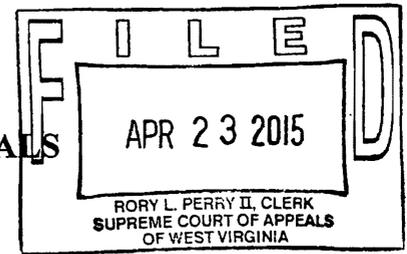


ARGUMENT
DOCKET
BEFORE THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA



Re: DAVID S. HART, a member of
The West Virginia State Bar

Bar No.: 7976
Supreme Court No.: 13-0748
I.D. Nos.: 11-01-496, 12-01-111,
12-01-421, 12-01-485,
12-01-498 & 12-01-500
and
Supreme Court No.: 14-0349
I.D. No.: 14-01-037

**MOTION TO CONSIDER AN ADDITIONAL
AGGRAVATING FACTOR TO ENHANCE SANCTION**

COMES NOW the Office of Disciplinary Counsel by Andrea J. Hinerman, Senior Lawyer Disciplinary Counsel, and moves that this Honorable Court consider an additional aggravating factor and enhance the sanction against Respondent. In support of this motion, Disciplinary Counsel states as follows:

1. On January 15, 2015, the "Report of the Hearing Panel Subcommittee" was filed for each of the above-referenced cases. The Hearing Panel Subcommittee issued the following recommendation as the appropriate sanctions for both Statements of Charges:
 - A. That Respondent's law license be suspended for one year;
 - B. That prior to petitioning for reinstatement pursuant to Rule 3.32 of the Rules of Lawyer Disciplinary Procedure, Respondent issue refunds to Casey M.

Johnson in the amount of \$2,650.00 and Charles E. Banks in the amount of \$5,200.00, and provide proof thereof to ODC;

C. That Respondent issue an itemized statement of account to Tony R. Henderson, Jr. provide proof thereof to ODC; and

D. That Respondent be ordered to pay the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

2. On February 12, 2015, pursuant to Rules 3.11 and 3.12 of the Rules of Lawyer Disciplinary Procedure, the Office of Disciplinary Counsel sent a letter to Rory L. Perry, Clerk of the Supreme Court of Appeals of West Virginia, Respondent, and the Hearing Panel Subcommittee stating that it objected to the recommended sanctions set forth in the "Report of the Hearing Panel Subcommittee."
3. Respondent submitted neither a consent nor an objection to the "Report of the Hearing Panel Subcommittee."
4. By Order entered March 3, 2015, the Supreme Court of Appeals advised the parties that it set this matter for oral argument under Rule 19 of the Rules of Appellate Procedure and set a briefing schedule as follows: the Petitioner "is directed" to file an original and ten copies of its brief on or before March 23, 2015; the Respondent "is directed" to file a like number of briefs on or before April 13, 2015; and any reply brief deemed necessary is to be filed on or before April 23, 2015.
5. The briefing schedule is based upon Rule 36 of the West Virginia Rules of Appellate Procedure which provides, in part, that ". . . when a briefing schedule is required to be set, the Court will issue a scheduling order containing information and deadlines

as appropriate under the circumstances. Once the Court has issued a scheduling order, all subsequent filings in the action and the Court's final disposition of the case are controlled by the Rules of Appellate Procedure."

6. Disciplinary Counsel received that Order on March 4, 2015, and filed her brief on March 23, 2015. The brief was served on Respondent at his address of 102 McCreery Street, Beckley, West Virginia 25801.
7. Upon information and belief, Respondent has failed to file a responsive brief in this matter.
8. This Court has recently considered three cases in which the Respondent attorneys had failed to comply with this Court's order that the Respondent attorneys file a brief in his or her own disciplinary case. In Lawyer Disciplinary Board v. Grindo, 231 W.Va. 365, 745 S.E.2d 256, 262 (2013), this Court stated that "the fact that Mr. Grindo failed to respond to the deadlines and entreaties of this Court regarding the filing of briefs certainly weighs heavily against Mr. Grindo." In Lawyer Disciplinary Board v. Ronald S. Rossi, – W.Va. –, 769 S.E.2d 464, 474 (2015), the Court stated that "[w]e find [Rossi's] failure to follow this Court's order especially egregious considering Mr. Rossi's repeated failures to respond to the ODC" *See also*, Lawyer Disciplinary Board v. Conner, – W.Va. –, 769 S.E.2d 25, 34 (2015) ("Ms. Conner's consistent failure to respond to the ODC, coupled with her pattern of ignoring directives from this Court, also weighs in favor of an increased sanction.")
9. Thus, Respondent's misconduct in failing to file a brief in his own disciplinary case is an aggravating factor which the Supreme Court may examine when considering the

imposition of sanctions, as enumerated under Rule 3.16 of the West Virginia Rules of Lawyer Disciplinary Procedure and in Lawyer Disciplinary Board v. Scott, 213 W.Va. 209, 214, 579 S.E. 2d 550, 555 (2003) (*quoting ABA Model Standards for Imposing Lawyer Sanctions*, § 9.31). Elaborating on Rule 3.16, 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, 213 W.Va. at 216, 579 S.E.2d at 557 (*quoting ABA Model Standards for Imposing Lawyer Sanctions*, § 9.21).

10. Moreover, in attorney disciplinary cases, this Court has stated that:

“[a] person named in a disciplinary proceeding before this Court, who, after the Hearing Panel Subcommittee has filed its Report with recommended sanctions, commits a violation of the Rules of Professional Conduct related to the facts in the underlying complaint may be subject to an increased degree of discipline. Such subsequent misconduct may be relied upon by this Court as an aggravating factor that justifies enhancement of the recommended sanctions of the Hearing Panel Subcommittee.”

Syl. Pt. 7, Lawyer Disciplinary Board v. Grafton, 227 W.Va. 579, 712 S.E.2d 488 (2011).

11. As an attorney, Respondent is considered to be an officer of the court and is expected to conform his conduct in both his professional life and in his personal life, to a certain extent, to the requirements set forth in the Rules of Professional Conduct. Moreover, he has a duty to uphold the legal process. *See*, Preamble to the Rules of Professional Conduct. This Court has also held that “lawyers who engage in the practice of law in West Virginia have a duty to know the Rules of Professional

Conduct and to act in conformity therewith.” Lawyer Disciplinary Board v. Ball, 219 W.Va. 296, 633 S.E.2d 241 (2006).

12. Rule 3.4(c) of the Rule of Professional Conduct provides , as follows, “[a] lawyer shall not: . . . (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based upon an assertion that no valid obligation exists;” [Emphasis Added].¹
13. Rule 10(j) of the West Virginia Rules of Appellate Procedure provides that “[t]he failure to file a brief in accordance with this rule may result in the Supreme Court refusing to consider the case, denying oral argument to the derelict party, dismissing the case from the docket, or imposing such other sanctions as the Court may deem appropriate.”²
14. Respondent is therefore obligated to comply with this Court’s directives in its scheduling order in this matter and with the directive of Rule 3.4(c) which outlines his duty to not “knowingly disobey an obligation under the rules of a tribunal. . . .”
15. Respondent’s knowing and intentional failure to file a brief in his own disciplinary case could also be considered a violation of Rule 3.4(c) of the Rules of Lawyer Disciplinary Procedure and this misconduct certainly violates the duties he owes to the legal system and to the profession. Recently in Conner, when the attorney ignored a directive of this Honorable Court and did not file a responsive brief, this Court

¹It is important to note that Rule 3.4(c) of the Rules of Professional Conduct is not specific to an attorney’s obligation owed only to clients, such as rules involving an attorney’s duties to communicate and to act diligently. Rule 3.4(c) is found in the section entitled “Advocate” and the Rule’s specific title is “Rule 3.4. Fairness to opposing party and counsel.”

²See also, Rule 36 of the Rules of Appellate Procedure, *supra*, at 2-3 .

stated that “[n]ot only does this behavior evince a pattern of misconduct, but it also shows a failure to obey an obligation imposed by a tribunal.” Lawyer Disciplinary Board v. Conner, 769 S.E.2d at 32.

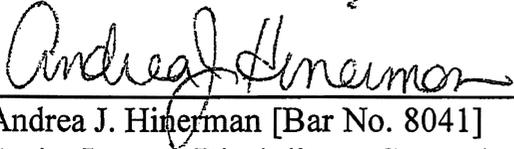
16. Finally, the clear and convincing evidence in this matter also demonstrates that Respondent has exhibited a pattern and practice of failing to respond to requests for information from the Office of Disciplinary Counsel and failure to obey obligations under the rules of a tribunal.
17. Respondent’s failure to file a brief in this matter, after being directed to do so by this Court, is continued evidence of a pattern and practice of failing to obey the obligations imposed on him by a tribunal.
18. Therefore, Disciplinary Counsel requests that this Honorable Court enhance Respondent’s sanction to include additional time beyond the eighteen (18) month suspension previously requested by the ODC.³ Specifically, Disciplinary Counsel requests that this Honorable Court suspend Respondent’s license to practice law an additional six (6) months above the eighteen (18) months previously recommended by the ODC for a total period of two (2) years.

WHEREFORE, the Office of Disciplinary Counsel requests that the Supreme Court consider an additional aggravating factor and enhance the sanction against Respondent as set forth herein, and that the undersigned be permitted to argue for such relief in oral argument when this matter proceeds to hearing as scheduled on May 12, 2015.

³This was the length of suspension requested by the ODC in its brief after objecting to the one (1) year suspension recommended by the Hearing Panel Subcommittee.

DATED this 23rd day of April, 2015.

RESPECTFULLY SUBMITTED
OFFICE OF DISCIPLINARY COUNSEL



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Senior Lawyer Disciplinary Counsel
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CERTIFICATE OF SERVICE

This is to certify that I, Andrea J. Hinerman, Senior Lawyer Disciplinary Counsel for the Office of Disciplinary Counsel, have this day, the 23rd day of April, 2015, served a true copy of the foregoing **"MOTION TO CONSIDER AN ADDITIONAL AGGRAVATING FACTOR AND ENHANCE SANCTION"** upon Respondent David S. Hart, by mailing the same via United States Mail, with sufficient postage, to the following address:

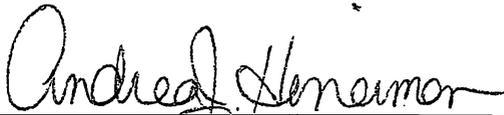
David S. Hart, Esquire
102 McCreery Street
Beckley, West Virginia 25801

and upon the Hearing Panel Subcommittee at the following addresses:

Richard M. Yurko, Esquire
400 White Oak Boulevard
Bridgeport, West Virginia 26330

John W. Cooper, Esquire
Post Office Box 365
Parson, West Virginia 26287

Dr. K. Edward Grose
2305 Winchester Road
Charleston, West Virginia 25303



Andrea J. Hinerman