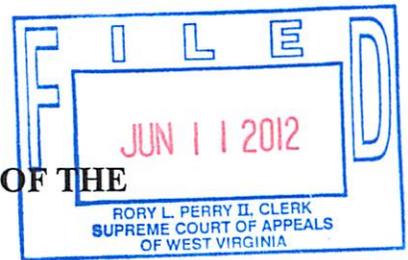


BEFORE THE SUPREME COURT OF APPEALS OF THE
STATE OF WEST VIRGINIA



LAWYER DISCIPLINARY BOARD,

Complainant,

v.

No. 11-0813

D. MICHAEL BURKE,

Respondent.

BRIEF OF THE LAWYER DISCIPLINARY BOARD

Jessica H. Donahue Rhodes [Bar No. 9453]
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. STATEMENT OF THE CASE	1
A. NATURE OF PROCEEDINGS AND RECOMMENDATION OF THE HEARING PANEL SUBCOMMITTEE	1
B. FINDINGS OF FACT	2
C. CONCLUSIONS OF LAW	10
II. SUMMARY OF ARGUMENT	11
III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION	12
IV. ARGUMENT	12
A. STANDARD OF PROOF	12
B. ANALYSIS OF SANCTION UNDER RULE 3.16 OF THE RULES OF LAWYER DISCIPLINARY PROCEDURE	13
1. Respondent violated duties owed to his client, to the public, to the legal system, and to the legal profession.	14
2. Respondent acted negligently.	16
3. The amount of injury is great.	16
4. There is one aggravating factor present.	17
5. There are several mitigating factors present.	17
V. CONCLUSION	18

TABLE OF AUTHORITIES

Cases:

<u>Attorney Grievance Commission v. Nichols</u> 405 Md. 207, 950 A.2d 778 (Md. 2008)	19
<u>Columbus Bar Association v. Cooke</u> 111 Ohio St.3d 290, 855 N.E.2d 1226 (Ohio 2006)	20
<u>Committee on Legal Ethics v. Blair</u> 174 W.Va. 494, 327 S.E.2d 671 (1984)	13
<u>Committee on Legal Ethics v. Karl</u> 192 W.Va. 23, 449 S.E.2d 277 (1994)	13
<u>Committee on Legal Ethics v. McCorkle</u> 192 W.Va. 286, 452 S.E.2d 377 (1994)	12, 13
<u>Committee on Legal Ethics v. Morton</u> 186 W.Va. 43, 410 S.E.2d 279 (1991)	18
<u>Committee on Legal Ethics v. Tatterson</u> 173 W.Va. 613, 319 S.E.2d 381 (1984)	18
<u>Committee on Legal Ethics v. Walker</u> 178 W.Va. 150, 358 S.E.2d 234 (1987)	18
<u>Daily Gazette v. Committee on Legal Ethics</u> 174 W.Va. 359, 326 S.E.2d 705 (1984)	18
<u>Disciplinary Proceeding Against Preszler</u> 169 Wash.2d 1, 232 P.3d 1118 (Wash. 2010)	19
<u>Lawyer Disciplinary Board v. Cunningham</u> 195 W.Va. 27, 464 S.E.2d 181 (1995)	12, 13
<u>Lawyer Disciplinary Board v. Hardison</u> 205 W.Va. 344, 518 S.E.2d 101 (1999)	18

Lawyer Disciplinary Board v. McGraw
194 W.Va. 788, 461 S.E.2d 850 (1995) 13

Lawyer Disciplinary Board v. Scott
213 W.Va. 209, 579 S.E. 2d 550 (2003) 17

Lawyer Disciplinary Board v. Taylor
192 W.Va. 139, 451 S.E.2d 440 (1994) x13

Office of Disciplinary Counsel v. Jordan
204 W.Va. 495, 513 S.E.2d. 722 (1998) 14

Roark v. Lawyer Disciplinary Board
207 W.Va. 181, 495 S.E.2d 552 (1997) 12

West Virginia Statutes and Rules:

R. of Appellate Proc. Rule 20 12

R. Law Disc. Proc. Rule 3.7 10, 13

R. Law Disc. Proc. Rule 3.15 20, 21

R. Law Disc. Proc. Rule 3.16 13, 17

R. Professional Conduct Rule 1.1 10, 11

R. Professional Conduct Rule 1.3 2, 10, 11, 19

R. Professional Conduct Rule 1.4(a) 2, 10, 11, 19

R. Professional Conduct Rule 1.4(b) 2, 10, 11, 19

R. Professional Conduct Rule 1.5(a) 11

R. Professional Conduct Rule 1.15(b) 11

R. Professional Conduct Rule 8.4(c) 10, 11

R. Professional Conduct Rule 8.4(d) 10, 11

Other:

ABA Model Standards for Imposing Attorney Discipline, St. 4.14 18

ABA Model Standards for Imposing Attorney Discipline, St. 4.44 18

ABA Model Standards for Imposing Attorney Discipline, St. 4.54 19

ABA Model Standards for Imposing Lawyer Sanctions, § 9.21 17

I. STATEMENT OF THE CASE

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

This is a disciplinary proceeding against Respondent D. Michael Burke, (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 May 17, 2011. Respondent was served with the Statement of Charges on May 20, 2011, and filed a timely response thereto.

The matter then proceeded to hearing in Martinsburg, West Virginia, on October 10, 2011. Allan N. Karlin, Esquire, appeared on behalf of Respondent, who also appeared. Jessica H. Donahue Rhodes, Lawyer Disciplinary Counsel, appeared on behalf of the Office of Disciplinary Counsel. The Hearing Panel Subcommittee, comprised of Debra A. Kilgore, Esquire, Chairperson; Sean D. Francisco, Esquire; and Ms. Cynthia L. Pyles, laymember, presided over the proceedings. The hearing in this matter was consolidated with the hearing in In re: Barry J. Nace, I.D. No. 09-05-353, Supreme Court No. 11-0812, upon motion of Respondent’s counsel and Mr. Nace’s counsel. The misconduct of Respondent and Mr. Nace arise out of the same case and facts.

The Hearing Panel Subcommittee heard testimony from Robert W. Trumble, Barry J. Nace and Respondent. The Hearing Panel Subcommittee also admitted into evidence the Office of Disciplinary Counsel’s Exhibits 1-18, and Respondent’s Exhibits 1-9.

On or about March 21, 2012, the Hearing Panel Subcommittee issued its decision in this matter and filed with the Supreme Court of Appeals of West Virginia its “Report of the Hearing Panel Subcommittee” (hereinafter “Report”). The Hearing Panel Subcommittee properly found that the evidence established that Respondent violated Rules 1.3, 1.4(a) and 1.4(b) of the Rules of Professional Conduct. The Hearing Panel Subcommittee issued the following recommendation as the appropriate sanction:

1. That Respondent be admonished for his conduct;
2. That Respondent satisfy any obligations imposed on him in the pending adversary proceeding filed by the Bankruptcy Trustee; and
3. Respondent be ordered to pay the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

B. FINDINGS OF FACT

Complaint of Robert W. Trumble

I. D. No.: 09-05-354

D. Michael Burke (“Respondent” herein) is a lawyer practicing in 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 June 26, 1979. On February 5, 2004, Barbara Ann Miller entered into a “Contract of Employment and Authority to Represent” with Respondent regarding her medical malpractice case involving her deceased

husband. This agreement stated Forty Percent (40%) of the proceeds would be paid to the firm for the representation. [ODC Ex. 9, p. 192.]

On September 27, 2004, Barbara Ann Miller filed a Chapter 7 Voluntary Petition in the U.S. Bankruptcy Court in the Northern District of West Virginia, Bankruptcy Petition #: 3:04-bk-03365 in Martinsburg, West Virginia. [ODC Ex. 18, p. 502.] On September 27, 2004, Robert W. Trumble was appointed as Interim Trustee.[ODC Ex. 17, p. 473.] On December 21, 2004, an Order discharging Ms. Miller was entered. [ODC Ex. 18, p. 538.]

On January 11, 2005, Mr. Trumble sent a letter to Respondent advising he had been appointed as Trustee to handle the bankruptcy estate of Barbara Miller and she had testified at the Meeting of the Debtor that Respondent was handling a medical malpractice claim on her behalf. Mr. Trumble asked for a valuation of the case.[ODC Ex. 1, p. 9.] On January 12, 2005, Mr. Trumble filed a "Trustee's Notice of Assets & Request for Notice to Creditors with Request to Issue Claims." [ODC Ex. 17, p. 473.] On January 13, 2005, Mr. Trumble filed the "Notice to Creditors to File Claims." [ODC Ex. 17, p. 473.]

On January 25, 2005, Respondent replied by letter to Mr. Trumble stating that Ms. Miller's potential medical malpractice claim was being reviewed by Barry J. Nace, Respondent's co-counsel, and that any evaluation could not be done on the case until a medical review was completed. Respondent stated Mr. Nace is from Washington, D.C. However, Mr. Nace appears as "of counsel" on Respondent's law firm's letterhead.[ODC Ex. 1, p. 11.] Although Mr. Nace appears as "of counsel" on Respondent's law firm's letterhead,

he is a member of a separate law firm, Paulson & Nace, located in Washington, D.C. On January 27, 2005, Mr. Trumble sent Respondent and Barry J. Nace separate correspondence with a copy of the Trustee's Application to Employ Special Counsel, a proposed Order Authorizing Trustee to Employ Special Counsel, and an Affidavit for each of them to sign. [ODC Ex. 1, pp. 12-17.]

On February 1, 2005, Respondent signed an "Affidavit" wherein he agreed to "accept employment by the Trustee on the basis set forth in the Application to Employ . . .". He mailed it to the Trustee by letter dated February 2, 2005. [ODC Ex. 1, pp. 18 and 23.] On February 24, 2005, Barry J. Nace signed an "Affidavit" wherein he agreed to "accept employment by the Trustee on the basis set forth in the Application to Employ . . .". By letter dated February 24, 2005, Mr. Nace sent the signed "Affidavit" to Mr. Trumble and noted his new address as of March 5, 2005. [ODC Ex. 19, pp. 19 and 22.]

On March 3, 2005, Mr. Trumble filed the Trustee's Application to Employ Special Counsel. Within that application, Mr. Trumble stated that he found "it necessary and in the best interest of this estate to employ [Respondent], Esquire, and Barry J. Nace, Esquire as Trustee's legal counsel to pursue the Debtor's personal injury claim as a result of a vehicular accident, under a contingency fee arrangement."¹ [ODC Ex. 1, pp. 20, 21.] On March 4, 2005, the Order Authorizing Trustee to Employ Special Counsel was entered and filed with the bankruptcy court. [ODC Ex. 1, p. 25.]

¹ The reference to the Miller claim as a personal injury resulting from a vehicular accident, rather than a medical malpractice claim, was a clerical error. [Tr. Trumble, pp. 16, 17, 64.]

On May 18, 2005, Mr. Trumble sent a letter to Respondent about “the status of the Debtor(s) medical malpractice claim which is an asset of [the] Bankruptcy Estate.” [ODC Ex. 1, p. 26.] By letter dated May 24, 2005, Respondent replied to Mr. Trumble explaining that his “co-counsel” had notified the potential defendants that “our expert has determined [they] were at fault . . .”. Respondent and co-counsel were waiting for a response from defendants. Respondent further stated the case “can be expected to take several years to complete.” [ODC Ex. 1, p. 27.]

On June 17, 2005, a complaint of medical malpractice was filed by Respondent and Barry J. Nace in the Circuit Court of Berkeley County, West Virginia, of behalf of Ms. Miller as plaintiff against Defendants Jesse B. Jalazo, M.D., Martinsburg Internal Medicine Associates, Inc., James M. Carriers, M.D., Timothy K. Bowers, M.D., Old Mill Internists, Ltd., and City Hospital, Inc. Respondent’s signature is signed by Lawrence Schultz, Esquire who noted his name and his Bar Number, 4293. [ODC Ex. 15, pp. 582-587.] On July 8, 2005, Barry J. Nace filed an Amended Complaint with only his name on the complaint. [ODC Ex. 15, pp. 588-594.] On July 25, 2005, Respondent withdrew as Ms. Miller’s attorney due to a personal conflict of interest, but he informed Ms. Miller that Barry J. Nace would continue as her counsel. [ODC Ex. 9, p. 185.] No withdrawal notice was submitted to the bankruptcy court or bankruptcy Trustee.

In September of 2006, a partial settlement with Defendant City Hospital, Inc. was reached in Ms. Miller’s medical malpractice claim for Seventy-Five Thousand Dollars

(\$75,000.00). [ODC Ex. 9, pp. 296-303.] The settlement was reached and proceeds distributed without approval or authority from the Trustee. On September 27, 2006, Ms. Miller signed a Statement of Account Paul Miller reflecting the disbursement of the Seventy-Five Thousand Dollars (\$75,000.00) settlement proceeds. Ms. Miller received Ten Thousand One Hundred Twenty-Six Dollars and Sixteen Cents (\$10,126.16). The rest of the money was taken for attorney fees and expenses. [Id.]

On October 30, 2006, Ms. Miller's case proceeded to jury trial against the other defendants. [ODC Ex. 15, pp. 609-613.] On November 9, 2006, the jury returned a verdict against Defendant Dr. Jesse B. Jalazo for a total of Five Hundred Thousand Dollars (\$500,000.00). Ms. Miller recovered no judgment from Defendants James Carrier, M.D. and Timothy Bowers, M.D. [Id.] Judgment was entered upon the jury verdict on January 4, 2007, awarding judgment in the amount of Four Hundred Twenty-Five Thousand Dollars (\$425,000.00), thereby reducing the Five Hundred Thousand Dollars (\$500,000.00) award by the settlement of Seventy-Five Thousand Dollars (\$75,000.00). [Id.] Respondent did not participate in the trial of the case, nor did he participate in the Defendant's subsequent appeal. [Tr. Burke, pp. 226-227; Tr. Nace, p. 329.]

On July 27, 2007, Mr. Trumble sent a letter to Respondent again asking about "the status of the Debtor(s) medical malpractice claim which is an asset of [the] Bankruptcy Estate." [ODC Ex. 1, p. 12.] On August 8, 2007, Respondent faxed and mailed a copy of Mr. Trumble's July 27, 2007 letter to Gabriel Assad, an associate in Barry J. Nace's office.

[ODC Ex. 1, p. 294.] At Respondent's sworn statement to ODC on March 10, 2010, he was "pretty sure" he called Mr. Trumble after receiving the July 27, 2007 letter from Mr. Trumble and told him he was no longer in the case and to contact Mr. Nace's office. However, Respondent had no independent recollection of making that phone call and further stated he thought he called or instructed his secretary to call. [ODC Ex. 8, pp. 145-147.]

By the time of the hearing in this matter, Respondent was certain he was the one who called Mr. Trumble's office in July 2007 and left a message with Mr. Trumble's assistant that he was no longer representing Ms. Miller and to contact Mr. Nace's office. [Tr. Burke, pp. 197, 250.] Respondent acknowledged that without a motion to withdraw and order permitting withdrawal, he is the attorney of record for the Trustee. As Respondent stated: "I believe once you're in - you're in until the Judge lets you out." [Nace Ex. 6, pp. 18-19.]² Mr. Trumble testified he never received notice of Mr. Burke's withdrawal from the Miller case until shortly before he wrote both Respondent and Mr. Nace in October of 2008, which was after the case had been partially settled, tried before a jury, and after all the money had been distributed. [Tr. Trumble, pp. 115, 121, 133-135.]

Earlier, Defendant Dr. Jesse Jalazo had filed an appeal in the malpractice case and on February 12, 2008, the Supreme Court of Appeals for West Virginia refused the petition for appeal. [ODC Ex. 15, p. 657.] On February 28, 2008, Ms. Miller signed a "Statement

² Mr. Nace's case was heard simultaneously with Respondent's case. Mr. Nace's exhibits include a deposition of Respondent taken in the adversary proceeding filed against Respondent and Mr. Nace by the bankruptcy Trustee.

of Account Paul Miller” wherein the net proceeds to the client was to be Two Hundred Twenty Thousand Four Hundred Sixty-Seven Dollars and Forty-Five Cents (\$220,467.45). [ODC’s Nace Ex. 10, p. 268.]

On March 5, 2008, Barry J. Nace sent a letter to Ms. Miller which included a check for the verdict in the matter. Barry J. Nace paid the costs and fees in the matter, and the balance went to Ms. Miller. Barry J. Nace sent Ms. Miller a check for Two Hundred Twenty Thousand Four Hundred Sixty-Seven Dollars and Forty-Five Cents (\$220,467.45). [ODC’s Nace Ex. 10, pp. 268-273.] Mr. Nace and Respondent had previously stated that a small referral fee was paid to Respondent after the settlement of the case, but at the October 10, 2011 hearing, both Respondent and Mr. Nace testified there was no such payment in this case. [Tr. Burke, p. 211; Tr. Nace pp. 301-302.]

On October 10, 2008, Mr. Trumble sent a letter to Respondent and Barry J. Nace noting that both individuals were employed as special counsel to him. Mr. Trumble indicated that he discovered the medical malpractice case “was resolved and that all of the proceeds were turned over to the Debtor, Barbara Miller.” Mr. Trumble stated that he “was not contacted by either [individual] to obtain [his] authority as to the settlement of [the] matter, nor did [Mr. Trumble] receive any documentation relating to the settlement, or any of the settlement proceeds.” Mr. Trumble requested copies of all documents regarding the settlement and indicated that any amount of the settlement proceeds that exceeded what Ms. Miller was allowed would force him to seek recovery of the Estate’s portion of the settlement

proceeds. The letter was sent to Barry J. Nace at Paulson & Nace, 1814 North Street, NW, Washington, D.C. 20036. [ODC Ex. 1, pp. 29-30.] On November 14, 2008, Mr. Trumble sent a second request to Respondent and Barry J. Nace for settlement documents referred to in his October 10, 2008 letter. The letter was sent to Barry J. Nace at Paulson & Nace, 1615 New Hampshire Avenue, NW, Washington, D.C. 20009-2520. The first letter to Mr. Nace was sent to the wrong address. [ODC Ex. 1, p. 31; Tr. Trumble, p. 31.]

On July 13, 2009, Mr. Trumble filed an ethics complaint against Respondent because of Respondent's distribution of the proceeds from the medical malpractice case without regard to the bankruptcy estate. [ODC Ex. 1, p. 1-3.] On August 25, 2009, Respondent filed his response to the complaint. Within his response, Respondent denied receiving the signed Order entered by the Court authorizing his employment as special counsel. [ODC Ex. 3, p. 52.] On October 5, 2010, Mr. Trumble filed a "Trustee's Complaint for Breach of Contract and Legal Negligence" in the U.S. Bankruptcy Court for the Northern District of West Virginia, Case Number 04-03365, against Respondent and Mr. Nace based upon their failure to turn over proceeds from the medical malpractice case to the Trustee.[ODC Ex. 16, pp. 442-445.]

Mr. Trumble testified Respondent had previously been involved as special counsel for him in bankruptcy cases and that he had never had any problems in the past "with employing Mr. Burke as special counsel to represent an estate." [Tr. Trumble, pp. 114-115.] When Mr. Trumble was asked whether he knew of anything "new about Mr. Burke's personality, or

character, or integrity that would lead you to believe that he [Mr. Burke] intended, in this case, for lack of a better word, the bankruptcy estate to get stiffed”, Mr. Trumble responded: “No. I don’t know any change in his character or his practice that he intended to.” [Tr. Trumble, p. 115.]

C. CONCLUSIONS OF LAW

Rule 3.7 of the Rules of Lawyer Disciplinary Procedure provides: “[i]n order to recommend the imposition of discipline of any lawyer, the allegations of the formal charge must be proven by clear and convincing evidence.” Respondent was charged with violating Rules 1.1, 1.3, 1.4(a), 1.4(b), 8.4(c) and 8.4(d) of the Rules of Professional Conduct, which state 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.

Rule 1.3. Diligence.

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

Rule 1.4. Communication

(a) A lawyer shall explain a client reasonable informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Rule 8.4. Misconduct.

It is professional misconduct for a lawyer to:

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

(d) engage in conduct that is prejudicial to the administration of justice.

The evidence is clear and convincing that Respondent violated Rule 1.3 - failure to act with diligence, Rule 1.4(a) - failure to keep a client reasonable informed, and Rule 1.4(b) - failure to reasonably explain matters to a client. There is no clear and convincing evidence to support any violation of Rule 1.1 - competence, Rule 8.4(c) - conduct involving dishonesty, fraud deceit or misrepresentation, and Rule 8.4(d) - conduct that is prejudicial to the administration of justice. Respondent was also charged with violations of Rule 1.5(a) - charging an unreasonable fee, and 1.15(b) - failure to notify client upon receipt of funds or property. ODC conceded in its Proposed Findings of Fact, Conclusions of Law and Recommended Sanctions, and the Hearing Panel Subcommittee agreed, that there was no evidence Respondent violated these Rules. The charges against Respondent for violating Rule 1.1, Rule 1.5(a), Rule 1.15(b), Rule 8.4(c) and Rule 8.4(d) should be dismissed.

II. SUMMARY OF ARGUMENT

Respondent fully admitted that he failed to properly withdraw as special counsel for the U.S. Trustee. As a result of this failure, the bankruptcy estate experienced a substantial loss of funds and the bankruptcy estate is still trying to recover those funds. Because of Respondent's negligence in this matter, Disciplinary Counsel respectfully submits that Respondent be admonished for his misconduct.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Office of Disciplinary Counsel does not object to oral argument in this matter. The issues raised by Respondent and the findings made by the Hearing Panel Subcommittee do not address any new issues of law that would require Disciplinary Counsel to request oral argument pursuant to Rule 20 of the Rules of Appellate Procedure.

IV. ARGUMENT

A. STANDARD OF PROOF

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).

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

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). Factors to be considered in imposing appropriate sanctions are found in Rule 3.16 of the Rules of Lawyer Disciplinary Procedure. These factors consist of: (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. *See also*, Syl. Pt. 4, Office of Disciplinary Counsel v. Jordan, 204 W.Va. 495, 513 S.E.2d 722 (1998).

1. 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 and abide by the rules of procedure which govern the administration of justice in our state. 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 client, the public, the legal system, and the legal profession.

Respondent was the first attorney to meet with Barbara Miller with regard to her medical malpractice claim. Respondent signed a contingency fee contract with Ms. Miller for forty percent (40%) of any recovery in the matter. Respondent began working with Barry J. Nace as co-counsel to review the matter to see if it was a viable medical malpractice case. Soon after, Ms. Miller filed for bankruptcy and listed the medical malpractice claim as an asset. Robert W. Trumble, U.S. Bankruptcy Trustee, then contacted Respondent about the matter. Respondent testified that he had previously represented Mr. Trumble as the U.S. Trustee in previous cases. [Tr. Trumble, pp. 193-194]. As a result, Mr. Trumble sent an affidavit, an Application to Employ Special Counsel, and a proposed Order Authorizing

Trustee to Employ Special Counsel. On February 1, 2005, Respondent signed the affidavit. Respondent claimed in his original response to the ethics complaint that he did not receive the Order entered by the Court. [ODC Ex. 3, p. 52]. However, at the hearing in this matter, Respondent admitted that he understood at that point he had been retained by the Trustee to prosecute the medical malpractice case for the bankruptcy Trustee. [Tr. Burke, p. 263].

Respondent continued to work on the medical malpractice case and even responded to the Trustee's request for information, but he ultimately withdrew from the matter on or about July 25, 2005, due to a personal conflict of interest. Respondent did not make any attempt to notify the Trustee of his withdrawal from the medical malpractice case until two (2) years after he withdrew from the matter and Respondent never formally withdrew as special counsel for the U.S. Trustee. Because the Trustee was relying on his contact with Respondent, the Trustee never made contact with Respondent co-counsel, Mr. Nace. As a result, the Trustee did not receive the substantial funds from the medical malpractice case.

Accordingly, Respondent's misconduct violated duties owed to his client. Further, his failure to properly withdraw from the bankruptcy proceeding violated duties he owed to the legal system. Respondent's misconduct also violated duties owed to the public because the public is entitled to be able to trust lawyers to protect their property. In this regard, lawyers are to exhibit the highest standards of honesty and integrity, and lawyers have a duty to not engage in conduct involving dishonesty, fraud or interference with the administration of justice.

2. Respondent acted negligently.

The evidence establishes that Respondent acted negligently in this matter. The ABA Standards for Imposing Lawyer Sanctions define negligence as the failure of a lawyer to heed 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 that situation. Respondent withdrew from the underlying medical malpractice case but failed to withdraw as special counsel for the U.S. Trustee. Respondent's failure to withdraw is negligent.

3. The amount of injury is great.

Respondent failed to properly withdraw as special counsel for the U.S. Trustee and has acknowledged the same. The U.S. Trustee relied on Respondent to communicate about the medical malpractice case and he was unaware of how to communicate with Mr. Nace. Respondent made no attempts to ensure that any of the money recovered in the medical malpractice case was paid to the bankruptcy court for disbursement. As a result, the U.S. Trustee did not receive money from the earlier settlement of Seventy-Five Thousand Dollars (\$75,000.00) nor did he receive any money from the Four Hundred Twenty-Five Thousand Dollars (\$425,000.00) awarded from the jury trial in the matter. Further, Mr. Trumble has had to file an adversary proceeding against Respondent and Mr. Nace to recover those funds and the case is ongoing in the bankruptcy court.

4. There is one aggravating factor 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. 216, 579 S.E. 2d 550, 557 (2003) quoting *ABA Model Standards for Imposing Lawyer Sanctions*, 9.21 (1992). In this matter, the only aggravating factor present is Respondent's substantial experience in the practice of law.

5. There are several mitigating factors present.

The Scott Court also adopted mitigating factors in a lawyer disciplinary proceeding 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. 216, 579 S.E.2d 550, 557 (2003).

The following mitigating factors are present: absence of a prior disciplinary record; full cooperation with the disciplinary matter; and an excellent professional reputation. Respondent has been licensed to practice law in West Virginia since June 26, 1979, and has no prior discipline from either the Investigative Panel of the Lawyer Disciplinary Board or the West Virginia Supreme Court of Appeals. Further, the evidence does not suggest that

Respondent had selfish or dishonest motive in these matters. Respondent has also expressed remorse for his misconduct.

V. CONCLUSION

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, 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).

Standard 4.14 of the ABA Standards for Imposing Attorney Discipline states that an 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. In addition, Standard 4.44 of the

ABA Standards for Imposing Attorney Discipline states that an admonition is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes little or no actual or potential injury to a client. Admonition is also generally appropriate under Standard 4.54 of the ABA Standards for Imposing Attorney Discipline when a lawyer engages in an isolated instance of negligence in determining whether he is competent to handle a legal matter, and causes little or no actual or potential injury to a client.

In deciding an appropriate sanction, the Hearing Panel Subcommittee must consider not only what sanctions would appropriately punish Respondent, but also whether the sanctions are adequate to serve as an effective deterrent to other members of the Bar and restore public confidence in the ethical standards of the legal profession. The evidence in this case demonstrates that Respondent violated several Rules of Professional Conduct. Respondent has violated Rules 1.3, 1.4(a), and 1.4(b). Other jurisdictions have suspended attorneys for settling claims without notifying the bankruptcy trustee. See Attorney Grievance Commission v. Nichols, 405 Md. 207, 950 A.2d 778 (Md. 2008) (an attorney indefinitely suspended for failing to list personal injury claim as an asset on bankruptcy petition, settling claim without notifying bankruptcy trustee, and in deducting a fee without obtaining prior permission of bankruptcy court); Disciplinary Proceeding Against Preszler, 169 Wash.2d 1, 232 P.3d 1118 (Wash. 2010) (an attorney suspended for three (3) years for charging unreasonable fee, giving mistaken legal advice, filing false documents with a tribunal, failing to supervise paralegal, and not obtaining the approval from the bankruptcy

court before distributing proceeds of client's personal injury claim to himself); Columbus Bar Association v. Cooke, 111 Ohio St.3d 290, 855 N.E.2d 1226 (Ohio 2006) (attorney indefinitely suspended for failing to disclose client's intention to seek a personal injury claim in bankruptcy filing and for settling the personal injury claim while the bankruptcy was pending).

However, in this case, it is clear that Respondent never held the money in his hands or in his bank account. Respondent also acknowledged his failure to withdraw as special counsel for the U.S. Trustee when the conflict came up and that he did not withdraw when he continued to receive letters from Mr. Trumble inquiring about the status of the case. This failure resulted in the Trustee's continuing reliance upon Respondent and the Trustee's failure to contact Mr. Nace. Respondent's misconduct, while slight, did contribute to the bankruptcy estate not receiving the substantial funds from the medical malpractice case. While the amount of injury was great in the lost of the substantial funds, the one incident of negligence along with the mitigating factors still apply to this case.

Rule 3.15 of the Rules of Lawyer Disciplinary Procedure provides that the following sanctions may be imposed in a disciplinary proceeding: (1) probation; (2) restitution; (3) limitation on the nature or extent of future practice; (4) supervised practice; (5) community service; (6) admonishment; (7) reprimand; (8) suspension; or (9) annulment.

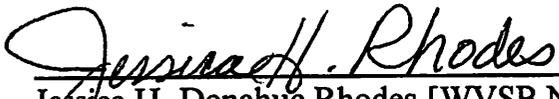
For the reasons set forth above, the Hearing Panel Subcommittee recommended the following sanctions:

1. That Respondent be admonished for his conduct;

2. That Respondent satisfy any obligations imposed on him in the pending adversary proceeding filed by the bankruptcy trustee; and
3. Respondent be ordered to pay the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

Accordingly, the Office of Disciplinary Counsel urges that this Honorable Court uphold the sanctions recommended by the Hearing Panel Subcommittee.

Respectfully submitted,
The Lawyer Disciplinary Board
By Counsel



Jessica H. Donahue Rhodes [WVSB No. 9453]

Lawyer Disciplinary Counsel

Office of Disciplinary Counsel

City Center East, Suite 1200C

4700 MacCorkle Avenue SE

Charleston, West Virginia 25304

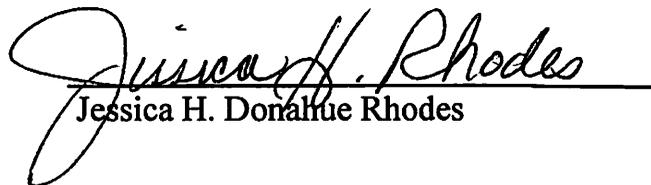
(304) 558-7999

(304) 558-4015 *facsimile*

CERTIFICATE OF SERVICE

This is to certify that I, Jessica H. Donahue Rhodes, Lawyer Disciplinary Counsel for the Office of Disciplinary Counsel, have this day, the 11th day of June, 2012, served a true copy of the foregoing "**Brief of the Lawyer Disciplinary Board**" upon Allan N. Karlin, counsel for Respondent D. Michael Burke, by mailing the same via United States Mail, both certified and regular, with sufficient postage, to the following address:

Allan N. Karlin, Esquire
174 Chancery Row
Morgantown, West Virginia 26505


Jessica H. Donahue Rhodes