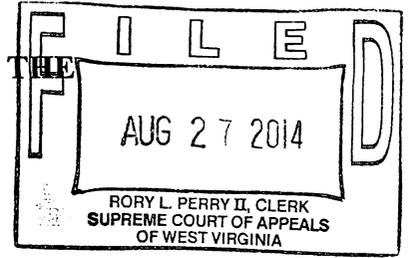


ARGUMENT DOCKET

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



LAWYER DISCIPLINARY BOARD,

Complainant,

v.

No. 12-1172

BENJAMIN F. WHITE,

Respondent.

REPLY BRIEF OF THE OFFICE OF DISCIPLINARY COUNSEL

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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. Respondent does not object to this recommendation, however, the ODC did exercise its right to object and properly notified the Chair of the Hearing Panel Subcommittee. By letter dated May 15, 2014, the Hearing Panel Subcommittee was advised of its right to retain independent counsel, and chose not to do so.

While the Court grants substantial deference to factual findings made by the Hearing Panel Subcommittee, 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). The Office of Disciplinary Counsel asserted in its brief 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.¹ ODC further asserted 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.

¹ ODC does not understand why Respondent takes umbrage to ODC's concession that it failed to meet its burden on Rule 3.4 of the Rules of Professional Conduct.

A. Respondent's request for additional time in oral argument should be denied.

ODC does not believe that Respondent's request to exceed the time of ten (10) minutes as allotted by Rule 19(e) of the Rules of Appellate Procedure is warranted under the circumstances and believes without hesitation that this Honorable Court can make a determination in this matter without unduly and unnecessarily consuming the Court's resources in oral argument. The matter has been fully briefed by the parties and the record in this matter is complete. Perhaps if Respondent chose to focus on the evidentiary record instead of extraneous issues, the need for additional time in oral argument would be eliminated.

B. Respondent's assertions that H&L engaged in unethical conduct are irrelevant and not supported by the evidence.

Respondent did not and has not filed an ethics complaint against H&L or the attorney for H&L in the civil suit. The Kanawha County Circuit Court has not vacated its judgment against Respondent, nor made any findings against H&L or the lawyer for H&L. The Hearing Panel Subcommittee did not make findings as to any ethical misconduct of H&L or the lawyer for H&L. Respondent's allegations should not be considered by this Court in reaching a determination on the merits of Respondent's course of conduct.

C. Respondent mischaracterizes ODC's position.

Respondent states that ODC's argument in support of disbarment is "premised on the contention that Mr. White converted moneys that were the unquestioned property of Hendrickson & Long..." Respondent Brief at 29. This is simply untrue. As stated in ODC's brief, 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*. ODC need not attempt to overcome the factual findings made by

the Hearing Panel Subcommittee, it instead requests the Court de novo review the application of law to the findings made the Hearing Panel Subcommittee.

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

The Hearing Panel Subcommittee's reasoning that it was unsure if after the merger, that 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, both H&L and Respondent had a legitimate interest in the fee awards and thus Respondent was under an obligation to hold the fees separate and notify H&L. In fact, the Rules require 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. If Respondent had notified H&L of the "business dispute" and advised that he was placing the questioned fee awards into a separate account—then, Respondent would be in compliance with his duties under the Rules. The Hearing Panel Subcommittee concluded that Respondent knew or should have known that H&L had a legitimate interest in at least a portion of

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 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 a portion of the SSA fee awards, and attributed that knowledge to Respondent, because Respondent failed to put the fees in a separate account, the evidence requires that there must be a finding of a violation of Rule 1.15(a) of the Rules of Professional Conduct.

The Hearing Panel Subcommittee's finding that there was no deceitful conduct in violation of Rule 8.4(c) and (d) by Respondent is simply not based on the findings of facts made by the Hearing Panel Subcommittee. 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 how could he credibly do so.) The fact that he admitted the same when confronted with undisputable evidence of the deception does not negate the deceitful activity.

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 to 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. The Hearing Panel Subcommittee's reasoning that Respondent can take 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 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

D. Self-Help is not a defense in lawyer disciplinary proceedings.

Additionally, as stated in the brief of ODC, although ODC does not believe that a public reprimand is appropriate, there may be factors present that may mitigate from the presumption of disbarment in this case. However, "self-help" is not a legitimate defense and this should be expressly rejected by this Court. 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. Respondent was an employee of H&L and he is also an attorney with fiduciary obligations and thus he is not legally permitted to exercise the common law remedy.

Respondent improperly asserts that that "public confidence in the Bar and the lawyer disciplinary board does not need restoring. It was never shaken by this business dispute among lawyers." Respondent Brief at 34. However, ODC contends that permitting lawyers to engage in unauthorized self-help does undermine the public's confidence in the Bar. A business dispute is handled by lawyers through discussion, mediation, arbitration, and, at times, civil proceedings. Lawyers are held to a higher standard and should be expected to utilize the legal system properly when they find themselves in disputes with other lawyers. Non-lawyers utilize our system of law to resolve disputes and to indicate that lawyers are not bound by the system does shake, if not shatter, public confidence in the system.

E. Alleged malice of H&L as mitigating factor should be disregarded.

Respondent argues that H&L had malice in filing the ethics complaint, but as with any party that files an ethics complaint, H&L may have had negative feelings toward Respondent because of his conduct. But there were no evil motives or attempts to utilize the disciplinary system to collect the fees from Respondent. Unlike Respondent, H&L utilized the civil justice system to reclaim its interest in the fees. And, again, H&L did help Respondent transition from H&L to his own law firm even after the firm learned of his actions.

F. Respondent's distinction of Hess and reliance upon Gende are erroneous.

Respondent attempts to distinguish the Hess case by claiming that the “large volume of evidence demonstrates that the employment was not a traditional one and its terms were incomplete and ambiguous.” Respondent Brief at 32. However, from the outset of the employment relationship with H&L, Respondent did as a part of pattern and practice tender the social security fees to H&L. Respondent's departure from the pattern and practice of tendering the fee awards for deposit at H&L did result from Respondent's belief that he was being treated unfairly by H&L. Respondent knew that the funds were not authorized solely to him and that the firm had an interest, and in fact, based upon the course of conduct, he was aware that the firm believed it was entitled to all fee awards. “[T]his is not a situation where there is a bond fide dispute as to whether, under the firm's past practice, the funds converted were authorized.” Committee on Legal Ethics v. Hess, 186 W.Va. 514 at 517, 413 S.E.2d 169 (1991).

Respondent also cites to Office of Lawyer Regulation v. Gende, 344 Wis.2d 1, 821 N.W.2d 393 (2012) in support of the public reprimand. However, this reliance is faulty. The facts and circumstances arising in Gende are the result of a separation agreement after Gende left the firm of Cannon & Dunphy, S.C.. There is no evidence that when Gende was employed by the firm that

he diverted the fees from Cannon and & Dunphy. When Gende left the firm's employ, the parties negotiated a separation agreement that permitted Gende to retain 20% of the fee, and the firm was remitted 80%, on all but one case, that would be split 75/25 in favor of the firm. *Id.* At 395. Almost immediately, litigation ensued over the fees and the "war" that Respondent references refers to the actions of the parties in the civil litigation. Gende "held or tried to hold" 80% percent of the fees in trust, while paying himself his earned 20%. However, in two cases, one of which being the case specifically negotiated at 75/25, he took the entire fee and set nothing aside for the firm. The referee in reaching its decision noted that Gende had a colorable claim to the fees in the two cases and that might assist Gende in litigation, but it did not "permit him to help himself to disputed funds." *Id.* At 397. Gende was in litigation from the outset over the subject fees, and attempted to "steal" the fees by use of the court system and for his misconduct, and he was reprimanded and ordered to repay the firm. As ODC has conceded it has not met the burden regarding Respondent's conduct in the civil suit filed by H&L, this case is somewhat irrelevant and that is not what the situation is for Respondent and H&L.

Dissatisfied with H&L and feeling rejected by Eckert Seamans, Respondent, while a salaried associate lawyer, departed from his standard practice of giving the awards to the firm (that he followed from the outset of his employment) because he was concerned for himself. Respondent knew H&L had *at least* an interest in the fees. He squirreled the fees away unbeknownst to the firm and when he was caught—he ultimately took every last dime of the fees for his own personal use.

Conclusion

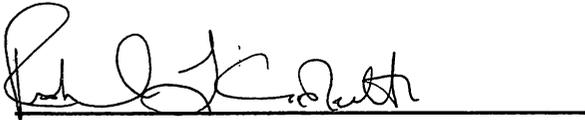
Discipline must serve as both instruction on the standards for ethical conduct and as a deterrent against similar misconduct to other attorneys. Moreover, a principle purpose of attorney disciplinary proceedings is to safeguard the public's interest in the administration of justice. Daily Gazette v. 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). Lawyers should be reminded that the Rules apply to lawyers at all times, especially when they find themselves "in a dispute with another lawyer or firm". Respondent Brief at 34.

Accordingly, for the reasons set forth above, the Office of Disciplinary Counsel requests that this Honorable Court reject self-help as a defense in disciplinary proceedings and 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



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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 27th day of August, 2014, served a true copy of the foregoing "**Reply 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