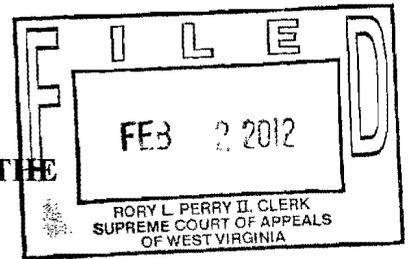


**BEFORE THE SUPREME COURT OF APPEALS OF THE
STATE OF WEST VIRGINIA**



LAWYER DISCIPLINARY BOARD,

Complainant,

v.

No. 10-4011

MICHAEL S. SANTA BARBARA,

Respondent.

BRIEF OF THE LAWYER DISCIPLINARY BOARD

Andrea J. Hinerman [Bar No. 8041]
Senior Lawyer Disciplinary Counsel
Office of Disciplinary Counsel
City Center East, Suite 1200C
4700 MacCorkle Avenue SE
Charleston, West Virginia 25304
(304) 558-7999
(304) 558-4015 – facsimile

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

I. NATURE OF PROCEEDINGS AND RECOMMENDED DECISION
OF THE HEARING PANEL SUBCOMMITTEE 1

II. STANDARD OF REVIEW 5

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW 6
 Count I 6
 Count II 10
 Count III 12
 Count IV 15

IV. DISCUSSION 24
 A. Respondent violated duties to his clients, to the public,
 to the legal system and to the legal profession. 25
 B. Respondent acted negligently. 28
 C. The amount of real injury was great. 28
 D. There are several aggravating factors present. 29

V. SANCTION 33

TABLE OF AUTHORITIES

Cases:

<u>Committee on Legal Ethics v. Battistelli</u> 185 W.Va. 109, 405 S.E.2d 242 (1991)	2, 3
<u>Committee on Legal Ethics v. Blair</u> 174 W.Va. 494, 327 S.E.2d 671 (1984)	6
<u>Committee on Legal Ethics v. Hess</u> 186 W.Va. 514, 413 S.E. 2d 169 (1991)	36
<u>Committee on Legal Ethics v. Karl</u> 192 W.Va. 23, 449 S.E.2d 277 (1994)	6
<u>Committee on Legal Ethics v. McCorkle</u> 192 W.Va. 286, 452 S.E.2d 377 (1994)	5, 6
<u>Committee on Legal Ethics v. Morton</u> 186 W.Va. 43, 410 S.E.2d 279 (1991)	33, 36
<u>Committee on Legal Ethics v. Mullins</u> 159 W.Va. 647, 226 S.E. 2d 427 (1976)	34
<u>Committee on Legal Ethics v. Tatterson</u> 173 W.Va. 613, 319 S.E.2d 381 (1984)	33, 36
<u>Committee on Legal Ethics v. Walker</u> 178 W.Va. 150, 358 S.E.2d 234 (1987)	33
<u>Daily Gazette v. Committee on Legal Ethics</u> 174 W.Va. 359, 326 S.E.2d 705 (1984)	33
<u>In re Dameron</u> 131 W.Va. 66, 45 S.E. 2d 741 (1947)	34
<u>Lawyer Disciplinary Board v. Battistelli</u> 206 W.Va. 197, 523 S.E. 2d 257 (1999)	36

<u>Lawyer Disciplinary Board v. Coleman</u> 219 W.Va. 790, 639 S.E. 2d 882 (2006)	35
<u>Lawyer Disciplinary Board v. Cunningham</u> 195 W.Va. 27, 464 S.E.2d 181 (1995)	5, 6
<u>Lawyer Disciplinary Board v. Dues</u> 218 W.Va. 104, 624 S.E. 2d 125 (2005)	30
<u>Lawyer Disciplinary Board v. Hardison</u> 205 W.Va. 344, 518 S.E.2d 101 (1999)	33
<u>Lawyer Disciplinary Board v. Keenan</u> 189 W.Va. 37, 427 S.E.2d 471 (1993)	34
<u>Lawyer Disciplinary Board v. Kupec (Kupec I)</u> 202 W.Va. 556, 505 S.E.2d 619 (1998) <i>remanded with directions</i>	3, 35, 36
<u>Lawyer Disciplinary Board v. Kupec (Kupec II)</u> 204 W.Va. 643, 515 S.E.2d 600 (1999)	35, 36
<u>Lawyer Disciplinary Board v. McGraw</u> 194 W.Va. 788, 461 S.E.2d 850 (1995)	6
<u>Lawyer Disciplinary Board v. Scott</u> 213 W.Va. 209, 579 S.E. 2d 550 (2003)	29, 30
<u>Lawyer Disciplinary Board v. Taylor</u> 192 W.Va. 139, 451 S.E.2d 440 (1994)	24
<u>Lawyer Disciplinary Board v. Wheaton</u> 216 W.Va. 673, 610 S.E. 2d 8 (2004)	36
<u>Office of Disciplinary Counsel v. Jordan</u> 204 W.Va. 495, 513 S.E.2d. 722 (1998)	24, 35
<u>Roark v. Lawyer Disciplinary Board</u> 207 W.Va. 181, 495 S.E.2d 552 (1997)	5

West Virginia Statutes and Rules:

R. Law Disc. Proc.	Rule 3.7	6
R. Law Disc. Proc.	Rule 3.16	24
R. Professional Conduct	Rule 1.1	5, 14
R. Professional Conduct	Rule 1.3	5, 9, 11, 14
R. Professional Conduct	Rule 1.4(a)	5, 9, 11, 15
R. Professional Conduct	Rule 1.4(b)	5, 9, 11, 15
R. Professional Conduct	Rule 1.15(a)	5, 20
R. Professional Conduct	Rule 1.15(b)	20
R. Professional Conduct	Rule 8.1(a)	11
R. Professional Conduct	Rule 8.4(b)	21
R. Professional Conduct	Rule 8.4(c)	21

Other:

ABA Model Standards for Imposing Lawyer Sanctions, § 4.42	34
ABA Model Standards for Imposing Lawyer Sanctions, § 9.21	29
ABA Model Standards for Imposing Lawyer Sanctions, § 9.22(c)	29
ABA Model Standards for Imposing Lawyer Sanctions, § 9.31	30

I. NATURE OF PROCEEDINGS AND RECOMMENDED DECISION OF THE HEARING PANEL SUBCOMMITTEE

This is a disciplinary proceeding against Respondent Michael S. Santa Barbara, (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 December 9, 2010. The charges were served upon Respondent via certified mail by the Clerk on December 15, 2010. Respondent filed his answer to the Statement of Charges on January 10, 2011. A telephonic scheduling conference was held on January 19, 2011, and a telephonic prehearing conference was held on April 13, 2011.

The matter proceeded to hearing in Martinsburg, West Virginia, on May 4 and 5, 2011, in the Berkeley County Judicial Complex. At all proceedings, Andrea J. Hinerman, Senior Lawyer Disciplinary Counsel, represented the Office of Disciplinary Counsel (hereinafter "ODC"). Robert H. Davis appeared on behalf of Respondent, who also appeared. The Hearing Panel Subcommittee, comprised of John W. Cooper, Esquire, Chairperson; David W. Frame, Esquire; and Ms. Cynthia L. Pyles, laymember, presided over the proceedings.

The Hearing Panel Subcommittee heard testimony from Robert S. Sencindiver, Christa B. Clark, Tommy D. Burris, Karen A. Thomas, Crystal Marsh, David A. Camilletti, Terry Wayne Chambers, Kathy M. Santa Barbara, Bernard Lewis and Respondent. It also received an affidavit from Paul T. Camilletti, Assistant United States Attorney for the Northern District of West Virginia, which was offered by Respondent.¹ Certain evidentiary questions were resolved prior to the two-day hearing. During the hearing, ODC's Exhibits 1, 3, 7, 8, 11, 14, 18, 27, 29, 30, 31, 36, 40 and 41 were admitted into evidence. Respondent's counsel did not object to Exhibit 40 during the hearing

¹ Mr. Camilletti is a member of the Hearing Panel of the Lawyer Disciplinary Board, but he disqualified himself from participation as a member of the Hearing Panel Subcommittee in this matter because of his involvement in the prosecution and conviction of Penny Young (a former employee of the Santa Barbara Law Offices, PLLC), as well as his familiarity with some of the facts involved in this disciplinary proceeding.

because much of it was duplicated in some of his own exhibits, but in his post-hearing memorandum of law on the evidentiary issues, Respondent's counsel raised objections to limited portions of Exhibit 40.² The July 10th Order excluded those portions of Exhibit 40. Upon reconsideration of it earlier ruling on this issue, however, the Hearing Panel Subcommittee reversed its earlier ruling and concluded that these portions should also be admitted into evidence because these bank records of Respondent's IOLTA account are relevant to the Karen Thomas matter because they span the entire time period in which the Thomas settlement funds should have been included in the account. The settlement of her case and delivery of her settlement check to Respondent occurred in 2002 and the final distribution was not issued to her until August 4, 2008. Respondent's Exhibits 1-33 were also admitted into evidence during the hearing.

Several of the ODC exhibits remained at issue at the conclusion of the hearing. On May 10, 2011, the Hearing Panel Subcommittee Chairperson entered an Order with respect to the remaining ODC exhibits and permitted the parties to file written briefs before making final rulings. The parties thereafter submitted memoranda of law on those issues and an Order ruling on the objections was entered on July 5, 2011.

An abbreviated summary of the rulings from that Order follow, but for the detailed discussion of the rules and basis therefor, this Honorable Court is referred to the July 5, 2011 Order. At the onset, in his memorandum of law, Respondent withdrew his objections to Exhibits 4, 12, 13, 22, 38 and 39, and the same were admitted. Next, under Committee on Legal Ethics v. Battistelli, 185 W.Va. 109, 405 S.E.2d 242 (1991), in a disciplinary proceeding, a lawyer is entitled to "due process" which *inter alia* includes the requirement that he be given notice of the allegations against him.

² Respondent's memorandum of law objected to pages 1593-1642 and 1649-1653, asserting that they were not related to this proceeding. Essentially, these pages were bank records relating to the IOLTA account of Respondent from November 2003 through August 2007 and August 2007 through August 4, 2008, when the account was closed.

Exhibits 2, 16, 17, 24, 25, 26, 34 and 35 are admitted for the limited purpose of demonstrating that Respondent had notice of the charges against him.

Additionally, although Rule 3.6 of the West Virginia Rules of Lawyer Disciplinary Procedure (WVRLDP) provides that hearings shall be governed by WVRE, Lawyer Disciplinary Board v. Kupec, 202 W.Va. 556, 567, 505 S.E.2d 619, 630 (1998) [Kupec I] requires a complete record of the disciplinary proceedings to be submitted, because “an evidentiary record is necessary for [the Supreme Court] to determine the proper disposition of the charges.” Hence, the Hearing Panel Subcommittee found that it may admit certain exhibits which were procedural in nature to provide this Honorable Court with a complete record of what has happened even though such exhibits were not considered for any other purposes. In that vein, the objections to Exhibits 5, 19, 28 and 33 were sustained, but these Exhibits were nonetheless included in the record to provide this Court with a complete record of the proceedings below under Kupec I. Similarly, Exhibit 24 also falls within that classification as well as a Battistelli notice document. The objection to Exhibit 6 (one of Respondent’s sworn statements taken during investigative examination by ODC) was sustained to the limited extent of comments made by counsel and to the further extent it included reference to another matter which was not a part of this proceeding; but otherwise, the objection was overruled and the balance of the sworn statement was admitted. Similarly, with respect to Exhibit 21 (Respondent’s second sworn statement taken during investigative examination by ODC), the objection was sustained to the limited extent that it contained discussions about an unrelated Brittingham and an unrelated Tinsman matter which were not the subject matter of this proceeding.³

³ Alane Brittingham v. Michael S. Santa Barbara, Esquire, I.D. No. 08-05-421, was closed by a Chief Lawyer Disciplinary Counsel Closing on April 5, 2010, with a finding that there was insufficient evidence to establish that Respondent violated the Rules of Professional Conduct in that matter. Douglas P. Tinsman v. Michael S. Santa Barbara, Esquire, I.D. No. 09-02-182, was closed by a Chief Lawyer Disciplinary Counsel Closing on July 29, 2010, with a finding that there was insufficient evidence to establish that Respondent violated the Rules of Professional Conduct in that matter.

Also, the objection was sustained to the extent it contained extraneous comments by counsel. Otherwise, the objection was overruled and the remainder of Exhibit 21 was admitted. With respect to Exhibit 36 (a 34 page response filed on behalf of Respondent and his wife, Kathy Santa Barbara, to the Charges alleged against Respondent in this proceeding, and apparently for matters arising in another disciplinary matter apparently involving Respondent and his wife for which the Hearing Panel Subcommittee was not apprised), the objection was sustained to the extent that it applied to the Tinsman matter,⁴ the Karne matter⁵ and other matters not directly related to this proceeding, but otherwise the objection was overruled and the Exhibit was admitted. The objection to Exhibit 37 was overruled for the same reasons and to the same extent that the objections to Exhibit 36 were overruled as it is merely the verification of the joint response comprising Exhibit 36. Exhibit 37 was admitted. The objections to ODC Exhibits 9, 10, 15, 20, 23 and 31 were overruled and the same were received into evidence. The objection to Exhibit 32 was sustained on multiple grounds as more fully appears in the Order.

On or about December 2, 2011, the Hearing Panel Subcommittee issued its decision in this matter and filed with the Supreme Court of Appeals of West Virginia its “Recommended Decision of the Hearing Panel Subcommittee of the West Virginia Lawyer Disciplinary Board Findings of Fact and Conclusions of Law” (hereinafter “Report”). The Hearing Panel Subcommittee properly

⁴ There is at least some tangential relationship between Mr. Tinsman and the present proceeding, as he was a client who allegedly became romantically involved with Penny Young in the Count IV filed by ODC. There were references to that relationship during the course of the present case in testimony offered to show wrongful conduct and adverse motive on the part of Penny Young, a former employee who was prosecuted in federal court for defrauding Respondent for thousands of dollars. But the nature of a separate Tinsman complaint is not before this Panel either to decide on the merits or to consider in aggravation or mitigation of any recommended disciplinary action in the present charges against Respondent.

⁵ The Karnes were mentioned by Penny Young in her complaint against Michael Santa Barbara, which was opened in the name of the Office of Disciplinary Counsel and is Count IV herein.

found that the evidence established that Respondent committed multiple violations of Rules 1.3, 1.4(a) and 1.4(b), and single violations of Rules 1.1 and 1.15(a).

The Hearing Panel Subcommittee issued the following recommendation as the appropriate sanction:

1. That Respondent's law license be suspended for one year;
2. That during the period of suspension that Respondent commence and continue to undergo psychological and/or psychiatric counseling to deal with depression and alcohol abuse issues until such time that it is determined by the treating psychologist or psychiatrist that treatment is no longer necessary, and reports concerning the same shall be submitted to the Office of Disciplinary Counsel every six months;
3. Respondent shall take eight (8) hours of Continuing Legal Education in office management and office practice within the next twenty-four (24) months and provide proof of same to the Office of Disciplinary Counsel;
4. Respondent shall, upon being reinstated, undergo supervised practice for one year; and
5. Respondent shall pay the costs incurred in this disciplinary proceeding.

II. STANDARD OF REVIEW

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.

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. McCorkle, Id.; 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.

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).

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).

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Michael S. Santa Barbara (hereinafter "Respondent") is a lawyer practicing in Martinsburg, Berkeley County, West Virginia, and, as such, is subject to the disciplinary jurisdiction of the Supreme Court of Appeals of West Virginia and its properly constituted Lawyer Disciplinary Board. Respondent was admitted to The West Virginia State Bar on January 15, 1991. He has practiced with various firms in the Martinsburg area since his admission to the bar, including Wallace Harris and Sims, Steptoe and Johnson, Camilletti Ollar and Santa Barbara, before opening his own office in the latter part of the 1990's. As of January 1, 2003, he entered into practice with his wife, Kathy Santa Barbara.

COUNT I

Complaint of Robert S. Sencindiver

I.D. No. 07-05-523

2. Complainant Robert S. Sencindiver hired Respondent on or about February 8, 2005, to represent him with regard to personal injuries sustained in a "slip and fall" accident in which

he was involved on November 20, 2004. Mr. Sencindiver signed a retainer agreement with Respondent in Respondent's office on February 8, 2005, and he believed that Respondent would pursue his claim. However, the retainer agreement was not signed by Respondent. Respondent denies that he was aware that the retainer agreement was signed by Mr. Sencindiver, but the contract was in Respondent's file. It is unclear who was present when Mr. Sencindiver signed the contract, but it may have been signed in the presence of a legal assistant in the office rather than Respondent.⁶ Mr. Sencindiver called Respondent's office four or five months after retaining Respondent and was advised by Respondent's assistant that his medical bills were being submitted to the insurance company. Mr. Sencindiver also testified that he contacted Respondent's office on several occasions, but Respondent was never available to speak to him.

3. Respondent filed an answer to the ethics complaint and confirmed that Mr. Sencindiver came to see him on February 8, 2005. Although this is a slip and fall case, there was a question as to whether it was a "deliberate intent" case or a simple "slip and fall" matter as Mr. Sencindiver related to Respondent that he had slipped and fallen while working at D&S Auto Sales on November 20, 2004. Respondent explained the problem of "deliberate intent" cases in employee injury claims, at which time he contends that Mr. Sencindiver vacillated as to whether he was an employee of D&S, or had simply been helping out as a friendly accommodation to the owner. Respondent said he asked for additional information at this

⁶ Penny Young and Mr. Sencindiver were friends. It was she who advised Mr. Sencindiver to contact the ODC to file a complaint. She was later fired for office related misconduct by Respondent and his wife. The hostility which developed between Respondent and Penny Young and her eventual prosecution in federal court for bilking Respondent and his wife out of tens of thousands of dollars raise serious questions about the motives for Mr. Sencindiver's complaint and his credibility (and others which were among the matter heard by the Hearing Panel Subcommittee), but they do not relieve him of the responsibility for mishandling Mr. Sencindiver's case.

meeting, and indicated that Mr. Sencindiver did not comply with this request. There was also another matter for which Mr. Sencindiver consulted Respondent,⁷ but he apparently decided not to use Respondent's services because he did not have sufficient funds to meet the fee he was quoted.

4. Respondent said he heard nothing further from Mr. Sencindiver until Mr. Sencindiver called his office on January 31, 2007. Respondent also said he was unable to reach Mr. Sencindiver when he returned this telephone call.
5. Respondent said Mr. Sencindiver called again on March 7, 2007, inquiring about the status of his claim. Respondent said at that point, his staff began a search for the client file.
6. Respondent said the file was located on May 11, 2007. Respondent said it only contained a few handwritten notes and the February 8, 2005 fee agreement.
7. Respondent said he wrote to Mr. Sencindiver on May 11, 2007, to advise him that the statute of limitations had been missed and he should contact other counsel to see what claims he might have against Respondent.
8. In his sworn statement on December 19, 2008, Respondent stated that it was not his intention to represent Mr. Sencindiver on the slip and fall case. Respondent testified that he not only did not recall giving Mr. Sencindiver the retainer agreement, but he also did not recall giving him the authorization to obtain medical files. However, both of these documents were in the client file, signed by Mr. Sencindiver on February 8, 2005. Respondent performed no work on Mr. Sencindiver's behalf, and there was no documentation in the client file indicating that

⁷ Mr. Sencindiver had been charged on February 17, 2005, with "driving under the influence" and he consulted with Respondent about representation on that matter as well. That matter had a first scheduled appearance on February 28, 2005, as confirmed by ODC Exhibit 7, Bates No. 167. Hence, it appears that the DUI matter had to have been discussed after the meeting on February 8 when the retainer agreement was signed.

Respondent declined the representation. Respondent said he had no contact with Mr. Sencindiver from February 8, 2005, until the January of 2007, when Mr. Sencindiver contacted his office.

9. Whether the retainer agreement was signed in Respondent's presence or in the presence of a staff member, it was done with the knowledge and authorization of his office and an attorney-client relationship was thus created as of February 8, 2005.
10. Because Respondent failed to diligently pursue Mr. Sencindiver's claim and allowed the statute of limitations to run, he violated Rule 1.3 and of the Rules of Professional Conduct, which provides as follows:

Rule 1.3. Diligence.

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

11. Because Respondent failed to keep Mr. Sencindiver informed about the status of his claim, failed to send him a declination of representation letter, had no contact with Mr. Sencindiver for more than two years, and did not explain the matter to him to the extent reasonably necessary to permit him to make informed decisions about the representation, he violated Rules 1.4(a) and 1.4(b) of the Rules of Professional Conduct, which provide as follows:

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.

COUNT II
Complaint of Tommy D. Burris
I.D. No. 08-05-032

12. In late January or early February 2004, Tommy D. Burris hired Respondent to represent him in a claim for injuries arising from a January 14, 2004 head-on collision with a drunk driver. He came to Respondent, in part, because his mother had been a client of Respondent previously. Not only Tommy Burris, but also his mother, had communications with Respondent and his office about his case. Mr. Burris alleged that after some period of time, Respondent would not return his telephone calls concerning the status of his case. On or about January 30, 2007, after his mother contacted the insurance company about the matter, Mr. Burris contacted Respondent and learned that the two year statute of limitations to file suit had expired.
13. Respondent admitted that he missed the statute of limitations, both in his written response to the ethics complaint and at his sworn statement taken on December 19, 2008. Respondent stated he missed the deadline because he had erroneously entered the date of the accident into his calendar as January 14, 2005,⁸ not January 14, 2004. Respondent said he did not discover his error until January of 2007, when his client asked for his file.
14. During his sworn statement taken by ODC during its investigation of the matter, Respondent provided Disciplinary Counsel with a copy of his client file. Many of his handwritten notes and various letters list the date of accident (DOA) as 1/14/04, 1/15/04 or Jan. 04. One of the letters dated April 29, 2004 (from Nationwide Insurance to Tommy Burris c/o Santa Barbara

⁸ Respondent's Exhibit 10 is a computer screen from Respondent's computer which is a "Word Perfect" index of files. On that screen beside a file entitled "Burris Brown v. Baldwin" the following numbers are entered: "1 15 05". Respondent and one of his staff employees testified that this was the tickler system Respondent used in his practice to remind him of statutes of limitations in cases until he recently changed his calendaring to a more conventional method.

Law Offices PLLC) clearly referenced the DOA as 01-14-2004. The medical records, on two of the evaluation sheets, listed the DOA as 1/14/05. The only correspondence with Respondent's signature that listed an incorrect date was his letter of February 27, 2007, to his malpractice carrier. Respondent testified that he did not look at the dates on the correspondence and relied upon his "Word Perfect" screen tickler system and overlooked the dates on the documents in his file.

15. Because Respondent failed to pursue Mr. Burriss' claim and missed the statute of limitations to file suit, he violated Rule 1.3 of the Rules of Professional Conduct as set forth in Count I above.
16. Because Respondent failed to return Mr. Burriss' telephone calls, failed to keep Mr. Burriss informed of the status of his case, and did not explain the matter to him to the extent reasonably necessary to permit him to make informed decisions about the representation, he violated Rules 1.4(a) and 1.4(b) of the Rules of Professional Conduct as set forth above.
17. ODC suggests that because Respondent falsely stated in his answer to the ethics complaint that he missed the statute of limitations for Mr. Burriss' claim because he had entered the wrong date for the accident, when a copy of the client file clearly indicates the accident occurred in January of 2004, Respondent violated Rule 8.1(a) of the Rules of Professional Conduct, which provides that [A] lawyer in connection with a . . . disciplinary matter, shall not knowingly make a false statement of material fact. The Hearing Panel Subcommittee finds that under the totality of the evidence presented, the ODC failed to meet its requisite burden of proof: it was not proven by "clear and convincing evidence" that Respondent knowingly made a false statement of material fact. Respondent's failure to review the date of the injury as reflected in correspondence with others may constitute carelessness or negligence, but that does not establish the element of "knowledge". Rule 8.1(a) of the Rules

of Professional Conduct specifically provides that the lawyer must knowingly make a false statement of material fact in connection with a disciplinary matter. Where the evidence is subject to two equally plausible explanations, the requisite burden of proof is not met. The explanation given by Respondent about relying upon his “Word Perfect” index tickler system is just as plausible as that offered by ODC as to why he failed to meet the statute of limitation.

COUNT III
Complaint of Christa B. Clark
I.D. No. 08-05-181 &
Complaint of Jennifer L. Milanowski
I.D. No. 08-05-184

18. Christa B. Clark and Jennifer L. Milanowski⁹ were injured at their workplace on March 10, 2005, while working for a government contractor for a facility of the Federal Emergency Management Agency (FEMA) at its facility at Mt. Weather, Bluemont, Virginia. Ms. Clark had fallen from a fire escape and Ms. Milanowski fell when she went to assist Ms. Clark. On April 9, 2005, Christa B. Clark and Jennifer L. Milanowski each retained Respondent in separate contingent fee agreements to represent them in their respective personal injury claims.
19. Ms. Clark and Ms. Milanowski sent numerous emails and left telephone messages for Respondent, but he did not respond. In reviewing Exhibits 23 (Clark’s file) and 31 (Milanowski’s file), it appears that most of Ms. Milanowski’s communications by email were directed to Penny Young and most of Ms. Clark’s communications by email were typically

⁹ At the hearing, by agreement of counsel, Ms. Clark, who was stationed in Iraq was permitted to testify by telephone. Ms. Milanowski was also scheduled by agreement to testify by phone as she was in New Mexico. However, when ODC attempted to initiate contact with her to testify by phone, she reportedly was hospitalized with appendicitis and was about to undergo an appendectomy. ODC made efforts to reach her during the hearing at the hospital, but those efforts proved unsuccessful.

sent to Respondent with copies sent to Penny Young.¹⁰ Ms. Clark indicated that after she would send emails, she would followup with a phone call to Penny Young to verify that the email transmission had been received. There were email communications from Respondent to Ms. Clark on occasion, but there were little or no direct communication with Respondent by telephone from shortly after Respondent was retained until March 8, 2007, when Ms. Milanowski called his office to inquire about the status of their claims. Both Ms. Clark and Ms. Milanowski were concerned that the statute of limitations was approaching and began sending emails and a letter inquiring about the status of filing the suit.

20. During a telephone conversation with Respondent's secretary on March 8, 2007, Respondent was overheard telling his secretary that he had until May 10, 2007, to file the lawsuit. Ms. Clark and Ms. Milanowski called back to Respondent's office and informed his secretary that the correct deadline was March 10, 2007.
21. Respondent filed the lawsuit on or about March 10, 2007. However, Respondent admitted that because a government agency was involved, the cases had to be filed under the Federal Tort Claims Act (FTCA) and that he had not properly researched the pre-suit requirements for such lawsuits.¹¹ He further admitted that the claims of Ms. Clark and Ms. Milanowski were lost as a direct result of his failure to inform himself of the special requirements of a FTCA action for damages.
22. Respondent again failed to communicate with Ms. Clark and Ms. Milanowski after suit was filed. They tried to schedule an appointment to meet with Respondent, but were

¹⁰ At some point in the progress of the case, Ms. Clark and Penny Young became social networking "friends" on Facebook.

¹¹ Respondent had failed to file a required notification form (Form 95), which is mandatory and it must be filed six months prior to filing the lawsuit.

unsuccessful. Consequently, on April 14, 2008, they physically went to his office seeking a meeting.

23. Respondent finally met with Ms. Clark and Ms. Milanowski on April 15, 2008, and advised them that due to an error on his part, he had “messed up” their case and could not fix it. Thereafter, they were compelled to retain new counsel to pursue a malpractice claim against Respondent.¹²
24. Ms. Clark and Ms. Milanowski lost the right to pursue their lawsuits because of Respondent’s failure to perfect the claim administratively prior to filing the suit. Respondent admitted that he had no real understanding of the FTCA.
25. Because Respondent failed to familiarize himself with the requirements set forth for Federal Tort Claim Act cases and failed to perfect the jurisdictional notice requirements prior to filing the lawsuits of Ms. Clark and Ms. Milanowski, he violated Rule 1.1 of the Rules of Professional Conduct, which provides as follows:

Rule 1.1. Competence.

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

26. Because Respondent failed to diligently pursue Ms. Clark’s and Ms. Milanowski’s lawsuits, he also violated Rule 1.3 of the Rules of Professional Conduct as set forth above.
27. Because Respondent failed to return the telephone calls of Ms. Clark and Ms. Milanowski, failed to keep them informed of the status of their cases, and did not explain the matter to them to the extent reasonably necessary to permit them to make informed decisions about

¹² Those claims were successful and Ms. Clark and Ms. Milanowski recovered from Respondent’s liability insurance carrier.

the representation, he violated Rules 1.4(a) and 1.4(b) of the Rules of Professional Conduct as set forth above.

COUNT IV¹³
Complaint of the Office of Disciplinary Counsel
I.D. No. 09-01-304

28. Respondent represented Karen Thomas in a slip-and-fall case against WalMart.
29. Respondent successfully represented Mrs. Thomas in that litigation, which resulted in a settlement, after suit was filed, in the amount of \$50,000.00 in August of 2002.¹⁴
30. In August of 2002, Respondent was operating as the Law Office of Michael Santa Barbara when he placed the funds withheld into his IOLTA account.
31. Respondent and his wife, Kathy Santa Barbara, Esquire, jointly opened the Santa Barbara Law Offices, P.L.L.C., in January of 2003.
32. Respondent did not transfer the sums he withheld from Mrs. Thomas' settlement to the bank accounts set up for the new law firm, but it is unclear where that money was placed. What

¹³ The Statement of Charges has a typographical error in that it mistakenly numbered this Count as "Count VI". The correct Roman numeral is IV. However, it was included in the Statement of Charges as a complaint by ODC. The criminal activity of Penny Young, her relationship with some of the Complainants, and the involvement, motivation and influence of Penny Young on all but the Burris complaint raised credibility issues which surfaced through much of the testimony and documentary evidence in this entire proceeding. The extent and nature of the Penny Young matter will be further discussed in more detail below.

¹⁴ The Thomas settlement funds were deposited in the Michael Santa Barbara Law Office IOLTA account in the Susquehanna Bank. In August 2002, Respondent issued a check in the amount of \$16,650 to his law firm from the IOLTA account for fees, another check in the amount of \$838.94 to a medical provider for Mrs. Thomas, and a third in the amount of \$62.50 to a mediator for his fee in the Thomas claim. In September 2002, Respondent issued a check in the amount of \$1,892.20 to his firm for reimbursement of expenses from the IOLTA account. On November 12, 2002, Karen Thomas was issued a check in the amount of \$16,000.00 from the IOLTA account, with an understanding the remaining funds were to be held for a possible Medicaid lien. This left a balance in the IOLTA account of \$14,557.26 on that date, which was available for the Thomas matter. One of the bank records which was located purported to record an additional payment to Karen Thomas of \$2,500.00 on November 11, 2002, but that check, comparing incomplete records of the IOLTA account, available to Attorney Santa Barbara at and since that time to later records, was apparently written to another Santa Barbara client, Stanhope.

is clear is that there were insufficient funds remaining in Respondent's former IOLTA account to satisfy the remaining funds of Mrs. Thomas.

33. The evidence is undisputed in this case that Respondent was not comfortable with, and strongly disliked the administrative/business side of the practice of law. Throughout his practice he chose to focus more on the litigation side than on the business and office management side. He began his practice with Wallace Ross & Harris, LLC, as an associate in a satellite office of that firm in Martinsburg, where he essentially had no office administration or management experience. Management and administration decisions in that firm were generally conducted by lawyers in the main office in Elkins. Similarly, when he was later employed as an associate in the law firm of Steptoe & Johnson, PLLC, in Martinsburg, he was involved in the litigation side of the practice, but had little or no experience in the office administration or management activities of that firm. When he subsequently became a partner in the law firm of Camilletti, Ollar and Santa Barbara, he avoided office administration and management activities, leaving those responsibilities primarily to his partners.¹⁵
34. When Respondent left the latter firm, he opened his own law office and relied upon his legal assistant to handle most of the administrative responsibilities related to his IOLTA account and similar financial matters. He handled the litigation side of the business, but did not like the financial management side of the practice and avoided it to the extent he could. That continued into the current law practice with his wife, who now is primarily responsible to manage that part of the firm practice.

¹⁵ Not only did Respondent testify to the fact that he did not enjoy that part of the practice, but also, his former law partner, David Camilletti, testified unequivocally that this part of the practice of law was something that Respondent neither enjoyed nor wanted to do and that he relied upon others for those responsibilities.

35. Prior to 2003, Respondent relied primarily upon his legal assistant/secretary for office management, scheduling, bookkeeping, and handling the firm's bank accounts, including his IOLTA account. Soon after his wife joined the firm, Penny Young took over many of the tasks previously handled by Respondent's former secretary, although Respondent's wife began primary oversight of office management and administrative tasks.
36. Although Respondent had practiced for twelve years prior to the settlement in Mrs. Thomas' case, he was relatively inexperienced in the administrative aspects of the practice of law. Indeed, he had only actively been involved in the handling and supervision of the operating accounts and IOLTA accounts for three or four years prior to the Thomas settlement. Clearly, his inexperience and dislike of the administrative and office management aspects of his law practice do not relieve him of the duties and responsibilities imposed upon him by the Rules of Professional Conduct. However, under the facts of this case, these factors do come into play in determining whether the violations proven against him were committed intentionally or negligently and also in determining the existence of any mitigating factors.
37. At some point in 2003, Mrs. Thomas contacted Respondent concerning the status of the monies withheld to pay the Medicaid lien. Respondent did not respond to Mrs. Thomas' inquiries.
38. There were no communications between Respondent and Mrs. Thomas for several years concerning the status of the potential Medicaid lien and the funds withheld to satisfy it. In August of 2007, when Mrs. Thomas was in need of funds, she called Respondent. When Respondent checked his IOLTA account he discovered that he did not have sufficient funds to cover fully the amount he believed he had withheld for the Medicaid lien. He has no explanation of what happened to the funds, although the testimony of Respondent and witnesses called on his behalf suggest that Penny Young may have had some involvement

not only in the disappearance of the file of Mrs. Thomas and others which came up missing, in instituting the eventual filing the charges which now comprise Count IV, and possibly in the missing funds.

39. Ms. Young eventually was fired in 2008 after Respondent and his wife discovered that she had paid funds to herself without authorization and after she defrauded the Santa Barbara firm out of tens of thousands of dollars. Both Respondent and his wife were called as witnesses when Ms. Young was later indicted and convicted of federal crimes associated with the fraudulent activity. After her termination, Respondent and his office staff discovered that a number of files were missing from the office, as well as many records involving the IOLTA account and other business records. The firing of Penny Young and the subsequent involvement of Respondent and his wife in testifying against her in federal criminal proceedings raise issues about her motivation in retaliating against them in the present proceedings.
40. In August 2007, Respondent had a balance of \$248.87 in the Law Office of Michael Santa Barbara IOLTA account, well below the \$15,000.00 amount withheld from the settlement in November 2002.
41. In September of 2007, Respondent deposited a check for \$11,934.20, from the Santa Barbara Law Offices account, into his Law Office of Michael Santa Barbara IOLTA account.
42. By letter dated September 6, 2007, Respondent forwarded a check for \$11,000.00 to Mrs. Thomas. He stated that he would contact Mrs. Thomas in November. At this point, Respondent still owed Mrs. Thomas \$4,000.00.
43. Respondent failed to contact Mrs. Thomas in November of 2007, and she called his office in or around January of 2008. Respondent advised Mrs. Thomas that he did not have the funds to pay the monies due.

44. By letter dated August 4, 2008, Respondent made a payment to Mrs. Thomas of \$4,488.73 and advised her that he thought there was still a balance due of \$511.27.
45. By letter dated September 22, 2009, Respondent made a final payment of \$511.27 to Mrs. Thomas.
46. In his sworn statement on January 29, 2010, in the investigation of this proceeding, Respondent said he could not locate Mrs. Thomas' client file,¹⁶ nor some of the records for the Law Office of Michael Santa Barbara IOLTA account. Respondent also stated he had no record of any Medicaid lien being pursued in Mrs. Thomas' case and he advised her that she was safe from any lien because the case had concluded in or about 2002. Respondent also stated that because the Thomas file could not be located, he was uncertain of what he owed her, but had believed he still owed Mrs. Thomas \$5,000.00 instead of \$4,000.00, so he had paid her that amount.
47. Penny Young worked in the Santa Barbara Law Offices from early in 2003 until mid-2008 as a secretary/legal assistant/paralegal for Respondent. Ms. Young had previously worked for the law firm of Respondent's wife in her prior law practice, and Mrs. Santa Barbara brought her into the new law firm when she joined her husband in January 2003. Ms. Young's attitude caused discord within the law firm beginning soon after her arrival. At times, Ms. Young suggested to Respondent's wife that Respondent was having an extra-marital affair. On other occasions, Ms. Young suggested to Respondent that his wife was having an extra-marital affair. The evidence also established that on one occasion, Respondent accidentally walked into his office in the evening and observed Ms. Young

¹⁶ During the hearing, Respondent, his wife and current office staff testified that after the termination of Penny Young, they discovered that the Thomas file and other files were missing, as well as other banking records.

having an amorous relationship with a client. Respondent did not terminate Ms. Young until 2008 because of his wife's desire that she remain. Her presence caused significant disruption of the morale and operation of the law office, and substantial discord and distrust in Respondent's marital and family situation.

48. Eventually, Respondent began a course of behavior where he stayed away from the office and worked from his home. His attentiveness to more detail with complicated cases, and to details of office practice deteriorated. This course of conduct, compounded by his long-established history of inattention to the business aspects of his law practice became apparent to his office staff and his wife.
49. Because Respondent failed to keep the \$15,000.00 he had withheld for an alleged Medicaid lien from a settlement for Karen Thomas in his Law Office Michael Santa Barbara IOLTA account,¹⁷ he violated Rules 1.15(a) of the Rules of Professional Conduct, which provides as follows:

Rule 1.15. Safekeeping property.

(a) A lawyer shall hold property of clients or third persons that is in a 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 safeguarded. 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.

¹⁷ The Statement of Charges also charged Respondent with a violation of Rule 1.15(b) of the Rules of Professional Conduct which provides, in part, that "[u]pon receiving funds . . . in which a client . . . has an interest, a lawyer shall promptly the client . . . a lawyer shall promptly deliver to the client . . . any funds . . . that the client . . . is entitled to receive, . . ." However, the Hearing Panel Subcommittee Report does not appear to address this rule violation.

50. Counsel for ODC suggests that the failure to account for the funds in the Thomas matter also constitutes a violation of Rules 8.4(b) and 8.4(c) of the Rules of Professional Conduct, which provide as follows:

Rule 8.4. Misconduct.

It is professional misconduct for a lawyer to:

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

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

51. The Hearing Panel Subcommittee finds that to establish a violation of Rule 8.4, there must be proof by clear and convincing evidence of an intent by the lawyer charged with a violation either to commit the criminal act or to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. The evidence on whether there was a violation of Rule 8.4 is contradictory at best. The Hearing Panel Subcommittee finds that this necessary element of intent was not proven by clear and convincing evidence. Although such an inference might be raised, it is equally plausible that the failure of Respondent properly to account for the funds of Mrs. Thomas resulted from his poor law office management skills, from recurring bouts with severe depression, from illegal acts or omissions by Penny Young, or a combination of these facts.

52. As part of Respondent's mitigation evidence in this case, he offered testimony of Dr. Bernard Lewis, a clinical and forensic psychologist located in Winchester, Virginia, who practices and is licensed in Virginia and West Virginia. Dr. Lewis frequently provides professional counseling to professionals such as lawyers. Dr. Lewis offered opinion testimony to a reasonable degree of certainty within his speciality that Respondent suffers from chronic

depression which sometimes reaches levels of severe depression. At times, his level of depression waxed and waned in terms of severity.

53. But it is undisputed that Respondent has suffered from recurring periods of depression both before and after his admission to the practice of law. He has received professional treatment, counseling, prescription medication and medical treatment related to his depression at different times in his life dating as far back as his years in undergraduate school at Virginia Military Institute. Since 2003, he has been diagnosed with depression and received prescription medication to deal with depression from his family physician. Dr. Lewis indicated that Respondent also has a history of alcoholism which may have exacerbated his problems. Respondent also consulted with Dr. Lewis for a period of time in 2008, but failed to continue therapy after several visits.
54. Dr. Lewis further opined that episodes of severe depression sometimes do not impact all of a person's activities, and that upon his own evaluation of Respondent, and based upon the medical history and facts surrounding this case, Respondent likely would be able to handle more routine client matters despite the depression, while lacking sufficient energy or interest, due to severe depression (coupled with the office turmoil related to Penny Young, and her suggestions of marital infidelity by Respondent and his wife), to attend to the more difficult matters and issues such as those presented in the Statement of Charges against Respondent.
55. Respondent's depression, the office discord caused by Penny Young, and the strained marital relationship between Respondent and his wife are not a defense of the charges against him. But the clear and convincing evidence establishes that he suffered from moderate to severe depression throughout much of the time period from 2003 to 2008, and that to a reasonable degree of certainty in the field of psychology, his illness contributed to and adversely affected

the delivery of legal services by Respondent to the Complainants in the case, as well as to Mrs. Thomas.

56. Respondent did not manifest either severe or moderate depression at the time of the hearing, but Dr. Lewis opined that he should be involved in counseling or therapy on an ongoing basis to assist Respondent in recognizing the onset of symptoms of severe depression in the future and the need to continue with the medications prescribed by Respondent's physician to treat his emotion condition. Dr. Lewis also expressed concern about the impact of alcohol on Respondent's emotional condition. Finally, he expressed concerns about the possible adverse effect which continued practice with his wife might have in light of the strained marital relationship which has existed and continues to exist between Respondent and his wife.

57. Respondent did not significantly contest the Burris, Clark and Milanowski complaints against him. He was remorseful at the hearing for his violations in regard to the matters. In his responses to all but the Sencindiver and Thomas complaints, he acknowledged his omissions and violations to his clients. In Sencindiver, he maintained that no attorney-client relationship existed because Respondent was unaware that Mr. Sencindiver had signed the retainer agreement and because Mr. Sencindiver failed to bring him additional information Respondent requested from him that might have allowed the prosecution of a "deliberate intent" case. As previously indicated, the Hearing Panel Subcommittee finds that the attorney-client relationship did exist. He acknowledged that he neglected to adequately research the requirements for perfecting a claim under the Federal Tort Claims Act prior to filing the suits in the related cases of Ms. Clark and Ms. Milanowski. Both of them eventually filed malpractice actions against Respondent and recovered from his insurance carrier. With respect to the allegations involving Mrs. Thomas, Respondent denied that he

intentionally misappropriated or converted her funds in his IOLTA account, but did not deny that the time lapse between discovery of the shortfall and final reimbursement to her was unreasonable. However, he did eventually make full restitution to her and she was made whole.

58. The character evidence established that Respondent was a person of good moral character.

59. The lack of attention, diligence and the failure to communicate with his clients in these matters constituted a pattern of conduct that persisted over a period of years and are aggravating factors. Additionally, the length of time it took for Respondent to remit the funds of Mrs. Thomas which had been entrusted to Respondent was protracted and constitutes an aggravating factor.

IV. DISCUSSION

The Supreme Court of Appeals of West Virginia 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, 451 S.E.2d 440 (1994).

Syl. Point 4 of Office of Disciplinary Counsel v. Jordan, 204 W.Va. 495, 513 S.E.2d. 722 (1998) holds: Rule 3.16 of the Rules of Lawyer Disciplinary Procedure provides that when imposing a sanction after a finding of lawyer misconduct, the Court shall consider: (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 extensive record in this matter indicates that Respondent has transgressed all four factors set forth in Jordan.

A. Respondent violated duties to his clients, to the public, to the legal system and to the legal profession.

Lawyers owe duties of candor, loyalty, diligence and honesty to their clients. Members of the public should be able to rely on lawyers to protect their property, liberty, and their lives. Lawyers are officers of the court, and as such, must operate within the bounds of the law. Furthermore, a lawyer's duties also include maintaining the integrity of the profession. The evidence in this case establishes by clear and convincing proof that Respondent violated his duties owed to his clients, to the public, to the legal system, and to the legal profession.

Respondent failed to diligently pursue Mr. Sencindiver's slip and fall case, failed to keep him informed as to the status of the matter, and failed to respond to his requests for information. While Respondent disputed his own belief that Mr. Sencindiver was his client, the evidence established that Mr. Sencindiver clearly believed that Respondent had agreed to represent him in the matter and the Hearing Panel Subcommittee found that an attorney-client relationship had been established.¹⁸ Mr. Sencindiver signed a retainer agreement on or about February 8, 2005. [Exhibit 1, Bates No. 008; 5/4/11 Trans. p. 15]. Mr. Sencindiver also testified that he met with Respondent twice to discuss his matter and that he clearly believed that Respondent had agreed to represent him in the case. [5/4/11 Trans. p. 15]. Mr. Sencindiver also testified that after his second meeting with Respondent, he was unable to speak to Respondent again and did not receive any correspondence from Respondent about his case. [5/4/11 Trans. pp. 16-17]. Mr. Sencindiver was eventually able to speak to Respondent on January 31, 2007, and inquired about the status of his matter. After finally looking for and finally locating Mr. Sencindiver's file in or about March of 2007, Respondent eventually advised Mr. Sencindiver by letter dated May 11, 2007, that no claim in the slip and fall matter had

¹⁸ In fact, the Hearing Panel Subcommittee noted that Respondent's failure to acknowledge that an attorney-client relationship existed was "unwarranted and wholly inappropriate under the totality of the circumstances in [Mr. Sencindiver's] complaint." [Hearing Panel Subcommittee Report, p. 28].

been pursued on his behalf, that the statute of limitations had expired, and that Mr. Scencindver was “invite[d] to discuss this matter with another attorney.” [Exhibit 1, Bates No. 007]. As a direct result of Respondent’s failure to act diligently in this matter and in Respondent’s failure for nearly two years to communicate with Mr. Sencindiver, Mr. Sencindiver suffered real and actual injury.

The evidence also established that Respondent failed to diligently pursue Mr. Burris’ matter, failed to keep him informed as to the status of the matter, and failed to respond to his and his mother’s requests for information. Furthermore, Respondent admitted that he neglected Mr. Burris’ matter and missed the statute of limitations. [Exhibit 11, Bates 203]. From early 2004 until January of 2007, Mr. Burris was unable to speak with Respondent about his case. [5/4/11 Trans. pp. 75-76]. If Respondent had been diligent in working on Mr. Burris’ case, he would have certainly been aware of the correct accident date because Respondent’s client file contained many references to the correct accident date. [Exhibit 14]. Mr. Burris suffered real and actual injury as a direct result of Respondent’s admitted failure to act diligently in this matter and in Respondent’s failure to communicate for nearly three years with Mr. Burris.

Respondent likewise admitted that he failed to diligently pursue the workplace injury matters for which Christa Clark and Jennifer Milanowski had hired him, or respond to their inquiries and that he failed to keep them informed of the status of their matter. Moreover, their cases were ultimately dismissed because Respondent was unfamiliar with the requirements set forth in the Federal Tort Claim Act and had filed their matters incorrectly. Furthermore, Ms. Clark testified that Respondent had never even informed her that her case had been dismissed. [5/4/11 Trans. pp. 50-52]. Both Ms. Clark and Ms. Milanowski suffered real and actual injury as a direct result of Respondent’s admitted failure to act diligently in these matters, Respondent’s failure to communicate with them, and in his unfamiliarity with the requirements for filing claims under the Federal Tort Claim Act.

The evidence also clearly and convincingly demonstrates that Respondent violated his duties owed to Mrs. Thomas. Respondent successfully represented Mrs. Thomas in a slip and fall case against Wal-Mart which was settled in or about August of 2002 for \$50,000.00. After depositing this money into his Michael Santa Barbara Law Office IOLTA account at the Susequehanna Bank, Respondent issued a check in the amount of \$16,650.00 to his law firm in August of 2002. [Exhibit 36, Bates No. 1550]. Respondent then issued three (3) checks in the amounts of \$834.04, \$62.50 and \$1,892.20 for costs and expenses. [Id.]. On or about November 12, 2002, Respondent issued a check in the amount of \$16,000.00 from his IOLTA account to Mrs. Thomas leaving a balance of \$14,557.26 of her funds remaining in the IOLTA account. [Exhibit 36, Bates No. 1554]. Respondent and Mrs. Thomas both understood that this money was being withheld for a possible Medicaid lien. [5/4/11 Trans. pp. 101-102, 198-199; Exhibit 36, Bates Nos. 1389-1390]. Aside from one telephone contact in or about 2003, Respondent neglected the matter until August of 2007 when Mrs. Thomas contacted Respondent again about the status of the money being withheld. [5/4/11 Trans. pp. 103-104] In August 2007, Respondent's IOLTA account had a balance of \$248.87. [Exhibit 40, Bates No. 1642]. Respondent then sent Mrs. Thomas a check in the amount of \$11,000.00 on or about September 6, 2007. [5/4/11 Trans. p. 199; Exhibit 40, Bates No. 1643-4, 1645-6]. Respondent again neglected the matter until sending two (2) additional checks to Mrs. Thomas in the amounts of \$4,488.73 and \$511.27 on August 4, 2008, and September 22, 2009, respectively.¹⁹ [Exhibit 36, Bates No. 1509; Exhibit 40, Bates No. 1659; Exhibit 36, Bates No. 1504]. As a direct result of Respondent's failure to act diligently in this matter and in Respondent's failure to communicate with Mrs. Thomas for nearly five years, Mrs. Thomas suffered real and actual injury and was deprived of the use of her settlement funds for nearly five years.

¹⁹ Respondent mistakenly believed that he owed Mrs. Thomas \$5,000.00, not \$4,000.00.

B. Respondent acted negligently.

The Hearing Panel Subcommittee found that the evidence established that Respondent's conduct constituted, at a minimum, negligence. Respondent failed to take any action with regard any action whatsoever to properly represent Mr. Sencindiver, Mr. Burris, Ms. Clark, and Ms. Milanowski. In regard in his representation of Mrs. Thomas, the Hearing Panel Subcommittee also noted that Respondent failed to maintain proper safekeeping of client funds. The Hearing Panel Subcommittee was not of the opinion, however, that Respondent intentionally misappropriated Mrs. Thomas' funds. The Hearing Panel Subcommittee noted that the evidence was unclear where the funds had been placed and used when Respondent closed his solo practice office and opened the Santa Barbara Law Offices, P.L.L.C., with his wife, Kathy Santa Barbara in January of 2003.²⁰

C. The amount of real injury was great.

Mr. Scencindiver, Mr. Burris, Ms. Milanowski, Ms. Clark and Mrs. Thomas were clearly harmed by Respondent's lack of diligence and communication in their matters. The Hearing Panel Subcommittee found that Mr. Burris was clearly harmed by the lapse of the statute of limitations in a valid case and was never compensated. While the Hearing Panel Subcommittee noted that Mr. Sencindiver's case might not have survived, he was still, nonetheless, harmed by Respondent's failure to fail a claim. While Ms. Milanowski and Ms. Clark were eventually compensated through a malpractice claim filed against Respondent, they were still harmed by his misconduct. Mrs.

²⁰ However, Kathy Santa Barbara testified that because the paperwork for the Santa Barbara Law Offices was not yet approved by the West Virginia State Bar until February of 2003, she was unable to open any bank accounts for Santa Barbara Law Offices and as a result, she and Respondent used Respondent's bank accounts, including the general office account for the Law Offices of Michael Santa Barbara, until they could open the other firm's bank accounts. [5/5/11 Trans. pp. 9-10]. On December 31, 2002, Respondent's IOTLA account for the Law Offices of Michael Santa Barbara held a balance of \$21,862.63. [Exhibit 40, Bates No. 1579]. In January of 2003, Respondent wrote five (5) checks from his Law Offices of Michael Santa Barbara IOLTA account totaling \$27,508.34, including two (2) checks totaling \$18,000.00 payable to the Law Offices of Michael Santa Barbara general account. [Exhibit 40, Bates Nos. 1575-1577]. By February of 2003, Respondent's IOLTA account for the Law Offices of Michael Santa Barbara had an account balance of \$4,354.26. [Exhibit 40, Bates No. 1582].

Thomas suffered real and actual injury and was deprived of the use of her full settlement funds for nearly seven (7) years.

D. 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). There are several aggravating factors present in this case.

Rule 9.22(c) of the *ABA Model Standards for Imposing Lawyer Sanctions* indicates that a pattern of misconduct constitutes an aggravating factor. Respondent has clearly exhibited a pattern and practice of failing to communicate with his clients and failing to diligently pursue cases on behalf of clients which the Hearing Panel Subcommittee described as “repeated offenses that occurred over a substantial period of time.” The Scott Court noted that the ABA Model Standards for Imposing Lawyer Sanctions has recognized "multiple offenses" as an aggravating factor in a lawyer disciplinary proceeding. Scott, 213 W.Va. at 217, 579 S.E.2d at 558. The Hearing Panel Subcommittee stated that Respondent’s refusal to acknowledge that an attorney-client relationship existed between him and Mr. Sencindiver was “unwarranted and wholly inappropriate under the totality of the circumstances.” Respondent also exhibited an indifference, or as the Panel expressed it, exhibited an “unreasonable delay,” in making full restitution to Mrs. Thomas. Finally, Respondent has substantial experience in the practice of law.

In addition to adopting aggravating factors in Scott, the Scott court also adopted mitigating factors in a lawyer disciplinary proceedings and stated 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, 579 S.E.2d 550, 555 (2003) quoting *ABA Model Standards for Imposing Lawyer Sanctions*, 9.31 (1992).²¹ However, it should be clear that mitigating factors were not envisioned to insulate a violating lawyer from discipline. The Hearing Panel Subcommittee found that the following mitigating factors exist in this matter: (1) an absence of a prior disciplinary record; (2) absence of a dishonest motive; (3) inexperience in the practice of law to the extent of office management; (4) his otherwise good character; (5) physical or mental disability or impairment; and (6) Respondent’s remorse with respect to each complainant, except for Mr. Sencindiver.

Respondent presented extensive evidence that he suffered from a mental disability or impairment and the Hearing Panel Subcommittee found that Respondent suffered from a mental disability (depression) during the time period of the allegations in the Statement of Charges and considered the same as mitigating in this matter. In Lawyer Disciplinary Board v. Dues, 218 W.Va. 104, 624 S.E.2d 125 (2005), the Supreme Court of Appeals of West Virginia stated that “[i]n a lawyer disciplinary proceeding, a mental disability is considered mitigating when: (1) there is evidence that the attorney is affected by a mental disability; (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.” Respondent appeared to be suffering from the effects of

²¹ The *Scott* Court held that mitigating factors which may be considered in determining the appropriate sanction to be imposed against a lawyer for violating the Rules of Professional Conduct include: (1) absence of a prior disciplinary record; (2) absence of a dishonest or selfish motive; (3) personal or emotional problems; (4) timely good faith effort to make restitution or to rectify consequences of misconduct; (5) full and free disclosure to disciplinary board or cooperative attitude toward proceedings; (6) inexperience in the practice of law; (7) character or reputation; (8) physical or mental disability or impairment; (9) delay in disciplinary proceedings; (10) interim rehabilitation; (11) imposition of other penalties or sanctions; (12) remorse; and (13) remoteness of prior offenses.

depression in or about 2004 and 2005 which the Hearing Panel Subcommittee believed led to his difficulties in communicating with Mr. Sencindiver, Mr. Burris, Ms. Clark, and Ms. Milanowski and in his neglect of their cases. The Hearing Panel Subcommittee also noted that there was evidence that Respondent stayed away from his office because of marital issues with his wife who was also his law partner and due to employee issues in their law firm.²²

The employee issue within the law firm primarily involved a legal assistant by the name of Penny Young. Ms. Young worked in the Santa Barbara Law Offices from early 2003 until mid-2008 as a secretary/legal assistant from Respondent. However, Ms. Young had previously worked for Respondent's wife prior to the formation of the Santa Barbara Law Offices. The Hearing Panel Subcommittee found that Ms. Young created discord in the office in a variety of ways, such as suggesting to both Respondent and his wife that the other spouse was having an affair. Ms. Young was eventually fired from her employment with the Santa Barbara Law Offices and she was also later indicted and convicted of federal crimes associated with fraudulent activity involving her employment with the Santa Barbara Law Offices. The Hearing Panel Subcommittee noted that Dr. Bernard Lewis, a clinical and forensic psychologist, opined to a reasonable degree of certainty that Respondent suffered from recurring episodes of chronic depression which sometimes reaches levels of severe depression. [5/5/11 Trans. p. 154, 155]. Dr. Lewis further opined that episode of severe depression sometimes do not impact all of a person's activities, and that Respondent likely would have been able to handle more routine client matters, while at the same time, lacked sufficient energy to attempt to the to the more difficult matters. [5/5/11 Trans. p. 155-162].

²² The Hearing Panel Subcommittee also noted that the evidence demonstrated that Respondent "was not comfortable with, and strongly disliked the administrative/business side of the practice of law. In fact, it was clear that Respondent "avoided office administration and management activities [and left] those responsibilities primarily to his partners." When he was in solo practice, Respondent again left much of the administrative/business side of his practice to his staff. Finally, when he and his wife became partners, Mrs. Santa Barbara was "primarily responsible to manage that part of the firm practice."

Nonetheless, the Office of Disciplinary Counsel notes that it did not appear that Respondent can demonstrate that his recovery from depression is demonstrated by a meaningful and sustained period of successful rehabilitation. Respondent indicated that he has suffered from three episodes of severe depression. In this third episode which Respondent reported began in or about 2005 or 2006, Respondent did not seek treatment from a psychologist, Dr. Bernard J. Lewis, until September 4, 2008. [Respondent's Exhibit 24].²³ Respondent only went to three appointments with Dr. Lewis on September 4, 2008, September 23, 2008, and October 2, 2008. [Respondent's Exhibit 24].²⁴ Dr. Lewis indicated in his Psychological Report dated April 4, 2011, that he had developed a treatment plan dated September 5, 2008, noting a diagnostic impression of a "major depressive disorder, recurrent, as well as alcohol abuse" and that Respondent should undergo individual therapy sessions once a week and referred Respondent to a "Dr. Goshen" for psychiatric evaluation. Dr. Lewis testified that he discussed the treatment plan with Respondent. [5/5/11 Trans. p. 174].²⁵ Dr. Lewis also said that Respondent was "[n]ot as equipped as I would like for him to be. I still think he has some things that he could learn that could help him to better be prepared to handle [another episode]." [5/5/11 Trans. p. 186]. While Respondent believes he can recognize when he is suffering

²³ It is noted, however, that Respondent submitted notes from his family physician, Jeffrey DeBord, D.O., which indicate that Respondent had been prescribed some type of antidepressant medication since in or about November of 2003. [Respondent's Exhibit 25]. Respondent said at his December 19, 2008 deposition that he only saw Dr. DeBord "once every three months" for "prescription maintenance" and that he while he ". . . kept taking these drugs, [he] didn't see any real change, didn't feel like it was working at all." [Exhibit 6, Bates Nos. 132, 140].

²⁴ Although, Respondent stated at this December 19, 2003 sworn statement that "I am continuing to see Bernie Lewis." [Exhibit 6, Bates No. 134].

²⁵ At the hearing, Dr. Lewis testified however that Respondent did not meaningfully or actively participate in the treatment plan and in fact, did not attend any follow-up appointments beyond the October 2, 2008 appointment even though an appointment was scheduled for October 20, 2008. [Respondent's Exhibit 24; 5/5/11 Trans. pp. 175-176, 181-182]. Dr. Lewis also testified that he thinks the "treatment of depression, as in this case, involves both [therapy sessions and medication]" and that Respondent would have benefitted from "talk therapy" despite the fact that Respondent termed this type of treatment for depressions as "nonsense talk." [5/5/11 Trans. pp. 176-177, 179-180. See also Exhibit 6, Bates No. 130].

from depression, and it cannot be denied that he did not seek treatment from Dr. Lewis until well into this episode of depression, Dr. Lewis also testified that he still has a concern for Respondent regarding continuing to practice law with his wife. [5/5/11 Trans. p. 192-193] Furthermore, Respondent has not demonstrated that his “recovery” arrested the misconduct and recurrence of that misconduct is unlikely. It is clear from his actions that Respondent did not actively engage in treatment at the earliest signs of depression and did not seek the advice of a psychologist until September of 2008, three to five years into this most recent episode.

V. 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.

Moreover, a principle purpose of attorney disciplinary proceedings is to safeguard the public’s interest in the administration of justice. Daily Gazette v. Committee on Legal Ethics, 174 W.Va. 359, 326 S.E.2d 705 (1984); Lawyer Disciplinary Board v. Hardison, 205 W.Va. 344, 518 S.E.2d 101 (1999).

Absent any aggravating or mitigating circumstances, the *ABA Model Standards for Imposing*

Lawyer Sanctions provide that:

Standard 4.42. Suspension is generally appropriate when: (a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client; or (b) a lawyer engages in a pattern of neglect [and] causes injury or potential injury to a client.

Respondent's violations in this case are extremely egregious and touch the very essence of the public's perception of the legal profession. Respondent engaged in a negligent pattern of neglect and failure to communicate that extended for a number of years and caused these complainants to suffer real injury and to lose their opportunity to pursue their claims altogether due to Respondent's inaction. Furthermore, Respondent mishandled client funds entrusted to his care.

Serious among the charges against Respondent are the multiple examples of extreme neglect of his clients and their cases, and his complete failure to communicate at all with these clients over at least a two year period. In addition, Respondent's neglect of Mrs. Thomas' case spanned a period of nearly five (5) years during which time he could not locate the settlement funds or explain what had happened to the funds he was holding in his IOTLA bank account.²⁶

In Committee on Legal Ethics v. Mullins, the Supreme Court of Appeals of West Virginia stated that "[m]isconduct or malpractice consisting of negligence or inattention, in order to justify a suspension or annulment, must be such as to show the attorney to be unworthy of public confidence and an unfit or unsafe person to be entrusted with the duties of a member of the legal profession or to exercise its privileges." Mullins, 159 W.Va. 647, 652, 226, S.E.2d 427, 430 (1976), quoting Syllabus No. 1, In Re Damron, 131 W.Va. 66, 45 S.E.2d 741 (1947). See also, Lawyer Disciplinary

²⁶ The Hearing Panel Subcommittee found that the circumstances involving the difficulties with Ms. Young may have contributed to Respondent's mismanagement and the disappearance of Mrs. Thomas' funds from his IOLTA account.

Board v. Keenan, 189 W.Va. 37, 427 S.E.2d 471 (1993) (indefinite suspension for failure to provide competent representation, failure to act with reasonable diligence, failure to communicate effectively with his clients, and failure to return unearned fees). Respondent's inaction in these cases clearly rises to the level such that he is unworthy of public confidence in his ability to conform to his obligations under the Rules of Professional Conduct.

Furthermore, like most courts, West Virginia holds that absent compelling circumstances, misappropriation or conversion by a lawyer of funds entrusted to his/her care warrants disbarment. Office of Disciplinary Counsel v. Jordan, 204 W.Va. 495, 513 S.E.2d. 722 (1998); and Lawyer Disciplinary Board v. Kupec (Kupec I), 202 W.Va. 556, 561, 505 S.E.2d 619, 631 (1998), *remanded with directions*, see Lawyer Disciplinary Board v. Kupec (Kupec II), 204 W.Va. 643, 515 S.E.2d 600 (1999). In this case, the Hearing Panel Subcommittee found that compelling extenuating circumstances exist in this case and that Respondent's actions warrant suspension because the Hearing Panel Subcommittee noted that no intent to misappropriate or convert client funds was exhibited by Respondent.

In Lawyer Disciplinary Board. v. Coleman, 219 W. Va. 790, 639 S.E.2d 882 (2006), the Supreme Court of Appeals of West Virginia stated that "we do not take lightly those disciplinary cases in which a lawyer's misconduct involves the misappropriation of money. In such instances, we have resolutely held that, unless the attorney facing discipline can demonstrate otherwise, disbarment is the only sanction befitting of such grievous misconduct." *Id.*, 219 W.Va. at 797, 639 S.E.2d at 889. In addition, "[m]isappropriation of funds by an attorney involves moral turpitude; it is an act infected with deceit and dishonesty and will result in disbarment in the absence of compelling extenuating circumstances justifying a lesser sanction." *Id.* (quoting Lawyer Disciplinary Bd. v. Kupec, 202 W.Va. 556, 571, 505 S.E.2d 619, 634 (1998) (additional quotations and citation omitted)).

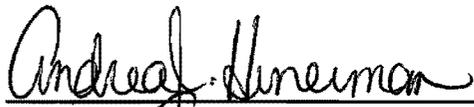
Moreover, the fact that Respondent finally paid Mrs. Thomas does not negate the misconduct, is not a defense, and in this case should not mitigate any proposed sanction. Syl. pt. 8, Lawyer Disciplinary Board v. Geary M. Battistelli, 206 W.Va. 197, 523 S.E.2d 257 (1999); Syl. pt. 4, Committee on Legal Ethics v. Hess, 186 W.Va. 514, 413 S.E.2d 169 (1991); and Lawyer Disciplinary Board v. Kupec (Kupec I), 202 W.Va. 556, 569-570, 505 S.E.2d 619, 632-633 (1998), *remanded with directions*, see Lawyer Disciplinary Board v. Kupec (Kupec II), 204 W.Va. 643, 515 S.E.2d 600 (1999). Battistelli and Hess note that mitigation of punishment because of restitution must be governed by the facts of the particular case. Furthermore, in Lawyer Disciplinary Board v. Wheaton, 216 W.Va. 673, 610 S.E.2d 8 (2004), this Court made clear that to accept restitution as a mitigating factor, it must be made promptly. In this case, Respondent did not pay Mrs. Thomas the final part of the funds which he was holding from the August 2002 settlement until nearly seven (7) years later. In view of this delay, restitution should not be viewed as mitigating. For the public to have confidence in our disciplinary and legal systems, lawyers who engage in the type of misconduct 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 a severe sanction is necessary to deter other lawyers from engaging in similar conduct and to restore the faith of the victims in this case and of the general public in the integrity of the legal profession.

The Rules of Professional Conduct state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. Syl.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, 45, 410 S.E.2d 279, 281 (1991). Respondent, a lawyer with considerable experience, clearly has demonstrated conduct which has fallen below the minimum standard for attorneys, and discipline must be imposed.

In reaching its recommendation as to sanctions, the Hearing Panel Subcommittee carefully considered the totality of circumstances, including the evidence, the facts, the aggravating factors and mitigating factors.

Accordingly, the sanctions recommended by the Hearing Panel Subcommittee should be upheld.

Respectfully submitted,
The Lawyer Disciplinary Board
By Counsel

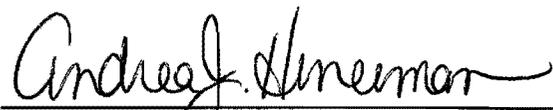


Andrea J. Miner [WVSB No. 8041]
Senior Lawyer Disciplinary Counsel
Office of Disciplinary Counsel
City Center East, Suite 1200C
4700 MacCorkle Avenue SE
Charleston, West Virginia 25304
(304) 558-7999
(304) 558-4015 facsimile

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 2nd day of February, 2011, served a true copy of the foregoing "**Brief of the Lawyer Disciplinary Board**" upon Robert H. Davis, Jr., counsel for Respondent Michael S. Santa Barbara, by mailing the same via United States Mail, both certified and regular, with sufficient postage, to the following address:

Robert H. Davis, Jr., Esquire
121 Pine Street
Harrisburg, Pennsylvania 17101



Andrea J. Hinerman