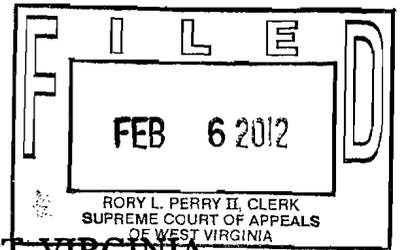


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

LAWYER DISCIPLINARY BOARD, Petitioner

vs.

S. Ct. Docket No 10-4011

MICHAEL S. SANTA BARBARA, ESQ,

a member of the West Virginia State Bar, Respondent

**BRIEF OF RESPONDENT MICHAEL SANTA BARBARA
IN SUPPORT OF OBJECTIONS TO
HEARING PANEL SUBCOMMITTEE RECOMMENDED DECISION**

Presented By: Robert H. Davis, Jr., Esq.
Counsel to Michael Santa Barbara, Esq
W.Va. I.D. # 962
121 Pine Street , Harrisburg PA 17101
Ph: (717) 238-6861
Email: ethiclaw@paonline.com

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BRIEF OF RESPONDENT MICHAEL SANTA BARBARA
IN SUPPORT OF OBJECTIONS
TO HEARING PANEL SUBCOMMITTEE RECOMMENDED DECISION

COMES NOW Respondent MICHAEL S. SANTA BARBARA, ESQ., by his counsel, Robert H. Davis, Jr. Pursuant to Rule 3.11 and 3.13, W.V.R.L.D.P and, Rules 10, 19, 35 and 36, W.V.R.A.P. and presents his Brief to the Honorable Supreme Court of Appeals of West Virginia as follows:

I. SUMMARY STATEMENT OF OBJECTIONS

The Objections filed by Respondent Attorney Michael Santa Barbara raised objection to the Recommended Findings of the Hearing Panel Subcommittee¹ are best summarized for the Honorable Court as objection to the overall disciplinary recommendation of suspension of a year as not in accord with the findings of fact of the HPS or the record in that the HPS failed to give appropriate weight to the explanation established clearly in the record of the connection of each violation found with the mitigation element of significant depression, failed to give proper weight to the disruptive actions of an office staff member, failed to recognize the synergistic effect of

¹ The references to the Hearing Panel Subcommittee of the Disciplinary Board hereinafter will be by the abbreviation "HPS" .

that disruption upon the proven depression as it affected each client matter in this proceeding, failed to give proper weight to the proven impact of such disruption on Attorney Santa Barbara's ability to defend these charges, failed to recognize a lack of necessary proof as to the aggravating factor of the alleged damage to the legal claim of complainant Sencendiver and, generally, failed to properly recognize the extraordinary mitigation present overall in this proceeding in assessing the unduly severe sanction of suspension from practice of law for a year.

II. STATEMENT OF THE CASE

This matter was initiated by filing of a Statement of Charges containing four counts issued November 3, 2010, after a Disciplinary Board Investigative Panel Order of October 30, 2010. The counts of the Statement of Charges alleged:

I. - That in failing to pursue the claim of Robert Sencindiver, who claimed to have hired him as counsel, Attorney Santa Barbara violated RPC 1.3. Diligence and that he had no contact with Sencendiver for two years and failed to keep him informed of the status of his claim, violating RPC 1.4. Communication [Count I - Sencendiver];

II - That after being hired by Tommy D. Burriss to pursue a claim for personal injury suffered in a 2004 head-on collision, that Attorney Santa Barbara failed to return client phone calls regarding status inquiries about his case in violation of RPC 1.4(a) and (b). Communication, that he failed to pursue the claim of Burriss and missed the statute of limitations, in violation of Rule 1.3. Diligence, and that in a sworn statement to the

Office of Disciplinary Counsel² on December 19, 2008, Attorney Santa Barbara made a false statement of material fact to the ODC as to his reason for missing the Burris statute of limitations, in violation of RPC 8.1(a) [Count II- Burris];

III. - That Attorney Santa Barbara was hired in April of 2005 by Christa B. Clark and Jennifer L. Milanowski to pursue related personal injury claims of each suffered on March 10, 2005, that he failed to contact them to report the status of their claims until March of 2007 at which time clients Clark and Milanowski insisted he honor the correct date of injury and file their action, that Attorney Santa Barbara filed a claim for each within the assumed two-year limitation period but the claims were Federal Tort Claims and were filed incorrectly, causing the claims of both Clark and Milanowski to be lost, in violation of RPC 1.1, Competence, RPC 1.3, Diligence, and RPC 1.4(a) and 1.4(b) [Count III - Clark and Milanowski];

IV. - And that Attorney Santa Barbara mishandled and converted part of a \$50,000 personal injury settlement payment obtained for his client Karen Thomas after placing it, in August of 2002, in the IOLTA account used in his solo practice prior to starting his current law firm, that he failed to promptly pay to Ms. Thomas her proper share of the recovery and has failed to account to her as to his exact handling of her recovery funds, alleged by the Office of Lawyer Disciplinary Counsel to be \$15,000, held in trust against payment of potential liens, in violation of RPC 1.15(a) and RPC 8.4 (b) and (c), that he could not locate the client file, nor his complete records for the Law Office of Michael

² References in this brief to the Office of Lawyer Disciplinary Counsel will be abbreviated hereinafter as "ODC".

Santa Barbara IOLTA account and could not make an accurate accounting and had criminally and dishonestly converted funds all in violation of RPC 8.4(b) and (c), W. Va. Rules of Professional Conduct. [Count IV, mis-numbered Count VI - ODC Complaint].

Attorney Santa Barbara filed an Answer to the Statement of Charges clearly and candidly admitting a significant portion of the neglect charges but denying the detail of the allegations describing his relations with clients, denied that he was ever hired by complainant Sencendiver [Count I] and denying that Sencendiver ever had a valid claim for damages, admitted the failure to account to Ms. Thomas timely and properly in Count IV of the Statement of Charges but denied any intentional failures to contact and communicate with clients, to neglect their client matters or to fail to properly handle the funds of Karen Thomas. He defended based upon intervening actions of a member of his staff, Penny Young, upon the absence of his files relating to Thomas due to passage of time and the likely actions of staff member Penny Young, and defended the neglect-related and communication charges by raising mitigation in the form of a claim that significant depression, as aggravated by extremely poor office, family and personal morale, had materially impacted his ability to handle client matters and communications with those persons involved in the four complaint matters.

Respondent cooperated with the prosecution by filing a Waiver of Time Limit for Initial Conference and Hearing dated January 3, 2011, both the ODC and Respondent provided discovery disclosures on January 2, and 3, 2011, and the scheduling conference was held by telephone conference call on Wednesday, January 19, 2011, which set the

prehearing for April 13, 2011 and the hearing for May 4, 2011, in Martinsburg, W.Va. . Respondent further cooperated in the proceeding by filing a Waiver of 120-day time limit for hearing on January 25, 2011. On March 31, 2011, the ODC filed its Motion to Exclude Testimony of Character and Expert Witnesses and Documentary Evidence of Mitigating Factors, which Motion was answered by Respondent's counsel on April 6, 2011. On April 13, 2011 Chairman Cooper entered the Hearing Panel Order upon the issues decided in the prehearing conference of the same date. On April 14, 2011, Attorney Santa Barbara timely filed his Supplemental List of Persons with Knowledge and Witness and Character Witness List; the ODC filed its Supplemental List of Witnesses on April 19, 2011. Prior to hearing, and at hearing, Attorney Santa Barbara made evidentiary stipulations and specifically agreed that testimony by prosecution witnesses could be presented by telephone or any other available electronic means. [Hrg.Tr. I, pp. 6-9]

The hearing into the Statement of Charges was conducted by the Hearing Panel Subcommittee on May 4th and 5th, 2011. After the hearing, in response to significant objections to admission of proffered ODC exhibits, the Hearing Panel entered its May 10, 2011 Order giving Respondent until May 25, 2011 to formally record its detailed objections and the legal basis therefor with the Hearing Panel after which the ODC was to file its Memorandum of Law in support of its exhibits seven days after the filing by Attorney Santa Barbara. Both parties timely filed the pleadings as ordered. The hearing transcript was mailed to the parties and Hearing Panel on May 31st and post-hearing briefs to the Hearing Panel were to be filed on or before July 13, 2011. On July

5, 2011, Hearing Panel Chairman Cooper issued the panel decision as to the challenges of Attorney Santa Barbara to the ODC's exhibits. Post-hearing briefs were timely filed by both parties.

On December 2, 2011 the Hearing Panel Subcommittee, pursuant to Rule 3.10, W.Va.R.L.D.P., presented to the Supreme Court of Appeals its recommended Decision in this matter. The Hearing Panel made adverse findings of fact most of which are based largely upon facts Respondent admitted or did not contest, made findings strongly favorable to Respondent Santa Barbara on most of the key contested facts, with some exceptions, and upon rejecting many of the most serious alleged violations of Rules of Professional Conduct, found violations of relatively less serious Rules and recommended discipline of suspension from practice for a year, supervision, education and counseling during such period and payment of costs. On December 27, 2011, Respondent Santa Barbara, by counsel presented to the Court his written Objections to the Hearing Panel recommended disposition. By its Order of January 3, 2012, this Honorable Court set a briefing schedule and ordered argument of the Objections of Respondent to be held on Tuesday, April 10, 2012, in Charleston, West Virginia. This Brief of Respondent Attorney Michael Santa Barbara is filed pursuant to that Order.

III. SUMMARY OF ARGUMENT

The HPS assigned to this matter admittedly performed with skill and attention and made a number of findings of fact and regarding violation and of non-violation of

Rules of Professional Conduct which Respondent Santa Barbara had requested, which are fully supported in the record and are not contested here.

The objections of Attorney Santa Barbara here relate primarily to the failure of the HPS to appreciate fully the unusual convergence of mitigating factors proven in the record in this matter. While the HPS quite properly made findings on mitigation highly favorable to Respondent Santa Barbara, it failed to appreciate the literally unprecedented convergence of mitigating factors clearly proven within the record and found by it which justify and require discipline in this matter less than a suspension for any period of time. Specifically the HPS failed to give full weight to the synergistic interaction between the conclusively-proven major depressive disorder of Attorney Santa Barbara with the criminal and malicious actions and activities of former staff member Penny Young both as to the specific complainants and, more generally, upon the life, family situation and practice of Attorney Santa Barbara. Further, as the HPS made findings amounting essentially to lack of skill or negligence on the part of Attorney Santa Barbara, imposition of a disciplinary sanction of suspension is inappropriate, particularly in light of the significant mitigation proven in the record.

Attorney Santa Barbara also disagrees with the factual conclusions of the HPS as to the aggravating effect of the alleged neglect of complainant Sencendiver's legal claim in that there was insufficient evidence presented by the Office of Disciplinary Counsel as to the existence, much less seriousness, of a valid legal claim of Sencendiver, which failure of proof, in turn, negates any finding of aggravation resulting from alleged damage to Sencendiver's claim. In fact, the record shows that Attorney Santa Barbara,

as with client Burris, made prompt and unusually candid disclosures of his error, that serious question existed, and still does, as to the basis for an “deliberate intent” claim by Sencendiver and that the HPS finding of questionable veracity of Sencendiver’s testimony added to all other evidence in the record as to Sencendiver fail to provide a record that any such claim ever existed.

Finally the HPS failed to give Respondent Michael Santa Barbara full mitigating credit for the unusually-candid honesty and remorse demonstrated toward his clients and expressed in the investigation and hearing into these charges when he realized his errors and acts of neglect of their matters. When considered in light of this and a number of other mitigation factors, discipline less than the recommended suspension is appropriate in this proceeding.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The opportunity to file Objections for review of an attorney disciplinary matter by the Supreme Court of Appeals is established in Rules 3.11 and 3.13, W.Va.R.L.D.P. and, pursuant to Rule 19, W.V.R.A.P. the Clerk of the Supreme Court of Appeals, via **in vacation** order in this matter dated January 3, 2012, has provided notice that oral argument of this matter before the Supreme Court of Appeals of West Virginia shall occur on April 10, 2012. Oral argument is particularly appropriate in this proceeding because this case presents a unique, indeed factually unprecedented, convergence of significant major mitigation factors in a single disciplinary prosecution.

V. ARGUMENT

Given the findings and conclusions of the HPS in this matter, the overwhelming majority of which are not contested here by Respondent Santa Barbara and are largely favorable to him both as to violations of Rules and as to mitigation of truly unusual degree, the assessment of appropriate discipline in this matter is more difficult than in more typical cases involving the same Rule violations. In this case the HPS and this Honorable Court are presented with a Respondent, Attorney Michael Santa Barbara, who found himself amidst the “perfect storm” in which two major mitigating factors not only existed simultaneously at the time of each Rule violation, but proven staff member misconduct worked to magnify the effects that the depression of Attorney Santa Barbara had upon his subsequent responses to problematic client files and vice versa. The clear and uncontested proof in the record of the existence of a significant ongoing medical condition of major depression during the extended time span at issue in this proceeding, as discussed by witness Dr. Lewis, by Respondent and by Respondent’s wife-law partner, informs this Honorable Court as to an extreme mitigation to be weighed in order for it to determine discipline properly proportioned to the facts uniquely found in this proceeding.

A. Respondent Proved A Clear Connection Between His Depression

And Each of the Violations Found

That Attorney Santa Barbara suffered from a significant, debilitating, major depression is unquestionably established in the record in this proceeding. Assessing its proper weight when determining the degree of mental intent, or “intransigence” that

existed as to individual violations and its assessing its proper weight as mitigation of final discipline is the greater challenge here. The standard to be applied in assessing whether the illness is mitigating has been clearly established:

“ 3. In a lawyer disciplinary proceeding, a mental disability is considered mitigating when: (1) there is medical 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 the misconduct is unlikely.

Syl. Pt. 3, Lawyer Disciplinary Board v. Dues, 218 W.Va. 104, 624 S.E.2d 125 (2005).

1. Existence of the Disease of Depression

In this proceeding, the severity, the persistence and the direct impact of the diagnosed recurrent major depressive disorder was clearly established in the record. Indeed, there is no credible evidence in the record which would indicate the contrary. On these facts, as with most in the facts in the proceeding, the HPS made correct and conclusive findings. Dr. Bernard Lewis, the defense expert, provided uncontradicted testimony, referring to Michael Santa Barbara’s medical files, which the HPS found credible and adopted in its findings, Rec.Dec., pp. 21-23, F.O.Fs. 52-54³; Hrg. Tr. II, pp. 142, 153-161⁴, that Respondent Santa Barbara suffered from depression that was

³ Citations to the HPS Recommended Decision will be indicated by “Rec.Dec.” and page number and, as to numbered Findings, to individual Findings of Fact, thus the above citation would be indicated : “Rec.Dec., pp. 21-22, F.O.Fs. 52-54”.

⁴ Citations to the transcripts in this matter will refer to testimony in the Transcript of May 4, 2011 as “Hrg. Tr. I, p. *”; citations to the Transcript of the second day of hearing, May 5, 2011, will be similarly indicated by “Hrg. Tr. II, p. *”

“moderate and at its worst it may have been severe” during the time frames encompassed by the four charges in this proceeding and “...the depression was there. If not every day, it was there a great majority of time and was significant.” Hr. Tr. II, pp. 157. Expert Dr. Lewis noted that it was a “major depressive disorder” Hrg.Tr. II, p. 185; R.Exhs. 31, 32⁵. He and other witnesses whose testimony was credited by the HPS revealed that there were days Attorney Santa Barbara was unable to function, unable to go in to the office for a variety of reasons, including conflict in the office and related conflict with his wife. Hrg.Tr. II, pp. 18-20 (K. Santa Barbara), 63-64, 68, 95 (M. Santa Barbara), 158 (Dr. Lewis) .

2. The Proven Mental Disability Was the Direct Cause of the Misconduct

Element 2. in the analysis of mitigation based on mental disability is proof of causation of the particular misconduct which is the focus of the proceeding. In that regard, this Honorable Court will note that the HPS correctly made clear findings that Respondent’s “... depression, office discord caused by Penny Young, the strained marital relationship between Respondent and his wife are not a defense of the charges against him, but clear and convincing evidence establishes that he suffered from moderate to severe depression throughout much of the time period from 2003 to 2008, and 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

⁵ When citing to the exhibits submitted by the parties herein, exhibits of the Office of Disciplinary Counsel will be referenced to the specific numbered exhibit and, where appropriate, to the Bates-numbered page of the exhibit, as follows: “ODC Exh. *. p.*” ; similarly, Exhibits of Respondent Santa Barbara will be referenced as follows: “R.Exh. *, p.”

this case as well as to Mrs. Thomas.” Rec.Dec.. pp. 22, 23, F.O.F. 55. This finding by the HPS reflected carefully-presented testimony from Dr. Lewis, as mentioned above, as well as from Respondent’s wife, Kathy Santa Barbara, as indicated above. The testimony of Dr. Lewis confirming a direct and substantial link of the depression of Respondent to the specific failures charged in this proceeding established such a connection as to each charge. The defense asked Dr. Lewis to take into consideration all of the medical notes available to him, R.Exhs, 25-31, the family and office disruption situation Attorney Santa Barbara faced, N.T. II. p,152 and after hearing Respondent Santa Barbara’s testimony at hearing, he opined that the depression had an impact on Respondent Santa Barbara’s ability to perform for client Sencendiver, Hrg.Tr. II, p. 152-153, for client Burriss, Hrg. Tr. II, p. 95 (M. Santa Barbara), 153-154 (Dr. Lewis), for clients Clark and Milanowski, Hrg.Tr. II, pp. 97, 98 (M. Santa Barbara), 155-157 (Dr. Lewis). Further, Dr. Lewis explained why the specific client matters that were neglected in this proceeding by Respondent Santa Barbara were the types of matters that the condition of major depression would impact, while other client’s matters of more routine nature would not be. Hrg.Tr. II, pp. 158-162.

3. A Meaningful and Sustained Period of Recovery Was Shown

On this element, one thing is clear - all of the charged failures of Respondent Santa Barbara go back to as early as early 2003 and do not involve errors or failures to act after Penny Young left employment at the Santa Barbara firm in August of 2008 and Respondent and his wife Kathy’s resulting reconciliation soon thereafter. It is also noted that Respondent Santa Barbara self-referred to Dr. Lewis in or about September,

2008, Hrg.Tr. II, p. 171(Lewis). He is currently taking medications to continue a “minimally active participation in recovery” which, while not the optimum situation described by Dr. Lewis, is a situation which, along with the removal of the Penny Young stressors, results in a “better prognosis or long-term possibility of avoidance of additional depression or deeper depression.” Hrg. Tr. II, pp 190-191. In that regard the evidence in the record is that, after Penny Young was fired and Respondent Santa Barbara continued the low-dose appropriate medication, Hrg. Tr. II p. 106-110, 123-124, 194 (M. Santa Barbara), he has monitored his health with his personal physician, Hrg. Tr. II, p. 114, and, importantly, has experienced no ethics complaints or other complaints similar to those at issue here. The HPS also reports, from its observation of Attorney Santa Barbara over two days’ time of the hearing, as part of its discussion of best long-term practices for Respondent, that he did not manifest either severe or moderate depression at the time of the hearing. Rec.Dec., pp.23, F.O.F. 56.

4. Recovery Arrested the Misconduct and Future Misconduct Is Unlikely
Respondent Santa Barbara understood and understands that his ongoing recovery from depression must be shown as a necessary element of proof of medical mitigation in this proceeding. *Lawyer Disciplinary Board v. Wheaton*, 216 W.Va 673, 610 S.E.2d 81 (2004). As noted, Attorney Santa Barbara measures the improvement in his medical situation from the date that Penny Young left his law office on August 12, 2008, candidly admitted that recovery was not easy and he described several constructive activities undertaken in his office, at his initiative to correct the problems that Penny Young had caused and to make repetition of his errors of the past less likely.

R.Exh. 11; Hrg. Tr. I, p. 270-273 (C. Marsh); Hrg. Tr. II, pp. 19-26, 32-33 (K. Santa Barbara); 72, 97-98, 104-112 (M. Santa Barbara).

Again, it is significant that the complaints in this proceeding, at least the actions of omission that the HPS has found to exist are now quite old, with the exception of the Thomas payment delays attributable to financial capability and the poor office climate until the summer of 2008. Attorney Santa Barbara's candor in the proceeding, his expressions of remorse for the violations of Rule and injuries they caused to his clients also speak to his personal awareness of the seriousness of his medical situation. Rec.Dec., pp. 23-24, F.O.F. 57. The defense expert, Dr. Lewis, testified that depression of the type he found in Respondent generally contains risk of recurrences of elevated feelings of depression and identified additional ways that Attorney Santa Barbara could deal with his depression; however, he described Attorney Santa Barbara as an attorney who had originally self-referred for help, who was seeking to follow a self-help method of dealing with his depression, was taking appropriate types and amounts of medication, was dealing with much less stress in his life and was coping with his illness. Hrg.Tr. II, pp 162, 163, 166, 167. That Attorney Santa Barbara has not had prior discipline and has not been the subject of a client-initiated complaint in a number of years, despite the extreme stress of maintaining an active and successful practice while defending this proceeding and the stress of repairing his marital relationship, speaks for itself on this required element.

B. Actions of Staff Member Young Magnified the Problems With Depression

The record clearly indicates that the claim of Respondent Santa Barbara that his depression was significantly and negatively impacted by the actions of staff member, Penny Young, are clearly grounded in psychological testimony and reports of persons who witnessed those actions and their result. There is compelling evidence that the office disruption factor should constitute significant mitigation in itself. When the effect that the very disruptive presence of Ms. Young had on Attorney Santa Barbara's proven depression is given its appropriate full weight, the conclusion that Respondent Santa Barbara has proven entitlement to a geometrically-enhanced degree of mitigation is clearly demonstrated.

Defense expert witness Dr. Bernard Lewis testified, without rebuttal, and was believed by the HPS, that, as to Attorney Santa Barbara's depression, the Penny Young situation was a "significant contributor to his problems". Hrg.Tr. II, p. 168,183 (Dr. Lewis). Rec.Dec., pp. 22-23, F.O.F. 55.

Attorney Santa Barbara described apparent actions Ms. Young took to disrupt and injure his law practice, Hr. Tr. II, pp. 72, 127 (missing, hidden office files and documents, improper conduct), 132 (urging Sencendiver complaint). His wife and law-partner Kathy Santa Barbara also described misconduct on the part of Penny Young, Hrg. Tr. II, pp. 14 (dislike for Michael), 17-18, 21-25 (rumors of affairs, improper relations with client Tinsman, illegal use of firm credit card, wrongful taking of "witness only closings" income), 30- 31 (destruction of office Outlook calendar, theft of firm documents), 36-37 (inability to work with other legal assistants), 40-41, 48-49(theft of

documents for use in ethics complaints). Finally law office staff member Crystal Marsh described the significant disruption caused by Penny Young, Hrg. Tr. I, pp. 264 (Respondent avoided her), 266 (poor morale of co-workers), 274 (calendar destruction).

Making its findings crediting this testimony at Rec.Dec.. pp. 20, 23-34, F.O.Fs. 47, 48 and 55, the HPS clearly found particularly telling the testimony that the actions of Ms. Young caused Respondent to avoid the office and work at home, Hrg. Tr. II, p. 264, and the statements of Respondent Santa Barbara that he was depressed, sad, angry, blue, and was "... just miserable. And I didn't like - - and frankly, didn't like the practice of law at that point." Hrg. Tr. II, p. 95, and his statement "... I can remember specifically. Every time Penny would buzz me or nudge me and say 'Hey, you've got to do this, got to do this,' I was very, very angry at everybody, everything." Hrg. Tr. II, pp. 97-98 (M. Santa Barbara). Thus, in light of these extraordinary facts proven in the record, the HPS correctly found that the actions of staff member Young were the cause of "significant disruption of the morale and operation of the law office and substantial discord and distrust in Respondent's marital and family situation " Rec.Dec.. , p. 20, F.O.F. 47 (final sentence). The evidence supporting that conclusion is more than clear and convincing.

C. The Proof of Actual Loss by Complainant Sencendiver Fails and is Thus Not a Proper Aggravating Factor

Among Respondent Santa Barbara's few objections to findings of the HPS in this matter is its finding, as an aggravating factor, that the actions or omissions of

Respondent Santa Barbara caused damage to complainant Sencendiver, whom they found to be a client. However, careful review of the record to find support for the existence of, or the measure of, ultimate damage done to Sencendiver and his interests shows, again, that the ODC provided no clear and convincing proof of legal damage as to complainant Sencindiver whom Attorney Santa Barbara never considered to be a client and, in any event, was at best client who, according to the proof of record, had no “malicious intent” or other recognizable cause of action that could be successfully pursued. One notes that the HPS admittedly found an aggravating loss of a claim of some value by Sencendiver despite testimony by Respondent Santa Barbara that information he received from Sencendiver indicated a work-related slip-and-fall injury, which fact Sencendiver seemed to back away from once the “malicious intent” elements barring injured workers’ claims was explained. The statement of complainant Sencendiver attached to his complaint, ODC Exh. 8, p.191, supports this assertion. There is no evidence, much less the required quantum of clear and convincing evidence, that the Sencendiver injury was one upon which he could reasonably have recovered damages. We remind the Honorable Court that the HPS impeaches its own finding on this narrow issue as it noted, Rec.Dec.. p.6, F.O.F 2 and fn.5, p.6, that the relationship of Sencendiver with staff member Penny Young “raise serious questions about the motives for the Sencendiver complaint and his credibility (and others which were among the matters heard by the Hearing Panel Subcommittee)...” While client Burris clearly had medical damages, he had not, as of the dates of the hearing into this matter, sought any sort of financial recovery for them from any source after firing Attorney Santa

Barbara, although Attorney Santa Barbara specifically invited him to discuss his case with other counsel for the purpose of having his rights protected. R.Exhs. 5, 6. The evidence in the Sencendiver claim, documents such as R.Exh.5, p. 175 (error notification letter) and ODC Exh. 7, pp. 185-189 (original interview notes of Respondent) indicate clearly that the facts complainant Sencendiver had related to Attorney Santa Barbara raised a “deliberate intent” claim which the HPS, although finding that Sencendiver was “likely harmed”, Rec.Dec.. p. 26, also found that while no action was filed it is “not clear whether the 5 elements of a deliberate intent case would have been established.” Rec.Dec.. p. 26.

We submit that, as there is a clear lack of substantial evidence as to the existence of the five elements of a deliberate intent claim, as the HPS correctly found as just quoted, the record does not support a conclusion that complainant Sencendiver was “likely harmed” in terms of loss of a legal claim he asked Attorney Santa Barbara to handle.

We note, as well, that the prosecution failed to prove the degree of damages to Burris with the result that the degree of his damage also cannot be stated with any confidence on the record provided, although clearly he suffered some physical damages and, as of the hearing, had an opportunity to seek malpractice-type damages but had not yet done so. Thus, due to lack of any evidence on such facts in the record, a reading of the entire record in this proceeding also reveals no required proof, much less proof by full, clear evidence, of the degree of losses suffered by Burris. In such a situation, the “loss” of Sencendiver cannot be fairly determined, even as “likely” and thus it ought not

be considered a part of the list of aggravating factors in this proceeding. This is true although complainant Sencendiver testified that he considered R.Exh. 5 as “showing his guilt and inviting me from what the other lawyer -when he read this, that he took it as he was inviting me to sue his insurance company.” Hrg. Tr. I, p. 28.

Similarly, on this general topic, this Honorable Court ought also to note that while Respondent Santa Barbara admitted error to complainant Burris, no legal claim was shown to have been made or in progress at the time of hearing to seek redress from Attorney Santa Barbara for Burris’ alleged losses, despite Attorney Santa Barbara’s unusually-direct invitation that such be done. R.Exh. 8.

D. The Sum of Mitigation Factors Justifies Discipline Less than A Suspension of Any Length

In light of the arguments above, it follows that, while Attorney Santa Barbara has candidly admitted all along in this ethics matter that he did not serve his clients well, the HPS has failed fully to appreciate his proofs of the extreme mitigation clearly established in the record in this proceeding and to give it its proper weight when assessing the proper, fair, rehabilitative and proportional discipline to be assessed upon Attorney Santa Barbara.

1. Factors to be Used to Calculate Proper Discipline

The factors to be considered in assessment of appropriate sanctions necessarily includes well-settled principles enumerated in Rule 3.16 W.Va.R.L.D.P :

Rule 3.16 of the West Virginia Rules of Lawyer Disciplinary Procedure enumerates factors to be considered in imposing sanctions and provides as

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

Syl. Pt. 4 Office of Lawyer Disciplinary Counsel v. Jordan, 204 W.Va. 286, 452 S.E.2d 377 (1998)

All issues in a disciplinary proceeding, are to be evaluated on a case-by-case basis, carefully considering the facts and circumstances unique to each case, including mitigating facts and circumstances. *Committee on Legal Ethics v. Roark*, 181 W.Va. 260, 382 S.E.2d. 313, 1989 W.Va. LEXIS 85 (1989). This Honorable Court has also held that in its analysis of each case, they are cognizant that “ ‘Rule 3.7 of the Rules of Lawyer Disciplinary Procedure . . . requires the Office of Disciplinary Counsel to prove the allegations of the formal charge by clear and convincing evidence. . . .’ *Syllabus Pt. 1* [in part,] *Lawyer Disciplinary Board v. McGraw*, 194 W.Va. 788, 461 S.E.2d 850 (1995).” *Syl. Pt. 2* [in part] *Lawyer Disciplinary Board v. Cunningham*, 195 W. Va. 27, 464 S.E.2d 181 (1995). However, once the HPS makes its findings, they are afforded substantial deference. *Syl. Pt. 3, Lawyer Disciplinary Board v. McCorkle*, 192 W. Va. 286, 452 S.E.2d 377 (1994). Attorney Santa Barbara recognizes that because the Board’s factual findings and conclusions are given substantial deference, “[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].” *McCorkle, Supra*, 192 W. Va. at 290, 452 S.E.2d at 381.

There is also a clear policy of long standing in West Virginia to recognize the propriety of rehabilitative discipline in preference to a purely punitive removal from the bar in circumstances in which recognized medical problems are proven to have been in existence at the time of the infractions and to have caused them, *Lawyer Disciplinary Board v. Hardison*, 205 W.Va. 344, 518 S.E.2d 101, 1999 W.Va. LEXIS 72 (1999); *Lawyer Disciplinary Board v. Dues*, 218 W. Va. 104, 624 S.E.2d 125 (2005) and to do so even when no medical mitigation is present and the problem is clearly one of imperfect office practice and procedure. *Lawyer Disciplinary Board v. Cunningham*, 195 W.Va. 27, 464 S.E.2d 181 (1995). It is thus particularly important when assessing the disciplinary sanction proper in this proceeding to view the admitted violations of ethics rules in light of the truly unprecedented mitigating factors of mental health problems as aggravated and magnified by the accompanying major factor of a disruptive and dishonest staff member, Penny Young.

(2) Analysis of the Factors

(A) Whether the Lawyer Has Violated a Duty to a Client, to the Public, to the Legal System or to the Profession.

In this proceeding, with the exception of the claim that complainant Sencendiver was never a client, Attorney Santa Barbara has not contested that he failed in most alleged duties to the complaining clients. One need only refer to his Answer and to his testimony to see that he admits, with remorse, that his actions constitute a failure to

fulfill his duty of competence and diligence to complainant Sencendiver and clients Burris, Clark, Milanowski and Karen Thomas.

The HPS has quite correctly found that the ODC failed to prove that Attorney Santa Barbara has failed his duty to the public and to his profession to tell the truth, both as to statements under oath to the ODC about how the Burris complaint came to be neglected, Rec.Dec., p.11, F.O.F. 17, and also failed to prove that he stumbled in his duty of fundamental honesty in handling of client funds of client Karen Thomas, Rec.Dec., p.21, F.O.F. 51. Clear evidence in the record justifies deference by the Honorable Court to these findings. Thus, the entire record in this proceeding shows that the violations involved here are more violations of neglect and episodic lack of competence in service to clients, mitigated as explained in our discussion of the next element of damages in this brief. From the beginning, Attorney Santa Barbara has admitted failing his clients, so that some discipline in this proceeding is appropriate; the determination of appropriate sanctions for his conduct is the more difficult determination to be made in this proceeding.

(B) Degree of Intransigence of Conduct

When applying factor #2 enumerated in *Jordan*, above-recited, the Honorable Court is reminded of its adoption of ABA Standards for Imposition of Lawyer Discipline ["Discipline Standards"] in *Lawyer Disciplinary Board v. Scott*, 213 W.Va. 209, 579 S.E.2d 550 (2003). Of particular importance here is the proper weight to be given to the mental state of Attorney Santa Barbara at the time that his actions occurred. The Disciplinary Standards are instructive in such a situation as well. The definition of

“mental states” found in the A.B.A. Discipline Standards is particularly important and instructive in this matter:

The mental states used in this model are defined as follows: 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 state is that of knowledge, when the lawyer acts with conscious awareness of the nature or attendant circumstances of his or her conduct both without the conscious objective or purpose to accomplish a particular result. The least culpable mental state is negligence, when a lawyer fails to be aware of a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.

A.B.A. Standards for Imposition of Lawyer Discipline, as amended February 1992.

Careful review of the record and of HPS findings, Rec.Dec.. p. 11, F.O.F. 17, p. 17, F.O.F. 36, reveals that Attorney Santa Barbara’s actions were not intentional and, in most instances, were acts of omission due to lack of knowledge or mistaken omissions substantially resulting from his depression, as compounded by the misconduct of Penny Young. Thus, Attorney Santa Barbara’s actions violative of ethics rules occurred when he was functionally in a mental state of negligence, which negligence he has readily admitted to the ODC and complainants in this proceeding, R.Exh. 8 ; Pet.Exhs. 11, pp 203-204 and 18, p. 372-374.

The A.B.A. Standards are especially useful in the analysis of the significance of the explanatory evidence relating to depression and staff misconduct as one assesses the degree of knowledge and intent of Attorney Santa Barbara at the time of the disappearance of the Thomas funds and as to the honesty of his response once problems

with his IOLTA account came to his attention.

Particularly useful are Standards relating specifically to the duty lawyers have to properly and honestly handle client funds:

4.1 FAILURE TO PRESERVE THE CLIENT'S PROPERTY

Absent aggravating or mitigating circumstances, upon application of the factors set out in 3.0 [set forth above], the following sanctions are generally appropriate in cases involving the failure to preserve client property:

- 4.11 Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client.
- 4.12 Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.
- 4.13 Reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client.
- 4.14 Admonition is generally appropriate when a lawyer is negligent in dealing with client property and causes little or no actual or potential injury to a client.

A.B.A. Standards for Imposing Lawyer Discipline, as amended, 1992.

The overall confusion relating to Karen Thomas' funds, particularly the confused and inconsistent records, as illustrated by R.Exh. 16 and Pet.Exh. 40, pp. 1553-1554; Hrg.Tr. I, pp. 133-137 and the clear record of Attorney Santa Barbara's lack of sufficient understanding of IOLTA account operation and his failure of oversight at the time that the Thomas funds were depleted, Rec.Dec. pp. 15, 16, F.O.Fs. 33 through 36, make clear that his actions relating to the misapplication of funds from his IOLTA account were the

result of negligent, not knowing or intentional, action and inaction on his part.

The HPS has correctly found that there is insufficient evidence of intentional wrongdoing or conversion in the Thomas funds matter. Rec.Dec. p.21, F.O.F. 51 (evidence of a Rule 8.4 violation “contradictory at best”, “necessary element of intent not proven”); Rec.Dec. P. 28. After viewing and hearing Attorney Santa Barbara during the two days of hearing, the HPS correctly found that generally “Respondent clearly violated duties to his client. At a minimum, his conduct constituted negligence in each of the proven violations.”

Additionally as to the communication, accounting and competence-based charges made in this proceedings, we urge the Honorable Court to agree with the HPS, as we do, that the damage done by Attorney Santa Barbara to clients and potential clients was not intentional damage - his actions were purely those of lack of practice oversight, inattention, negligence and neglect directly and substantially arising from, and magnified by, his unique and substantial medical and office and family problems, none of which was intentional in nature. Rec.Dec. p. 21, F.O.F. 51. His failure properly to manage the financial and office procedure aspects of his practice due to lack of training and experience, clearly demonstrated in this proceeding, must also be considered to explain and mitigate his failings in practice. *Committee on Legal Ethics v. Morton*, 186 W.Va. 43, 410 S.E. 2d 279, 1991 W.Va. LEXIS 160 (1991).

The HPS agreed that such situation exists in this matter, finding, when enumerating mitigating factors on page 27 of its Recommended Findings “(3) inexperience in the practice of law to the extent of office management skills and

handling of accounts.” This finding by the HPS is also particularly important when assessing the counterpart aggravating element of delay in return of the funds to client Thomas, because it explains why, uniquely in the Thomas funds charge, an attorney who suffers from the disabling mental disability of significant depression would be especially susceptible to avoidance of the problem with client funds records by simple inaction or referral of the problems to others. And the record is absolutely clear in this matter that such is precisely what occurred: Attorney Santa Barbara allowed the disbursements of Thomas funds from his former solo firm’s IOLTA account to be handled and to be monitored essentially without his oversight; further he thereafter, as the account became dormant and demands were made for payments by Ms. Thomas, also simply failed to act to perform the necessary detailed reconstruction of the Thomas funds portion of the IOLTA account which appeared to him, in the midst of his depression when payment requests were made by Ms. Thomas, to be a task he simply could not personally perform given his condition at the time.

Taken altogether, the Findings of Fact by the HPS, which accept and support Attorney Santa Barbara’s mitigation position and inform as to the element of the degree of intransigence, establish that this element regarding calculation of proper discipline must be found to favor Attorney Santa Barbara, even before the consideration of substantial mitigating factors - - that at the very most , each of Attorney Santa Barbara’s violations of Rules of Professional Conduct established in this proceeding is the result of negligent inattention to his practice, as reflected in ABA Standard 4.13 and that, therefore, maximum proper discipline of reprimand is appropriate.

(C.) Actual and Potential Injury Caused by Attorney Santa Barbara's
Misconduct

We have discussed in detail in part C. of this Brief, above, as to why the ODC failed to prove that Attorney Santa Barbara's failure to proceed with the claim of client Sencendiver resulted in an identifiable loss of a legally-valid claim and, consequently to prove the necessary detail of "likely" legal damage to his rights and his opportunity at financial reimbursement for his claimed damages.

As for complainants Clark and Milanowski, it is clear that they brought successful professional liability claims which have been paid and that, at least as to Ms. Milanowski, that it is likely that her recovery appears to have exceeded the claims she had under Virginia's contributory negligence law. Finally, it is clear in the record of this proceeding that Ms. Thomas was more than made whole financially by Attorney Santa Barbara, although her loss of time waiting for payment cannot be restored. Clearly, Karen Thomas appeared at hearing as much as a client generally satisfied with the services of Attorney Santa Barbara as a witness supporting the prosecution clearly brought vindictively by staff member Penny Young. See R.Exh. 22, ¶¶ 19, 23,26, 27; Hrg.Tr. I, p.117 (Thomas). Indeed, a summary of payments attached to our Brief to the HPS, based upon all available documents in the hearing record, indicates that Attorney Santa Barbara, after rejecting statements from Ms. Thomas that less was owed, R.Exh. 22, ¶23, overpaid her in the amount of \$3,942.74 on an entrustment of \$30, 557.26, most of which payment preceded his knowledge of the existence of the related Penny Young complaint. The fact that Attorney Santa Barbara, in a situation in which his

reconstruction of the Thomas financial records was not possible - not through his fault - insisted upon an overpayment of Ms. Thomas out of an abundance of caution and honesty toward her, presents a mixed situation as to damage done. There was delay in payment; Mrs. Thomas lost prompt use of her funds but was more than repaid and, in the end, was generally satisfied with the representation of Attorney Santa Barbara, as just noted. The overpayment is not mitigating and does not negate that there was a "potential loss" but does negate the argument that this was a loss to Ms. Thomas which can be fairly seen as a significant aggravating factor in determining the proper discipline in this matter.

As for other aggravating circumstances, there are few of significance beyond the facts of the violations themselves. Moreover, while there was a pattern of neglect and of non-communication and of delay in payment to client Thomas in the violations, as properly found by the HPS, Rec.Dec., p 28, cases cited above also illustrate that patterns of conduct and delay explained by significant or major mental illness have seen reduction of discipline from that seen in similar cases which do not involve mental illness mitigation. As expected, Disciplinary Counsel argued for a disbarment in this matter, as one aspect of the charges related to an inadvertent use of client funds and delay in payment of those funds to client Thomas. However, a survey of the historic range of cases on trust account-related discipline, including those in which there is related neglect of client matters, indicates that the severe sanction of suspension from practice is only appropriate when there is a pattern of misuse of a trust account and direct deposits of client funds into a practice or personal account, false statements to

clients about receipt or distribution of funds, intentional and criminal conversion of the funds, a pattern of trust account violations with more than one client, refusal to return funds or files when being terminated, a failure to repay the client once the trust account error is detected and the amount of missing funds has been clearly established, or when there are misrepresentations to the ODC during investigation of the trust account charges - - not one of which aggravating facts has been proven to exist in this proceeding.

(D). The Mitigation Factors Which Justify Discipline Less than
Suspension

Attorney Santa Barbara is entitled to significant mitigation, under case law and many of the 13 mitigating factors listed in Syl. Pt. 3, *Lawyer Disciplinary Bd. v. Scott*, 213 W.Va. 209, 579 S.E.2d 550 (2003) and Syl. Pt. 8, *Lawyer Disciplinary Board v. Cavendish*, 226 W.Va. 37, 700 S.E.2d 779 (2010), for the following reasons:

(1) He has no prior record of discipline. Rec.Dec.. P. 27; *Scott* Syl. Pt. 4, factor 1. *Lawyer Disciplinary Board v. Losch*, 219 W.Va. 316, 633 S.E.2d.261, 2006 W.Va. LEXIS 79 (June 29, 2006) .

(2) As the original complainant in Count IV, Penny Young, clearly had spite motivation in bringing a complaint that Ms. Thomas never supported. R.Exh. 22, ¶27, p. 489; Rec.Dec.. F.O.F. 39. As it appears that similar spite motivated complainants Sencindiver and Burris, this mitigation element may properly be considered. *See Committee on Legal Ethics v. Smith*, 156 W.Va. 471, 194 S.E.2d 665, 1973 LEXIS 238 (1973).

(3) Attorney Santa Barbara is clearly entitled, given its proven clear impact on his ability to perform as a professional, to have the Hearing Panel mitigate any discipline for the personal (family and law office staff) and emotional problems experienced during his representation of clients and others who have complained against him as are more fully explained above in sections A. and B. of this Brief. Findings of fact, # 45 and #46, above. *Scott* Syl. Pt. 3, factor 3; *Committee on Legal Ethics v. Lilly*, 174 W.Va 680, 328 S.E.2d 695 (1991).

(4) Activity to make restitution or rectify consequences of misconduct are admittedly present in the record, including prompt notice and letters to clients whose cases he had harmed that they should obtain counsel and to contact his insurer. The extraordinary information communicated to complainants Burriss and Sencendiver, amounting to an invitation to make malpractice claims against Respondent Santa Barbara and his liability insurer ought to be weighed a evidence of good character and as mitigation. Rec.Dec., p. 23-24, F.O.F. 57. Attorney Santa Barbara's efforts successfully to compensate Ms. Thomas, prior to any disciplinary complaint [Tr.-II, p. 104-105 (MSB)] in an amount clearly above the amount with which he was entrusted is also noted. *Scott*, Syl. Pt. 3, factor 4.

(5) Attorney Santa Barbara's cooperative attitude and openness and candor with the disciplinary counsel and during the formal proceedings is evidenced by his provision of extensive records, at least those records he still had, during investigation, his appearance before, and candid testimony to, the Office of Disciplinary Counsel on two separate occasions, his admissions in his Answer of

many facts in the Statement of Charges plus additional stipulations during the hearing held in this matter, [Tr.-I, pp. 6-7, 9] including stipulations of material documents, his stipulation aimed to make possible testimony by prosecution witnesses whose location was distant from West Virginia, as well other waivers and agreements to expedite the proceedings. Rec.Dec., p.23-24, F.O.F. 57. All these are indicators that Attorney Santa Barbara is entitled to mitigation on the basis of the cooperative attitude factor as well. *Scott Syl. Pt. 3, factor 5.*

(6) Testimony of Attorney Santa Barbara's good character was provided by unopposed character witnesses. [Tr.-I, pp. 287-290 (D. Camilletti), pp. 294-295, 297 (Chambers); Tr.-II, p. 31, 32 (Kathy Santa Barbara); R.Exh. 33 (U.S. Atty. P Camilletti affidavit)) and is a strong mitigation factor. Rec.Dec.. p. 27. *Scott Syl. Pt. 3, factor 7.*

(7) Mental disability or impairment shown by strong documentary and testimonial proof, uncontested by the Office of Disciplinary Counsel, supported by expert testimony and explanation, showing that a years-long episode of depression, now in remission and continuously properly medicated [Tr.-II, pp. 106-110 (MSB)] up to the date of the hearing was a substantial and material and direct cause of his misconduct, as discussed in much greater detail in section A of this brief, above. There has been no additional complaint of violation of ethical rules since staff member Penny Young was fired and Attorney Santa Barbara began to address his depression with greater focus, including self-referral to consult Dr. Lewis and more focused attention to proper medication. [Tr.-II, pp

33-36 (Kathy Santa Barbara)]; HPS Rec.Dec.. F.O.Fs. 52 through 56 - *Scott Syl* Pt. 3, factor 8 and *Cavendish Syllabus* Points 4 and 9.

(8) Reference to investigative documentation relating to the proceedings reveals that delay in investigation and prosecution of the proceedings clearly has occurred, including delay that may have allowed some evidence to be destroyed by Penny Young. It is fair to also urge the Honorable Court to accept the fact that, if attorney Santa Barbara was any type of danger to the public regarding handling of client funds, as alleged in Count IV of the Petition for Discipline, this matter would have been investigated and prosecuted with more vigor and promptness by the Office of Disciplinary Counsel. *Scott Syl*. Pt. 3, factor 9

(9) Attorney Santa Barbara, in his presentations to the ODC and during the hearing showed full acceptance of his errors for clients Burris, Clark, Milanowski and Thomas, and expressed remorse for any injury to the legal interests of complainants whom he considered to have been active clients. Rec.Dec.. p. 27; *Scott, Syl*. Pt. 3, factor 12.

The existence here of very substantial mitigation must be weighed in light of the sanctions afforded similar cases with roughly analogous charges, mitigated and otherwise, in order to appropriately balance the ultimate, fair discipline to be imposed in this matter.

Cases involving neglect of more than one client matter have found a variety of disciplines assessed, admittedly with an upper disciplinary effect of suspension from

practice for some term. Where however, as in this case, there is some evidence that poor office practice and medical conditions and a problematic family life have contributed to the violations, some period of probationary suspension has often been recommended. Situations involving intentional conversion of client funds and intentional hiding of that wrongdoing from the client have resulted in more severe sanctions. However, to the extent that the most disturbing aspect of the charges here, that of intentional conversion of client funds and of intentional misrepresentations to clients, has been found unproven in this proceeding, a more rehabilitative approach to discipline in this matter seems appropriate.

It is clear that a prior good record can weigh heavily in favor of avoiding suspension and imposing reprimands and rehabilitative and educational conditions on practice, even in the event of isolated instances of dishonesty in practice. *Lawyer Disciplinary Board v. Losch*, 219 W.Va. 316, 633 S.E.2d. 261, 2006 W.Va. LEXIS 79 (2006). Serious criminal misconduct has even been substantially mitigated by family problems and diagnosed depressive disorder by the respondent attorney. *Lawyer Disciplinary Board v. Albers*, 219 W.Va. 704, 639 S.E.2d. 796, 2006 W.Va. LEXIS 137 (2006).

VI. CONCLUSION

In light of the entirety of the evidence in the record of this proceeding the sanction of public reprimand and payment of all costs in this proceeding, followed by a period of supervised practice for a period of one year is most appropriate in light of the

goals of the disciplinary system, including punishment, deterrence, rehabilitation of the attorney and restoration of public respect for, and confidence in, the bar.

Actual suspension as deterrent or as an opportunity for rehabilitation, as was the case in *Lawyer Disciplinary Board v. Hardison, supra*, is not appropriate here, as this record clearly illustrates that the delay in attention to client matters and poor communications and problems with Attorney Santa Barbara's IOLTA account and records arise, to an overwhelming degree, uniquely from an episode of major depression, now ended, and to his pure misfortune in having employed a highly-disruptive office staff member. Nor is this a case in which annulment is proper for a pattern of neglect not mitigated by two substantial factors but aggravated by refusals to answer disciplinary complaints, and failure ultimately to pay funds to a client, as in *Lawyer Disciplinary Board, v. Lusk*, 212 W.Va. 456, 574 S.E.2d 788(2002). This case is also quite similar to the 1991 case in which a clear lack of meaningful experience in handling of a fiduciary account which resulted in disservice to two clients, accompanied by mitigation evidence, resulted in public reprimand and appointment of a mentor. *Committee on Legal Ethics v. Morton*, 186 W.Va. 43, 410 S.E.2d 279 (1991).

Suspension is unavailing to deter an attorney hearing of this case from suffering from their own depression or from making a tragic and costly mistake in judging the character of an applicant for employment. In that Attorney Santa Barbara has illustrated that his practice in the recent past and at present are proceeding without any evidence of risk to clients, indefinite suspension or any other length of suspension is an unnecessary and inappropriate discipline.

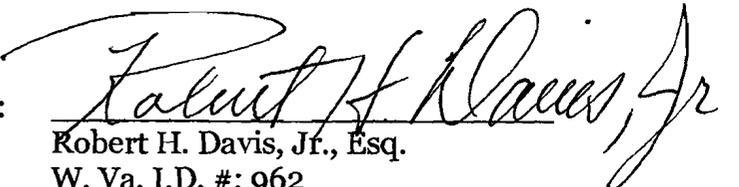
The public's view of Attorney Santa Barbara and his character, established in the record as presently very good, and its view of the integrity of the bar, will be enhanced by assessing public discipline in the form of a reprimand. The public's interest in having mentally alert, unimpaired counsel will not be directly enhanced by a suspension of Attorney Santa Barbara; rather a period of supervised practice under terms very similar to those recommended by the HPS, at Rec.Dec.. p. 29, points (1) to (4), will best serve the interests of the public and the reputation of the bar.

Such rehabilitative discipline will establish Attorney Santa Barbara as a positive model to other attorneys to actively seek help and rehabilitation when they are, through no fault of their own, subject to depression and its low points and who are experiencing special office stress - - a much more desirable result than punishing an attorney merely because a major illness unavoidably manifests itself while he or she practices law. During the year of supervised practice that we urge this Honorable Court to adopt as discipline here, Attorney Santa Barbara should be required to take six additional hours of legal ethics instruction or courses in office management, particularly in management of trust accounts, if available, and be required to counsel with an appropriate mental health professional during such time period to aid Attorney Santa Barbara to put the former period of depression and the entire unpleasantness arising from the activities of former staff member Penny Young and its impact on his marital situation firmly behind him. Additionally we agree that the supervised practice terms should also include monitored visitation to a qualified physician on a quarterly basis for the specific purpose of reviewing and adjusting, if necessary, the medication and counseling

frequency necessary to give an even greater assurance that Attorney Santa Barbara's present proper course of dealing with his medication and depression and with related conditions shall be given the maximum chance at long-term maintenance and success.

WHEREFORE, for all the foregoing enumerated reasons and arguments, we respectfully urge this Honorable Court to reject the few Findings of Fact in the Recommended Decision of the HPS in this proceeding which we here challenge, including the conclusion that complainant Sencendiver suffered legal injury, that they confirm the other HPS Findings of Fact as here urged, upon the evidence and bases in the record indicated here, that they make the findings as to Rule violations as urged here and that this Honorable Court recognize the unique convergence of mitigating factors clearly found by the HPS and shown in the record and assess discipline appropriate to this matter as described and justified here.

Respectfully submitted this the 3rd of February, 2012.

BY: 
Robert H. Davis, Jr., Esq.
W. Va. I.D. #: 962
Counsel for Attorney Santa Barbara
121 Pine Street
Harrisburg, PA 17101
Phone: (717) 238-6861
Facsimile: (717) 920-9447
Email : ethicl@paonline.com

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

IN RE: MICHAEL S. SANTA BARBARA, Esq
a member of the West Virginia
State Bar

Bar No.: 5625
I.D. Nos: 07-05-523, 08-05-032
08-01-181; 08-05-184
& 09-01-304

CERTIFICATE OF SERVICE

I Certify that I have served the foregoing document, Respondent's BRIEF OF RESPONDENT MICHAEL SANTA BARBARA IN SUPPORT OF OBJECTIONS TO HEARING PANEL SUBCOMMITTEE RECOMMENDED DISPOSITION, concurrently with transmittal to the Supreme Court of Appeals for filing, upon the Office of Disciplinary Counsel and the members of the hearing panel by Priority United States Mail, as shown below:

Office of Disciplinary Counsel: (Via U.S. Mail)

Andrea J. Hinerman, Senior Lawyer Disciplinary Counsel, Office of Disciplinary Counsel
City Center East, Suite 1200C, 4700 MacCorkle Ave., SE, Charleston, WV 25304

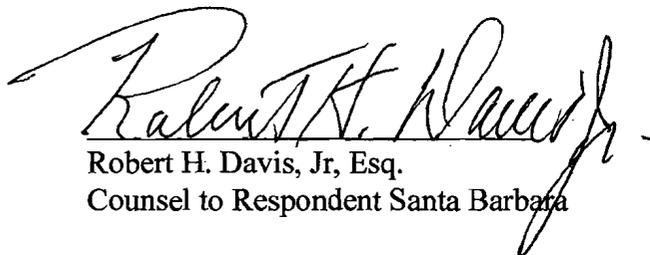
Hearing Panel Subcommittee: (Via U.S. Mail)

John W. Cooper, Esq., Chair, Post Office Box 365, Parsons, WV 26287 (+ disc)

Ms. Cynthia L. Pyles, Public Member, 24 Sharpless Street, Keyser, WV 26726

David W. Frame, Esq., Member, 439 Washington Ave., Ste. 2, Clarksburg, WV 26301

This the 3rd day of February, 2012.


Robert H. Davis, Jr, Esq.
Counsel to Respondent Santa Barbara