

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

LAWYER DISCIPLINARY BOARD,

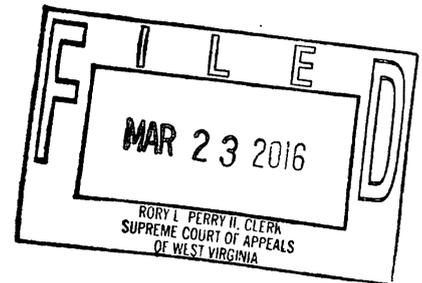
Complainant,

v.

HOWARD J. BLYLER,

Respondent.

No. 14-0365



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AMENDED BRIEF OF THE LAWYER DISCIPLINARY BOARD

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## I. STATEMENT OF THE CASE

### A. NATURE OF PROCEEDINGS AND RECOMMENDATION OF THE HEARING PANEL SUBCOMMITTEE

This is a disciplinary proceeding against Respondent Howard J. Blyler, (hereinafter “Respondent”), arising as the result of a Statement of Charges issued against him and filed with the Supreme Court of Appeals of West Virginia on or about April 18, 2014. Respondent was served with the Statement of Charges on April 22, 2014, and filed a timely response thereto. A scheduling conference was held on April 30, 2014, and the matter was set for hearing on July 22, 2014. Disciplinary Counsel filed her mandatory discovery on or about May 8, 2014. Respondent subsequently obtained counsel and filed his Answer to the Statement of Charges on or about May 27, 2014. Respondent’s discovery was filed on April 24, 2015.

On July 7, 2014, Respondent’s counsel filed a “Motion to Continue”, citing numerous issues, including the poor health of Respondent’s wife and problems encountered when Respondent and his counsel needed to meet to prepare for the hearing. On July 8, 2014, the hearing was rescheduled for September 26, 2014. On September 15, 2014, Respondent’s counsel filed a second “Motion to Continue”, citing the deteriorating health of Respondent’s wife. A status conference was set for October 29, 2014. The hearing was then set for January 7, 2015. Disciplinary Counsel and Respondent entered into “Stipulations Regarding Findings of Fact and Conclusions of Law”, and a copy was provided to the Hearing Panel Subcommittee on December 19, 2014. Disciplinary Counsel reserved the right to argue the factual and legal matters encompassed in paragraphs 22, 23, and 24 of the Statement of Charges.

On December 24, 2014, Respondent’s counsel filed a “Motion to Continue” the January 7, 2015 hearing date based on health issues of the care-giver who assisted in caring for Respondent’s

wife. Respondent's wife passed away on December 28, 2014, and the January 7, 2015 hearing was continued to March 5, 2015. Due to an impending ice/snow storm and possible flooding, the March 5, 2015 hearing was continued to April 20, 2015. On April 10, 2015, Respondent's counsel filed a "Motion to Permit Testimony", and Disciplinary Counsel filed her objection thereto.

Thereafter, this matter proceeded to hearing at Stonewall Resort in Roanoke, West Virginia, on April 20, 2015. Respondent did not attend that day of hearing due to his mother passing away just before the hearing. A second day of hearing was held on August 31, 2015. The Hearing Panel Subcommittee was comprised of John W. Cooper, Esquire, Chairperson, Kelly D. Ambrose, Esquire, and Cynthia L. Pyles, Layperson. Jessica H. Donahue Rhodes, Lawyer Disciplinary Counsel, appeared on behalf of the Office of Disciplinary Counsel. Gregory A. Tucker, Esquire, appeared on behalf of Respondent, at both hearings. Respondent appeared for the second day of hearing on August 31, 2015. The Hearing Panel Subcommittee heard testimony from Lloyd A. Cogar, II, on April 20, 2015; and heard the testimony of Joyce Helmick Morton, Dwayne Vandevender, Michele Hitt and Respondent on August 31, 2014. In addition, ODC Exhibits 1-27 and Joint Exhibit 1 were admitted into evidence on April 20, 2015; and Respondent's Exhibit 1 was admitted into evidence on August 31, 2015.

On or about January 20, 2016, the Hearing Panel Subcommittee issued its decision in this matter and filed with the Supreme Court of Appeals of West Virginia its "Report of the Hearing Panel Subcommittee" (hereinafter "Report"). The Hearing Panel Subcommittee found that the evidence established that Respondent violated Rules 1.3, 1.4(a), 1.4(b), 3.2, 8.4(c) and 8.4(d), but declined to find a violation of Rules 1.15(a) and 3.4(c). The Hearing Panel Subcommittee issued the following recommendation as the appropriate sanction:

1. That a strong reprimand be issued against Respondent;
2. That he be placed on probation for a period of at least eighteen months;
3. That he be permitted to practice law during the period of probation under the supervision of Joyce Morton, or any other lawyer approved by this Court and ODC;
4. That Respondent make restitution of the amounts seized from the special commissioners' account within 36 months from the date of the Court's order if the same is not fully satisfied in the Cogar's pending negligence action against Respondent; and
5. That Respondent pay the costs and expenses incurred by ODC in the prosecution of this proceeding and in overseeing the Respondent's probation and in the fulfillment of his obligations in making restitution.

The Hearing Panel Subcommittee noted that this Court had recently addressed the same facts and circumstances in Blyler v. Matkovich, No. 14-0760, No. 14-1335 (W.Va. Supreme Court, November 23, 2015) (memorandum decision).

Thereafter, on or about February 16, 2016, Disciplinary Counsel filed her objection to the recommendation made by the Hearing Panel Subcommittee.

**B. FINDINGS OF FACT MADE BY THE HEARING PANEL SUBCOMMITTEE**

Howard J. Blyler (hereinafter "Respondent") is a lawyer practicing in Cowen, which is located in Webster County, West Virginia. ODC Ex. 9, Bates stamp 40. Respondent was admitted to The West Virginia State Bar by diploma privilege on May 18, 1976. ODC Ex. 9, Bates stamp 42. As such, Respondent is subject to the disciplinary jurisdiction of the Supreme Court of Appeals of West Virginia and its properly constituted Lawyer Disciplinary Board.

On or about May 19, 2005, Brenda Alderman, the Executrix of the Estate of Lloyd Allen Cogar, Jr., and Trustee of the Estate of Stacy Lynn Cogar, infant, filed an action in the Circuit Court

of Braxton County, West Virginia, Case No. 05-C-29, to sell the real estate of Lloyd Allen Cogar, III, and several other individuals. ODC Ex. 15, Bates stamp 556-561. The lawsuit was filed on behalf of the plaintiff by William C. Martin, a suspended member of the West Virginia Bar who has since passed away, and Respondent was retained to represent Lloyd A. Cogar, III. ODC Ex. 15, Bates stamp 561. On or about November 10, 2005, an Order was entered in the case wherein the parties agreed to sell all of the real estate owned by the late Lloyd Allen Cogar, Jr., at the time of his death. ODC Ex. 15, Bates stamp 564-565. The Order was stated that William C. Martin and Respondent were appointed as Special Commissioners to conduct the sale and post bond in the amount of \$50,000.00. Id. The proceeds from the sale were ordered to be used to pay the costs of the sale, then to pay an unpaid loan at the Bank of Gassaway which secured the real estate. Id. The remaining sums were ordered to be held by the Special Commissioner pending distribution under the will of Lloyd Allen Cogar, Jr. Id. Bernard R. Mauser, Esquire, was also appointed Commissioner to determine the assets and liabilities of the estate to determine the priority of the same, along with a report to be filed with the Court. Id.

On or about April 27, 2006, the Court entered an “Order Approving Sale” which allowed the payment of certain costs and ordered the remaining balance of the proceeds from the sale to be deposited by William C. Martin into his trust account to be distributed upon further Order of the Court. ODC Ex. 15, Bates stamp 567-568. On or about April 25, 2007, the Court entered another “Order Approving Sale” regarding a separate sale, which allowed payment of certain costs and ordered the remaining balance of the proceeds from the sale to be deposited by Respondent into his trust account to be distributed upon further Order of the Court. ODC Ex. 15, Bates stamp 574-575. The Order noted that William C. Martin was now a full time prosecuting attorney and could no

longer act as a Special Commissioner in the case and, therefore, he was relieved as Special Commissioner and his bond was released. Id. Pursuant to said Orders, all sums had been deposited into the account of William C. Martin and/or Respondent.

By March of 2009, the “Special Account” maintained by Respondent at City National Bank, Account Number 8004027879, reached the amount of Ninety-Six Thousand Eight Hundred Fifty-One Dollars and Eighty Cents (\$96,851.80). ODC Ex. 23, Bates stamp 788. On or about March 16, 2009, a Notice of Levy from the State of West Virginia was served on City National Bank for personal income taxes due and owing by Respondent. ODC Ex. 10, Bates stamp 238-242. On or about March 19, 2009, and in response to this levy, City National Bank withdrew all of the sums from the “Special Account”. ODC Ex. 23, Bates stamp 790. The State of West Virginia was paid the amount of Ninety-Six Thousand Seven Hundred Twenty-Six Dollars and Eighty Cents (\$96,726.80) with City National Bank keeping One Hundred Twenty-Five Dollars (\$125.00) as a legal processing fee. ODC Ex. 23, Bates stamp 789.

On or about September 11, 2012, the Court entered an Order which stated that Respondent was to hold the funds in his trust account and the State of West Virginia had taken the money from the account for a tax levy. ODC Ex. 15, Bates stamp 638-640. The Order also stated, “Special Commissioners William Martin and Howard Blyler opened an account, entitled “Special Account” with City National Bank, and the proceeds from the two sales were deposited in this account.” The Order also stated that Respondent was attempting to retrieve the money back from the State of West Virginia. Id. However, the Court noted that the State of West Virginia and City National Bank were not parties to the case, therefore the Court had no authority to order them to return the money. Id. The Court ordered Respondent to take action to restore the funds within thirty (30) days from the

entry date of the Order, and if Respondent felt the money was improperly paid, then he would need to take appropriate legal action within thirty (30) days from the entry date of the Order. Id.

Complainant Lloyd A. Cogar, III, filed his complaint against Respondent on November 21, 2012. ODC Ex. 1, Bates stamp 1-9. Mr. Cogar alleged that Respondent did not alert the heirs of the estate about the State of West Virginia taking the money for a tax levy, nor did Respondent take any steps to get the money back. ODC Ex. 1, Bates stamp 2. Mr. Cogar indicated that he discovered the money was missing on or about September 5, 2012, when the Braxton County Circuit Court held a hearing on the matter. Id.

By letter dated November 30, 2012, Disciplinary Counsel forwarded the complaint to Respondent asking for a response thereto. ODC Ex. 2, Bates stamp 11-12. Respondent did not respond. By letter dated January 14, 2013, sent via certified and regular mail, Disciplinary Counsel again wrote to Respondent asking for a response to the complaint by January 24, 2013. ODC Ex. 3, Bates stamp 13-15. The return receipt was signed and such was received by the Office of Disciplinary Counsel on or about January 18, 2013. ODC Ex. 3, Bates stamp 15. On or about January 24, 2013, Respondent called and asked for an extension to file his response. An extension was granted to February 6, 2013, and Respondent was told to send a letter to confirm the extension. On or about February 19, 2013, the Office of Disciplinary Counsel received a response from Respondent dated February 5, 2013. ODC Ex. 4, Bates stamp 16-25. Respondent stated in his response that he was retained by Mr. Cogar to represent him in a partition action filed by his step-mother to sell the property of his father after his father's death. ODC Ex. 4, Bates stamp 16. The Court then appointed Respondent and William C. Martin as Special Commissioners to hold the property sale, which was done. Id. Bernard Mauser was appointed and ordered to determine the liabilities of the estate. Id.

Respondent was holding the funds pending Mr. Mauser's report. Id. Respondent stated that he contacted Mr. Mauser on numerous occasions about getting the report. Id. At a time soon after, the State Tax Commissioner filed a suggestion with City National Bank and the bank then forwarded all of the money to the State Tax Commissioner. ODC Ex. 4, Bates stamp 17. Respondent said that upon learning of the tax levy, he immediately notified the bank and the State Tax Commissioner that the money was not his money. Id. No action was taken on the matter until the Court brought a hearing on the same. Id. Respondent stated that he had a complaint prepared to sue City National Bank and the State Tax Commissioner for the return of the money. Id. Mr. Cogar has now retained William McCourt, Esquire, to represent him, and Respondent sent Mr. McCourt a copy of the complaint for him to include Mr. Cogar as a party. Id. Respondent also stated that Clinton Bischoff, Esquire, was appointed as Special Commissioner, and he would also have an opportunity to modify the complaint to include Mr. Bischoff's client. Id.

Mr. Cogar filed additional correspondence dated August 17, 2013, wherein he stated that Respondent had not filed a suit to retrieve the money. ODC Ex. 7, Bates stamp 28. On or about October 15, 2013, Respondent, along with Mr. Cogar and other heirs, filed a lawsuit against City National Bank and the West Virginia State Tax Commissioner in the Braxton County, West Virginia Circuit Court, Case Number 13-C-59. ODC Ex. 20, Bates stamp 736-741. <sup>1</sup>

On or about November 19, 2013, Respondent appeared for a sworn statement at the Office of Disciplinary Counsel. ODC Ex. 9, Bates stamp 37-91. Respondent stated that he "should have filed suit sooner" in reference to the money which was taken by the State Tax Commissioner. ODC

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<sup>1</sup> This Court determined that both Mr. Blyler's claim and the claim of Mr. Cogar and his siblings are barred by the applicable statute of limitations on November 23, 2015. Blyler v. Matkovich, No. 14-0760, No. 14-1335 (W.Va. Supreme Court, November 23, 2015) (memorandum decision).

Ex. 9, Bates stamp 76. Respondent provided a copy of his file concerning this case. ODC Ex. 9, Bates stamp 41. In that file, there was an unsigned March 23, 2009 letter addressed to City National Bank that stated the funds were a client's funds and should not have been subjected to the tax levy. ODC Ex. 10, Bates stamp 251.

On or about November 24, 2013, the Court entered an Order that forfeited Respondent's bond as Special Commissioner and ordered that the insurance company for the bond pay the Fifty Thousand Dollar (\$50,000.00) bond into an account set up for the monies concerning the estate with the Braxton County Commission and Braxton County Fiduciary Commissioner. ODC Ex. 15, Bates stamp 672-676.

**C. ADDITIONAL FINDINGS MADE BY THE HEARING PANEL SUBCOMMITTEE**

The Hearing Panel noted that Mr. Cogar and his siblings have filed a professional negligence claim against Mr. Blyler that was pending as of the date of the August 31, 2015 hearing. That claim seeks damages for the losses suffered by Mr. Cogar and his siblings with regard to the funds seized from the special account in the tax levy. 4/20/15 Hrg. Trans., p.23; 8/31/15 Hrg. Trans. p. 34-35).

Further, the Hearing Panel Subcommittee found that Respondent's law practice is and has been a small, rural general rural practice, which focused in large part upon defense criminal appointments, abuse and neglect cases, domestic relations, and guardian ad litem work. Other than the prosecuting attorney, Respondent is one of the only two (2) regular practitioners in Webster County. 8/31/15 Hrg. Trans. p. 58-59.<sup>2</sup> The only other lawyer in the area, Joyce Morton, Esquire, has reduced her practice to part-time and she does not handle criminal appointments or abuse and neglect

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<sup>2</sup> A third lawyer recently closed his office practice, but it is presently unknown whether he may be doing some work from his home.

cases. Ms. Morton did testify that she would be willing to act as a supervising attorney for Respondent should the sanctions imposed by the Supreme Court of Appeals include such a requirement. 8/31/15 Hrg. Trans. p. 50, 66.

The Hearing Panel Subcommittee also found that Madonna Jan Blyler, Respondent's wife of 45 years, was a school teacher who, at an early age, suffered from cognitive problems related to Alzheimer's disease, which forced her to take an early retirement at the end of the school year in 2008. Respondent's Ex R-1. Before her retirement, Respondent had helped compensate for his wife's failing mental acuity at home by grading all of her student's papers, by preparing all of her student's report cards and performing other tasks that she was unable to do. Also, his wife's school administrators and fellow teachers assisted her with in-school tasks and responsibilities, but as the disease process progressed, she was unable to continue to work and forced to take early retirement. 8/31/15 Hrg. Trans. p. 39-40). In March of 2009, at age fifty-four, Respondent's wife applied for and received social security disability because of a diagnosis of early onset dementia or Alzheimer's disease. Id. Respondent and his wife had managed financially until that time, but with the loss of her income and increase in her medical costs, they became financially strapped and did not have sufficient funds to provide the full-time care which Madonna Blyler required. 8/31/15 Hrg. Trans. p. 42, 54. Mrs. Blyler not only had medical bills related to Alzheimers disease, but she also had substantial ongoing monthly expenses for medications related to a prior gastric bypass surgery and for diabetes, neither of which were covered by insurance or Medicare. 8/31/15 Hrg. Trans. p. 54-55.

The Hearing Panel Subcommittee found that Respondent was a caring and devoted husband who provided his wife with round-the-clock care from the time of her diagnosis with Alzheimer's disease in March, 2009, until her death in December, 2014. He tried hiring outside help to care for

her while he worked, but that proved difficult and unworkable. The testimony of Joyce Morton, Esquire, a practicing attorney in Webster County, is particularly detailed on the extent of the measures Respondent took to care for his wife:

Q: Okay, can you tell the panel as far as Howard's situation with Madonna, what you about it or when you first learned of it?

A: I can't tell you the date I first learned about it, but I do know that she had an early onset of Alzheimer's and that it took its toll on Howard. He basically cared for her every need. He – there were times, many times and close to the end, he had to bring her to court all of the time. I've seen him out private with her. He would have to lead her. To my knowledge, he didn't have any outside help. I know the children lived outside of the county. They came in and helped him when they could. Because of the nature of her disease, it was hard to get somebody to come in and sit with her, mainly because of her fears and the unknowns for her because it was Alzheimer's. I know that everything took a backseat to his wife for a long time.

Q: The extent of the care you mentioned while we were out in the hallway. There was a situation that you saw at an auction?

A: Yeah. Howard and Madonna and my husband and I, we often ended up at the same auctions and I just remember specifically watching Howard – watching him take Madonna to the bathroom. He had to take care of all of her needs. She couldn't even go to the bathroom by herself.

8/31/15 Hrg. Trans. p. 64-65. Initially, Respondent was able to take his wife to court and to depositions with him. He cared for his wife by himself until the last year when he could no longer take her to court with him because of the gravity of her deteriorating health. He had difficulty, however, keeping people to stay with her during his court appearances. 8/31/15 Hrg. Trans. p. 9. At the time Respondent neglected to take sufficient action to recover the seized funds from City National Bank, the record reflected Respondent's wife had also broke her arm and began having fainting spells. However, because she suffered from Alzheimer's, medical professionals advised that

she could not be placed under general anesthesia for corrective surgery. As such, her medical condition required extensive travel, several times a week, from Cowen to Parkersburg, for physical therapy and orthopedist's care, causing her to become more dependent on Respondent for assistance and care with her daily activities. Nonetheless, Respondent continued to practice law while taking her with him to court and to hearings. 8/31/15 Hrg. Trans. p. 40-44.

Prior to the time of the present proceedings, and despite having practiced for thirty-nine (39) years in this State, Respondent has only received an admonishment/reprimand for not responding to Office of Disciplinary Counsel communications.<sup>3</sup> The time frame of Respondent's wife being diagnosed with Alzheimer's was within a month of the tax levy in question in this case. 8/31/15 Hrg. Trans. p. 40.

The funds taken from the special account in the tax levy were taken without Respondent's knowledge, authorization or consent. He had no involvement in the process, and was unaware that the levy would occur. Respondent had no complicity or involvement in the decision-making process that amounted to the levy upon the special commissioner's account nor a chance to contest or rebut this action prior to the levy being issued. Likewise, there is no evidence that indicates any nefarious or other intentional act was taken on the part of Respondent to benefit him financially from this matter. The execution of the levy and the withdrawal of the funds from the special account were separate administrative actions taken by the State Tax Department and City National Bank. The special commissioner's account was originally opened after the first property was sold by both Respondent and William Martin in their names. Originally, the account had both the FEIN of Mr.

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<sup>3</sup> Respondent had the following prior discipline: 1) an admonishment from the Investigative Panel on June 27, 1995 for violating Rule 1.9(a) regarding conflicts and Rule 1.8 regarding business transactions with clients and obtaining an interest in litigation with a client matter; 2) an admonishment from the Investigative Panel on June 19, 2001 for failing to respond to the Office of Disciplinary Counsel; and 3) a reprimand from this Honorable Court on January 26, 2006 for failure to respond to the Office of Disciplinary Counsel. ODC Ex. 26.

Martin and the social security number of Respondent. At some point, Mr. Martin was relieved as special commissioner because of his new position as prosecuting attorney. Mr. Martin's name and FEIN number were apparently removed from the account by City National Bank without the knowledge of Respondent. 8/31/15 Hrg. Trans. p. 11, 13, 14, 16, 67.<sup>4</sup>

After learning that the funds in the special commissioner's account had been seized pursuant to the tax levy, Respondent immediately notified the State Tax Department and the bank that the funds levied upon were not personal funds, but were instead client funds not subject to levy. He also made contact with a representative of the Governor's office to see if they might intervene to help recover the money. 8/31/15 Hrg. Trans. p. 36-37. Admittedly, Respondent failed to followup on the loss of the client funds, and to notify his client of this action which was clearly adverse to his client's interest. He additionally failed to notify the Court having jurisdiction over this matter. Respondent indicated he was embarrassed by the tax levy and failed to disclose what happened because of that. He also admitted he failed to take adequate steps to bring a lawsuit or other action against the Tax Commissioner until the matter was set for hearing by the Circuit Court of Braxton County. 8/31/15 Hrg. Trans. p. 16-20.

Respondent was very contrite and emotion during the hearing he attended on August 31, 2015. Although the transcript may not reflect it, Respondent repeatedly was brought to tears both during the testimony relating to his admitted violations and during the testimony relating to the illness and death of his wife and mother. He was embarrassed, apologetic, and regretful in his testimony. He was also sincere. He readily admitted the violations contained in the Stipulation,

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<sup>4</sup> Respondent prepared the April 25, 2007 Order entered by the Circuit Court, which noted that William C. Martin was now a prosecutor and could not participate as a special commissioner. ODC Ex. 15, Bates stamp 574-575. That Order specifically stated that "it is Adjudged and Ordered that William C. Martin be, and he is hereby relieved as Special Commissioner and that his bond as said Special Commissioner is released as to William C. Martin only."

including violations of Rules 1.3, 1.4, and 8.4. 8/31/15 Hrg. Trans. p. 6, 8, 30, 31, 32, 35, 36. Respondent stated that he was fully willing to make restitution if he has the means from his practice to do so. 8/31/15 Hrg. Trans. p. 37-38.

Respondent is practicing on a limited basis at present. He has not asked to be put back on the panel of appointed lawyers in abuse and neglect cases, felony cases or guardian ad litem cases because of the uncertainty of his status as a practicing lawyer going forward due to this pending disciplinary issue. Initially, after the death of his wife and mother, Respondent did not work, but has since resumed some parts of his civil practice.

**D. CONCLUSIONS OF LAW OF THE HEARING PANEL SUBCOMMITTEE  
AND OBJECTIONS OF THE OFFICE OF DISCIPLINARY COUNSEL**

The Hearing Panel Subcommittee found that Respondent violated Rules 1.3, 1.4(a), 1.4(b), 3.2, 8.4(c), and 8.4(d).<sup>5</sup> The violation regarding Rule 1.3 on diligence was due to Respondent's failure to retrieve the money taken by the State Tax Commissioner, which resulted in harm to his client because the money is no longer available. Respondent was found to have violated Rules 1.4(a)

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<sup>5</sup> The Supreme Court of Appeals of West Virginia approved comprehensive amendments to the West Virginia Rules of Professional Conduct. The amendments became effective January 1, 2015; however, this document applies to the version of the Rules that was in effect at the time of Respondent's transgressions. It is noted that the substance of the new Rules would not result in a different disposition in this case.

**Rule 1.3. Diligence.**

A lawyer shall act with reasonable diligence and promptness in representing a client.

**Rule 1.4 Communication.**

- (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

**Rule 3.2 Expediting litigation.**

A lawyer shall make reasonable efforts to expedite litigation consistent with the interest of the client.

**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;

and 1.4(b) by failing to inform his client about the money being taken by the State Tax Commissioner. Failure to retrieve the money taken by the State Tax Commissioner and failure to make reasonable efforts to retrieve the money was found to be a violation of Rule 3.2 regarding expediting litigation. Further, the violations regarding Rules 8.4(c) and 8.4(d) were found to be proven due to Respondent failing to inform his own client and others such as the Court about the money being taken from the Special Account. The Hearing Panel Subcommittee noted that Rule 8.4(c) dealt only with deceit.

The Hearing Panel Subcommittee declined to find a violation of Rules 1.15(a) and 3.4(c).<sup>6</sup> The Office of Disciplinary Counsel had argued that Respondent had failed to properly safeguard the funds and failed to timely retrieve the sums in violation of Rule 1.15(a). The Hearing Panel Subcommittee found that Respondent complied with West Virginia Code § 55-12-1<sup>7</sup> and such statute

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<sup>6</sup> **Rule 1.15 Safekeeping property.**

(a) A lawyer shall hold property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account designated as a "client's trust account" in an institution whose accounts are federally insured and maintained in the state where the lawyer's office is situated, or in a separate account elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safe guarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

**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.

<sup>7</sup> West Virginia Code § 55-12-1 states that "[a] court, in a suit properly pending therein, may make a decree or order for the sale of property in any part of the State, and may direct the sale to be for cash, or on such credit and terms as it may deem best; and it may appoint a special commissioner or special receiver to make such sale. Every special commissioner or special receiver appointed under this section shall be a resident of the State of West Virginia, and he shall make no sale and shall receive no money under a decree or order until he give a bond with approved security before the said court or its clerk, conditioned as the law requires for the faithful accounting therefor and with the further condition that he will deposit in his name as such special commissioner or special receiver all moneys received by him as such special commissioner or special receiver in one or more banks in the county in which the suit or cause is properly instituted, and will not remove the same therefrom without the order or decree of distribution of the presiding judge; and any special commissioner or special receiver violating the conditions of his bond or the provisions of this section by making a sale or receiving money before executing bond as aforesaid, or failing to deposit the money in one or more banks in the county in which the suit or cause is properly instituted as aforesaid, or failing to keep the same therein subject to a decree of distribution, shall be guilty of a misdemeanor and shall be punished by a fine of not less than

did not require that Respondent place the funds in a trust account. However, this Honorable Court found in Blyler v. Matkovich, No. 14-0760, No. 14-1335 (W.Va. Supreme Court, November 23, 2015) (memorandum decision), which involved a civil lawsuit filed by Respondent to retrieve the very money involved in this case, that “the court orders directing the deposit of those funds clearly provided that the funds were to be deposited in lawyer trust accounts, which did not occur.” The Hearing Panel Subcommittee noted that the statute did not allow the funds to be deposited into an “IOLTA” account. The Hearing Panel Subcommittee appears to be confused as to the difference between a trust account and an IOLTA account. An IOLTA account during that time period would have fallen under Rule 1.15(d), which allows lawyers to deposit “client funds that are nominal in amount or are expected to be held for a brief period.” The Office of Disciplinary Counsel was not proceeding under that specific section of Rule 1.15 because the funds were neither nominal nor expected to be held for a short period of time. The statute that applied to this case would certainly include a trust account which is applicable under Rule 1.15(a), as well as the court Order. Further, this court has already found that Respondent was to place the money into his client trust account, but Respondent failed to do so. The Office of Disciplinary Counsel asserts that Respondent did violate Rule 1.15(a) by failing to properly safeguard the funds that were placed with him to be held in trust.

Regarding Rule 3.4(c), the Hearing Panel Subcommittee made no mention of this rule in their recommendation. Respondent did not stipulate to this rule violation, but the evidence presented in this case is clear that Respondent failed to follow the Circuit Court’s Order to place the funds in a trust account. While the Hearing Panel Subcommittee may again be relying on the argument that an IOLTA account was not the proper account to deposit the funds, a trust account would have been

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twenty-five nor more than one hundred dollars and may be imprisoned in the county jail for a term not to exceed ten days.”

acceptable under the statute. The Circuit Court's Order specifically stated that the funds should be placed in a trust account.

## II. SUMMARY OF ARGUMENT

The Hearing Panel Subcommittee correctly found that Respondent committed multiple violations of the Rules of Professional Conduct. The Hearing Panel Subcommittee recommended that Respondent be "strongly reprimanded"; that he be placed on probation for a period of at least eighteen months; that he be permitted to practice law during the period of probation under the supervision of Joyce Morton, Esquire, or any other lawyer approved by this Court and the Office of Disciplinary Counsel; that Respondent make restitution of the amounts seized from the special commissioners' account within thirty-six (36) months from the date of the Court's order if the same is not fully satisfied in the Cogar's pending negligence action against Respondent; and that Respondent pay the costs and expenses incurred by the Office of Disciplinary Counsel in the prosecution of this proceeding and in overseeing Respondent's probation and in the fulfillment of his obligations in making restitution. Respectfully, the Office of Disciplinary Counsel asserts that while there was no error in the findings of fact made by the Hearing Panel Subcommittee, but the Office of Disciplinary Counsel disputes certain conclusions of law made by the Hearing Panel Subcommittee as well as the Hearing Panel Subcommittee's recommendation as to sanction. The Office of Disciplinary Counsel asserts that the sanction of reprimand and probation proposed by the Hearing Panel Subcommittee is inadequate considering the clear and convincing evidence against Respondent and precedent of this Honorable Court. The Office of Disciplinary Counsel also requests that this Honorable Court make clear that should this proceeding result in a suspension of Respondent's law license for any amount of time, he should be reinstated through the procedure set

forth in Rule 3.32 of the Rules of Lawyer Disciplinary Procedure. In ordering a strong sanction in this attorney disciplinary proceeding, the Court will be serving its goals of protecting the public, reassuring the public as to the reliability and integrity of attorneys, and safeguarding its interests in the administration of justice.

### **III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

The Office of Disciplinary Counsel does not object to oral argument in this matter. The Office of Disciplinary Counsel objected to the recommendation of the Hearing Panel Subcommittee, which set this matter for oral argument. Further, pursuant to Rule 19 of the Revised Rules of Appellate Procedure, this Honorable Court's February 19, 2016 Order has set this matter for oral argument on Tuesday, May 17, 2016.

### **IV. ARGUMENT**

#### **A. STANDARD OF PROOF**

The charges against an attorney must be proven by clear and convincing evidence pursuant to Rule 3.7 of the Rules of Lawyer Disciplinary Procedure. *See*, Syl. Pt. 1, Lawyer Disciplinary Board v. McGraw, 194 W. Va. 788, 461 S.E.2d 850 (1995). Substantial deference is to be given to the Lawyer Disciplinary Board's findings of fact unless the findings are not supported by reliable, probative, and substantial evidence on the whole record. Committee on Legal Ethics v. McCorkle, 192 W. Va. 286, 452 S.E.2d 377 (1994); Lawyer Disciplinary Board v. Cunningham, 195 W. Va. 27, 464 S.E.2d 181 (1995). At the Supreme Court level, "[t]he burden is on the attorney at law to show that the factual findings are not supported by reliable, probative, and substantial evidence on the whole adjudicatory record made before the Board." Cunningham, 464 S.E.2d at 189; McCorkle, 192 W. Va. at 290, 452 S.E.2d at 381.

In lawyer disciplinary matters, a *de novo* standard of review applies to questions of law, questions of application of the law to the facts, and questions of appropriate sanction to be imposed. Roark v. Lawyer Disciplinary Board, 207 W. Va. 181, 495 S.E.2d 552 (1997); Committee on Legal Ethics v. McCorkle, 192 W. Va. 286, 452 S.E.2d 377 (1994). The Supreme Court of Appeals gives respectful consideration to the Lawyer Disciplinary Board's recommendations as to questions of law and the appropriate sanction, while ultimately exercising its own independent judgment. McCorkle, 192 W. Va. at 290, 452 S.E.2d at 381. The Supreme Court of Appeals is the final arbiter of formal legal ethic charges and must make the ultimate decisions about public reprimands, suspensions or annulments of attorneys' licenses to practice law. Syl. Pt. 3, Committee on Legal Ethics v. Blair, 174 W.Va. 494, 327 S.E.2d 671 (1984); Syl. Pt. 7, Committee on Legal Ethics v. Karl, 192 W.Va. 23, 449 S.E.2d 277 (1994).

The Office of Disciplinary Counsel asserts that the findings of fact made by the Hearing Panel Subcommittee in its recommendation were correct, sound, fully supported by reliable, probative and substantial evidence on the whole adjudicatory record made before the Board, and should not be disturbed. The Office of Disciplinary Counsel asks that this Honorable Court, while giving respectful consideration to the Hearing Panel Subcommittee's recommendations concerning questions of law and the appropriate sanction, impose a stronger sanction upon Respondent in this matter due to the extent of the serious violations of the Rules of Professional Conduct.

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

Syllabus Point 4 of Office of Lawyer Disciplinary Counsel v. Jordan, 204 W.Va. 495, 513 S.E.2d. 722 (1998) holds that Rule 3.16 of the Rules of Lawyer Disciplinary Procedure provides as follows:

In imposing a sanction after a finding of lawyer misconduct, unless otherwise provided in these rules, the Court [West Virginia Supreme Court of Appeals] or Board [Lawyer Disciplinary Board] shall consider the following factors: (1) whether the lawyer has violated a duty owed to a client, to the public, to the legal system, or to the profession; (2) whether the lawyer acted intentionally, knowingly, or negligently; (3) the amount of the actual or potential injury caused by the lawyer's misconduct; and (4) the existence of any aggravating or mitigating factors.

A review of the record in this matter indicates that Respondent has transgressed all four factors set forth in Jordan.

**1. The Hearing Panel Subcommittee found that Respondent violated duties to his clients, to the public and to the legal system.**

The Hearing Panel Subcommittee found that the evidence shows that Respondent committed violations of the Rules of Professional Conduct, including (1) failing to act with reasonable diligence and promptness in representing his client; (2) failing to communicate with his client; (3) failing to expedite litigation consistent with the interest of the client; (4) engaged in deceitful conduct by failing to tell his client and others about the money being taken; and (5) engaged in conduct that is prejudicial to the administration of justice by failing to tell his client and others about the money being taken. Accordingly, the Hearing Panel Subcommittee determined that Respondent had violated duties owed to his client, the public, and the legal system.

Lawyer owe their clients duties of loyalty, communication, and diligence. Respondent has fallen short of his duties to effectively communicate with his client about the case. The record clearly reflects that Respondent failed to communicate with his client and failed to diligently work on the case. Respondent was aware that the funds had been taken from the special account, but he failed to alert his client about the seizure of the funds and failed to timely make an effort to retrieve those funds. While Respondent asserted that he contacted the bank and the State Tax Department about

the error regarding those funds, Respondent did nothing further beyond making one (1) phone call and sending one (1) letter, neither of which were made to his client. Respondent clearly did not follow up on the issue. It should be noted again that it was a significant amount of money. Ninety-Six Thousand Eight Hundred Fifty-One Dollars and Eight Cents (\$96,851.08) was seized by the State Tax Commissioner to pay Respondent's unpaid taxes. In addition, this Honorable Court has found that the statute of limitations now prevents Respondent from attempting to get those funds back. With the ruling by this Court, Respondent will now continually have the benefit of having someone else, his client, to pay his unpaid taxes down by Ninety-Six Thousand Dollars (\$96,000.00) and his client, whose money was used to pay Respondent's unpaid tax liability, is still left without the money at this time. While Respondent may not have intentionally taken the funds, he certainly intentionally failed to alert his client about the situation, which resulted in the statute of limitations running on the matter. Respondent admitted that he should have filed the suit to recover the Estate's funds earlier than he did. 8/31/15 Hrg. Trans. p. 26. Further, "[t]here was nothing that prevented [Respondent] from filing a suit" and "it was wrong for [Respondent] not to have taken steps between 2009 and 2012." 8/31/15 Hrg. Trans. p. 31-32.

While the Hearing Panel Subcommittee did not specifically state that Respondent violated duties owed to the public and the legal system, the Hearing Panel Subcommittee did find that Respondent failed to protect the funds given to him and was deceitful by failing to tell his client about the funds being seized. This is a violation of the duties owed to the public because the public is entitled to trust lawyers to protect their property, and lawyers have a duty not to engage in deceitful conduct. Further, the Hearing Panel Subcommittee found that Respondent did fail to timely recover the funds, which affected the administration of justice. This is even more apparent by the fact that

the statute of limitations now has run on retrieving the funds and further shows that Respondent failed to follow the procedural rules by not timely moving to retrieve the funds.

**2. The Hearing Panel Subcommittee found Respondent acted intentionally and negligently.**

The Hearing Panel Subcommittee noted that, in this case, they had to determine actions or omissions by Respondent which were both intentional and negligent. The most culpable mental state is that of intent, when the lawyer acts with the conscious objective or purpose to accomplish a particular result. The next most culpable mental state is that of knowledge, when the lawyer acts with conscious awareness of the nature or attendant circumstances of his conduct, but without the conscious objective or purpose to accomplish a particular result. The least culpable mental state is negligence, which occurs when a lawyer fails to be aware of a substantial risk that circumstances exist or that a likely adverse result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.

The Hearing Panel Subcommittee found that the evidence related to the ethical violations involving the failure to timely file suit to retrieve the funds was negligent. The Office of Disciplinary Counsel disagrees with this finding. Respondent was aware that the funds had been taken and did nothing for three (3) years. And, at this point, Respondent has now benefitted from the payment of back taxes by funds that likely would have went, in part, to his client. Further, the evidence showed that Respondent did not file a lawsuit to retrieve the funds until the Circuit Court ordered him to do so. The Office of Disciplinary Counsel believes the negligent behavior of Respondent was his failure to properly name the account in which the funds were stored. There is no evidence that Respondent intentionally misnamed the account, but it is clear that Respondent did nothing to protect the funds.

Further, the Hearing Panel Subcommittee found that Respondent's failure to inform his client about the funds being taken and his failure to timely file suit to recover the funds was intentional.

**3. The Hearing Panel failed to make any statement regarding the amount of injury.**

The Office of Disciplinary asserts that Respondent's misconduct resulted in actual injury to his client because the funds from the Estate have been seized and the Estate is still open. Respondent's client had to employ additional counsel to try to recover the funds and to file a legal malpractice suit. Moreover, the attempt to recover the funds has been rendered moot by this Honorable Court's ruling regarding the statute of limitations. While the malpractice action is still pending, Respondent's own testimony at the disciplinary hearing seemed to indicate that his malpractice carrier was trying to deny coverage. This again would leave Respondent's client without any recourse to recover the funds and would leave Respondent as the only individual who benefitted from the taking of the funds.

**4. There are several aggravating factors present.**

Aggravating factors are considerations enumerated under Rule 3.16 of the Rules of Lawyer Disciplinary Procedure for the Court to examine when considering the imposition of sanctions. Elaborating on this rule, the Scott Court held "that aggravating factors in a lawyer disciplinary proceeding 'are any considerations, or factors that may justify an increase in the degree of discipline to be imposed.'" Lawyer Disciplinary Board v. Scott, 213 W.Va. 209, 216, 579 S.E. 2d 550, 557(2003) quoting *ABA Model Standards for Imposing Lawyer Sanctions*, 9.21 (1992).

The Hearing Panel Subcommittee found the following aggravating factors: dishonesty in failing to inform his client of the tax levy and in failing to immediately and diligently move forward with legal action to rectify this mistake. In addition, Respondent's substantial experience in the

practice of law is also an aggravating factor. Respondent has practiced since 1976, and has had more than adequate experience to understand the appropriate conduct expected and required of him in this matter. Another aggravating factor not found by the Hearing Panel Subcommittee was Respondent's has prior discipline. Respondent received discipline from the Investigative Panel in the form of two (2) prior admonishments and prior discipline from this Honorable Court in the form of one (1) reprimand.

**5. There are several mitigating factors present.**

In addition to adopting aggravating factors, the Scott court also adopted mitigating factors in lawyer disciplinary proceedings concluding that mitigating factors "are any considerations or factors that may justify a reduction in the degree of discipline to be imposed." Lawyer Disciplinary Board v. Scott, 213 W.Va. 209, 214, 579 S.E.2d 550, 555 (2003) quoting *ABA Model Standards for Imposing Lawyer Sanctions*, 9.31 (1992). In this case, the Hearing Panel Subcommittee found the following mitigating factors present: personal problems due to the health of Respondent's wife, good character, and absence of selfish motive.<sup>8</sup>

**6. Facts that are not considered aggravating or mitigating.**

Forced or compelled restitution is not considered an aggravating or mitigating factor. In this case, Respondent was ordered by the Circuit Court to sue the State Tax Department and the bank to recover the funds. If it were not for the Circuit Court setting the matter for a hearing, the discovery of the missing funds by Respondent's client may never have happened and Respondent's attempt to retrieve the funds may not have begun. However, it is now known that the attempt to retrieve the

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<sup>8</sup> The Hearing Panel Subcommittee also found as a mitigating factor that Respondent had no prior discipline. The Office of Disciplinary Counsel incorrectly indicated in their proposed Findings of Fact and Conclusions of Law that Respondent had no prior discipline. Clearly, the evidence in this matter shows that Respondent was previously admonished by the Investigative Panel on two (2) occasions and reprimanded by this Honorable Court. See ODC Ex. 26. Such evidence is an aggravating factor and should not be considered a mitigating factor.

funds was too late and, again, Respondent is the only one who benefitted from what happened to the funds.

C. SANCTION

The Rules of Professional Conduct state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. Syllabus Pt. 3, *in part*, Committee on Legal Ethics v. Tatterson, 173 W.Va. 613, 319 S.E.2d 381 (1984), *cited in* Committee on Legal Ethics v. Morton, 186 W.VA. 43, 410 S.E.2d 279, 281 (1991). In addition, discipline must serve as both instruction on the standards for ethical conduct and as a deterrent against similar misconduct to other attorneys. In Syllabus Point 3 of Committee on Legal Ethics v. Walker, 178 W.Va. 150, 358 S.E.2d 234 (1987), the Court stated:

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

The Supreme Court of Appeals has long recognized that attorney disciplinary proceedings are not designed solely to punish the attorney, but also to protect the public, to reassure the public as to the reliability and integrity of attorneys, and to safeguard its interests in the administration of justice. Lawyer Disciplinary Board v. Taylor, 192 W.Va. 139, 144, 451 S.E.2d 440, 445 (1994). Indeed, the principle purpose of attorney disciplinary proceedings is to safeguard the public's interest in the administration of justice. Syl. pt. 3, Daily Gazette v. Committee on Legal Ethics, 174 W.Va. 359, 326 S.E.2d 705 (1984).

Based upon the conduct discussed herein, the Hearing Panel Subcommittee recommended that, in addition to other sanctions, Respondent should be strongly reprimanded. The Office of

Disciplinary Counsel asserts that the lesser sanction of a reprimand is inadequate sanction considering the clear and convincing evidence against Respondent and the precedent of this Court. The Office of Disciplinary Counsel also asserts that a reprimand in this matter does not serve as both an instruction on the standards for ethical conduct or an effective deterrent against similar misconduct to other attorneys.

With regard to the failure to safeguard or preserve the Estate's funds, 4.13 of the Standards for Imposing Lawyer Sanctions states that reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client. Respondent was negligent in handling the funds as a special commissioner. However, Respondent committed other misconduct that must be considered by this Honorable Court to determine the ultimate sanction.

When looking at the other Standards for Imposing Lawyer Sanctions, the clear indication is that Respondent should be disbarred. Standards for Imposing Lawyer Sanctions 4.41 states that disbarment is generally appropriate, absent aggravating or mitigating circumstances, when (b) a lawyer knowing fails to perform services for a client and causes serious or potentially serious injury to a client; or (c) a lawyer engages in a pattern of neglect with respect to client matters and causes serious or potentially serious injury to a client. 5.11 of the Standards for Imposing Lawyer Sanctions states that disbarment is generally appropriate when a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice, absent aggravating or mitigating circumstances. The sanction of disbarment is generally appropriate in cases involving failure to expedite litigation under the Standards for Imposing Lawyer Sanctions 6.21 when a lawyer knowingly violates a rule with the

intent to obtain a benefit for the lawyer or another, and causes serious injury or potentially serious injury to a party or causes serious or potentially serious interference with a legal proceeding. However, the sanction of disbarment under the Standards notes that it is without the consideration of aggravating or mitigating factors.

In this current case, it is clear that Respondent was dealing with a serious personal problem involving his wife's illness, which impacted all aspects of their lives. Further, this personal problem continued until early 2015, when Respondent's wife passed away. However, a review of the record here shows that Respondent continued to practice law during that time period, and even brought his wife with him to court until that was no longer manageable. Respondent provided no evidence which prevented him from informing his client about the funds being seized, or prevented him from seeking to recover the funds prior to the Court ordering him to do so in 2012. Respondent's wife was ill during 2012 and Respondent sought to recover the funds during her illness after being ordered to do so the Circuit Court. Without the Circuit Order's intervention into the matter, it is likely that Respondent would have never informed anyone about the missing funds. Further, this case involves a significant amount of client funds being seized. There is no dispute that over Ninety-Six Thousand Dollars (\$96,000.00) was seized. This amount has not been recovered by the client, and it appears it may never be recovered because the statute of limitations ran on the matter and the malpractice carrier is attempting to deny coverage. It is also clear that Respondent still owes a large amount of unpaid taxes, and any additional money he earns would likely go to pay those amounts. In essence, Respondent has received the clear benefit of having Ninety-Six Thousand Dollars (\$96,000.00) of his back taxes paid with client funds and his client is left with nothing.

The Hearing Panel Subcommittee noted that a case out of Oregon was distinguishable from this case. That case, In re Skagon, 149 P.3d 1171, 342 Or. 183 (Or. 2006), found that negligent handling of a trust account would normally result in a reprimand, but an increase in the sanction was appropriate because the attorney then engaged in deceptive conduct, which resulted in an one year suspension. In the Skagon case, the Oregon Supreme Court found that the attorney had mishandled his trust account and client funds, which resulted in the failure to preserve client property, but he also failed to cooperate with the disciplinary investigation. Id. at 1191, 216-217. The attorney's mental state in that case was found to have been negligent regarding his trust account and intentional conduct for the being prejudicial to the administration of justice and failure to be truthful and open in the disciplinary investigation. In re Skagon, 149 P.3d 1171, 1192, 342 Or. 183, 217 (Or. 2006). The Hearing Panel Subcommittee argued that in this case Respondent did not mishandle client funds and did not mishandle the special account. Further, mitigating factors including cooperation in disciplinary proceedings and remorse were not present in Skagon. However, it is Respondent who failed to follow the Circuit Court's Order regarding the placement of funds in his trust account and his failure to properly name the account. While there were issues regarding the account because another attorney was removed and Respondent had initially used his social security number to open the account, it remains that Respondent was still responsible for safekeeping the funds and he failed to do so. The Office of Disciplinary Counsel argues that the Skagon case is on point because Respondent's case also deals with two (2) mental states, which are also negligence and intentional. Further, the Skagon case found the negligence to be the mental state regarding the trust account, and intentional to be the mental state regarding the failure to communicate and failure to recover the funds. While there were no mitigating factors found in Skagon, the Court in that case noted that

some of the attorney's misconduct would result in a reprimand and other misconduct would result in a suspension. Id. at 1193, 219. The Oregon Court looked to several cases of its own and stated that "this case falls somewhere . . . where suspensions of two or three years were imposed for conduct prejudicial to the administration of justice and failure to cooperate with the Bar, as well as misrepresentation" and a case where an attorney was suspended for sixty (60) days. Id. at 1193, 220. The Oregon Court was not looking to allow an attorney who committed such misconduct to only be sanctioned with a reprimand. Further, again, in looking to the Standards of Imposing Lawyer Sanctions, Respondent should be disbarred for his misconduct. However, the mitigating factors in this case have been considered and may lessen the sanction. In that case, Respondent should be suspended for one (1) year.

The Hearing Panel Subcommittee failed to note the West Virginia case of Lawyer Disciplinary Board v. Santa Barbara, 229 W.Va. 344, 729 S.E.2d 179 (2012), which dealt with an attorney who failed to diligently handle client matters, failed to communicate with a clients, failed to competently represent his client, and failed to manage a trust account for a client. That case also resulted in a one (1) year suspension, which again is what the Office of Disciplinary Counsel is seeking in this matter. The Hearing Panel Subcommittee may not have looked into this case because they did not find a violation of Rule 1.15(a). However, this case is even more on point regarding the appropriate sanction. While that case dealt with multiple complaints, it is on point to show what happens when a trust account is handled negligently and there is clear failure to communicate with your clients. Specifically, there were three (3) instances of the attorney not being diligent and not communicating with his clients. The other case dealt with the attorney's failure to properly oversee and manage his trust account. Further, the attorney in that case "assert[ed] that the recommendation

[of one year] shows a failure of the [Hearing Panel Subcommittee] to appreciate the ‘synergistic effect’ between the disruption caused by the assistant/secretary he ultimately fired, his depression, and his ability to defend the charges.” *Id.* at 186, 351. This Court noted that the Hearing Panel Subcommittee did consider the attorney’s depression as a mitigating factor to reach the sanction of a one (1) year suspension, and noted that the Hearing Panel Subcommittee would have recommended a longer suspension period if not for the mitigating factors. In closing, this Court stated in that case that “[i]n consideration of these factors, this Court adopts the discipline recommended by the [Hearing Panel Subcommittee] as the appropriate punishment for [the attorney’s] professional transgressions, as it adequately serves to deter like conduct by other lawyers, to restore public confidence in the legal profession and to protect the public.” *Id.* at 187, 352. That case could have resulted in a longer suspension, but a mitigating factor was the attorney’s depression, which lessens the suspension to only one (1) year. Here, Respondent has acted negligently in handling the special account, but also acted intentional in failing to communicate to his client about the funds being taken and failing to timely seek to recover the funds. Again, the Standards indicate that Respondent’s misconduct should result in disbarment, but the mitigating factors present in this case lessen the sanction to suspension. It appears that the Santa Barbara case is analogous to the situation in this case.

While the Hearing Panel Subcommittee made the recommendation that Respondent make restitution, the Office of Disciplinary asserts this is based upon Lawyer Disciplinary Board v. Rossi, 234 W.Va. 675, 769 S.E.2d 464 (2015). In that case, the Supreme Court of Appeals of West Virginia ordered an attorney who had multiple issues of misconduct which included diligence issues, failure to communicate charges, failure to litigate issues, and failure to respond to disciplinary counsel

charges, to pay make full restitution to a client if the client's company is required to pay a default judgment. *Id.* at 687, 476. The client had hired the attorney to represent him to seek the dismissal of a lawsuit that was filed against his company. *Lawyer Disciplinary Board v. Rossi*, 234 W.Va. 675, 680, 769 S.E.2d 464,469 (2015). While the attorney told the client that he had researched the matter and had filed "stuff" in the case, a default judgment for Thirty Thousand Dollars (\$30,000.00) was entered against the company for failure to file any pleadings in the case. The West Virginia Supreme Court obviously felt that an attorney should be required to make the client whole.

Further, this Honorable Court has ordered an attorney to make restitution regarding the fees he supposedly earned from estate work. *See Lawyer Disciplinary Board v. Ball*, 219 W.Va. 296, 633 S.E.2d 241 (2006). While that case dealt with an issue regarding "earned fees," this Court stated that

"total restitution is required. There is no question that the violations in this case involve a clear and serious breach of duty [the attorney] owed to his clients. We have already determined that [the attorney's] misconduct was intentional and that it caused actual and potential harm to his clients. Furthermore, complete restitution is the only adequate remedy in this case. To permit [the attorney] to retain any of the proceeds of his unethical conduct would send a chilling message to the public and, because of the amount of money involved, would be an incentive for other lawyers to engage in similar conduct."

*Id.* at 309, 254. In this case, Respondent will now always have the benefit of his unethical conduct by having a significant portion of his unpaid taxes paid with funds from his client. Respondent should be ordered to immediately refund the money back to the estate and that is the only appropriate remedy in this case.

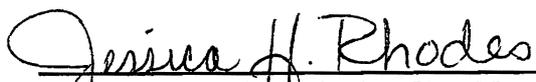
For the public to have confidence in our disciplinary and legal systems, lawyers who engage in the type of conduct exhibited by Respondent must be removed from the practice of law for some period of time. A license to practice law is a revokable privilege and when such privilege is abused, the privilege should be revoked. A severe sanction is also necessary to deter lawyers from engaging

in similar conduct, and is necessary to protect the public, to reassure the public as to the reliability and integrity of attorneys, and to safeguard the interest in the administration of justice.

## V. CONCLUSION

Accordingly, for the reasons set forth above, the ODC requests that this Honorable Court adopt the following sanctions: (1) that Respondent's law license be suspended for at least one year; (2) that Respondent be required to petition for reinstatement pursuant to Rule 3.32 of the Rules of Lawyer Disciplinary Procedure; (3) that upon reinstatement, Respondent's practice be supervised for one (1) year; (4) that Respondent pay Ninety-Six Thousand Eight Hundred Fifty-One Dollars and Eighty Cents (\$96,851.80) into the Estate of Lloyd Allen Cogar, Jr.; and (5) that Respondent pay the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

The Lawyer Disciplinary Board  
By Counsel

  
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**CERTIFICATE OF SERVICE**

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This is to certify that I, Jessica H. Donahue Rhodes, Lawyer Disciplinary Counsel for the Office of Disciplinary Counsel, have this day, the 23<sup>rd</sup> day of March, 2016, served a true copy of the foregoing "**Amended Brief of the Lawyer Disciplinary Board**" upon Gregory A. Tucker, counsel for Respondent Howard J. Blyler, by mailing the same via United States Mail with sufficient postage, to the following address:

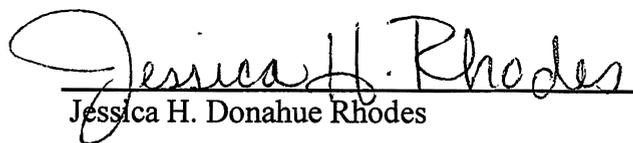
Gregory A. Tucker, Esquire  
719 Main Street  
Summersville, West Virginia 26651

And upon the Hearing Panel Subcommittee via email and at the following addresses:

John W. Cooper, Esquire  
Post Office Box 365  
Parsons, West Virginia 25287

Kelly D. Ambrose, Esquire  
Office of the Staff Judge Advocate  
1703 Coonskin Drive  
Charleston, West Virginia 25311

Cynthia L. Pyles  
24 Sharpless Street  
Keyser, West Virginia 26726

  
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Jessica H. Donahue Rhodes