c), ODC met the burden of clear and convincing standard of proof on violations of Rule 1.15(a); Rule 8.4(c) and Rule 8.4(d) of the Rules of

Professional Conduct. ODC further asserts that the Hearing Panel Subcommittee's recommendation erred in its recommendation as to sanction as it wrongfully endorses and applies the defense of self-help in disciplinary matters that involve misappropriation and sets dangerous precedent that is contrary to the stated goals of the disciplinary process and that is contrary to law.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 19 of the Revised Rules of Appellate Procedure, this Honorable Court's May 20, 2014 Order set this matter for oral argument for a date yet to be determined during the September 2014 term of Court.

IV. ARGUMENT

A. STANDARD OF PROOF

The Supreme Court is the final arbiter of formal legal ethic charges and must make the ultimate decisions about public reprimands, suspensions or annulments of attorneys' licenses to practice law. Syl. Pt. 3, Committee on Legal Ethics v. Blair, 174 W.Va. 494, 327 S.E.2d 671 (1984); Syl. Pt. 7, Committee on Legal Ethics v. Karl, 192 W.Va. 23, 449 S.E.2d 277 (1994). The charges against an attorney must be proven by clear and convincing evidence pursuant to Rule 3.7 of the Rules of Lawyer Disciplinary Procedure. See, Syl. Pt. 1, Lawyer Disciplinary Board v. McGraw, 194 W. Va. 788, 461 S.E.2d 850 (1995). The Supreme Court gives respectful consideration to the Lawyer Disciplinary Board's recommendations as to questions of law and the appropriate sanction, while ultimately exercising its own independent judgment. McCorkle, 192 W. Va. at 290, 452 S.E.2d at 381. The burden is on the lawyer challenging the findings of facts and substantial deference is to be given to the Lawyer Disciplinary Board's findings of fact unless the findings are not supported by reliable, probative, and substantial evidence on the whole record. McCorkle, Id.; Lawyer Disciplinary

Board v. Cunningham, 195 W. Va. 27, 464 S.E.2d 181 (1995). However, in lawyer disciplinary matters, a *de novo* standard of review applies to questions of law, questions of application of the law to the facts, and questions of appropriate sanction to be imposed. Roark v. Lawyer Disciplinary Board, 207 W. Va. 181, 495 S.E.2d 552 (1997); Committee on Legal Ethics v. McCorkle, 192 W. Va. 286, 452 S.E.2d 377 (1994).

B. ANALYSIS OF SANCTION UNDER RULE 3.16 OF THE RULES OF LAWYER DISCIPLINARY PROCEDURE.

Syl. Point 4 of Office of Disciplinary Counsel v. Jordan, 204 W.Va. 495, 513 S.E.2d. 722 (1998) holds: Rule 3.16 of the Rules of Lawyer Disciplinary Procedure provides that when imposing a sanction after a finding of lawyer misconduct, the Court shall consider: (1) whether the lawyer has violated a duty owed to a client, to the public, to the legal system, or to the profession; (2) whether the lawyer acted intentionally, knowingly, or negligently; (3) the amount of the actual or potential injury caused by the lawyer's misconduct; and (4) the existence of any aggravating or mitigating factors. A review of the extensive record in this matter indicates that Respondent has transgressed all four factors set forth in Jordan.

1. Respondent Violated Duties to the Legal System and to the Legal Profession.

The Hearing Panel Subcommittee determined that Respondent violated his duties to to the legal system and to the profession.

2. Respondent Acted Negligently, Intentionally and Knowingly.

The Hearing Panel Subcommittee determined that Respondent's failure to give notice of the existence of the checks he was holding to H&L was negligent. However, the Hearing Panel

Subcommittee also determined that Respondent acted intentionally and knowingly when he negotiated the checks for his own use before the dispute was resolved.

3. The amount of injury caused by the lawyer's misconduct.

The Hearing Panel Subcommittee found that there was no actual or potential injury. Respectfully, the undersigned disagrees with the Hearing Panel Subcommittee's conclusion and instead asserts that Respondent's conduct demonstrates lack of judgment and concern for his own personal integrity. This apparent lack of understanding demonstrates a heightened risk potential for injury to the public. Moreover, H&L suffered financial losses, which were recouped in part by litigation, but make no mistake even if there was no loss suffered, Respondent can still be disciplined for his misconduct. Additionally, Respondent's steadfast refusal to acknowledge the wrongfulness of his conduct is troubling as it demonstrates that Respondent lacks a fundamental understanding of how to handle entrusted funds or deal with issues of controversy through legal means.

4. There Is Evidence of Mitigating and Aggravating Factors.

The Scott Court adopted mitigating factors in a lawyer disciplinary proceeding and stated that mitigating factors "are any considerations or factors that may justify a reduction in the degree of discipline to be imposed." Lawyer Disciplinary Board v. Scott, 213 W.Va. 216, 579 S.E.2d 550, 557 (2003). The undersigned agrees with the Hearing Panel Subcommittee that an absence of a prior disciplinary record, that he was cooperative with the disciplinary process, and he was inexperienced in the practice of law are factors that mitigate in his favor. However, while there may have been a bona fide contract dispute between Respondent and H&L, Respondent did not utilize the skills and resources of an attorney, instead Respondent began surreptitiously squirreling away checks without the knowledge of H&L. Moreover, the undersigned disagrees that Respondent acted without a

dishonest or selfish motive. Respondent's actions were meant to further and protect his own interests at the subjugation of H&L's interests.

Aggravating factors are considerations enumerated under Rule 3.16 of the Rules of Lawyer Disciplinary Procedure for the Court to examine when considering the imposition of sanctions. Elaborating on this rule, the Scott Court also held "that aggravating factors in a lawyer disciplinary proceeding 'are any considerations, or factors that may justify an increase in the degree of discipline to be imposed.'" Lawyer Disciplinary Board v. Scott, 213 W.Va. 216, 579 S.E. 2d 550, 557 (2003) quoting *ABA Model Standards for Imposing Lawyer Sanctions*, 9.21 (1992). The Hearing Panel Subcommittee found that there were no aggravating factors in this case. Again, the undersigned disagrees and submits that the aggravating factors present in this case are: 1. a pattern of misconduct; 2. multiple offenses; 3. selfish or dishonest motive; and 4. failure to acknowledge the wrongful nature of conduct.

V. SANCTION

Rule 3.15 of the Rules of Lawyer Disciplinary Procedure provides that the following sanctions may be imposed in a disciplinary proceeding: (1) probation; (2) restitution; (3) limitation on the nature or extent of future practice; (4) supervised practice; (5) community service; (6) admonishment; (7) reprimand; (8) suspension; or (9) annulment.

Sanctions are not imposed only to punish the attorney but also are designed to reassure the public's confidence in the integrity of the legal profession and to deter other lawyers from similar conduct. Committee on Legal Ethics v. White, 189 W.Va. 135, 428 S.E.2d 556 (1993); Committee on Legal Ethics v. Walker, 178 W.Va. 150, 358 S.E.2d 234 (1987); Committee on Legal Ethics v. Roark, 181 W.Va. 260, 382 S.E.2d 313 (1989); Lawyer Disciplinary Board v. Friend, 200 W.Va.

368, 489 S.E.2d 750 (1997); Lawyer Disciplinary Board v. Keenan, 208 W.Va. 645, 542 S.E.2d 466 (2000).

A principle purpose of attorney disciplinary proceedings is to safeguard the public's interest in the administration of justice. Daily Gazette v. Committee on Legal Ethics, 174 W.Va. 359, 326 S.E.2d 705 (1984); Lawyer Disciplinary Board v. Hardison, 205 W.Va. 344, 518 S.E.2d 101 (1999). This type of conduct has a dramatic impact on the public's confidence in the integrity of the Bar and a severe sanction is warranted. *See* Lawyer Disciplinary Board v. Wade, 217 W.Va. 58, 614 S.E. 2d 705 (2005); Lawyer Disciplinary Board v. Daniel, Supreme Court Nos. 32574 and 32613; and Lawyer Disciplinary Board v. Askintowicz, Supreme Court No. 33070.

As fully discussed *supra*, despite the conclusions of the Hearing Panel Subcommittee, Respondent's admitted conduct is in violation of Rules 1.15(a); 1.15(b); 1.15(c) 8.4(c); and 8.4(d) of the Rules of Professional Conduct. This Honorable Court proceeds from a general rule that, absent compelling extenuating circumstances, misappropriation or conversion by a lawyer of funds entrusted to his/her care warrants disbarment. Syl. Pt. 5, Office of Disciplinary Counsel v. Jordan, 204 W. Va. 495, 513 S.E.2d 722 (1998). ODC is concerned that the Hearing Panel Subcommittee's recommended sanction of a reprimand also relies heavily upon the finding that the funds in question did not belong to the clients. This distinction is faulty and not supported by the plain language of Rule 1.15 or the case law in West Virginia. The Hearing Panel Subcommittee's reliance on this distinction is critical to the recommendation as to the minimal sanction imposed against Respondent.

In Committee on Legal Ethics v. Hess, 186 W.Va. 514, 413 S.E.2d 169, 1991 W.Va. Lexis 250 (1991) the Court reasoned that if a lawyer converted firm monies to his own use without authorization, the attorney is subject to a disciplinary charge. Hess was suspended from the practice of law for two years. In Lawyer Disciplinary Board v. Ford, 211 W.Va. 228, 546 S.E.2d 438 (2002)

the lawyer after making full and timely restitution was admonished for failing to turn over \$22,450.00 in fees to partnership, which included the lawyer's father. Most recently, in Lawyer Disciplinary Board. v. Coleman, 219 W. Va. 790, 639 S.E.2d 882 (2006), Mr. Coleman misappropriated firm fees and the Supreme Court of Appeals of West Virginia stated that "we do not take lightly those disciplinary cases in which a lawyer's misconduct involves the misappropriation of money. In such instances, we have resolutely held that, unless the attorney facing discipline can demonstrate otherwise, disbarment is the only sanction befitting of such grievous misconduct." Id., 219 W.Va. at 797, 639 S.E.2d at 889. In addition, "[m]isappropriation of funds by an attorney involves moral turpitude; it is an act infected with deceit and dishonesty and will result in disbarment in the absence of compelling extenuating circumstances justifying a lesser sanction." Id. quoting Lawyer Disciplinary Bd. v. Kupec, 202 W.Va. 556, 571, 505 S.E.2d 619, 634 (1998) (additional quotations and citation omitted).

West Virginia's presumptive sanction of disbarment for the fundamentally dishonest conduct of conversion is consistent with the decisions of other states as well, whether the funds are client funds or third party funds. See, e.g., Grievance Administrator v. Mark J. Tyslenko, 12-17-GA (ADB 2013) (disbarred attorney for knowingly converting funds in fees paid to by clients and owed to his law firm); In Re Todd J. Thompson, 991 P.2d 820 (Colo. 1999) (disbarred attorney for misappropriating funds that clients gave to him that he should have turned over to law firm); In Re Jeffrey F. Renshaw, 298 P.3d 1216 (Ore. 2013) (rejected various mitigating factors and stated, "a lawyer who 'embezzles' funds from the lawyer's firm is no different from a lawyer who takes his or her client's funds and . . . 'disbarment will generally follow' from that conduct"). Additionally, in 2010, the State of Virginia accepted the affidavit declaring consent to revocation of the law license of Kyle Cornelia Leftwich for similar misconduct. Leftwich while employed at the law firm of

Marks & Harrison, had a SSA disability practice. When she successfully concluded a claim, SSA would issue a fee check made payable to her and beginning in 2003, she kept those fees rather than delivering them to the firm. The Virginia Bar accepted her consent to revocation and she was later prosecuted and convicted of embezzlement. [See Attached Virginia Order and Affidavit].

Moreover, the ABA Standards state that:

5.11 Disbarment is generally appropriate when: . . . (b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

ABA Standards for Imposing Lawyer Sanctions, Std. 5.11(b).

The ABA Standards further state that:

7.1 Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional, with the intent to obtain a benefit for the lawyer...and causes serious or potentially serious injury to...the legal system.

ABA Standards for Imposing Lawyer Sanctions, Std. 7.1.

Additionally, while there may be factors present that may mitigate from the presumption of disbarment in this case, the Hearing Panel Subcommittee in its recommended sanction creates “self help” as a legitimate defense to misappropriation or conversion and this should be expressly rejected by this Court. This Honorable Court has recognized a creditor's common law right to self help repossession pursuant to the Uniform Commercial Code, Article 9, Section 503, wherein a secured party has the right to take possession of collateral without judicial process if this can be done without breach of the peace. *See General Electric Credit Corp. v. Timbrook*, 170 W.Va. 143, 291 S.E.2d 383 (1982), *Cook v. Lilly*, 158 W.Va. 99, 208 S.E.2d 784 (1974). This Court has never held that “self help” is a defense in disciplinary matters, nor should it. Respondent was an employee of H&L,

Respondent is an attorney with fiduciary obligations and he is not legally permitted to exercise the common law remedy.

The Hearing Panel Subcommittee's factual findings make clear that Respondent *knew* that H&L were entitled to at least a portion of the fees.¹³ Rule 1.15 affirms the well-established requirements for segregation of funds traditionally imposed on professional fiduciaries, such as lawyers. The traditional requirements for client money was extended under Rule 1.15 to include property in which third parties claim an interest in as well. By diverting funds owed to the firm and ultimately converting and using the same for his own personal interests without the knowledge and/or consent of H&L, Respondent committed clear and numerous violations of the Rules of Professional Conduct. Even considering Respondent's claim that he had outstanding expenses owed to him by H&L, does not legitimize his actions. Under the Rules of Professional Conduct, an attorney is not entitled to simply pocket money of which another party has an interest because the attorney may be owed outstanding money from the party. The high court of Nebraska recently rejected such defense of self help in State of Nebraska ex rel. Counsel for Discipline of the Nebraska Supreme Court v. Sundvold, 844 N.W.2d 771 (Neb. 2014) holding "Respondent never informed the law firm that he had received the payments from the clients or that he intended to keep the payments as a means to offset the amount the law firm purportedly owed to him. Respondent was misappropriating payments owed to the law firm and failed to inform the law firm that he was doing so." The attorney was suspended for a period of three (3) years after mitigating factors were considered.

¹³ ODC contends that given the traditional employee-employer relationship with an associate and the firm that all the fees were to be turned over to H&L. Respondent was not operating as an independent contractor in a "eat what you kill" arrangement with H&L, Respondent fully enjoyed all the benefits of an associate attorney and the resources of a large firm.

VI. CONCLUSION

The Rules of Professional Conduct state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. Syllabus Pt. 3, *in part*, Committee on Legal Ethics v. Tatterson, 173 W.Va. 613, 319 S.E.2d 381 (1984), *cited in* Committee on Legal Ethics v. Morton, 410 S.E.2d 279, 281 (1991). In addition, discipline must serve as both instruction on the standards for ethical conduct and as a deterrent against similar misconduct to other attorneys. In Syllabus Point 3 of Committee on Legal Ethics v. Walker, 178 W.Va. 150, 358 S.E.2d 234 (1987), the Court stated:

In deciding on the appropriate disciplinary action for ethical violations, this Court must consider not only what steps would appropriately punish the respondent attorney, but also whether the discipline imposed is adequate to serve as an effective deterrent to other members of the Bar and at the same time restore public confidence in the ethical standards of the legal profession.

Moreover, a principle purpose of attorney disciplinary proceedings is to safeguard the public's interest in the administration of justice. Daily Gazette v. Committee on Legal Ethics, 174 W.Va. 359, 326 S.E.2d 705 (1984); Lawyer Disciplinary Board v. Hardison, 205 W.Va. 344, 518 S.E.2d 101 (1999).

Accordingly, for the reasons set forth above, the Office of Disciplinary Counsel requests that this Honorable Court adopt the following sanctions:

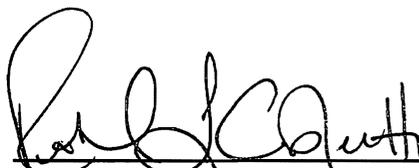
1. That Respondent's license to practice law be annulled;
2. That Respondent comply with Rule 3.28 of the Rules of Lawyer Disciplinary Procedure;
3. That prior to petitioning for reinstatement, that Respondent be required to sit for and receive a passing score on the Multi-State-Professional Responsibility Exam;

4. That prior to petitioning for reinstatement, that Respondent take an additional twelve (12) hours in Continuing Legal Education with a focus on law office management and/or legal ethics;
5. That upon reinstatement, Respondent's practice shall be supervised for a period of one (1) year by an attorney agreed upon between the Office of Disciplinary Counsel and Respondent; and
6. That Respondent be ordered to pay the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

Respectfully submitted,

The Office of Disciplinary Counsel

By counsel

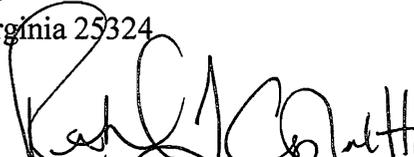


Rachael L. Fletcher Cipoletti [Bar No. 8806]
Chief Lawyer Disciplinary Counsel
City Center East, Suite 1200C
4700 MacCorkle Avenue SE
Charleston, West Virginia 25304
(304) 558-7999
(304) 558-4015 *facsimile*
rfcipoletti@wvdc.org

CERTIFICATE OF SERVICE

This is to certify that I, Rachael L. Fletcher Cipoletti, Chief Lawyer Disciplinary Counsel for the Office of Disciplinary Counsel, have this day, the 30th day of June, 2014, served a true copy of the foregoing "**Brief of the Office of Disciplinary Counsel**" upon Sherri D. Goodman, Counsel for Respondent, by mailing the same via United States Mail, with sufficient postage, to the following address:

Sherri D. Goodman, Esquire
Post Office Box 1149
Charleston, West Virginia 25324



Rachael L. Fletcher Cipoletti