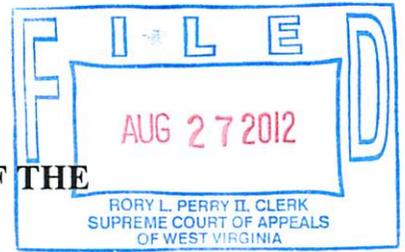


BEFORE THE SUPREME COURT OF APPEALS OF THE  
STATE OF WEST VIRGINIA



LAWYER DISCIPLINARY BOARD,

Complainant,

v.

No. 11-0813

D. MICHAEL BURKE,

Respondent.

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REPLY BRIEF OF THE LAWYER DISCIPLINARY BOARD

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## I. STATEMENT OF THE CASE

This matter is before the Court pursuant to the “Report of the Hearing Panel Subcommittee” issued on March 21, 2012, wherein the Hearing Panel Subcommittee properly found that the evidence established that Respondent committed violations of Rules 1.3, 1.4(a) and 1.4(b) of the Rules of Professional Conduct. Respondent noted in his brief that the Hearing Panel Subcommittee’s report on page 17 that Respondent “does not deny that he should have notified the Bankruptcy Trustee of his conflict in pursuing the Miller case and should have formally withdrawn from his role as special counsel to the Trustee.” Respondent’s Brief at p. 11. However, Respondent does not believe that he should be disciplined for this single act of legal negligence.

At this stage in the proceedings, this Court has held that “[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.” Lawyer Disciplinary Board v. Cunningham, 195 W.Va. 27, 34, 464 S.E.2d 181, 189 (1995); Committee on Legal Ethics v. McCorkle, 192 W. Va. 286, 290, 452 S.E.2d 377, 381 (1994).

The Rules of Professional Conduct state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. Committee on Legal Ethics v. Keenan, 189 W.Va.37, 40, 427 S.E.2d 471, 473 (1993) (*per curiam*); quoting Syl. Pt. 3, in part, Committee on Legal Ethics v. Tatterson, 173 W.Va. 613, 319 S.E.2d 381 (1984). Furthermore, the Preamble to the Rules of Professional Conduct provides that “[i]n all

professional functions a lawyer should be competent, prompt and diligent.” It cannot be said that Respondent’s conduct in this case conforms to the expectations of the profession as stated in the Rules of Professional Conduct. The evidence clearly establishes that Respondent acted in a manner wherein he was negligent and deviated from the standard of care that a reasonable lawyer, let alone one with Respondent’s considerable experience, would exercise in that situation.

## II. ARGUMENT

Respondent believes that his failure to file a motion to withdraw as special counsel to the Trustee in the Miller bankruptcy proceeding was an isolated incident of negligence which does not implicate a violation of the Rules of Professional Conduct. Respondent relies on Committee on Legal Ethics v. Mullins, 159 W.Va. 647, 226 S.E.2d 427 (W.Va. 1976), *overruled on other grounds*, Committee on Legal Ethics v. Cometti, 430 S.E. 2d 320 (W.Va. 1993), which states “[c]harges of isolated errors of judgment or malpractice in the ordinary sense of negligence would normally not justify the intervention of the ethics committee.” *Id.* at 430.

The Hearing Panel Subcommittee addressed the issues of Mullins in regard to this case. The Hearing Panel noted that this “Court determined Mr. Mullins’ failure to observe the applicable statute of limitations constituted negligence or inattention, which was an isolated error of judgment or malpractice. As such, Mr. Mullins’ conduct did not ‘rise to the level of showing the attorney to be unworthy of public confidence and an unfit or unsafe person to be

entrusted with the duties of a member of the legal professional . . . .’, to justify a finding of any ethics violation. Id. at 430-431". Hearing Panel Subcommittee Report at p. 12. The Mullins case also specifically indicated that to justify suspension or annulment as to malpractice, the issue of “public confidence” comes into play. In this case, the recommended sanction is admonishment, not suspension or annulment. The Hearing Panel specifically found that the Mullins case did not provide guidance as to when negligence rises a violation of the Rules of Professional Conduct.

The other cases cited by the Hearing Panel Subcommittee in their report showed guidance as to when negligence demonstrates a violation of ethical rules for attorneys. The Hearing Panel Subcommittee made reference to In the Matter of McKechnie, 656 N.W.2d 661 (N.D. 2003), to show how negligence can be a violation of ethical rules and which can lead to disciplinary action. The McKechnie case involved allegations of violations of competence and diligence ethical rules because there was a failure to properly calculate the statute of limitations in the client’s case. The ultimate result was a public reprimand for a violation regarding diligence because of limited contact with the client and the failure to calculate the statute of limitations.

Respondent cites to case In re PRB, Docket No. 2006-167, 925 A.2d 1026 (Vt. 2007) as a case that supports the proposition that a single act of negligence is not a basis for disciplinary action. The case noted that the attorney had worked to remedy the error and worked to correct the client’s situation to one as if the attorney had not missed a deadline in

the first place. In this case, Respondent did not file the motion to withdraw which played a part in the other attorney failing to turn over the judgment from the medical malpractice case to the bankruptcy Trustee for distribution. While Respondent was familiar with acting as special counsel for the U.S. Trustee, the attorney that Respondent left to handle the matter was unfamiliar in bankruptcy law. In fact, at this time, Respondent has yet to file a motion to withdraw as special counsel for the U.S. Trustee and is still listed as attorney of record in the Miller bankruptcy case.

The District of Columbia Court of Appeals found that the

"Rules of Professional Responsibility impose the responsibility to determine whether a conflict exists and to act accordingly on the attorney. That responsibility requires, at a minimum, that in a court proceeding the attorney unequivocally inform the court and client of the conflict and the duty to withdraw imposed by the ethical rules."

In re: Ponds, 888 A.2d 234, 240 (D.C. 2005). That case dealt with the violation of what would be our rules 1.7(b) and 1.16(a)(1). The attorney in that case was suspended for thirty (30) days because of the violations. Such violations were the result of one incident of failing to withdraw from a criminal client during a motion to withdraw a guilty plea. Another case dealing with the issue is out of Kentucky, Aublenbach v. Kentucky Bar Association, 151 S.W.3d 330 (Kent. 2004), which dealt with an attorney's failure "to keep his client reasonably informed about the status of the representation and to withdraw representation appropriately." Id. at 331. In that case, the attorney failed to inform the client of a trial date and sent the

motion to withdraw to a wrong address, which resulted in the client having a judgment entered against her. The attorney was reprimanded for such conduct. As in the case before the Supreme Court, the bankruptcy estate still does not have the judgment or settlement money to ultimately close the estate.

The case before the Supreme Court now, the failure of Respondent to file a written notice or a motion to withdraw as special counsel can be connected to the failure of the judgment proceeds from the Miller case to be disbursed to the bankruptcy estate. Respondent considered himself to be withdrawn from the Miller case in 2005, which was two years before he or his secretary informed the U.S. Trustee of this withdrawal by telephone. Respondent was aware of the procedure to withdraw from a case which would include the filing of a motion to withdraw and the Court granting the withdrawal. Respondent did not file a motion to withdraw nor did a Court grant the withdrawal. This conduct, by clear and convincing evidence, amounts to a failure to act with reasonable diligence in representing a client, Rule 1.3; a failure to keep a client reasonably informed, Rule 1.4(a); and a failure to explain matters to a client to permit the client to make informed decisions, Rule 1.4(b).

Respondent makes the argument that he “left the case in the hands of an experienced medical malpractice attorney who was also special counsel to the Trustee.” Respondent’s Brief at p. 20. However, Mr. Nace was clear during the Hearing that he was unfamiliar with bankruptcy law during that time, and yet Respondent still believes that leaving Mr. Nace as special counsel was the right decision. This decision has left the bankruptcy estate of Ms.

Miller in limbo as to payments to creditors and now there is a pending adversary proceeding. This is not a case where Respondent's negligence resulted in some disadvantage to the client that was later fixed by either the Respondent's participation or that of another attorney. The settlement and judgment from the Miller case is still not in the hands of the bankruptcy estate to pay creditors. This incident of negligence has caused additional costs to the bankruptcy estate to obtain the settlement and judgment for which both Respondent and Mr. Nace were hired to recover for the bankruptcy estate.

### **III. CONCLUSION**

Therefore, a review of the record clearly indicates that the Hearing Panel Subcommittee properly considered this matter when it made its recommendation to the Court. Wherefore, based upon the forgoing, the Office of Disciplinary Counsel respectfully requests that this Court accept and uphold the following recommended sanctions of the Hearing Panel Subcommittee:

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



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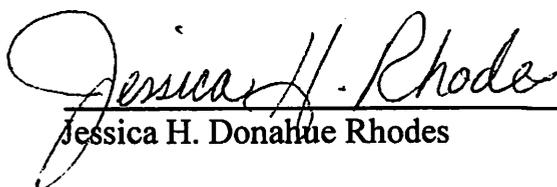
**CERTIFICATE OF SERVICE**

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This is to certify that I, Jessica H. Donahue Rhodes, Lawyer Disciplinary Counsel for the Office of Disciplinary Counsel, have this day, the 27<sup>th</sup> day of August, 2012, served a true copy of the foregoing "**Reply 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

  
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Jessica H. Donahue Rhodes