

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

LAWYER DISCIPLINARY BOARD,

Complainant,

v.

NO. 14-0670

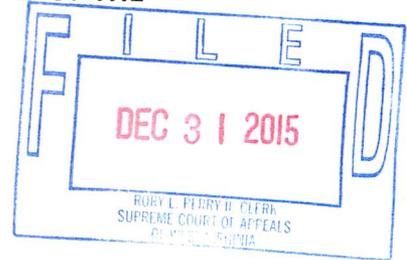
THORN H. THORN,

Respondent.

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BRIEF OF THE RESPONDENT

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Thorn H. Thorn (WV Bar #7346)
1403 Saratoga Avenue
Morgantown, WV 26505
thornlawoffice@yahoo.com
304-291-6100
304-291-5501 - Fax

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304-291-5501 - Fax**

I. STATEMENT OF THE CASE

A. NATURE OF PROCEEDINGS AND RECOMMENDATIONS OF THE HEARING PANEL SUBCOMMITTEE

This case arose as a disciplinary proceeding against, Thorn H. Thorn (hereinafter "Respondent"), arising out of a Statement of Charges issued against Respondent and filed with The Supreme Court of Appeals of West Virginia on or about July 14, 2014. Service was completed on July 17, 2014 and an Answer was filed by Respondent on September 25, 2014, after ODC gave permission for an extension to prepare and file an answer. After several delays and continuances the Final Hearing in this matter was held on April 8, 2015 at the WVU College of Law in Morgantown. The Hearing Panel Subcommittee (HPS) was comprised of John W. Cooper, Esq., Chairperson, Henry Morrow, Esq., and Jon Blair Hunter, layperson. Renee' Frymeyer, Lawyer Disciplinary Counsel, appeared for the ODC while Respondent appeared in person, pro se.

The HPS heard from Jessica Morris, Daniel Britton, Carly Wears, Mark Benkiel, Jack Torsney, and the Respondent.

On or about September 18, 2015, the HPS issued its recommended decision which was filed with the Supreme Court of Appeals of West Virginia. On or about October 13, 2015, the HPS issued an Amended Recommended Decision. with minor corrections to the original document.

The HPS recommended that the Respondent's law license be suspended for a period of ninety (90) days, that prior to reinstatement that Respondent refund \$1,100.00 to Debra Miller, refund \$600.00 to Martin Donovan, and that within eighteen (18) months following

reinstatement Respondent was to make restitution to Mark Benkiel in the amount of \$24,000.00 (Twenty four thousand dollars), and provide proof thereof to ODC.

In addition, the Respondent was further required to provide an itemized statement to Jessica Morris, Daniel Britton, Lisa Long, and Carly Wears and corresponding refunds if appropriate, with proof of these actions to ODC. Respondent's practice was then to be supervised for a period of one (1) year by an attorney agreed to by the ODC and the Respondent. The purpose of this supervision was to ensure that the quality and effectiveness of Respondent's practice was such that future complaints would not occur.

Finally, the Respondent was required to submit to counseling with a licensed psychologist or psychiatrist beginning immediately and that such counseling occur for a period of eighteen (18) months after the Court's mandate in this matter and have reports of attendance filed with ODC at least semi-annually describing the nature of the counseling, the progress of the Respondent, and verifying that his mental status is such that he is competent to continue his practice. Respondent was also ordered to pay the costs of this proceeding.

The ODC filed its objection to the Recommended Findings on October 21, 2015 and this matter was set for briefs and oral argument.

B. FINDINGS OF FACT OF THE HPS

The Respondent accepts the ODC's version of the HPS findings of facts as outlined in their brief, which accepts the HPS findings of facts as sound and that they "should not be disturbed," and believes that the factual circumstances which arose during Respondent's bout with severe depression are clearly outlined within the Findings of Fact of the HPS. In addition, the Respondent asserts that his record as an attorney for fifteen years prior to these issues, all of which arose during a fixed time period, is evidence of his ability to act as a competent attorney for his clients. The first fifteen years of practice, the Respondent did not have any Complaints which were deemed violations, even minor violations, by the ODC.

C. CONCLUSIONS OF LAW OF THE HPS AND ODC'S OBJECTIONS THERETO

The HPS held a thorough hearing scheduled for the entire day on April 8, 2015, numerous complainants failed to appear despite being subpoenaed by the ODC for their testimony. Among the persons failing to attend were Miller, Hughes, Goodnight, Donovan, Bethea, and Long. The HPS heard the testimony of Jessica Morris, Daniel Britton, Carly Wears, Mark Benkiel, Jack Torsney, and the Respondent. The HPS upheld the Respondent's objection to introduction of the exhibits which were proffered by the ODC but which lacked and foundation, including the testimony of the Respondent, to support.

The HPs found that the Respondent had made numerous violations, as outlined in their Amended Recommended Decision of the Hearing Panel Subcommittee, but also found that the Respondent had proven by clear and convincing evidence that the Respondent's problems in the various matters were an "anomaly and an aberration" from the manner in which

Respondent practiced law during the balance of the seventeen years of practice. The HPS specifically found that this aberration was the result of situational depression and that the depression created a legitimate and substantial mitigating factor in their recommendation. The HPS also found that although the Respondent committed numerous violations of professional conduct over this period of time, that the Respondent had some mitigating factors which warrant a short period of suspension.

The HPS found that the mitigating factors, as set forth in *Lawyer Disciplinary Board v. Scott*, 213 W.Va. 209, 214, 579 S.E.2d 550, 555 (2003), present in this matter are absence of a prior disciplinary record, absence of a dishonest or selfish motive, full and free disclosure to disciplinary board and cooperative attitude towards proceedings, mental disability, and obvious and repeated expressions of contrition and remorse during testimony.

The HPS found that Respondent proved by clear and convincing evidence that he was suffering from situational depression during the time frame of these complaints. In Syllabus Point 3 of *Lawyer Disciplinary Board v. Dues*, 218 W.Va. 104, 624 S.E.2d 125 (2005), this Court held that "a mental illness is considered mitigating when: (1) there is evidence the attorney is affected with a mental disorder; (2) the mental disability caused the misconduct; (3) the attorney's recovery from the mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and, (4) the recovery arrested the misconduct and recurrence of that misconduct is unlikely." In this case, the HPS found clear and convincing evidence to establish each of these factors.

The HPS also found that the Respondent was genuinely remorseful for his ethical violations and that Respondent was contrite throughout the proceedings. HPS found that the

recurrence of similar misconduct is unlikely, but to be safe, the HPS recommended ongoing psychological counseling for a period to ensure there is not a recurrence and to protect the public from any recurrence.

II. SUMMARY OF ARGUMENT

The HPS found that the Respondent committed numerous violations and that sanctions, including a suspension, was necessary to address the Respondent's conduct, to protect the public, to deter violations by other lawyers, and to fairly punish the Respondent. The HPS made a very thoughtful and well reasoned recommendation. This matter can be distinguished from the other cases in which this Court has Ordered more severe sanctions, or longer periods of suspension, and therefore, the HPS recommendations are not just warranted, but are appropriate.

In addition, the HPS recommended ongoing psychological treatment and a year of supervision of the Respondent's practice to add more safeguards to ensure that the public is properly protected and to ensure that the Respondent is no longer committing violations of his ethical duties to clients.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 19 of the Revised Rules of Appellate Procedure, this matter is set for oral argument on February 9, 2016 at 10:00 a.m.

IV. ARGUMENT

A. STANDARD OF PROOF

The charges against the Respondent must be proven by clear and convincing evidence pursuant to Rule 3.7 of the Rules of Lawyer Disciplinary Procedure, Syl. Pt. 1, *Lawyer Disciplinary Board v.*

McGraw, 194 W.Va. 788, S.E.2d 850 (1995). Substantial deference is to be given to the Recommended Findings of Fact as presented by the HPS. *Lawyer Disciplinary Board v. Cunningham*, 195 W.Va. 27, 464 S.E.2d 181 (1995). In this case, both the ODC and the Respondent agree that the HPS findings of fact are proper, reliable, sound, and appropriate.

In Lawyer Disciplinary Matters, a de novo standard of review applies to questions of law, questions of application of the law to the facts, and questions of appropriate sanctions to be imposed. *Roark v. Lawyer Disciplinary Board*, 207 W.Va. 181, 495 S.E.2d 552 (1997). The Supreme Court of Appeals of West Virginia is to give respectful consideration to the HPS recommendations as to questions of law (*Committee on Legal Ethics v. McCorkle*, 192 W.Va. 290, 452 S.E.2d at 381) and appropriate sanction, while ultimate decisions about public reprimands, suspensions, or annulments of attorneys' licenses to practice law. *Committee on Legal Ethics v. Blaire*, 174 W.Va. 494, 327 S.E.2d 671 (1984); Syl Pt. 7, *Committee on Legal Ethics v. Karl*, 192 W.Va. 23, 449 S.E.2d 277 (1994).

The Respondent and ODC both concur that the HPS did an excellent job in making their findings as to the facts and agree that those findings should not be disturbed. The Respondent objects to the ODC request that this Court not give deference to the HPS recommendations as to sanctions, and that this Court impose stricter sanctions, including a two (2) year suspension from practice.

B. ANALYSIS PURSUANT TO JORDAN

The ODC has outlined the four factors which must be present in order to impose sanctions under *Office of Disciplinary Counsel v. Jordan*, 204 W.Va. 495, 513 S.E.2d 722 (1998) held that there are four factors in determining the imposition of a sanction. Those four factors

include (1) whether the lawyer has violated a duty owed to a client, to the public, to the legal system, or to the profession; (2) whether the lawyer acted intentionally, knowingly, or negligently; (3) the amount of the actual or potential injury caused by the lawyer's misconduct; and (4) the existence of any aggravating or mitigating factors.

The ODC wants the Court to accept the HPS Recommended Findings of Fact as a whole while picking and choosing portions of the findings of fact that the ODC believes doesn't suit their intention of requesting a longer period of suspension. The HPS recommendations outline the violations that they found, as a matter of fact and as a matter of law, that the Respondent committed. In addition, using their factual determination, the HPS found that there was little factual information which would lead them to believe that the Respondent acted intentionally, willfully, selfishly, or with dishonest intentions.

ODC wants to rely on the Court's determination in *Lawyer Disciplinary Board v. Rossi*, 234 W.Va. 675, 769 S.E.2d 464 (2015) and *Lawyer Disciplinary Board v. Aleshire*, 230 W.Va. 70, 736 S.E.2d 70 (2012) to seek a more severe sanction. However, this case can be distinguished from those cases (and subsequent sanctions) in that the HPS findings of fact, which are uncontroverted, found that the Respondent knows how to manage a practice, and his lack of disciplinary infractions and even the testimony of and his own clients demonstrates that he has the ability to conduct an ethical and successful practice but for the situational depression.

In two other cases, in which the Court Ordered indefinite suspensions *Lawyer Disciplinary Board v. Keenan*, 189 W.Va. 37, 427 S.E.2d 471 (1993)(Indefinite suspension) and *Committee on Legal Ethics v. Mullins*, 159 W.Va. 647, 226 S.E.2d 427 (1976)(indefinite suspension) in which this Court rejected the allegations of mental illness as a mitigating factor,

both Respondents in *Keenan and Mullins* failed to provide expert testimony that they had actually suffered from mental or emotional disabilities.

Finally, it is disingenuous of the ODC to tell this Court that they wholeheartedly accept the Factual Findings of the HPS while at the same time making allegations that the HPS findings of fact didn't find that the Respondent failed to present the second, third, and fourth factors of *Lawyer Disciplinary Board v. Dues*, 218 W.Va. 104, 624 S.E.2d 125 (2005), "(2) that the mental disability caused the misconduct; (3) the attorney's recovery from the mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation, and, (4) the recovery arrested the misconduct and recurrence of that misconduct is unlikely." In fact, the HPS made those specific findings in their Recommended Decision and found that because they found all of those factors factually present, that the period of depression suffered by the Respondent should be deemed a mitigating factor. The testimony of the Respondent, and of his expert witness, Jack Torsney, both went uncontroverted that the three factors in *Dues*, *Supra*, were present. The Respondent has continued to practice law since the filing of the Statement of Charges, and the flurry of complaints has trickled to a stop.

C. SANCTION

The Respondent asserts that the sanctions recommended by the HPS are both appropriate and warranted given the agreed factual circumstances of this case. The HPS recommended a three month suspension, which is an effective and powerful form of punishment to the Respondent for his violations of his duties as a lawyer in the State of West Virginia. With this suspension will come the hardship that his current clients will suffer as the attorney that they are trusting and relying upon, who is back at full strength and providing

excellent legal assistance, must undergo a period of suspension. This suspension will clearly negatively affect these clients, and will likely cause them additional damage and hardships. However, any period in excess of three months will unduly harm these clients and further is not consistent with the well thought out and well reasoned suspension recommended by the HPS.

To further protect the public from any other wrongdoing by the Respondent, the HPS recommended a year of supervised practice, to ensure proper adherence to the rules as required by any attorney in this State. In addition, further protections include the requirement to submit to eighteen (18) months of ongoing psychological or psychiatric treatment and provide ongoing reports to the ODC to ensure compliance.

To reimburse the clients who were injured through the Respondent's bad acts, the HPS has recommended that the Respondent issue refunds to Debra Miller (\$1,100.00), Martin Donovan (\$600.00), and further that following reinstatement, that the Respondent make restitution to Mark Benkiel in the amount of twenty-four thousand (\$24,000.00) dollars, and provide proof of the various payments to ODC.

To ensure that there is no other financial harm to the Complainants, the Respondent was also required to issue itemized statements to Jessica Morris, Daniel Britton, Lisa Long, and Carly Wears, and issue any refunds that would be due based upon the itemized statements with proof to ODC.

Finally, it was recommended that the Respondent be ordered to pay for the costs of this proceeding pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

These combined recommended sanctions both punish the Respondent, while protecting the public and ensuring that any injuries suffered by the Complainants are rectified.

V. CONCLUSION

Accordingly, for the reasons set forth above, the Respondent requests that this Court adopt the sanctions as recommended by the HPS.

Respectfully Submitted,

Thorn H. Thorn
Pro Se



Thorn H. Thorn (WV Bar #7346)
1403 Saratoga Avenue
Morgantown, WV 26505
304-291-6100
304-291-5501
thornlawoffice@yahoo.com

CERTIFICATE OF SERVICE

This is to certify that I, Thorn H. Thorn, Esq., have this 30th day of December, 2015, served a true and exact copy of the foregoing "Brief of Respondent" upon counsel for the Office of Disciplinary Counsel, Renee Frymyer, and all other parties listed below via U.S.D. Mail Service on this the 30th day of December, 2015.



Thorn H. Thorn
