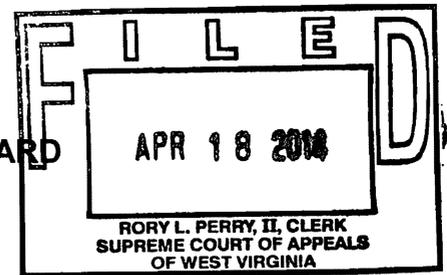


**BEFORE THE LAWYER DISCIPLINARY BOARD
STATE OF WEST VIRGINIA**



In Re: Benjamin F. White, a member of
The West Virginia State Bar
Supreme Court No.: 12-1172

Bar No.: 10062
I.D. No.: 09-03-334

**REPORT AND RECOMMENDATION OF THE
HEARING PANEL SUBCOMMITTEE**

I. PROCEDURAL HISTORY

Formal charges were filed against Respondent Benjamin F. White with the Clerk of the Supreme Court of Appeals on October 9, 2012, and served upon Respondent on October 11, 2012. Disciplinary Counsel filed her mandatory discovery on November 1, 2012, with supplements filed on May 15, 2013 and June 25, 2013. Respondent filed his Answer to the Statement of Charges on November 26, 2013. Respondent provided his mandatory discovery on 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 June 28, 2013, Respondent filed a Motion of Respondent for Subpoena. On July 2, 2013, the Office of Disciplinary Counsel (ODC) filed its response. On July 3, 2013, the Hearing Panel Subcommittee granted Respondent's Motion. On July 5, 2013, J. Miles Morgan, Esquire, on behalf of Hendrickson and Long, PLLC, filed a Motion to Quash Subpoena. On 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 July 9, 2013, the Office of Disciplinary Counsel filed a Motion for Issuance of Subpoena. On July 11, 2013, Respondent filed his response. On July 19, 2013, ODC filed its reply to Respondent's response. On July 26, 2013, the Hearing Panel Subcommittee granted, in part, the ODC's Motion.

On November 6, 2013, ODC filed a Motion to Exclude Testimony of Undisclosed Witnesses and Use of Untimely Disclosed Documents, which was denied in part and granted in part. (Tr. Vol. III pp. 26-29.)

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 Exhibit 22 were admitted into evidence.

The parties' proposed findings and conclusions were due January 10, 2014. Respondent requested and ODC agreed to an extension to January 16, 2013. ODC timely filed its Proposed Findings of Fact, Conclusions of Law and Recommended Sanctions. None were filed by Respondent on that date. On January 23, ODC filed a Motion to Exclude Respondent's Proposed Findings of Fact, Conclusions of Law and Recommended Sanctions. Nothing was heard from Respondent until counsel for the parties contacted the Hearing Panel Subcommittee

Chairman by telephone on February 3, 2014. In the telephone conference, counsel for Respondent explained why she had been unable to timely file her findings and requested an extension to February 18, 2014. ODC agreed. The Proposed Findings of Fact and Conclusions of Law Submitted by the Respondent, Benjamin F. White, was served by email February 19, 2014 at 6:43 a.m.

Based on the testimony, exhibits, and a review of the parties' proposed findings, the Hearing Panel Subcommittee of the Lawyer Disciplinary Board (HPS) makes the following findings of fact, conclusions of law, and recommended sanctions.

II. FINDINGS OF FACT

1. Benjamin F. White, the Respondent, is a lawyer practicing in Chapmanville, which is located in Logan County, West Virginia. Mr. White 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.
2. Prior to attending law school, Mr. White 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.)
3. Mr. White'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.) Mr. White received a base salary and bonuses. In 2007, Mr. White 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.) When he started work with Jan Dils he 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.)

4. 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. See http://www.ssa.gov/representation/fee_agreements.htm#a0=0&sb=2.

5. While working for Jan Dils' firm, Mr. White ran into Steve Hastings, from the Charleston law firm of Hendrickson & Long (H&L), who asked Mr. White if he would refer personal injury claims of his social security clients to H&L. Mr. White referred one. Following the successful resolution of that case, Mr. Hastings began discussing with Mr. White about affiliating with Hendrickson & Long. They had discussions over four to six months. (Tr. Vol. II pp. 35-37.)

6. Mr. White was not interested in working for another law firm. He wanted to develop his own social security practice. He testified he made this clear to Mr. Hastings. (Tr. Vol. II pp. 38-39.)

7. Therefore, the discussions with Mr. Hastings were centered around H&L providing Mr. White an office and resources for him to develop his social security practice. In return, Mr. White

would refer to H&L all personal injury claims arising out of social security disability claims. (Tr. Vol. II pp. 39-40.)

8. Mr. White 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" once a new case is opened. (Tr. Vol. II pp.40-43; Respondent Exhibit 18.)

9. Mr. White 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 Mr. White and his wife. (Tr. Vol. I p. 8; Vol. II pp. 47-48.)

10. At this meeting, according to Mr. White, he and his wife told Mr. Hendrickson and Mr. Long that Mr. White could not become a part of the firm for less than what he was currently earning, \$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.)

11. Mr. White testified Mr. Hendrickson proposed to pay a salary 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]."The parties reached no agreement that night on how to split the social security fees, but Mr. White was not worried because he did not anticipate receiving any fees for at least 18 months. Nevertheless, Mr. White 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.)

12. David Hendrickson did not testify about the substance of the discussions or negotiations with Mr. White that occurred at the meeting at his house. He simply testified the parties reached a verbal agreement "that eventually got memorialized into a letter by our office manager Rick Fisher." (Tr. Vol. I pp. 9, 11.)

13. Scott Long also did not testify to the substance of the negotiations or discussions with Mr. White that occurred during the meeting at Mr. Hendrickson's home, except he recalled "discussion about what [Mr. White's] compensation historically had been." (Tr. Vol. I pp. 84-85.)

14. Rick Fisher, H&L's office manager, testified Mr. Hendrickson told him the terms of Mr. White's employment. He then prepared and signed a letter to Mr. White dated March 25, 2008, which he calls a "term sheet." (Tr. Vol. I pp. 191-192, 308-309.)

15. The March 25, 2008 letter offers Mr. White 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;
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.)

16. Although Mr. Hendrickson testified the agreement with Mr. White required him to turn over to the firm all social security fees he earned (Tr. Vol. I pp. 18-19), the March 25, 2008 letter says nothing about social security fees. There is also no testimony by anyone of any conversation with Mr. White where he was told, or where he agreed, prior to employment that all the social security fees he earned would belong to H&L.

17. While 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 Mr. White's "bonus amounts," there is no testimony anyone explained to Mr. White prior to or at the start of his employment how H&L's bonus plan was structured.

18. Mr. Hendrickson testified Mr. White's employment with the firm was the same as other associates. That is, Mr. White 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. Mr. White was also provided office equipment, supplies and secretarial help. Mr. Hendrickson expected, as with all other associates and members of the firm, the fees Mr. White earned belonged to the firm. (Tr. Vol. I pp. 11-19.)

19. Further, Mr. Hendrickson testified the \$80,000.00 loan was to help Mr. White "until he started participating in the bonus pool, and then we were hoping it would be paid back." Once

Mr. White 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.)

20. Mr. White understood the arrangement with H&L was to help him develop his own social security practice as a separate entity. According to him, he was held out as the attorney responsible for the social security practice at H&L. A toll free phone number was acquired and advertised as 1-800-BFWhite. A web site at bfwhite.com was created, and commercials aired featuring Mr. White. The H&L logo also appeared in both the web site and in the commercials. (Tr. Vol. 11 pp. 52-54.)

21. Although Mr. Hendrickson testified in direct examination that Mr. White's arrangement was the same as other associates, he acknowledged in cross-examination the firm's arrangement with Mr. White was different from the other associates of the firm. (Tr. Vol. I pp. 39-40.)

22. 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.) Mr. White understood this language to mean that how the loan was to be paid back would be determined later. 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.) As Mr. White's revenue increased, the loan would be repaid by a percentage of the social security fees. Eventually, he would not need a salary or a bonus from the firm. (Tr. Vol. II pp. 199-201.)

23. Mr. White 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.)

24. 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 Mr.

White's name, Mr. White would endorse the checks and return them to the office manager, Mr. Fisher. Mr. White says these checks were intended by him as payments on the loan. (Tr. Vol. II pp. 62-63.)

25. Mr. Fisher testified Mr. White 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 Mr. White to be endorsed. (Tr. Vol. I pp. 207-208.)

26. On September 30, 2008, Mr. White signed a Line of Credit Promissory Note for \$80,000.00. The document recited that Mr. White 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).

27. The terms of the promissory note differed from the "term" letter of March 25, 2008. The letter stated that H&L would loan Mr. White "up to" \$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, Mr. White 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. (Id.)

28. Mr. White testified he was given no opportunity to negotiate the terms of the promissory note. 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.)

29. Mr. Hendrickson was out of town. So Mr. White talked to Scott Long about the proposed promissory note and told him this was not their agreement. According to Mr. White, 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.)

30. 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 Mr. White, 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.)

31. Mr. White 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.)

32. Mr. Long testified he met with Mr. White 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.)

33. Mr. Fisher testified he requested Steve Shwartz, an attorney in the firm, to prepare the note. Mr. Fisher told the attorney the substance of the terms. Mr. Fisher presented it to Mr. White three or four times. Mr. White did not want to sign the note. They made "small changes"

at Mr. White's request. He acknowledged that he threatened to withhold the draw if Mr. White did not sign. 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.)

34. In October 2008 Mr. White learned how the H&L bonus program worked. Mr. Fisher presented him with a notebook called "WIP," for work in progress. This was a calculation of the overhead costs attributed to Mr. White's practice. In order to be eligible for the bonus, his practice had to be profitable. Mr. White 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 his overhead before he would receive a bonus. Mr. White 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.)

35. 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 attorney has to be profitable. (Tr. Vol. I pp. 194-197.) Mr. White never received a quarterly bonus because "[h]e was never profitable." (Tr. Vol. I p. 254.)

36. The quarterly bonus program is also set forth in a document titled "Hendrickson and Long Bonus Plan." It was never presented to Mr. White until obtained by subpoena during the disciplinary proceedings. (Tr. Vol. II p. 215; ODC Exhibit 20, Bates 801-804.)

37. Mr. White 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. Mr. White 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.)

38. The first fee award check that Mr. White 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.) Mr. White 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 Mr. White 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.)

39. Thereafter, Mr. White endorsed all of the fee award checks that were delivered to him and returned them to the firm 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.)

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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.)

40. During the time period 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 Mr. White. (Tr. Vol. I p. 20.)

41. During the transition period in December 2008, Mr. White 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.)

42. After the merger with Eckert Seamans on January 1, 2009, H&L continued in existence. Eckert Seamans was still evaluating Mr. White's practice. It asked H&L to continue to pay Mr. White while Eckert Seamans reimbursed H&L for his salary and expenses. Mr. Fisher informed Mr. White of this arrangement late January 2009. (ODC Ex. 1, Bates 2; Tr. Vol. I pp. 217-220.)

43. 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.)

44. Beginning February 2009, Mr. White 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.)

45. During this time period when Mr. White'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 expenses, 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.)

46. At some point in April 2009, Eckert Seamans rejected Mr. White's plan. Mr. Fisher is the one who told Mr. White 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 Mr. White that Mr. Hendrickson was going to ask Eckert Seamans to pay Mr. White another 30 days. (Tr. Vol. I p. 225; Vol. II pp. 90-92.)

47. Mr. White began preparations to move from the H&L offices and 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. It had been a Chinese restaurant, and the landlord was responsible for the build-out so the space would function as an office. However,

H&L was prepared to let Mr. White work out of its office until the remodeling was complete. (Tr. Vol. I p. 228; Vol. II pp. 227-231.)

48. Shortly before May 20, 2009, Mr. Fisher grew concerned about the lack of SSA fee checks from Mr. White. He was aware of three checks that had been delivered to Mr. White, but not returned. He went into Mr. White's office at 6 a.m. on May 19 with an IT person to access Prevail, the software program designed for social security work, on Mr. White's computer. He found scanned copies of SSA fee checks in the approximate amount of \$46,000.00 and printed those out. 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.)

49. That same day, Mr. Fisher came to Mr. White's office and asked him to sign an SSA Form 3288, which is a Consent for Release of Information.¹ 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 Mr. White'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 containing 323 names and their Social Security numbers reads:

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 Mr. White 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.)

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

50. Mr. White 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. (Tr. Vol. I p. 237; Vol. II p. 96.) The form must also be signed by each individual claimant. (ODC Ex. 20, Bates 812.)

51. Mr. White 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 Mr. White's two assistants sent a text to him that they had been ordered to leave H&L premises. Because Sonya rode into work with Mr. White from Logan County, she had to wait until he returned around 6 p.m. for Mr. White. 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.)

52. At the 9 a.m. meeting on May 20, 2009, Mr. Hendrickson showed Mr. White copies of the checks they had found on the computer and demanded to be given the checks. Mr. White tried to explain his position and offered to place the checks in escrow. According to Mr. White, Mr. Hendrickson screamed at him and threatened him with prosecution for embezzlement. Mr. Fisher asked him again to sign the SSA Form 3288. Again, Mr. White refused because it would not accomplish what they were seeking. (Tr. Vol. II pp. 98-99.)

53. Mr. White 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 Mr. White had: Form SSA-3288 would not work. (Tr. Vol. II p. 99.) In response to a question from a HPS member, 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.)

54. At the disciplinary hearing, David Hendrickson was still insisting that Mr. White 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.)

55. Mr. Fisher was also insisting in his direct testimony that "to date" Mr. White 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.

56. At any rate, the May 20, 2009 meeting ended with Mr. White 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 Mr. White's files to him. Mr. Fisher also had a social security fee check which he requested Mr. White endorse. Mr. White endorsed the check perceiving he had to sign the check to receive his files. (Tr. Vol. II pp. 99-100.)

57. Mr. Fisher sent Mr. White an undated letter that appears to have been sent on May 21, 2009. It "confirms" Mr. White was terminated effective May 15, 2009 and demanded an accounting of all fees received by Mr. White from April 21, 2008 to May 15, 2009 as well as any unreimbursed 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 Mr. White to sign with his May 21, 2009 letter and further recited that he had sent Mr. White 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.)

58. By letter dated June 29, 2009, David Hendrickson wrote to the ODC claiming Mr. White had misappropriated fees belonging to H&L; that Mr. White 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.)

59. H&L's ethics complaint was forwarded to Mr. White by letter dated July 15, 2009. (ODC Ex. 3, Bates 14-15.) Mr. White 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.) Mr. White also sent this accounting to H&L by letter dated August 20, 2009. (ODC Ex. 20, Bates 832-833.)

60. On the first day of the disciplinary hearing, David Hendrickson stated he still believed Mr. White 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 Mr. White'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.)

61. As a result of this testimony, Mr. White and his counsel, along with counsel for ODC attempted to obtain additional information from the SSA. Mr. White 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. Mr. White established all the disputed checks were deposited to H&L. (Tr. Vol. II pp. 92-95; Respondent Ex. 13, 16, and 17.)

62. ODC also subpoenaed Mr. White's business and personal bank account records which demonstrated no social security fee checks prior to December 31, 2009 were deposited in Mr. White's own accounts. (ODC Ex. 23; Tr. Vol. III pp. 73-74.)

63. 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. The HPS is satisfied with Mr. White's accounting. This accounting shows from February 2009 to May 15, 2009, he did not turn over to H&L eighteen fee award checks totaling \$46,326.69. (ODC Ex. 20, Bates 808.) ODC did not prove any other checks or amounts it claims is owing to H&L.

64. Prior to the May 20, 2009 meeting where Mr. White was terminated, he had cashed five of those checks, totaling \$5,607.41. The first was cashed April 28, 2009, after he was told Eckert Seamans did not want him. Mr. White 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, Mr. White held the remaining checks and cashed them on separate dates. (Respondent Ex. 13.) According to him they were cashed as needed to set up and fund his practice. (Tr. Vol. II pp. 116-120.)

65. On October 30, 2009, H&L filed a lawsuit against Mr. White 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, Mr. White represented himself.

66. Before and during this litigation, H&L received four more SSA fee checks made payable to Mr. White 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.) No one at the firm notified Mr. White when they arrived. These checks were, at some point, turned over to Mr. Morgan. They were allowed to go stale. During the litigation, Mr. White 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.)

67. 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).²
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].)

2. These are the 4 checks described in paragraph 66, supra.

68. Following mediation, Mr. White 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.)

69. Mr. White'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, Mr. White 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 Mr. White's 1-800-BFWHITE number, he would tender the check. According to Mr. White, Mr. Fisher said that he had forgotten about the phone number and he would try to get it done. (Vol. II, 129-130.)

70. Transferring the 800 number from H&L's phone company to Mr. White'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.)

71. 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

Mr. White is to bring cash for the remaining funds owing. The hearing was scheduled for October 10, 2011. (Tr. Vol. I pp. 354-356; ODC Ex. 17, Bates 677.)

72. The hearing noticed for October 10, 2011 was actually held on October 13, 2011. (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 still needed to reissue. He explained he had a draft release, but until the last check was reissued, the release could not be signed and the case dismissed. 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.)

73. The remaining check came from Mr. White's representation of William Anderson. A print-out from Mr. White's Prevail program indicates that Mr. White 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 Mr. White. (Tr. Vol. II pp. 138-140; Respondent Ex. 3, entry for October 13, 2011.) Mr. White e-mailed Vincent King and Mr. Morgan that same day with the information. (ODC Ex. 17, Bates 746-747.)

74. Mr. White heard nothing further from the SSA. The Office of Disciplinary Counsel sent a letter to Mr. White dated January 10, 2012 asking for the status of the civil litigation. (ODC Ex. 13.) Mr. White 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.)

75. On February 1, 2012, Mr. Fisher e-mailed Mr. White asking about two checks: Robert Thompson and William Anderson saying H&L had not received them. (ODC Ex. 17, Bates 744.) Mr. White did not respond. He had set up his e-mail so that messages relating to the civil litigation would go in a particular folder. In the past months, he didn't check it because he believed the litigation had ended. (Tr. Vol. II pp. 146-147.) As for the Thompson check Mr. Fisher was looking for, apparently he did not remember the Thompson check had been previously delivered to him by Mr. White. As set forth in Mr. White'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.)

76. On April 18, 2012 at 2:17 p.m. Mr. Fisher e-mailed Mr. White to ask him about the Anderson check. He was still confused about the Thompson check because he also asked about the trace on “both checks.” Mr. Morgan also e-mailed Mr. White 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.)

77. Mr. White did not see these e-mails immediately for the same reason he did not see the February e-mail from Mr. Fisher.

78. April 23, 2012 at 4:56 p.m., Mr. Morgan e-mailed Mr. White again. He recited that Mr. White 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 Mr. White 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 [Mr. White] 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.)

79. At 7:51 p.m. on April 23, 2012, Mr. White 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.)

80. 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.

Mr. Morgan had evidently forgotten that the SSA told Mr. White in October 2011 that the check had already been reissued and mailed to Mr. White at H&L's address. The SSA was supposed to put a trace on the check.

81. Mr. White'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, Bates1085.) He testified he believes he called about this but he doesn't remember who he talked to. (Tr. Vol. II pp. 150-151.) However, Mr. Morgan testified at the hearing Mr. White 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.)

82. Mr. Morgan filed a Motion for Entry of Judgment for the Breach of Settlement Agreement on April 25, 2011. In paragraph 8, he represented to the Court: "Since the hearing, at the Court's 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 Mr. White on April 18, 2012, Mr. Morgan's e-mail of April 23, 2012 to Mr. White, and Mr. Fisher's e-mail to Mr. Morgan of April 24, 2012. Mr. Morgan did not include Mr. White's e-mail response of April 23, 2012 or Mr. Morgan's April 24, 2012 e-mail back to Mr. White. (ODC Ex. 17, Bates 688-690.)

83. When asked at the disciplinary hearing on cross-examination why he did not disclose to the Court that Mr. White had responded by email of April 23, 2012, Mr. Morgan answered that he was justified in omitting Mr. White's e-mail response because he thought "it was not responsive" to the issue of where the Anderson check was. Mr. Morgan considered Mr. White'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.)

84. Mr. Morgan mailed a copy of the motion to Mr. White and also e-mailed it as a pdf. Mr. White 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.)

85. Since Mr. White 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. Paragraph 8 read: "Since the hearing, at the Court's request, Plaintiff's counsel has repeatedly requested Defendants to report on the status of the payment, on or about February and April 2012, to no avail. See Exhibit B to Plaintiff's Motion." 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.)

86. Unaware of these proceedings, Mr. White 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.)

87. In the meantime, 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 Mr. White's bank account to pay H&L on August 22, 2012. (ODC 17, Bates 779-783.)

88. Mr. White finally received the Anderson check from the SSA issued on October 1, 2012 in the amount of \$3,548.50. (Respondent Ex. 15.)³ There is no evidence the release in the civil litigation was ever signed. On May 28, 2013, H&L issued an Internal Revenue Service Form

3. Pursuant to the parties' settlement agreement, Mr. White 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. Even though the SSA reduced the amount to \$3,548.50, H&L obtained the original amount per its Suggestion.

1099-C to Mr. White in the amount of \$48,607.25 as cancellation of debt during 2012.
(Respondent Ex. 20.)

III. THE CHARGES

1. ODC charges Mr. White knowingly failed to promptly advise H&L of the receipt of funds from the SSA; that he failed to turn over funds that rightfully belonged to H&L and instead diverted those funds away from H&L; and/or that he failed to properly keep the funds until the dispute between Mr. White and H&L had been resolved, and instead ultimately converted the funds to his own personal use, which are violations of Rules 1.15(a), (b), and (c), and 8.4(c) and (d) of the Rules of Professional Conduct. (Disciplinary Counsel's Proposed Findings of Fact, Conclusions of Law and Recommended Sanctions p.14.)

2. Rules 1.15(a), (b), (c), and 8.4(c) and (d) provide in relevant part as follows:

Rule 1.15. Safekeeping property.

(a) A lawyer shall hold property of . . . third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. . . .

(b) Upon receiving funds or other property in which a . . . third person has an interest, a lawyer shall promptly notify the . . . third party. . . .

(c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice.

3. ODC further charges that Respondent "failed to honor the agreed upon terms of the settlement agreement," and thereby violated Rule 3.4(c) of the Rules of Professional Conduct.

(Disciplinary Counsel's Proposed Findings of Fact, Conclusions of Law and Recommended Sanctions p. 16.)

4. Rule 3.4(c) provides as follows:

Rule 3.4 Fairness to Opposing Party and Counsel

A lawyer shall not:

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists.

IV. Discussion

H&L claims all the social security fees earned by Mr. White belonged to the firm while Mr. White's position is the fees were to be split between him and H&L in an amount to be agreed upon and a portion applied to repayment of the \$80,000.00 loan. The HPS finds the parties' dispute was legitimate and Mr. White's claim is reasonable and credible given the facts of this case.

The parties entered into contract, the material terms of which were ambiguous, incomplete and unclear. First of all, there is no mention of social security fees in the March 25, 2008 "term" letter, nor any evidence anyone specifically discussed this with Mr. White and that he agreed all social security fees would belong to H&L. Secondly, there is no evidence anyone explained to Mr. White H&L's bonus program and that he understood the social security fees he generated would first be applied to the overhead of his practice before being applied to his loan as a bonus.

Although H&L claims all fees earned by Mr. White belonged to the firm the same as all fees generated by other associates of the firm, Mr. White's understanding that the fees would be split and a portion applied to repay the loan is reasonable. This is because Mr. White was earning a base salary of \$160,000.00 when he left Jan Dils' practice. As he testified, he told H&L he could not join the firm for less than that amount. H&L offered an annual salary of \$80,000.00

plus an annual loan of \$80,000.00, an amount equal to \$160,000.00. Given this arrangement, if the social security fees earned by Mr. White were not applied to repay the loan in some form, then Mr. White would net just \$80,000.00. Further, if Mr. White did not receive some portion of the fees generated by him in excess of \$80,000.00, he would not receive any more than \$160,000.00 a year, and there would have been no incentive for him to leave Jan Dils' firm. In this regard, it was also Mr. White's understanding that H&L was helping him develop a separate social security practice with some type of affiliation with the firm. The ultimate goal was that he would no longer need a salary or draw from the loan once he was able to generate sufficient fees from the practice. In return, the social security fees were to be split between him and H&L at a percent to be determined, and H&L would also have all referrals from all personal injury claims arising from the social security cases.

Mr. White's arrangement with H&L was also not a typical employee/associate relationship. In addition to his salary of \$80,000.00 per year, he was provided a loan of \$80,000.00. The firm also had a separate 800 phone line, BFWHITE, and advertised the social security practice primarily featuring Mr. White.

The HPS also finds H&L's witness, David Hendrickson, was not convincing for several reasons. First, Mr. Hendrickson was inconsistent about the employment contract itself. Initially, he stated in his June 29, 2009 letter to ODC that Mr. White had "no written employment contract with the firm." (ODC Exhibit 1, Bates 1.) It is Mr. White who then produced the March 25, 2008 letter when giving his sworn statement to ODC. (ODC Exhibit 8, Bates 117; ODC Exhibit 9, Bates 221). At the disciplinary hearing, Mr. Hendrickson next maintained the parties had a verbal agreement that was later memorialized by the March 25, 2008 letter. (Tr. Vol. I p. 11.)

Further, in his June 29, 2009 letter, Mr. Hendrickson also stated Mr. White "agreed to turn over to Hendrickson & Long, PLLC all attorney fees he received from the Social Security Administration..." and "Mr. White agreed that he would have no personal financial interest in any portion of... the fees he was paid by the Social Security Administration." (ODC Exhibit 1, Bates 1.) However, as set forth above, there is no evidence anyone talked to Mr. White about all the social security fees belonging to the firm or that Mr. White agreed to this.

Mr. Hendrickson also testified he could not recall Mr. White telling him he could not start at H&L for less than \$160,000.00, and he denied the \$80,000.00 loan was a method to achieve \$160,000.00. (Tr. Vol. I pp. 13-14, 37-38.) Yet, the loan plus salary equals that exact amount, and the March 25, 2008 letter states in paragraph 1 that Mr. White's "beginning salary will be \$80,000.00 per year; plus a loan amount up to \$80,000.00 per year...." (ODC Exhibit 9, Bates 221.) (Emphasis added.) By including the loan amount in the same paragraph with the salary, it certainly appears as if the loan plus salary was a method to achieve \$160,000.00 per year.

In addition, at the disciplinary hearing on May 28, 2013, Mr. Hendrickson was still insisting Mr. White should have signed Social Security Form 3288 as he requested at the May 20, 2009 meeting, even though the form itself clearly provides it has to be signed by the individual claimant for whom information is being requested, and even though Mr. Fisher told him in the Fall of 2009 the Social Security Administration had advised the form would not accomplish the accounting Mr. Hendrickson wanted. (Tr. Vol. I pp. 27-28, 69, 324-326; ODC Exhibit 20, Bates 812.)

Finally, no one on behalf of H&L, including Mr. Hendrickson, testified or explained why the loan of \$80,000.00 per year as set forth in the March 25, 2008 letter became a one time line of credit in the amount of \$80,000.00 available only until December 31, 2009.

Significantly, after H&L's merger with Eckert Seamans on January 1, 2009, it is not clear H&L had an interest in the social security fees, except as repayment for the loan. Prior to the merger, Mr. White had learned he would not be receiving any bonuses and that none of the social security fees generated by him had been applied to repay the loan. Further, pursuant to the promissory note signed on September 30, 2008, Mr. White was obligated to repay the loan within one year he ceased to be an employee of H&L, or May 1, 2011, whichever came first. After the merger, while deciding whether to include Mr. White, Eckert Seamans reimbursed H&L for Mr. White's salary and expenses. There is no evidence either Mr. White or H&L were to remit the social security fees to Eckert Seamans. There was also no bonus program at Eckert Seamans and no evidence that after the merger there was even an H&L bonus plan in which Mr. White could participate so that the loan could be repaid.

In short, the HPS finds Mr. White had a good faith belief the social security fees were to be split by some percentage with a portion to be applied to repay the loan. After the merger with Eckert Seamans, Mr. White's concern that the social security fees were not being applied to repay the loan was reasonable.

Beginning February 2009, there is no dispute Mr. White withheld checks from H&L in the total amount of \$46,366.69. H&L, however, also claimed an interest in those fees of which Mr. White was aware. Mr. White did not give H&L notice beginning in February 2009 that he was withholding those checks. Further, after he learned on April 15, 2009 that he would not be part of the Eckert Seamans merger, he began cashing those checks to set up his own law practice. He eventually spent all the money.

H&L filed suit against Mr. White for the social security fees and breach of the promissory note. It was settled, in part, by H&L receiving cash from Mr. White and by Mr. White having four

social security fee checks reissued to him by the SSA and ultimately delivered to H&L. The settlement agreement only required Mr. White to "cooperate" with the reissuance, assignment and other means necessary to transfer the four checks to H&L. This involved requesting the SSA to find the checks, determine the status, and reissue them if necessary. The last check outstanding was for W. Anderson. In July 2011, both Mr. White and Mr. Morgan learned that check had been reissued and mailed to H&L. Both were informed by the clerk at the social security office that a trace would be placed on the check and the results forwarded to both Mr. White and Mr. Morgan. Thereafter, almost a year later in April 2012, when H&L questioned Mr. White about two checks, Mr. White reasonably asked Mr. Morgan which checks he was talking about. Once it was determined it was the W. Anderson check, Mr. White took steps at that time to locate the check. That Mr. White failed to receive the Motion for Entry Judgment for Breach of Settlement Agreement, and the Order granting judgment is his fault for failing to keep the court and opposing counsel apprised of his current address. He also failed to check his email. However, Mr. White did cooperate as required by the settlement agreement to have the four outstanding checks reissued and delivered to H&L.

IV. Conclusions of Law

1. Pursuant to Rule 3.7 of the Rules of Lawyer Disciplinary Procedure, in order to recommend any discipline, the allegations of the charges must be proved by clear and convincing evidence.
2. Based on the record, findings and discussion set forth above, and for the reasons set forth below, HPS finds by clear and convincing evidence Mr. White violated Rules 1.15(b) and (c) of the Rules of Professional Conduct. However, the evidence is not clear and convincing that

Mr. White violated Rules 1.15(a), 8.4(c), 8.4(d), and 3.4(a); therefore these charges should be dismissed.

3. Mr. White had a reasonable understanding the social security fees generated from his practice would be applied in some form to the repayment of the loan and/or a split between him and H&L. After the January 1, 2009 merger with Eckert Seamans, when Mr. White began withholding the fee checks, the evidence is not clear and the HPS is not convinced these fees were the property of H&L. This is because Mr. White's salary and expenses were being paid by Eckert Seamans and there is no evidence H&L was to remit those fees to Eckert Seamans. There was also no bonus plan in which Mr. White could participate to pay back the loan. At that point, then, the only interest H&L would have in the social security fees would be to repay the loan. Indeed, H&L offered no explanation why it would be owed Mr. White's social security fees after its merger with Eckert Seamans while Eckert Seamans was reimbursing it for Mr. White's salary and expenses.

Moreover, even if H&L's claimed interest in the social security fees is considered property of a third person, Mr. White kept the social security checks separate from his own property in a drawer. He did not commingle them with his own accounts. The checks were kept separate as checks until he cashed each one on different dates.

Accordingly, the HPS cannot find by clear and convincing evidence Mr. White violated Rule 1.15(a) by failing to hold property of a third person separate from the lawyer's own property. Therefore, this charge should be dismissed.

4. Mr. White knew, or should have known, H&L also claimed an interest in the social security fees. It is undisputed Mr. White failed to notify H&L in February 2009 when he began

withholding the checks. The evidence is clear and convincing Mr. White violated Rule 1.15(b) by failing to give prompt notice he was holding the checks.

5. Mr. White and H&L both claimed interests in the social security fees and it is undisputed Mr. White 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 evidence is clear and convincing he violated Rule 1.15(c).

6. The HPS does not find the evidence clear and convincing that Mr. White engaged in conduct involving dishonesty, fraud, deceit or misrepresentation, or that he engaged in conduct prejudicial to the administration of justice, in violation of Rules 8.4(c) and (d). Mr. White never misled or misrepresented the fact he was holding the social security checks and he has made an accounting of all checks he held and cashed. Mr. White also did not "convert" the social security checks as ODC charges. "Conversion", as ODC points out, is the unauthorized exercise of ownership of property belonging to another. (Disciplinary Counsel's Proposed Findings of Fact, Conclusions of Law and Recommended Sanctions, p.22 fn 4.) As set forth above, Mr. White reasonably believed he had a legitimate interest and claim to the social security fees.⁴ Therefore, these charges should be dismissed.

7. Finally, the evidence is not clear nor convincing that Mr. White violated Rule 3.4 by knowingly disobeying "an obligation under the rules of a tribunal." Mr. White paid the money he was owed pursuant to the parties' settlement agreement. As for the reissuance and delivery of the four social security checks, Mr. White was only obligated to cooperate in this process. Apparently three of the four checks were reissued and delivered to H&L in a reasonable amount

4. H&L claims Mr. White instructed the firm's employee who handles the mail not to open mail with social security checks and instead deliver them directly to Mr. White. (Tr. Vol. I pp. 221-222.) Mr. White denies this. (Tr. Vol. II pp. 77-79.) ODC presented no direct evidence on this issue. All evidence was hearsay and the HPS gives no weight to this claim.

of time. As for the fourth check, when it was pointed out to Mr. White in April 2012 the SSA still had not responded to the October 13, 2011 request to trace the W. Anderson check, Mr. White took steps at that time to locate it. The fact Mr. White did not receive the Motion for Entry of Judgment for Breach of Settlement Agreement, or the Order granting judgment, is due to his own negligence in failing to read his e-mail and failing to keep opposing counsel and the court apprised of his current address. This does not, however, amount to knowingly disobeying an obligation of the tribunal. Therefore, this charge should also be dismissed.

V. Recommended Sanctions

The Supreme Court of Appeals of West Virginia recognizes 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 factors to be considered in imposing appropriate sanctions are found in Rule 3.16 of the Rules of Lawyer Disciplinary Procedure. These factors consist of: (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 actual or potential injury caused by the lawyer's misconduct; and (4) the existence of any aggravating or mitigating factors. See also, Sylb. Pt. 4, Office of Disciplinary Counsel v. Jordan, 204 W.Va. 495, 513 S.E. 2d 722 (1998).

A. Mr. White violated duties to the legal system and profession.

In the end, this was a contract dispute between an attorney and his firm. The material terms of the contract were ambiguous, incomplete and uncertain. ODC did not prove by clear and convincing evidence under the circumstances of this case that H&L was entitled to all of the

social security fees or how Mr. White was to repay the loan after H&L's merger with Eckert Seamans. Mr. White also had a good faith reasonable belief the social security fees he generated, or some portion, would be applied in some fashion to the repayment of the loan.

However, Mr. White withheld the disputed checks without providing prompt notice to H&L and he eventually cashed them before the dispute was resolved. By doing this, Mr. White violated his duties owing to the legal system and the profession.

B. Mr. White acted negligently, knowingly and intentionally.

Mr. White knew or should have known H&L claimed a interest in the social security fee checks he was holding prior to the May 20, 2009 confrontation and termination of employment. Mr. White's failure to give notice was negligent. On the other hand, he knowingly and intentionally cashed the social security checks for his own use before the dispute was resolved.

C. There is no actual or potential injury.

Significantly, no clients funds were at issue nor at risk. Whether any firm monies were lost or were at risk was a genuine dispute which was resolved in the civil litigation.

D. There are mitigating and no aggravating factors present.

Mitigating factors are "are any considerations or factors that may justify a reduction in the degree of discipline to be imposed." Lawyer Disciplinary Board v. Scott, Sylb. Pt. 2, 213 W.Va. 216, 579 S.E.2d 550 (2003). Mitigating factors which may be considered include:

(1) absence of a prior disciplinary record; (2) absence of a dishonest or selfish motive; (3) personal or emotional problems; (4) timely good faith effort to make restitution or to rectify consequences of misconduct; (5) full and free disclosure to disciplinary board or cooperative attitude toward proceedings; (6) inexperience in the practice of law; (7) character or reputation; (8) physical or mental disability or impairment; (9) delay in disciplinary proceedings; (10) interim rehabilitation; (11) imposition of other penalties or sanctions; (12) remorse; and (13) remoteness of prior offenses.

Scott, supra at Sylb. Pt. 3.

The mitigating factors in this case include the fact this matter is essentially a bona fide contract dispute and Mr. White acted without dishonest or selfish motive. Mr. White was also relatively inexperienced in the practice of law. At the time he negotiated his relationship with H&L he had been licensed less than three years. Mr. White has no prior disciplinary record and he has been cooperative in the disciplinary proceedings. Further, his position and version of events has been consistent from his verified response to ODC to his testimony at the disciplinary hearing. Moreover, throughout the process, as questions were raised about specific social security checks, Mr. White took the steps to track them down through the SSA and bank records.

The HPS is also to consider aggravating factors pursuant to Rule 3.16 of the Rules of Lawyer Disciplinary Procedure when considering the imposition of sanctions. The Scott Court 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.'" Scott, supra at 579 S.E. 2d 550, 557, *quoting ABA Model Standards for Imposing Lawyer Sanctions*, 9.21 (1992). The HPS finds no aggravating factors.

E. Sanctions

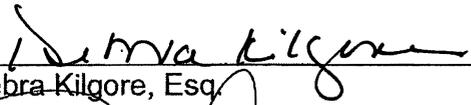
Again, this case is in essence a contract dispute between a lawyer and his firm. While Mr. White negligently failed to give notice to H&L that he was holding the social security checks and he knowingly and intentionally cashed those checks prior to their dispute being resolved, no client funds were at risk. Any injury or potential injury to H&L was disputed and resolved in the civil litigation. Accordingly, for violating Rules 1.15(b) and (c) of the Rules of Professional Conduct, and for the reasons discussed above, the HPS recommends and believes the following sanctions are sufficient to accomplish the disciplinary goals of punishing Mr. White,

serving as a deterrent to other members of the bar, and maintaining public confidence in the profession:

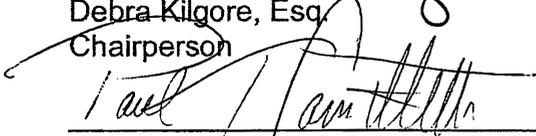
1. That Mr. White be reprimanded;
2. That he be required to take an additional six hours of continuing legal education with focus on law office management and legal ethics; and
3. That he be ordered to pay the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

Dated this the 17th day of April, 2014.

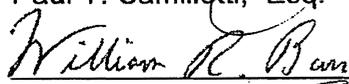
Respectfully submitted,
The Hearing Panel Subcommittee
of the Lawyer Disciplinary Board



Debra Kilgore, Esq.
Chairperson

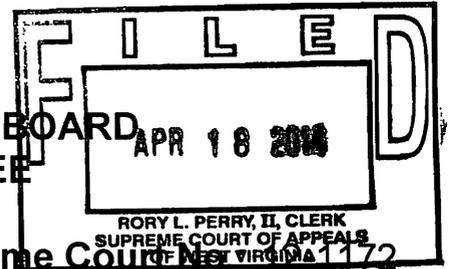


Paul T. Camilletti, Esq.



William R. Barr, Esq.
Layperson

BEFORE THE LAWYER DISCIPLINARY BOARD
HEARING PANEL SUBCOMMITTEE



In re: Benjamin F. White, a member of
The West Virginia State Bar

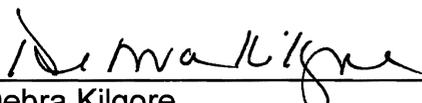
Supreme Court Case No. 10-1172
I. D. No.: 09-03-334
Bar No.: 10062

CERTIFICATE OF SERVICE

I, Debra Kilgore, do hereby certify that on the 17th day of April, 2014, I served a copy of the foregoing **Report and Recommendation of the Hearing Panel Subcommittee** upon counsel for Plaintiff, by depositing same in the United States mail, postage prepaid, addressed as follows:

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