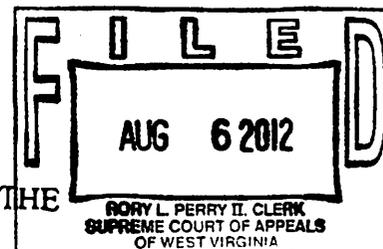


**BRIEF FILED
WITH MOTION**

**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 D. MICHAEL BURKE

Allan N. Karlin
WV Bar # 1953
Allan N. Karlin & Associates
174 Chancery Row
Morgantown, WV 26505
304-296-8266
304-296-8640 (Facsimile)

TABLE OF CONTENTS

- I. STATEMENT OF THE CASE 1
 - A. Nature of Proceedings and Recommendations of the Hearing Panel Subcommittee 1
 - B. Statement of Facts 1
 - 1. History of Mr. Burke’s Involvement with the Case 1
 - 2. Mr. Burke’s Communications with the Bankruptcy Trustee 4
- II. STATEMENT REGARDING ORAL ARGUMENT 11
- III. ARGUMENT
 - A. Standard of Proof 11
 - B. Introduction 11
 - C. The Hearing Panel Erred in Concluding That Mr. Burke Violated the Rules of Professional Conduct on the Facts of this Case 12
 - D. The Cases upon Which the Hearing Panel Relied Do Not Support its Conclusion 17
 - E. The Hearing Panel Erred in its Analysis of the Facts 22
 - 1. The Hearing Panel erred in its factual finding that Mr. Trumble “never received notice of Mr. Burke’s withdrawal from the Miller case until...October 2010” . 22
 - 2. The Hearing Panel erred in concluding that Mr. Burke’s error “ultimately resulted in the Trustee not receiving the funds from the medical malpractice case” 24
 - F. The Hearing Panel and the ODC Err in Their Treatment of the Appropriate Sanctions 24
- IV. CONCLUSION 24

TABLE OF AUTHORITIES

CASES

Columbus Bar Association v. Cooke
855 N.E.2d 1226 (Ohio 2006) 25

Committee on Legal Ethics of W. Va. State Bar v. Cometti
189 W. Va. 262 (1993) 13

Lawyer Disciplinary Board v. McCormick
199 W. Va. 283 (1997) 19

Attorney Grievance Commission v. Nichols
950 A.2d 778 (Md. 2008) 25

Committee on Legal Ethics v. Mullins
159 W. Va. 647 (1976) 13, 14, 17, 18, 21

Disciplinary Board v. Ncssif
504 N.W.2d 311 (N.D. 1993) 20

Disciplinary Proceedings Against Preszler
232 P. 3d 1118 (Wash. 2010) 25

Fla. Bar v. Lithnan
612 So. 2d 582 (Fla. 1993) 14

In re Complaint as to Conduct of Gygi
541 P.2d 1392, 1396 (Or. 1975) 14

In re Conduct of Skagen
149 P. 3d 1171 (Or. 2006) 14

In re PRB Docket No. 2006-167
925 A.2d 1026, 1028 (Vt. 2007) 13

In re: McKechnie
656 N.W.2d 661, 669-670003) 13, 17, 20, 21

In the Matter of Hoffman
703 N.W.2d 345, 351 (N.D. 2005) 13, 17, 20, 21

RULES

Lawyer Disciplinary Procedure Rule 3.7 22

Professional Conduct Rule 1.1 12-14, 17, 18, 20, 21

Professional Conduct Rule 1.3 12, 13, 17

Professional Conduct Rule 1.4 12, 13, 17, 21

Professional Conduct Rule 8.4 (a) 12

Professional Conduct Rule 8.4 (b) 12

Rules of Appellate Procedure 11

Rules of Professional Conduct 12

I. STATEMENT OF THE CASE**A. Nature of Proceedings and Recommendations of the Hearing Panel Subcommittee**

D. Michael Burke agrees with the general statement of the proceedings set forth in the Brief of the Lawyer Disciplinary Board.

B. Statement of Facts

Although the facts found by the Hearing Panel in its Report and set forth in the Brief of the Lawyer Disciplinary Board ("OCD Brief") are consistent with the evidence, those findings fail to address much of the relevant history necessary to understand Mr. Burke's conduct in its proper context.

1. History of Mr. Burke's Involvement with the Case

D. Michael Burke, an attorney in Martinsburg, West Virginia, has practiced law, at all times relevant herein, with the firm of Burke, Schultz, Harman & Jenkinson. Over the years, Mr. Burke has worked with Barry Nace on medical malpractice cases in West Virginia. Burke, T. 219. Mr. Nace's primary office is in Washington, D.C., but he is also licensed in West Virginia. Nace, T. 268. Mr. Burke worked with Mr. Nace on medical malpractice cases because Mr. Nace is an experienced and skilled attorney with expertise in medical malpractice litigation who has represented plaintiffs in many medical malpractice cases in West Virginia. *Id.*, 217-219.

In February 2004, Barbara Miller retained Mr. Burke in a medical malpractice case. Burke, T. 188-189; (OCD Burke Ex. 3, Attorney-Client Agreement, February 5, 2004, 56. Mr. Burke forwarded the case to Mr. Nace for his review because of Mr. Nace's expertise in medical malpractice. *Id.*, 192. *See also Id.*, 204 (explaining that he associates with Mr. Nace in medical malpractice claims). Subsequently, Ms. Miller filed a bankruptcy petition and an order was entered

by the Bankruptcy Court for the Northern District of West Virginia permitting attorney Robert Trumble, in his capacity as bankruptcy trustee, to employ Mr. Burke and Mr. Nace as special counsel to pursue Ms. Miller's claim. ODC Burke Ex. 1, Order, p. 39.

Mr. Nace concluded that Ms. Miller had a meritorious case. Burke, T. 192. However, before the lawsuit was filed, Mr. Burke and his firm determined that they should not represent Ms. Miller in the case because one of the doctors who had been identified as a defendant in the malpractice claim was the neighbor of Mr. Harman, an attorney in Mr. Burke's law firm. Burke, T. 202-203. That attorney explained that suing the doctor would "make[] things difficult for him" and asked Mr. Burke not to pursue the case. Mr. Harman asked Mr. Burke if he, Mr. Burke, would "get involved with a case against his neighbor." *Id.* Mr. Burke responded that he would not get involved in a case against Mr. Harman's neighbor and agreed that the firm should not take the case.¹ *Id.* As a result, Mr. Burke advised Ms. Miller that his firm would no longer handle the case and withdrew from all further involvement in the case. *Id.*, 202-204; ODC Burke Ex. 3, Letter Burke to Miller, July 25, 2005, p. 77. He also informed her that Mr. Nace would continue to represent her. *Id.* Ms. Miller was already familiar with Mr. Nace's involvement in the case. *Id.*, 203-204. Thereafter, Ms. Miller was represented by Mr. Nace. Nace, T. 283.

Mr. Burke's withdrawal from the malpractice case did not prejudice Ms. Miller or the Bankruptcy Trustee's interest in the malpractice case because Mr. Nace, not Mr. Burke, was the attorney with expertise in litigating and trying medical malpractice cases. Burke, T. 208 (explaining that Mr. Nace "has tried more cases in eastern West Virginia – more cases period, more civil cases,

¹ Mr. Burke reasoned, in part, that "if something goes wrong with the case," Ms. Miller might attribute the problem to the relationship between Mr. Harman, a partner in the firm, and his neighbor, one of the defendant doctors. Burke, T. 203.

than probably any other attorney in the area, and she was well represented at that time by the best guy – the best malpractice attorney in the area.”); 217-218 (explaining that he has seen Mr. Nace try 15-20 cases and that Mr. Nace’s reputation among the trial bar as a medical malpractice attorney is that “[t]here’s none better.”).

Although Mr. Burke’s firm did appear on the initial Complaint filed in Ms. Miller’s case, Mr. Nace filed an amended complaint that did not identify Mr. Burke as counsel for the plaintiff. Burke, T. 226-227; Nace T. 283. The amended complaint was filed before the original complaint was served so that neither Mr. Burke’s name nor that of his firm would be on the complaint served on Mr. Harman’s neighbor. *Id.*, 226 (explaining the mistake that led to his name on the complaint and the reason for filing an amended complaint).

All of the evidence demonstrates that Mr. Burke did not appear or otherwise participate in the Miller case thereafter. Trumble, T. 117-119. The case was pursued solely by Mr. Nace. Burke, T. 226; Nace, T. 329. With the exception of the initial complaint, Mr. Burke’s name did not appear on any of Mr. Nace’s pleadings and he was not, in any way, involved in any settlement, prosecution, trial, or appeal of the malpractice case. Trumble, T. 118; Burke, T. 226-227, 246-247; Nace, T. 329.

On or around September 2006, Mr. Nace reached a partial settlement with City Hospital, Inc., one of the defendants in Mr. Miller’s medical malpractice claim, for Seventy Five Thousand Dollars (\$75,000.00). Nace, T. 283-285. Mr. Burke was not involved in the settlement and did not receive any proceeds from the settlement. Burke, T. 211, Nace, T. 327-328; Nace Ex. 43. Moreover, Mr. Burke was not informed about the settlement by Mr. Nace. Burke, T. 246-247; Nace, T. 329 (noting that when Mr. Burke told him one of the defendants knew someone in the firm, he “put up the wall”). Nor was he otherwise aware of the settlement. Burke, T. 246-247; Nace, T. 329.

Also, although Mr. Burke was not involved in the case, Mr. Nace and/or others in his office were aware of Ms. Miller's bankruptcy at the time of the settlement with City Hospital. On September 26, 2006, Mr. Nace sent a letter to Ms. Miller. Among other things, that letter stated "presumably you have a bankruptcy attorney and if so that person should call me so I know whether or not a check can be written to you." ODC Burke Exhibit 9, p. 296. Apparently Mr. Nace and/or others in his office forgot about the bankruptcy issue because Ms. Miller then signed a Statement of Account regarding the City Hospital settlement and received Ten Thousand One Hundred Twenty-Six and 16/100 Dollars (\$10,126.16) with the remainder applied to attorney fees and expenses. ODC Nace Exhibit 10, p. 251.

Subsequently, Ms. Miller's case proceeded to trial against the remaining defendants. On or about November 9, 2006, the jury returned a verdict against one of the defendant doctors for a total of Five Hundred Thousand Dollars (\$500,000.00).² Mr. Burke did not participate in the trial of the case. Nor did he participate in the defendant's subsequent appeal. Burke, T. 226-227; Nace, T. 329. After this Court refused the defendant doctor's appeal petition in February 2008, Mr. Nace distributed the proceeds from the judgment to Ms. Miller and to himself for fees and costs. In March 2008, Mr. Nace sent Ms. Miller her share of the verdict after deducting his costs and fees. ODC Nace Ex. 10, 268. Again, Mr. Burke did not participate in the distribution of the funds and was not even aware that any distribution had occurred. Burke, T. 246-247; Nace, T. 329.

² The jury returned a verdict against the doctor who was the neighbor of one of Mr. Burke's colleagues and whose presence in the case had led Mr. Burke to withdraw from the case.

Thus, Mr. Burke did not receive a fee from either the initial settlement for \$75,000.00 or from the subsequent verdict. Burke, T. 211; Nace, T. 328.³ Once the case was filed, it was in the hands of Barry Nace who pursued it to conclusion without consulting with Mr. Burke and who retained all of the fees earned in the case.

2. Mr. Burke's Communications with the Bankruptcy Trustee

Mr. Burke readily acknowledges that he erred in failing to file a formal notice to withdraw as counsel for the Trustee. Burke, T. 207-208, 213. However, he knew that the Trustee was aware of Mr. Nace's involvement in the case as the Trustee knew that both Mr. Burke and Mr. Nace were appointed to represent him in the Miller case. *Id.* Moreover, Mr. Burke did contact the Trustee's office and Mr. Nace's office when he received a letter from Mr. Trumble in 2007. Burke, T. 215-216. These communications with Mr. Trumble's office and with Mr. Nace took place before the Miller appeal was final in February 2008 and before Mr. Nace distributed the proceeds of the jury

³ The Hearing Panel's Report notes that Mr. Burke initially stated that Mr. Nace had sent him a small fee. Hearing Panel Report, 8, ¶ 36. However, Mr. Burke and Mr. Nace subsequently searched their records and determined that Mr. Burke had never received any fee for the Miller case. Burke, T. 211-212; Nace, T. 301-302. This issue was developed in detail at the hearing and in exhibits from Mr. Nace's financial records. When Mr. Burke reviewed his firm's financial records, he could not find any record of a fee for the Miller case. Burke, T. 211-212. Mr. Nace, who had no motive to misrepresent the facts regarding payment to Mr. Burke, also searched his records and determined that he never paid Mr. Burke a fee for the Miller case. Nace, T. 327-328. In addition to his testimony, Mr. Nace provided documents at the hearing and in a post-hearing submission that substantiated his testimony that Mr. Burke had not received a fee from the Miller malpractice case. Mr. Nace also explained why Mr. Burke initially believed he had received a check from Mr. Nace for the Miller case. He testified that he had paid Mr. Burke for his share of the fees in another case around the same time as the distribution of funds from the jury verdict in the Miller case. Nace, T. 301; Nace Ex. 43, Affidavit and Attachments (explaining Mr. Nace's payments to Mr. Burke's firms from other joint cases).

In addition, Mr. Trumble admitted he had "no basis to believe that he [Mr. Burke] had any involvement in the distribution [of the funds from the Miller case]." Trumble, T. 117.

Thus, the evidence establishes that Mr. Burke did not receive any payment from Mr. Nace for his work on or referral of Ms. Miller's malpractice case. Any suggestion to the contrary is not credible and certainly not established by clear and convincing evidence.

verdict to Ms. Miller in March 2008. ODC Burke Ex. 15, Order of Supreme Court refusing Petition for Appeal, p.657.

In late July 2007, in response to Mr. Trumble letter asking for a status report on Ms. Miller's medical malpractice claim (ODC Burke Ex. 1, p. 12.), Mr. Burke called Mr. Trumble's office and told the woman who took the call that he was "no longer in the case" and that Mr. Nace was handling it.⁴ Burke, T. 197, 260 (stating he called Mr. Trumble's office, spoke to a woman, told her that he was no longer involved in the Miller case and his co-counsel, Mr. Nace, was handling the case.). Although Mr. Burke did not formally move to withdraw from representing the Trustee, this call placed Mr. Trumble's office on notice that Mr. Nace, not Mr. Burke, was handling the case. Moreover, communicating with the Trustee's paralegal rather than the Trustee himself is not uncommon given the volume of bankruptcy cases routinely handled by the Trustee. Trumble, T.111 (agreeing that "many calls are directed to my legal assistant").

Mr. Trumble did not have a record of the July call from Mr. Burke, but he admitted that there must have been a call from Mr. Burke's office to his office on or shortly after July 27, 2007:

- Q. So someone from Mr. Burke's office must have communicated with either you or your legal assistant sometime after July 27, 2007?
- A. [Mr. Trumble] Yes, sir.

⁴ The Hearing Panel's Recommended Decision points out that Mr. Burke initially was "pretty sure" he called Mr. Trumble after he received the July 2007 letter, but that he did have an independent recollection of the phone call and thought he called or instructed his secretary to call. Hearing Panel Report, 6, ¶ 29. Mr. Burke explained that, after thinking about the matter, he believed that he had made the call. Burke, T. 197. Whether Mr. Burke or his secretary contacted Mr. Trumble's assistant is not important because, as noted above, Mr. Trumble admitted that someone in Mr. Burke's office did, in fact, communicate with someone in Mr. Trumble's in late July 2007. T. 130, lines 5-8 and 19-22.

Q. So Mr. Burke or someone from his office spoke to you or someone in your office on July – shortly after July 27, 2007, true?

A. [Mr. Trumble] Yes.

T. 130, lines 5-8 and lines 19-22. This conversation occurred after Mr. Burke was no longer working on the Miller case. T. 130, line 23 - T. 131, line 1. Thus, one can infer that this was the call where Mr. Burke (or his secretary) told the legal assistant that he was no longer in the case and that Mr. Nace was handling the case.⁵

Although Mr. Trumble could not locate a written memorandum of the call, the absence of a notation is not surprising given the volume of his bankruptcy caseload. Mr. Trumble testified that, in recent years, he gets 80 to 100 new bankruptcy cases each month. Trumble, T. 110. Much of the work on these bankruptcies and the communications with counsel are handled by Mr. Trumble's legal assistant, not by himself. T. 110-111. Mr. Trumble acknowledged that, in this high volume bankruptcy practice, mistakes get made. T. 112-113. In fact, Mr. Trumble admitted that his legal assistant had conversations with Mr. Burke's office during the years that the case was pending, but that there is no written record in his files to document those calls.⁶ Trumble, T. 126-127. It is reasonable to infer, in light of the testimony of Mr. Trumble and Mr. Burke that the failure to

⁵ Mr. Trumble testified that he communicates with counsel in Trustee cases such as that of Ms. Miller in order to prepare his report to the Assistant United States Trustee's Office. Trumble, T. 126-130. Although the Trustee does not have a record of the conversation in the Miller file (Trumble, T. 126, 130), Mr. Trumble admitted that a conversation between Mr. Burke's office and his office must have occurred. *Id.*, 130).

⁶ One example of the errors that can result from Mr. Trumble's extensive case load is his failure to send Mr. Nace's October 2008 letter to the correct address. By letter dated February 24, 2005, Mr. Nace advised Mr. Trumble that he was moving to a new address on New Hampshire Avenue in the District of Columbia, three years later, in October 2008, Mr. Trumble still wrote Mr. Nace at his former address on N Street. *See* ODC Burke Ex. 1, Letter from Nace to Trumble, February 24, 2005, p. 19. Another example is Mr. Trumble's acknowledgment that one letter was sent to Mr. Jenkinson instead of Mr. Burke. Trumble, T. 112.

document the communication between Mr. Trumble's office and Burke's office is, more likely than not, such a mistake.

In addition to notifying the bankruptcy trustee that he was no longer counsel in the case, Mr. Burke faxed and mailed a copy of Mr. Trumble's July 27, 2007 letter to Gabriel Assad, an attorney at Mr. Nace's office and also contacted Mr. Trumble's office. Burke, T. 197, 201-202. As noted in the findings of Hearing Panel in the companion case against Mr. Nace, "[a] 'Fax Cover Memorandum' from Mr. Burke's office shows it was delivered to 'Gabriel', [sic] from 'Lacy,' on August 8, 2007. Lacy Godby was Mr. Burke's secretary. Handwriting also states: 'per Gabe send to him he will handle 8/8/07.'" Hearing Panel Report for Barry Nace, 9 referencing Burke, Supreme Court No. 09-05-353; T. 204, 247; ODC Exhibit- Burke #9, pp. 294-295.)

As noted in the findings of the Hearing Panel, Mr. Trumble sent a letter to Mr. Burke and Mr. Nace dated October 10, 2008, stating that he had learned of the resolution of the Miller case, expressing his concern about their failure to obtain his approval of any settlement and requesting documentation of the settlement. He also indicating his intent to seek recovery of the bankruptcy estate's interest in any settlement proceeds. Hearing Panel Report, 8, ¶ 27. The letter was sent to Mr. Nace at an incorrect address. *Id.*, 8-9, ¶ 38.

Based on his review of the record, Mr. Trumble admitted that, prior to his October 10, 2008, letter to Mr. Burke and Mr. Nace, he knew that Mr. Burke had not been involved in the trial of the case or the distribution of the funds from the case:

Q. Sometime prior to October 10, 2008, Mr. Trumble, you learned that Mr. Burke had not been involved – had not been involved in the trial and distribution – trial of the case and distribution of the money, true?

A. [Mr. Trumble] True.

Trumble, T. 135, lines 3-8. Yet, in July 2009, Mr. Trumble filed an ethics complaint against Mr. Burke alleging, among other things, that he and/or Mr. Nace had distributed the proceeds from the Miller case.⁷ ODC Ex. 1, p.3, Trumble Complaint.

Neither Mr. Burke nor Mr. Nace gained financially from Mr. Nace's failure to pay the bankruptcy trustee his share of the proceeds from the Miller case. Mr. Burke did not benefit because he did not receive anything from those proceeds. Mr. Nace did not benefit because he was entitled to his attorney fees and costs regardless of the amount he paid to the Trustee:

Q. My point is this: As far as you know, neither Mr. Nace nor Mr. Burke had any motive, that you know of to keep them from making sure the bankruptcy estate got its share of the money, did they?

A. [Mr. Trumble] No, not that I'm aware of.

Q. They didn't gain in any way by what happened in this case as far as you understand it, did they?

A. Not that I'm aware of.

Trumble, 181-182. This results from that fact that the Trustee's share of the proceeds would have come from the amount Mr. Nace sent to Ms. Miller, not out of the amount that he retained for fees and costs.

Mr. Trumble testified that Mr. Burke had previously been involved in cases for the Bankruptcy Court including cases where Mr. Burke represented a client in a personal injury case who filed for bankruptcy. T. 114. He further testified that Mr. Burke had always done what he was supposed to do noting that "[p]rior to this case, I have not had any problems with employing Mr. Burke as special counsel to represent an estate." T. 114-115. When asked whether he knew of

⁷ Mr. Burke is not denying that he should have filed to withdraw from the case. However, failing to file a motion to withdraw is not the same as failing to turn over the proceeds of the settlement and verdict to the Trustee.

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.” T. 115.

Although the amount received in the settlement and verdict in Ms. Miller’s case was substantial, the amount actually owed to the Trustee was far less. At his deposition in the action pending in the Bankruptcy Court, Mr. Trumble estimated the amount owed to the bankruptcy estate from the Miller case as \$18,000.00. Trumble, T. 146-147. Subsequently, Mr. Trumble changed his estimate of the amount owed for the creditor claims at \$12,730.00 plus interest. *Id.*, 147. Mr. Trumble has also stated that he “could count a hundred thousand (100,000).” *Id.*, 148. However, in a subsequent disclosure in the adversary proceedings, Mr. Trumble listed the amount owed to the estate as \$62,487.00 with \$34,162.74 of that amount representing claims for attorney fees by Mr. Trumble and others in his firm for work in the adversary proceeding. *Id.*, 152. At the hearing, Mr. Trumble explained that, in addition to attorney fees for himself and his firm, he expects to charge Mr. Burke and Mr. Nace a commission on the attorney fees he recovers for his and his firm’s work on the adversary proceeding. Trumble, T. 153-154. However, as of the date of the hearing in this disciplinary matter, Mr. Trumble, who knew exactly how much Mr. Nace had obtained in the Miller settlement and verdict still could not tell Mr. Burke or Mr. Nace exactly how much he believed they owed the bankruptcy estate.

II. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This matter raises an important issue regarding the interrelationship between allegations of a single act of legal negligence and disciplinary action for a violation of the Rules of Professional Conduct. Respondent contends that the Hearing Panel Report and the ODC Brief raise important issues regarding the intersection between an alleged act of negligence by an attorney and discipline against that attorney under the Rules of Professional Conduct. The recommendation of the Hearing Panel, however, has the potential to open the disciplinary process to claims against an attorney who fails to file a motion, misses a deadline, or otherwise violates a rule of Court. As a result this case raises issues of importance to the Bar and to the public and is therefore is appropriate for oral argument, in the Court's discretion, pursuant to Rules 18-20 of the Rules of Appellate Procedure.

III. ARGUMENT

A. Standard of Proof

Mr. Burke agrees with ODC's statement at pages 12-13 of its Brief.

B. Introduction

Mr. Burke 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. Hearing Panel Report, 17. Nor does he challenge the authority of the Lawyer Disciplinary Board to address allegations of misconduct by an attorney appointed to represent a bankruptcy trustee.⁶ Moreover, Mr. Burke has tried to resolve his responsibility for the Trustee's

⁶ Mr. Burke's and Mr. Nace's cases were consolidated for trial for reasons of judicial economy pursuant to their motion. This made sense because all of the witnesses would have had to testify in each case. Mr. Nace would have been called as a witness in Mr. Burke's case and Mr. Burke would have been a witness in that of Mr. Nace. Obviously, Mr. Trumble would have testified in both cases. T. 4-7.

Since the hearing, however, Mr. Nace has removed his companion case (*In re: Barry Nace*, Supreme Court Docket No. 09-05-353 to the United States District Court for the Northern District of West Virginia

loss. Burke Ex. 7, Emails Karlin and Crim (counsel for the Trustee indicating it was in his "client's best interests to either resolve all claims at one time, or have all parties before the Court when the case gets tried"). However, he cannot do so because the Trustee will not settle with him unless Mr. Nace joins in the settlement and Mr. Burke cannot speak for or control Mr. Nace.⁹ *Id.*

Mr. Burke also understands Mr. Trumble's concern about the events that led him to file his disciplinary complaint. However, the issue before the Court is not whether Mr. Burke fell below the standard of care when he failed to formally withdraw as counsel for the Trustee or how much he or Mr. Nace should pay to the Trustee. Rather, the sole issue before this Court is whether there is clear and convincing evidence to support a finding that Mr. Burke violated the Rules of Professional Conduct.

There is a difference between negligence and ethical misconduct. For an attorney of Mr. Burke's record, that distinction is not irrelevant. As the Hearing Panel recognized, Mr. Burke has no prior disciplinary record, cooperated fully in this ethics case, and has heretofore had an "excellent professional reputation." Hearing Panel Report, 18. He accepts responsibility for his mistake, but he does not believe it raises an issue of unethical behavior.

C. The Hearing Panel Erred in Concluding That Mr. Burke Violated the Rules of Professional Conduct on the Facts of this Case

The failure of Mr. Burke to file a notice of withdrawal or otherwise notify the Trustee in 2005 when he decided his firm could not represent Ms. Miller does not rise to a violation of Rules 1.1, 1.3, 1.4, and 8.4 (a) or 8.4 (b). Although the Hearing Panel correctly concluded that Mr. Burke's conduct

⁹ Mr. Burke recognizes Mr. Trumble's right to litigate the matter as he sees fit. He mentions this history only to demonstrate that he does want to address his respective responsibility for what happened and to explain why he is unable to do so.

did not violate Rules 1.1 (Competence), 8.4 (a)-(b) (Misconduct), it erred in finding that Mr. Burke violated Rules 1.3 (Diligence) and 1.4 (a)-(b) (Communication).

This Court has concluded that legal negligence is not the basis for disciplinary action under the Code of Professional Responsibility, the predecessor to the Rules of Professional Conduct:

A charge of malpractice, based on alleged actionable negligence before adjudication is generally not within the purview of the committee on legal ethics and, if used after adjudication, by the committee on legal ethics, should clearly show that the attorney is unworthy of public confidence and is an unfit or unsafe person to be entrusted with the duties of a member of the legal profession or to exercise the privileges of the legal profession.

Syl. Pt. 4, *Committee on Legal Ethics v. Mullins*, 159 W. Va. 647 (1976), overruled on other grounds, Syl. Pt. 11, *Committee on Legal Ethics of W. Va. State Bar v. Cometti*, 189 W. Va. 262 (1993). Although the applicable precedents arose under the Code of Professional Responsibility, nothing in the decisions of this Court suggests that a different Rule should be applied to cases under the Rules of Professional Conduct.

Mullens is consistent with cases from some other jurisdictions. See, e.g., *In re PRB Docket No. 2006-167*, 925 A.2d 1026, 1028 (Vt. 2007) (affirming a decision where the "the Panel found that a single isolated act of negligence did not constitute misconduct under the Rules."); *In the Matter of Hoffman*, 703 N.W.2d 345, 351 (N.D. 2005) (reversing a decision granting discipline against an attorney and concluding that "single instance of negligence coupled with other egregious conduct can be the basis for discipline"); *In re: McKechnie*, 656 N.W.2d 661, 669-670003) (reprimanding attorney for violation of Rule 1.4(b) where attorney gave improper advice about the statute of limitations, continued to represent the client for two and one-half years with sporadic and confusing communications, failed to file within the limitation period and, in the disciplinary proceeding, defended himself by stating that he gave the client a copy of the statute of limitations);

In re Complaint as to Conduct of Gygi, 541 P.2d 1392, 1396 (Or. 1975) (stating “we are not prepared to hold that isolated instances of ordinary negligence are alone sufficient to warrant disciplinary action”).¹⁰

This Court’s approach in *Mullins* is reasonable. The practice of law by diligent and competent attorneys often requires counsel to handle many different matters simultaneously. This was certainly true of Mr. Burke, Mr. Nace, and even Mr. Trumble, who had little time to monitor the many cases he administered as bankruptcy trustee. In the give and take of a busy law practice, a highly competent attorney may miss a deadline, fail to file a motion, or, as in this case, fail to formally withdraw from a case where he knows that another highly competent attorneys is representing the client. However, such an isolated act of negligence, standing alone, does not and should not result in discipline for an ethical violation under the Rules of Professional Conduct. If the law were otherwise, many attorneys would be subject to discipline, at one point or another in their careers, for an error that, although it may be the subject of a negligence claim, does not reflect on their ethical character or integrity.

A finding against Mr. Burke would set an unfortunate precedent that may encourage complaints whenever an attorney fails to file a required motion, comply with a rule of court, or submit a required response. In this respect, it is important to recognize that Mr. Burke did not miss

¹⁰ On its face, *In re Conduct of Skagen*, 149 P. 3d 1171 (Or. 2006) appears to alter the result in *Gygi*. However, the attorney in *Skagen* actually was guilty of more than negligence. He wrote checks to himself from his trust fund thereby depleting the fund of client deposits and stated that he kept track of his trust fund monies in his head. Although the Court may have characterized this behavior as negligent, it was far more serious than behavior that most attorneys or courts would consider to be negligent conduct. Note, however, some courts have allowed discipline for competency under Rule 1.1. In *Fla. Bar v. Littman*, 612 So. 2d 582 (Fla. 1993), an attorney was disciplined for failing to attach an affidavit to a motion. However, he would only have received a *private* admonishment but for his history of previous discipline. West Virginia does not provide for private admonishments as admonishments are subject to public disclosure.

a deadline, offer incompetent legal advice, or withhold funds from the Trustee. Because of the relationship between an attorney in his firm and one of the defendant doctors, he reasonably concluded that his firm should not continue in the case. Although Mr. Burke failed to file a motion to withdraw, he did not abandon either Ms. Miller or the Mr. Trumble. Mr. Burke knew that Mr. Nace, an expert in medical malpractice litigation, would remain in the case. Also, Mr. Trumble knew that Mr. Nace represented him because his file included communications with Mr. Nace, including his correct address, and an order appointing Mr. Nace to pursue the Miller case as Mr. Trumble's counsel. Moreover, when Mr. Trumble wrote Mr. Burke in 2007, Mr. Burke promptly contacted Mr. Trumble's office to advise Mr. Trumble that Mr. Nace was handling the case. Mr. Burke also communicated with Mr. Nace's office to remind Mr. Nace of his responsibility to the Bankruptcy Trustee.¹¹

Although the Hearing Panel and ODC appear to believe that Mr. Burke is the cause of Mr. Nace's failure to protect the Trustee's interest in the proceeds from the Miller case, the evidence demonstrates that Mr. Nace and/or others in his office were aware of the bankruptcy proceeding, but failed to act on that knowledge.¹² As noted above, Mr. Nace wrote Ms. Miller in September 2006,

¹¹ Note also, representation of a bankruptcy trustee is not akin to the normal client representation. In a no asset bankruptcy, the Court permits the bankrupt to pursue civil litigation that may result in additional funds to pay the creditors. To do so, the trustee agrees to let the bankrupt's civil litigation attorney pursue the case in the hope that he will recover funds for the creditor. In some cases, such as the present case, the settlement and/or verdict may be much greater than the claims of the creditor. To counsel, the primary relationship in litigating the case is his client, the individual who filed the bankruptcy. Counsel must interact with the client repeatedly during discovery, depositions, mediation, settlement, and, if necessary, trial. In contract, communication with the bankruptcy trustee is limited to responding to an occasional inquiry from the trustee regarding the status of the case necessitated for the trustee's reports to the Assistant United States Trustee's office, for approval of any settlement and for issues related to the distribution of any monies recovered by the litigation.

¹² Mr. Burke does not intend to suggest that Mr. Nace intentionally chose not to protect the bankruptcy estate's interests.

before disbursing any of the settlement funds to Ms. Miller, stating "presumably you have a bankruptcy attorney and if so that person should call me so I know whether or not a check can be written to you." ODC Burke Exhibit 9, p. 296. Moreover, Mr. Burke contacted both the Trustee's office and Mr. Nace's office in the summer of 2007. This occurred prior to the disbursement of the funds from the verdict in March 2008. Thus, whatever Mr. Burke's fault in not filing to withdraw in 2005, he did take steps to communicate his withdrawal to Mr. Trumble's office and he contacted Mr. Nace's office to remind him about the Miller bankruptcy.

As Mr. Burke testified, the problem evident in this case resulted from a "perfect storm" where a series of mis-communications and misunderstandings led to Mr. Nace's failure to notify the Trustee about the outcome of the Miller case. Burke, T. 237. The series of events that led to Mr. Trumble's complaint was unfortunate, but Mr. Burke's role in it, failing to file a motion to withdraw, was a mistake, not an ethical violation and was not the reason that Mr. Nace failed to protect the Trustee's interest in the Miller settlement and verdict.

In this case, Mr. Burke, who received nothing from the Miller settlement and verdict, also attempted to address his financial responsibility by offering to discuss settlement with Mr. Trumble. This should have been possible as the total amount that should have been paid to the Trustee was far less than the amount of the settlement.¹³ However, as noted, Mr. Trumble was not willing to consider a separate settlement with Mr. Burke.

Thus, Mr. Burke is caught in a cross-fire between Mr. Trumble and the attorney from his firm representing him in the adversary proceeding on the one hand and Mr. Nace on the other.¹⁴

¹³ Mr. Trumble retained an attorney from his firm to collect the amount owed the bankruptcy estate.

¹⁴ The record may leave this Court wondering how this problem got to its present posture. Mr. Burke has wanted to get the problem resolved from the date that Mr. Trumble and he spoke late in 2008. However,

D. The Cases upon Which the Hearing Panel Relied Do Not Support its Conclusion

The Hearing Panel relied on cases that support Mr. Burke's position. *Mullins; In re: McKechnie*, and *In the Matter of Hoffman*. All of these cases support the general principle that ordinary negligence should *not* be the basis for a disciplinary violation. Nonetheless, the Hearing Panel recommended and ODC supports a finding that Mr. Burke violated Rules 1.3 (Diligence) and 1.4 (a)-(b) (Communication).

As noted above, *Committee on Legal Ethics v. Mullins* established that "[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 653. Relying on *Mullens*, the Hearing Panel concluded that Mr. Burke's failure to notify the bankruptcy Trustee was just such an "isolated incident of ordinary negligence." Report of the Hearing Panel Subcommittee at 14. Thus, it conceded that he did not violate Rule 1.1, 8.4(a), or 8.4(b) as charged. Puzzlingly, however, the Hearing Panel then concluded that effects which "can be traced" to the same incident somehow constituted violations of Rules 1.3, 1.4(a), and 1.4(b) even though the discipline results from the same action that failed to support discipline under the other Rules. *Id.* Mr. Burke's error occurred in 2005 when he failed to tell the Trustee that he was not going to represent Mr. Miller in the case and, without moving to withdraw, ceased all involvement in Ms. Miller's case. In doing so, he did not abandon either Ms. Miller or the Trustee because he knew that the Trustee and Ms. Miller would continue to be represented by Mr. Nace.

Mr. Nace did not react well to Mr. Trumble's letter of January 5, 2009, responding to Mr. Nace's letter of December 1, 2008, and threatening to contact state bar associations about Mr. Nace's conduct. ODC Burke Ex. 9, pp. 287-290; *see also* Burke, T. 235 (explaining that the interactions between Mr. Nace and Mr. Trumble "made it difficult to discuss settlement"). Given the bad feelings between Mr. Nace and Mr. Trumble, the dispute over how much is owed to the bankruptcy estate and to Mr. Trumble's law firm has escalated in a manner that Mr. Burke cannot control.

In order to distinguish Mr. Burke's case from those involving isolated instances of negligence, the Hearing Panel and ODC fault Mr. Burke for lack of diligence and for failing to communicate with Mr. Trumble. They conclude that Mr. Burke violated duties owed to his client, to the public, and to the legal system. Hearing Panel Report, 16. In doing so, the Hearing Panel appears to rely on the fact that Mr. Burke "did not make any attempt to notify the Trustee until two years after he withdrew and he never formally withdrew as special counsel for the U.S. Trustee" and because the Trustee did not receive the funds from Mr. Nace because the Trustee "did not know how to communicate with Respondent's co-counsel Mr. Nace. *Id.* Yet, the first point simply reiterates the same act of negligence (failing to notify the Trustee and failing to file a motion to withdraw) that the Panel concluded did not justify discipline under Rules 1.1 and 8.4 pursuant to *Mullens*.

Moreover, the second point, the idea that Mr. Trumble was not paid by Mr. Nace because Mr. Trumble "did not know how to communicate" with Mr. Nace, makes no sense at all. As discussed above, Mr. Trumble knew Mr. Nace was his attorney and should have had no trouble locating him any time he wanted to do so. Most important, Mr. Nace's correct address was sitting in Mr. Trumble's file from February 2005 onward. In February 2005, Mr. Nace sent Mr. Trumble the affidavit necessary to obtain permission from the Bankruptcy Court to serve as special counsel. In the letter accompanying the affidavit, Mr. Nace wrote: "[a]lso, please note that as of March 5, 2005 my office address will be changed to the following '1615 New Hampshire Avenue, NW, Washington DC, 20009.'" ODC Burke Ex. 1, Letter from Nace to Trumble, February 24, 2005, p. 19. *Given the fact that Mr. Nace's correct address had been in Mr. Trumble's file since February*

2005, it is difficult to understand how anyone could conclude that Mr. Trumble did not know how to find Mr. Nuce.¹⁵

The Hearing Panel and ODC also err in their analysis regarding "diligence." They appear to analogize this case to one where an attorney remains active as counsel for a client, fails to pursue the case with diligence, and fails to provide the client with the information he needs to make decisions about the case. Yet, on these facts, it is difficult to understand how lack of diligence applies to the facts of the case. Mr. Burke turned the case over to Mr. Nace who diligently pursued the malpractice case to a successful conclusion. Mr. Burke's error was failing to notify the Trustee until 2007 that he was not involved in the case, not any failure by Mr. Burke or Mr. Nace to pursue the case with diligence.

Similarly, Mr. Burke's conduct does not fit the usual paradigm for failure to "communicate" with a client. Those cases usually involve an attorney who ignores client communications, fails to return phone calls, and otherwise neglects a client although he knows that he is responsible for representing that client. See, e.g., *Lawyer Disciplinary Board v. McCormick*, 199 W. Va. 283 (1997). There is no evidence that Mr. Burke is that kind of attorney. Mr. Trumble testified that Mr. Burke has been reliable in the past and spoke positively about his work with him. In 2007, after he withdrew from the case, he called Mr. Trumble to respond to Mr. Trumble's letter of July 27, 2007 to tell him that he was not involved in the litigation and told the assistant who took the call that Mr. Nace was handling the case. He also communicated with Mr. Nace's office, sending a copy of

¹⁵ Despite the fact that Mr. Nace informed Mr. Trumble of his correct address, Mr. Trumble later wrote to Mr. Nace at an old address. See ODC Burke Ex. 1, Letter Nace to Trumble, February 24, 2005; ODC Burke Ex. 1, Letter Trumble to Nace and Burke, October 10, 2005, p. 29 which was addressed to Mr. Nace on North Street in Washington, DC, rather than the correct address on New Hampshire Avenue.

the July 27 letter and discussing the matter with Mr. Assad. Mr. Burke is simply not an attorney who fails to communicate.

Mr. Burke thought he was out of the case. He had left the case in the hands of an experienced medical malpractice attorney who was also special counsel to the Trustee. The failure to communicate with the Trustee thereafter in order to tell him about the settlement or verdict flowed from Mr. Burke's one error: withdrawing from the case without a formal motion or other communication with the trustee. Any subsequent failure to communicate was not a new act of negligence or a new disregard of the duty to communicate with a client. This is not a case, such as *In re: McKecanie*, where the attorney continued in the case and nonetheless failed to communicate. Moreover, once Mr. Trumble wrote Mr. Burke in July 2007, Mr. Burke promptly responded by calling Mr. Trumble's office.

Of the other two cases cited in the Hearing Panel Report and the ODC Brief, only one actually resulted in the imposition of any sanction at all. In *In the Matter of Hoffman*, the Court rejected the recommendation of the hearing panel and held that the attorney's failure to timely file for post-conviction relief was an isolated act of negligence that did not violate Rule 1.1. It also stated that an isolated act of negligence could lead to discipline under the Rules where there was evidence of egregious conduct. 703 N.W.2d at 351. The Court's interpretation of egregious conduct is, in part, explained by its reference to *Disciplinary Board v. Nassif*, 504 N.W.2d 311 (N.D. 1993), in which the attorney had not only allowed a statute of limitations to expire, but he also "was 'oblivious[] to the statute of limitation,' was unaware of the date of the client's injury, failed to communicate with the client, and when the client sought to change representation for her claim, the lawyer told her 'he was still entitled to "my share of the money,'" and would continue to handle her

claim.” 703 N.W.2d at 349. Whatever errors Mr. Burke may be accused of, he did not manifest any conduct comparable to an attorney who, having missed a statute of limitations, told his client he was still entitled his “share of the money.”

In re: McKechnie also fails to justify a finding against Mr. Burke. In *McKechnie*, the North Dakota Court concluded that the attorney, who had five prior admonitions on his disciplinary record, violated Rule 1.4(b) by incorrectly advising a client as to the statute of limitations. As noted above, the attorney gave his client improper advice about the statute of limitations, continued to represent the client for two and one-half years with sporadic and confusing communications, failed to file within the limitation period, charged for some of his services and, in the disciplinary proceeding, defended himself by stating that he gave the client a copy of the statute of limitations. Mr. Burke, however, decided that his firm could not represent Ms. Miller and turned the case over to Mr. Nace. He did not turn around and blame Mr. Trumble for his error. He was never paid anything for his work. He did not remain in the case and continue to ignore the applicable law as did Mr. McKechnie. *McKechnie* is not a precedent that supports discipline in this case.

Setting aside the single, isolated, act of ordinary negligence which ODC concedes cannot form the basis for a violation of Rule 1.1 under *Mullins*, Burke acted diligently under Rule 1.3 and informed the Trustee about what happened shortly after receiving a letter from the Trustee in 2007, as required by Rule 1.4. Notably, there is no allegation that Mr. Burke had any history of failing to respond to requests from the Trustee in this or other cases in which he has been involved.¹⁶ Upon his withdrawal from the Miller case, Burke ensured that Nace was responsible for the case and was

¹⁶ The only possible exception is the Trustee's letter of October 10, 2008. ODC Burke Ex 9, 263. However, Mr. Burke did speak with Mr. Trumble sometime in the fall of 2008 or early 2009. Burke, T. 234-235; Trumble, 122-123.

also special counsel for the Trustee. Burke had no reason to believe that Nace would disregard his duty to the Trustee.

The Hearing Panel and ODC also confuse what Mr. Burke did wrong in 2005 when he failed to notify Mr. Trumble or formally withdraw from representation of the Trustee. It is obviously true that once Mr. Burke decided his firm should not stay in the case, he did not communicate with Mr. Trumble until July 2007 when he told Mr. Trumble's assistant that he was not involved in the case and directed her to Mr. Nace. While this may make him liable for damages, his actions did not aid or abet Mr. Nace's failure to protect the Trustee's interest in the Miller funds.¹⁷

E. The Hearing Panel Erred in its Analysis of the Facts

In evaluating the evidence, the clear and convincing standard applies. Rule 3.7 of the Rules of Lawyer Disciplinary Procedure. In the present case, the Hearing Panel reached some factual conclusions without evidence to support their findings under that standard.

1. The Hearing Panel erred in its factual finding that Mr. Trumble "never received notice of Mr. Burke's withdrawal from the Miller case until . . . October 2010"

The Hearing Panel Report concluded that Mr. Trumble "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." Hearing Panel Report, 7, ¶ 32. The Hearing Panel relied on this finding in its conclusion that Mr. Trumble "did not know to communicate with Respondent's Co-Counsel, Mr. Nace." Hearing Panel Report, 16. These findings, however, are inconsistent with the evidence and certainly not supported by clear and convincing evidence.

¹⁷ Mr. Burke does not intend to imply that Mr. Nace intentionally withheld money from the Trustee. Mr. Nace, as noted above, had no financial motive to do so.

First, the conclusion that Mr. Trumble never received notice of Mr. Burke's withdrawal until October 2008 is mistaken. As noted above, Mr. Burke testified that he contacted Mr. Trumble's office in July 2007 and advised the Trustee's assistant that he was no longer in the case and that Mr. Nace was handling it. Mr. Trumble admitted that Mr. Burke's office did contact his office following the July 2007 letter.¹⁸ As Mr. Burke had not been involved in the case since 2005, it is more than reasonable to infer that Mr. Burke is correct in his testimony that he contacted Mr. Trumble's office and communicated the fact that he had withdrawn in July 2007 *before* the Miller appeal was final and eight months before Mr. Nace sent Ms. Miller her share of the money from the jury verdict.

Second, the Hearing Panel's conclusion that Mr. Trumble did not know how to communicate with Mr. Nace makes little sense. Mr. Nace is (and was at the time) a member of the West Virginia State Bar. Although Mr. Nace may have moved his offices, his address and/or phone number should have been readily available through the State Bar, through a phone call to Mr. Burke, through a call to telephone information for Washington, D.C., and/or through an internet search. Moreover, as noted above, Mr. Trumble had Mr. Nace's correct address in his file from 2005 onward. All Mr. Trumble or his assistant needed to do to find Mr. Nace was to review his file.

¹⁸ As noted in the facts set forth above, the absence of a record of the July communication is not surprising. Mr. Trumble and his legal assistant administer hundreds of bankruptcy cases and, as Mr. Trumble testified, there were contacts between his office and Mr. Burke that are not noted in Mr. Trumble's records. Trumble, T. 130.

2. The Hearing Panel erred in concluding that Mr. Burke's error "ultimately resulted in the Trustee not receiving the funds from the medical malpractice case"

The Hearing Panel and ODC emphasize that Mr. Burke's conduct resulted in the Trustee not receiving funds from the Miller medical malpractice claim. However, Mr. Burke is, as he understands it, currently charged with ethical violations for his failure to withdraw from representation of the Trustee and to communicate with the Trustee. As the facts emerged, it became obvious that he was not involved in the distribution of Ms. Miller's funds to Ms. Miller rather than the Trustee. He placed the Trustee's office on notice of the fact that Mr. Nace was handling the case in July 2007, eight months before Ms. Miller received her share of the verdict. At the same time, he notified one of the attorneys in Mr. Nace's office with whom he dealt about the involvement of the bankruptcy trustee. His comparative liability for the failure to pay the Trustee may be an issue in the adversary proceeding, but it is not a basis for discipline.

F. The Hearing Panel and the ODC Err in Their Treatment of the Appropriate Sanctions.

The Hearing Panel and the ODC contend that Mr. Burke should be sanctioned because "the amount of injury is great." Hearing Panel Report, 17, ODC Brief, 16. However, in reaching this conclusion, they again confuse Mr. Burke's conduct with that of Mr. Nace. As noted above, Mr. Burke's failure to notify the Trustee of his firm's decision not to represent Ms. Miller did not cause Mr. Nace to fail to protect the Trustee's interests.

ODC compounds this error in its Brief on behalf of the Disciplinary Board when it argues that "[o]ther jurisdictions have suspended attorneys for settling claims without notifying the bankruptcy trustee." Mr. Burke's case, however, is unlike any of the cases cited by ODC at pages 19-20 of its Brief. Each of those cases involves an attorney who settled a claim without notifying

the bankruptcy trustee whereas Mr. Burke did nothing of the kind and each of the cases involved other misconduct by the attorney. Mr. Burke did not settle a claim without notifying the trustee, fail to list the claim as an asset on the bankruptcy petition, ignore the bankruptcy trustee's request for the funds, and deduct a fee without permission as in *Attorney Grievance Commission v. Nichols*, 950 A.2d 778 (Md. 2008). Nor did Mr. Burke engage in the multiple violations, including filing false documents, as in *Disciplinary Proceedings Against Preszler*, 232 P. 3d 1118 (Wash. 2010), or fail to disclose the intent to seek a personal injury claim, settle it without notifying the trustee, and lie throughout the disciplinary proceedings as in *Columbus Bar Association v. Cooke*, 855 N.E.2d 1226 (Ohio 2006).

III. CONCLUSION

For all the reasons set forth above, Mr. Burke requests that this Court reject the recommendation of the Hearing Panel and dismiss this case.

RESPONDENT,
BY COUNSEL.



ALLAN N. KARLIN, WV BAR # 1953
ALLAN N. KARLIN & ASSOCIATES
174 CHANCERY ROW
MORGANTOWN, WV 26505
304-296-8266

CERTIFICATE OF SERVICE

I, ALLAN N. KARLIN, attorney for the respondent, do hereby certify that service of the within and foregoing "Respondent's Motion for An Extension of Time to Reply to the Brief Submitted by the Lawyer Disciplinary Board" was made upon the parties hereinbelow listed by depositing a true copy of the same in the United States Mail, postage prepaid, addressed as follows:

Rory L. Perry II
Clerk, Supreme Court of Appeals of West Virginia
State Capitol Room E-317
Charleston, WV 25305

Lawyer Disciplinary Counsel
City Center East, Suite 1200C
4700 MacCorkle Avenue SE
Charleston, WV 25304

Debra A. Kilgore, Chairperson
1439 East Main Street, Suite 2
Princeton, WV 24740

Sean D. Francisco
317 Market Street
Parkersburg, WV 26101

Cynthia L. Pyles
24 Sharpless Street
Keyser, WV 26725

Michael Benninger
Benninger Law
PO Box 623
Morgantown, WV 26505

all of which was done on the 6th day of August 2012.



ALLAN N. KARLIN, WV BAR # 1953
ALLAN N. KARLIN & ASSOCIATES
174 CHANCERY ROW
MORGANTOWN, WV 26505
304-296-8266