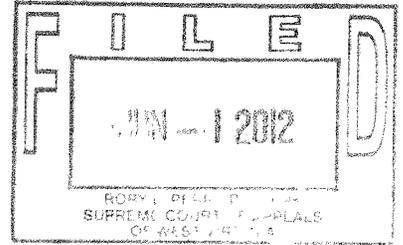


**BEFORE THE SUPREME COURT OF APPEALS OF THE
STATE OF WEST VIRGINIA**



OFFICE OF DISCIPLINARY COUNSEL,

Complainant,

v.

No. 35549

JOSHUA M. ROBINSON,

Respondent.

BRIEF OF THE LAWYER DISCIPLINARY BOARD

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I. STATEMENT OF THE CASE

A. NATURE OF PROCEEDINGS AND RECOMMENDATION OF HEARING PANEL SUBCOMMITTEE

This is a disciplinary proceeding against Respondent Joshua M. Robinson, (hereinafter "Respondent"). A Petition Seeking Annulment of Respondent's Law License Pursuant to Rule 3.18 of the Rules of Lawyer Disciplinary Procedure was filed against Respondent Joshua M. Robinson with the Clerk of the Supreme Court of Appeals on or about April 29, 2010. Respondent filed a request for a mitigation hearing with the Chairperson of the Lawyer Disciplinary Board on or about May 16, 2010. Disciplinary Counsel filed an Objection to Respondent's request for a mitigation hearing on or about June 3, 2010. The Chairperson of the Lawyer Disciplinary Board granted Respondent's request for a mitigation hearing thereafter. Disciplinary Counsel filed its mandatory discovery on or about July 28, 2010, with supplements filed September 14, 2010, and February 25, 2011.

Respondent failed to provide his mandatory discovery, which was due on or before August 29, 2010. Disciplinary Counsel then filed a Motion to Exclude Testimony of Witnesses and/or Documentary Evidence or Testimony of Mitigating Factors on October 25, 2010. Respondent filed a response to the Motion on October 28, 2010. The Hearing Panel Subcommittee denied Disciplinary Counsel's Motion to Dismiss on November 2, 2010. Respondent filed his mandatory discovery on or about November 1, 2010, with supplements on filed on or about November 12, 2010, November 19, 2010, February 14, 2011, and March 4, 2011.

Thereafter, this matter proceeded to hearing in Charleston, West Virginia, on March 28, 2011. The Hearing Panel Subcommittee was composed of David A. Jividen, Esquire, Chairperson, Debra A. Kilgore, Esquire, and Dr. Robert R. Rufus, layperson. Respondent appeared with Counsel, Sherri D. Goodman, Esquire, and Rachael L. Fletcher Cipoletti, Chief Lawyer Disciplinary Counsel, appeared on behalf of the Office of Disciplinary Counsel. The Hearing Panel Subcommittee heard testimony from Randall Clifford; Charles Hamilton, Esquire; Robert W. Schulenberg, III, Esquire; Fred J. Giggenbach, Esquire; and Respondent. In addition, the Hearing Panel Subcommittee admitted Joint Exhibits 1; ODC Exhibits 2-11, Joint Exhibits 12-16, and Respondent's Exhibits 1-2 and 4-7, into evidence. At the conclusion of the hearing, per the request of the Hearing Panel Subcommittee, ODC submitted color photographs for the previously submitted black and white photos in Exhibit 11. The Hearing Panel subcommittee denied the request of Respondent to admit R3, an affidavit that had not been previously identified.

On or about February 27, 2012, the Hearing Panel Subcommittee issued its decision in this matter and filed with the Supreme Court of Appeals of West Virginia its "Hearing Panel's Proposed Findings of Fact, Conclusions of Law and Recommended Sanctions" (hereinafter "Report"). The Hearing Panel Subcommittee properly found that the evidence established that Respondent violated 8.4(b) and 8.4(c) of the Rules of Professional Conduct.

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

1. That Respondent's law license be annulled;
2. That prior to petitioning for reinstatement of his law license, Respondent undergo a comprehensive psychological examination by an independent licensed psychiatrist to determine if Respondent is fit to practice law;
3. That Respondent fully comply with any and all treatment protocol expressed by this licensed psychiatrist;
4. That prior to petitioning for reinstatement of his law license, Respondent complete an extensive course recommended by the aforementioned licensed psychiatrist in anger management;
5. That prior to petitioning for reinstatement, Respondent pay the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure; and
6. That, upon reinstatement, Respondent's practice be supervised for a period of two (2) years.

B. FINDINGS OF FACTS

Joshua M. Robinson, hereinafter Respondent, is currently a suspended member of the West Virginia State Bar who most recently practiced in Charleston, 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

by bar examination to the West Virginia State Bar on December 5, 2002. Prior to relocating to West Virginia with his then wife, Respondent practiced law in Kentucky.

On or about June 29, 2009, a Grand Jury of the Fayette Circuit Court Criminal Branch, 4th Division of the Commonwealth of Kentucky issued a Two Count Indictment that charged Respondent with two counts of First Degree Wanton Endangerment. This was a result of an argument with Respondent's then wife which led her to leaving the house with her young son in a car. In an attempt to stop her from driving away, Respondent threw a propane tank through the rear window of the car. [ODC Exhibit 2, Bates 0002].

On or about October 9, 2009, Respondent pled guilty to Two Counts of Second Degree Wanton Endangerment. On or about October 13, 2009, a Judgment on Guilty Plea was entered by the Fayette Circuit Court. [ODC Exhibit 2, Bates 004-0006]. A sentencing hearing was set for November 20, 2009. Respondent failed to appear at the sentencing hearing and the Court entered an Order that revoked Respondent's bond and ordered Respondent and his surety to appear before the Court on December 18, 2009. However, the Hearing Panel Subcommittee noted that the Judge recognized that this absence was excused as Respondent's attorney gave him the wrong date. [Hearing Panel Report at ¶5, page 3]. The Court also issued a Warrant for Arrest for Respondent on or about November 25, 2009. [ODC Exhibit 2, Bates 0009-0011].

On or about October 16, 2009, Respondent entered into an agreement with Mr. Gerald Gump to represent him in a car accident that had occurred in to a vehicle owned by Mr. Gerald Gump which Mr. David Gump, Mr. Gerald Gump's nephew, was driving. [ODC

Exhibit 11, Bates 535]. On November 16, 2009, Respondent entered into an agreement to represent Mr. David Gump with respect to Mr. Gerald Gump's estate when he died. [ODC Exhibit 11, Bates 405].

On November 19, 2009, David Gump brought Respondent a State Farm check in the amount of \$1,117.35 made payable to Gerald Gump. It was endorsed on the back. Respondent opened a bank account at United Bank, cashed the check and placed \$50.00 in the account. [ODC Exhibit 11, Bates 425-27]. Gerald Gump died on November 20, 2009.

Respondent testified at the hearing that the One Thousand One Hundred and Seventeen Dollars and Thirty-Five Cents (\$1,117.35) was to be used as a fee for his legal services provided to David Gump, who had issues concerning a lease and a loan from Joe Graziano. [ODC Exhibit 11, Bates 490]. Respondent provided a receipt purporting to show that Respondent had been paid for legal services rendered outside the estate. [ODC Exhibit 11 Bates 485]. From the circumstances and testimony in this case, the Hearing Panel Subcommittee specifically found that this was not credible and found that the money was instead misappropriated and converted by Respondent for his own use. [Hearing Panel Report ¶11, page 4].

Respondent testified that on December 2, 2009, he and David Gump discussed terminating the legal representation and return of the lock boxes and estate papers he had. Mr. Gump showed up shortly before 5:00 p.m. Respondent testified that he had just finished taking a shower upstairs when he heard pounding and breaking glass. Respondent testified that he rushed downstairs in his jeans and found Mr. Gump inside the house, holding a

concrete lawn ornament on the floor. Glass had been broken from several diamond panes in the door and the door frame was damaged. Respondent testified that he grabbed a bat that was propped up against the wall near the door and used it to push Mr. Gump away from him and back out onto the porch. Respondent testified that Mr. Gump struck him with the concrete planter in the chest. [Transcript at p. 149]. Respondent called 911 at 5:00 p.m. He told the dispatch that Mr. Gump had tried to break into his house and that he was trying to detain Mr. Gump until the police arrived. [R. Exhibit 7]. Respondent also broke the windows out of Mr. Gump's car, which was parked in the driveway. It is noted that the Hearing Panel Subcommittee found Respondent's testimony about these events to be "disingenuous, not supported by the physical evidence, and frankly untruthful." [Hearing Panel Subcommittee Report at ¶17, page 5].

A drug screen run on Mr. Gump that night was positive for cocaine, THC, opiates and benzodiazepine. Mr. Gump was arrested and charged with battery and burglary. Mr. Gump required medical treatment at the Emergency Room as a result of the severe facial injuries he suffered from the altercation. [ODC Exhibit 11, Bates 527-529]. On or about December 11, 2009, after a hearing on the matter, Kanawha County Magistrate Paris Workman found no probable cause on both of the charges involving Mr. Gump and dismissed the case.[ODC Exhibit [ODC Exhibit 10, Bates 0119].

On or about December 15, 2009, the Office of Disciplinary Counsel opened an ethics complaint against Respondent and docketed the same for investigation. [ODC Exhibit 4, Bates 0060].

On or about December 23, 2009, Respondent was arrested on a fugitive warrant arising from the Kentucky Warrant for Arrest that was issued on or about November 25, 2009. On or about December 30, 2009, Respondent appeared before the Kanawha County Circuit Court and was permitted to pay \$1,000.00 in bond and upon agreement with the prosecutor in Kentucky, Respondent was permitted to self-report to Kentucky for a sentencing hearing scheduled February 5, 2010. On or about February 9, 2010, the Fayette Circuit Court Criminal Branch, 4th Division of the Commonwealth of Kentucky sentenced Respondent to (12) twelve months suspended sentence and was conditionally discharged for (2) two years. [ODC Exhibit 2, Bates 0054-0056].

On or about February 26, 2010, the Grand Jury of the Kanawha County Circuit Court issued a Three Count Indictment that charged Respondent with One Count of Felony Malicious Assault, One Count of Felony Embezzlement, One Count of Misdemeanor Obstruction of Justice. [ODC Exhibit 8, Bates 0115]. On or about March 5, 2010, the State of West Virginia filed its position on Respondent's bond. [ODC Exhibit 11, Bates 0136-0138]. On or about March 8, 2010, the Kanawha County Circuit Court Judge issued an Arraignment Order which set Respondent's bond at \$25,000.00 or 10% cash. The Court further ordered that in addition to the bond, Respondent would be placed on home confinement. Respondent was advised by the Court that he had until 4pm on or about March 8, 2010 to post the requisite bond or self-report to jail. [ODC Exhibit 11, Bates 0132-0133].

At the evidentiary hearing, Respondent testified that he called Judge Bloom's secretary to inquire whether he was permitted to leave the county to get bond money. He

testified that he was advised he was not permitted to leave the county, was denied additional time to get the bond money and was instead advised that he needed to self report at 4:00 p.m.. Respondent also testified that he called the jail and Keith Peoples at the Charleston Police Department, who told him he could report to the Charleston Police Department. [Transcript at p. 190-192]. However, on or about March 8, 2010, Respondent failed to appear before the Court and failed to self-report to jail.

On or about March 8, 2010, the Court subsequently issued a *Capias* Order for Respondent's failure to appear. On or about March 8, 2010, pursuant to the *Capias* Order, Respondent was arrested by the Charleston Police Department at 9:00 p.m. at his residence and was transported to South Central Regional Jail. [ODC Exhibit 11, Bates 0134-0135].

On or about March 15, 2010, pursuant to an extraordinary petition filed by Disciplinary Counsel, this Honorable Court suspended Respondent's law license and directed the Chief Judge of Kanawha County Circuit Court to appoint a trustee to protect the interests of Respondent's clients. [ODC Exhibit 4, Bates 0058-0106]. On or about March 17, 2010, the Honorable Judge Kaufman appointed Attorney Troy Giatras to serve as trustee. [ODC Exhibit 6, Bates 0109-0112].

Respondent testified that at some time following David Gump's preliminary hearing, he had a conversation with a Mr. Robert Wills, who was his neighbor on Lee Street. Respondent stated that Mr. Wills had thought that he had seen Mr. Robinson break the storm door, but Respondent told him it was the inner front door panels that had been broken. He said he would change the testimony he had given at Mr. Gump's preliminary hearing. He

purportedly sent an e-mail to Respondent at josh.lawyer@gmail.com on January 28, 2010. He purportedly sent a printout of the e-mail bearing the date of February 4, 2010, and witnessed by Wendy Robinson [R.1] bearing a signature of Mr. Wills. [Transcript at p. 176-178].

Respondent provided this e-mail to law enforcement. When asked by Assistant Prosecuting Attorney Rob Schulenberg about the e-mail, Mr. Wills denied that it was his e-mail, denied that he had the conversation with Respondent and reaffirmed his original testimony. Partly on the basis of this denial, a Grand Jury indicted Respondent for the unlawful obstruction of a police officer by submitting a false e-mail. The indictment issued on February 25, 2010.

A subpoena was issued to Suddenlink Communications for the IP address of 173.81.108.147 on January 28, 2010. Respondent testified this was the IP address on the e-mail message from Mr. Wills. Wendy Robinson provided Mr. Hamilton with the number. At this hearing, Respondent showed the Panel members the e-mail header saved on his webmail account at Yahoo. The header contained the information that the e-mail was "Received from [173.81.108.147]." The header information was printed for the Panel following the hearing and made a part of R1. The subscriber information produced in response to the subpoena was identified as being Carl Wills at 33 Miriam Avenue in St. Albans, West Virginia [R1]. Respondent failed to corroborate these accusations with any evidence and therefore the Hearing Panel Subcommittee determined that this e-mail was not

convincing to mitigating against punishment. [Hearing Panel Subcommittee Report ¶34, pages 8-9].

On or about April 19, 2010, Respondent entered a plea of guilty to the lesser included felony offense of Unlawful Wounding. [ODC Exhibit 11, Bates 0631-0637]. On or about April 19, 2010, the Honorable Judge Bloom entered an Order Accepting Plea of Guilty. [ODC Exhibit 11, Bates 0638]. On or about May 27, 2010, after reviewing the Pre-Sentence Investigation of Respondent, a Disposition Hearing was conducted by the Honorable Judge Bloom and the Court, prior to determining an appropriate sentence, ordered Respondent to undergo a complete psychological evaluation. On or about July 8, 2010, per the Court's June 3, 2010 Order, Respondent was evaluated by Dr. Ralph Smith. On or about July 28, 2010, a Return on Evaluation Disposition was conducted by the Honorable Judge Bloom and Respondent was sentenced to 1 to 5 years to be served in the alternative sentence of home confinement, plus court costs, with credit for time served in the amount of One Hundred and Forty-Five days. [ODC Exhibit 11, Bates 0772-0774].

At the time of the Hearing Panel Subcommittee Report, although Respondent had made motions, and the same have been granted by the Court (without objection from the Kanawha County Prosecutor's Office) to leave the jurisdiction to visit his children, Respondent remained on home confinement. On or about December 22, 2011, Respondent was released from home confinement and placed on Parole.

C. CONCLUSIONS OF LAW

Respondent knowingly and intentionally pled guilty to a crime which clearly demonstrates professional unfitness within the meaning of Rule 3.18 of the Rules of Lawyer Disciplinary Procedure. Respondent violated Rule 8.4(b) and Rule 8.4(c) of the Rules of Professional Conduct which state in pertinent part:

Rule 8.4(b) Misconduct

It is professional misconduct for a lawyer to:

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

Rule 8.4(c) Misconduct

It is professional misconduct for a lawyer to:

(c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

The pervasive pattern of criminal misconduct clearly warrants the annulment of Respondent's license to practice law.

II. SUMMARY OF ARGUMENT

Respondent pled guilty to the felony crime of the unlawful wounding of his client and that felony conviction reflects adversely on his honesty, trustworthiness, and fitness as a lawyer and is in direct violation of the Rules of Professional Conduct. 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). In order to effectuate the goals of the disciplinary process, Disciplinary Counsel respectfully submits that Respondent's license to practice law in the State of West Virginia be annulled.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Office of Disciplinary Counsel does not object to oral argument in this matter, but at this point, the issues raised by Respondent and the findings and recommendations made by the Hearing Panel Subcommittee do not address any new issues of law that would require Disciplinary Counsel to request a Rule 20 argument.

IV. ARGUMENT

A. STANDARD OF PROOF

"Where there has been a final criminal conviction, proof on the record of such conviction satisfies the [Office of Disciplinary Counsel's] burden of proving an ethical violation arising from such conviction." Syl. Pt. 2, Committee on Legal Ethics v. Six, 181 W.Va. 52, 380 S.E.2d 219 (1989). Clearly, ODC has met its burden of proof establishing an ethical violation as Respondent knowingly entered a plea of guilty to the lesser included felony offense of Unlawful Wounding.

Where disbarment of an attorney's law license is sought based upon a conviction, due process requires the attorney be given a right to request an evidentiary hearing to produce mitigating factors. The purpose of such a hearing is not to collaterally attack the conviction, but to introduce mitigating factors which may bear on the punishment to be imposed. *See* Committee on Legal Ethics v. Boettner, 186 W.Va. 136, 394 S.E.2d 735, 1990 W.Va. LEXIS

86 (1990) cert. denied., 506 U.S. 872, 506 U.S. 873, 113 S.Ct. 209, 121 L.Ed. 2d 149, 1992 U.S. LEXIS 5417 (1992). Rule 3.18(g) of the Rules of Lawyer Disciplinary Procedure further indicates that the "Office of Disciplinary Counsel may introduce evidence of aggravating factors at any mitigation hearing".

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 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

As previously stated, Respondent's felony conviction conclusively satisfies the Office of Disciplinary Counsel's burden of proving an ethical violation arising from such conviction has occurred, thus this Honorable Court shall consider the factors as outlined 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* Syllabus Pt. 4, Office of Disciplinary Counsel v. Jordan, 204 W.Va. 495, 513 S.E.2d 722 (1998).

1. Respondent violated duties owed to his client, to the public, to the legal system, and to the profession and caused significant injuries to his client.

Respondent savagely beat his client with a wooden baseball bat on his front porch and then chased his defense-less client with this weapon down a residential city street until his client fell to the ground, whereupon he again beat him with a baseball bat in the head, chest and back. The physical injuries sustained by his client were significant and causing such injuries to his client is certainly a violation of his duty to his client. As a duly licensed attorney and an officer of the Court, Respondent has an affirmative duty to comport his actions to that of the penal laws of this State and has therefore repeatedly violated his duties

to the public, the legal system and the profession. Moreover, the Hearing Panel Subcommittee found that Respondent provided false factual statements to the police and prosecuting attorneys in order to cover up his illegal acts.

2. Respondent acted knowingly and intentionally.

Respondent entered into his guilty plea and the same was voluntary, knowingly and intentional. Additionally, Respondent testified to the Hearing Panel Subcommittee that he did not and does not currently suffer from any impairment. [Transcript at 376-378].

3. Mitigating Factors

Mitigating 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 mitigating factors in a lawyer disciplinary proceeding ‘are any considerations, or factors that may justify a decrease in the degree of discipline to be imposed.’” Lawyer Disciplinary Board v. Scott, 213 W.Va. 209, 579 S.E. 2d 550, (2003) *quoting* ABA Model Standards for Imposing Lawyer Sanctions, 9.21 (1992). Respondent suggests the following mitigating factors exist in this case: (1). absence of disciplinary record; (2). personal and emotional problems; (3). full and free disclosure to the Disciplinary Board; (4). imposition of other penalties and sanctions; (5). interim rehabilitation; and (6). remorse.¹ [Transcript at 8-9].

¹ODC contends that the evidence demonstrates that not only do the proposed factors of interim rehabilitation and remorse not apply in this case, but the lack of interim rehabilitation and the lack of remorse should be considered as an aggravating factor. The same is discussed in the Aggravating Factors *see infra*.

While Respondent contends that he has an absence of disciplinary record, at the time of the instant hearing, Respondent was facing disciplinary charges in Kentucky as well as West Virginia for his criminal conduct in both states. Moreover, Respondent testified that he only located in West Virginia in August of 2009 and the criminal conduct occurred in December of 2010. [Transcript at 121]. Given the severity and pattern of his criminal conduct, this factor should be given little weight.

Respondent further suggests that he has personal and emotional problems and the same should mitigate in his favor. To support this claim of mitigation, Respondent submitted the treatment notes and the testimony of licensed counselor Randall Clifford, MA. [Exhibit R6]. Mr. Clifford testified that the focus of his counseling with Respondent was on anger management and cognitive restructuring. He further diagnosed Respondent with intermittent explosive disorder and adjustment disorder. [Transcript at 28-29].

Mr. Clifford testified that over the course of the professional relationship he had spent approximately 10 hours with Mr. Clifford. [Transcript at 51 and Exhibit R6]. However, there were long gaps between Respondent's sessions with Mr. Clifford and Respondent has not been seen Mr. Clifford since December of 2010. Additionally, Mr. Clifford's diagnosis was based solely on Respondent's self-serving disclosures. Moreover, despite the fact that Mr. Clifford agreed that it was important for a client to be truthful in his disclosures to his counselor, it is undisputed that Respondent was not truthful about his criminal history with Mr. Clifford when he failed to disclose his prior criminal convictions for aggravated assault in the 4th degree in October of 1995 and his February of 2010 convictions for wanton

endangerment. [Transcript at 47-48]. Additionally, Mr. Clifford's notes reflect that Respondent advised him that he had a history of heavy alcohol consumption/abuse; however, Respondent advised the psychiatrist performing a Court ordered evaluation that he drank alcohol in the past, but it was never a problem. [Exhibit 11, Bates No. 763] Additionally, ten days after he told Mr. Clifford he had an alcohol problem, Respondent testified under oath to the Kanawha County Circuit Court that he did not have an alcohol problem. [Exhibit 14, Bates No. 701 and Exhibit 11, Bates No. 619] Given the brevity and lack of continuity of the counseling sessions with Mr. Clifford and the demonstrated lack of candor in Respondent's disclosures to Mr. Clifford, this testimony and its effect was correctly assessed very little value in determining mitigation by the Hearing Panel Subcommittee.

Respondent also suggests that he has had full and free disclosure during these proceedings. However, Respondent's rendition of the felonious assault on his client, Mr. David L. Gump, is simply not supported by the facts and evidence. Respondent testified that Mr. David L. Gump was distressed because Respondent advised him that he would no longer represent his interests. Respondent testified that after a series of phone calls with Mr. David L. Gump that Mr. Gump appeared at his law office, which was located in his home, and began pounding on the front door. Respondent further testified under oath that when he came downstairs, Mr. David L. Gump had broken the bottom panes of glass in his front door by reaching in to try to unlock the door and then forcing the door open came into his foyer with a piece of concrete in his hand. Respondent stated that after struggling with Mr. David L. Gump in his foyer, Mr. David L. Gump dropped the concrete and Respondent struck him

with the wooden baseball bat multiple times. Respondent stated that the struggle then progressed onto the front porch and that Respondent continued to strike Mr. David L. Gump with the baseball bat. Respondent further stated that after Mr. David L. Gump attempted to flee from the assault levied upon him that Respondent then chased him down the street with the baseball bat and cornered him in an area that Mr. David L. Gump could not escape Respondent. After Respondent saw the police approaching, he then took his baseball bat and smashed the window out of Mr. David L. Gump's car. Respondent then provided a statement to the Charleston Police Department that he was the victim of an attempted burglary and battery. [Hearing Transcript at 148-167].

However, the evidence clearly contradicts Respondent's version of events of what happened leading up to and on that fateful December 2, 2010 day. Respondent testified that he terminated the attorney client relationship with Mr. David L. Gump on the phone prior to the violent assault. However, when he called 911 he clearly identified himself as Mr. David L. Gump's attorney. [Exhibit R7 and Transcript at 313-314]. Moreover, Respondent testified that he had already terminated the attorney client relationship, yet on December 3, 2010, the day following the December 2, 2010 incident he sought informal advice from the Office of Disciplinary Counsel as to whether, as a result of the altercation, if he had grounds to withdraw as counsel. [Transcript at 278-279]. All of these facts are inconsistent with Respondent's contention that the cause for Mr. David L. Gump's visit to his law office was to angrily protest Respondent's decision to terminate the relationship.

Additionally, despite Respondent's testimony that Mr. David L. Gump broke into his home and attacked him, the investigation reports by the police department show no physical evidence that Mr. David L. Gump was ever in Respondent's home. [Transcript at 545]. Despite Respondent's testimony that he violently beat Mr. David L. Gump with a baseball bat in the foyer of his home, the police were unable to document even a single drop of blood on the inside of Respondent's home. [Transcript at 426-427]. Despite Respondent's testimony that Mr. David L. Gump broke the bottom panes of glass in the door attempting to gain entry into his home, the crime scene photographs indicate that the top diamond of the glass was broken, which is consistent with an eye witness's accounting of the events that Respondent broke the glass out when he swung the baseball bat at Mr. David L. Gump while standing on his front porch. [Transcript at 281 and Exhibit 11, Bates No. 509].

The eye witness, who was a 10 year old minor, gave an accounting of the events to the police and she stated that she heard Respondent cussing on his front porch at Mr. David L. Gump. Then, she stated that Respondent attempted to hit Mr. David L. Gump with a baseball bat and missed, then tried again and missed and hit the top of the window of his front door breaking the glass. She then stated she saw Respondent chase Mr. David L. Gump off his front porch into the street and after Mr. David L. Gump had fallen down, she saw Respondent hit Mr. Gump with the baseball bat. She further stated that Respondent then again chased Mr. David L. Gump further down the street and beat him in the head with a baseball bat "over and over and over" again. [Exhibit 11, Bates No. 509]. Despite the fact that the eye witness accounting is consistent with the evidence, Respondent's explanation to

this 10 year old minor's statement is that she was lying. [Transcript at 284]. Respondent further explained that her uncle, who was also an eye witness and who gave a statement that mirrored her testimony, is also lying. [Transcript at 284]. Again, the Hearing Panel Subcommittee concluded that Respondent's rendition of this event is not accurate and is not trustworthy and therefore no mitigation value was assessed.

This Honorable Court should reject any mitigation value that Respondent seeks to assign to full and free disclosure to the Board after examining Respondent's unsupported testimony on the issues involving the misappropriation of Mr. Gerald Gump's settlement fees (*See infra* Aggravating Factors), the unsupported testimony involving the wanton endangerment charges involving his wife and her 4 year old son (*See supra* Findings of Facts and *see infra* Aggravating Factors); and the unsupported testimony of the felonious assault on his client, Mr. David L. Gump. Respondent failed to produce mitigating factors in this case that should reduce the sanction of annulment sought by ODC and recommended by the Hearing Panel Subcommittee.

4. Aggravating Factors

There are several aggravating factors present in this case and the same far outweigh the effect of any mitigation offered by Respondent. Aggravating factors are considerations enumerated under Rule 3.16 of the Rules of Lawyer Disciplinary Procedure for the Court to examine when considering the imposition of sanctions. Elaborating on this rule, the Scott court held "that aggravating factors in a lawyer disciplinary proceeding 'are any considerations, or factors that may justify an increase in the degree of discipline to be

imposed.'" Lawyer Disciplinary Board v. Scott, 213 W.Va. 209, 579 S.E. 2d 550, 557(2003) quoting ABA Model Standards for Imposing Lawyer Sanctions, 9.21 (1992). The following aggravating factors exist in this case: (1). history of violent criminal actions; (2). other violations of the Rules of Professional Conduct; (3). pattern of failing to follow Court Orders; (4). lack of full disclosure to the Hearing Panel Subcommittee (*see supra*); (5). continuation of a long history of violent behavior after the December 2, 2010 incident with his client; and (6). lack of remorse for actions.

The savage assault on his client is not the first episode of violent criminal behavior exhibited by Respondent. In addition to his long history of a myriad of traffic related offenses, on or about October 13, 1995, Respondent was convicted of Alcohol Intoxication in a Public Place, 1st & 2nd and Aggravated Assault in the 4th Degree. Respondent was fined and sentenced to six (6) months in jail, suspended sentence, and two (2) years unsupervised probation. [Exhibit 4, Bates 100].

On or about February 9, 2010, Respondent was also convicted of 2 Counts of Amended Down of Wanton Endangerment in the 2nd Degree. Respondent was sentenced to twelve (12) months jail to be served concurrently with a conditional discharge. [Exhibit 4, Bates 91-93]. Respondent testified that he and his wife got into an argument that he was concerned for her safety and tried to stop her from leaving. He testified that he never threw the propane tank through the windshield, but instead said that when she inexplicably struck him with the car, the propane tank fell out of his hands. [Transcript at 214-216].

However, in addition to the contradictory statements given to the police by his wife on the day of the event, the eye witness to this event, the next door neighbor, Danielle Stewart, gave a report to the police on the day of the event and stated that:

[s]he was pulling into her driveway and observed Mr. Robinson run between her house and his, towards the back. She then observed him run around front holding the propane tank. She witnessed him stand in the middle of the driveway as the garage door came up, and said that he picked the propane tank up over his head and threw it at the vehicle as his wife was backing out. Mrs. Stewart observed him do this several times until the rear window finally broke. Mrs. Stewart believed Mr. Robinson to have been waiting for Mrs. Case to back out, and was trying to impeded [sic] Mrs. Case from leaving. Mrs. Stewart then grabbed her child and ran into the house.

[Exhibit 4, Bates No. 140-141]. Regardless, Respondent repeatedly denies Mrs. Stewart's accounting of the incident and despite providing no motive or reason, simply insists that she was "motivated to exaggerate the facts". [Transcript at 406].

On or about March 2, 2010, Respondent was also convicted of Violation of Kentucky Emergency Protective Order / Domestic Violence Order involving his ex-wife and was fined. [Exhibit 4, Bates 91].

In addition to his lengthy and violent criminal history, Respondent's conversion of the settlement monies which rightfully belonged to his client, Mr. Gerald Gump should further aggravate the instant sanction as the same is in violation of the Rules of Professional Conduct and the same by itself would likely result in the annulment of Respondent's license to

practice law.² This Honorable Court, like most courts, follow “[t]he general rule (is) that absent compelling extenuating circumstances, misappropriation or conversion by a lawyer

²Because Respondent failed to deposit the settlement funds into a client trust account, failed to promptly deliver the owed fees to his client and instead converted the same to his own personal use, he has violated Rule 1.15(a); 1.15(b); 8.4(c) and 8.4(d) of the Rules of Professional Conduct which provides:

Rule 1.15. Safekeeping property.

(a) A lawyer shall hold property of clients or third persons that is in a lawyer’s possession in connection with a representation separate from the lawyer’s own property. Funds shall be kept in a separate account designated as a “client’s trust account” in an institution whose accounts are federally insured and maintained in the state where the lawyer’s office is situated, or in a separate account elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safe guarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

Rule 1.15. Safekeeping property.

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person shall promptly render a full accounting regarding such property.

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.

of funds entrusted to his/her care warrants disbarment.” Office of Disciplinary Counsel v. Jordan, 204 W.Va. 495, 513 S.E.2d. 722 (1998); and Lawyer Disciplinary Board v. Kupec (Kupec I), 202 W.Va. 556, 561, 505 S.E.2d 619, 631 (1998), *remanded with directions*, see Lawyer Disciplinary Board v. Kupec (Kupec II), 204 W.Va. 643, 515 S.E.2d 600 (1999).

On or about October 16, 2010, Gerald Gump, David L. Gump’s grandfather, retained Respondent to represent his interests in an accident that occurred in Gerald Gump’s car when it was being operated by David L. Gump on October 14, 2010. The attorney client agreement called for 40% of the settlement proceeds. [Exhibit 11, Bates No. 404]. On or about November 18, 2010, a check was received by Mr. Gerald Gump from State Farm as a result of the property damages from the October 14, 2010 accident. [Exhibit 11, Bates No. 427] Despite testifying to this Panel that he had no communication with the insurance company to negotiate or accept a settlement offer, and, in fact, did nothing on Mr. Gerald Gump’s behalf, on or about November 19, 2010, Respondent deposited Fifty Dollars (\$50.00) into a newly opened checking account and personally received the balance of the Mr. Gerald Gump’s settlement proceeds. [Hearing Transcript at 251 and ODC Exhibit 11, Bates No. 427]. It is undisputed that there is no documentation other than the attorney-client agreement drafted by Respondent which would entitle Respondent to any portion of the settlement proceeds. According to the contract prepared by Respondent’s own hand, at most, he was entitled to 40% of the settlement proceeds, but instead, despite providing no legal services to Mr. Gerald Gump, he converted the entire settlement fee that rightfully belonged to his

client, Mr. Gerald Gump, who at the time of this conversion was hospitalized, and according to Respondent, near death and on life support.

In addition, throughout the Kentucky and West Virginia criminal proceedings Respondent has demonstrated a continued failure to comply with Court Orders. On or about October 13, 2009, a Judgment on Guilty Plea was entered by the Fayette Circuit Court in the wanton endangerment case involving his wife and her four year old child. A sentencing hearing was set for November 20, 2009. Respondent failed to appear at the sentencing hearing and the Court entered an Order that revoked Respondent's bond and ordered Respondent and his surety to appear before the Court on December 18, 2009. The Court also issued a Warrant for Arrest for Respondent on or about November 25, 2009. On or about December 23, 2009, Respondent was arrested and incarcerated on a fugitive warrant arising from the Kentucky Warrant for Arrest that was issued on or about November 25, 2009. On or about December 30, 2009, Respondent appeared before the Kanawha County Circuit Court and was permitted to pay \$1,000.00 in bond and upon agreement with the prosecutor in Kentucky, Respondent was permitted to self-report to Kentucky for a sentencing hearing scheduled February 5, 2010.

Additionally, in the instant criminal matter, on or about March 8, 2010, the Kanawha County Circuit Court Judge issued an Arraignment Order which set Respondent's bond at \$25,000.00 or 10% cash. The Court further ordered that in addition to the bond, Respondent would be placed on home confinement. Respondent was advised by the Court that he had until 4:00pm on or about March 8, 2010, to post the requisite bond or self-report to jail. On

or about March 8, 2010, Respondent failed to appear before the Court and failed to self-report to jail. The Court subsequently issued a *Capias* Order for Respondent's failure to appear. On or about March 8, 2010, pursuant to the *Capias* Order, Respondent was arrested at his home by the SWAT team of the Charleston Police Department and was transported to South Central Regional Jail.

Moreover, while Respondent was incarcerated awaiting his April 19, 2010 trial date on the criminal assault of his client, Respondent was involved in a physical altercation with another inmate housed at South Central Regional Jail. The incident report indicates that on March 25, 2010, another inmate attempted to enter the cell shared by Respondent to speak to another inmate and Respondent told him to "get out and he said no, so inmate Robinson grabbed him by the throat and pushed him up against the wall and he, inmate Meadows, started hitting him". [Exhibit 11, Bates No. 459-464].

Perhaps the most troubling aspect of the hearing was Respondent's abject failure to acknowledge the wrongfulness of his conduct in any of the above-referenced situations. The Kentucky wanton endangerment charges involving his wife and her 4 year old child were trumped up by police officers and a lying neighbor. [Transcript at 406]. The failure to appear in Kentucky resulting in the bench and fugitive warrant was his lawyer's fault. [Transcript at 219-221]. His failure to surrender to authorities at a time set by the Court and then subsequently as agreed to by the Charleston Police Department was simply confusion on his part because the Court and law enforcement personnel were not clear enough about the details. [Transcript at 296-301]. The Kanawha County vicious assault was his client's fault

and the resulting criminal and disciplinary proceeding effects were because of sensationalized newspaper accounts and an over-zealous prosecutor. [Transcript at 285; and Exhibit 11 Bates No. 675-676]. Respondent's complete and apparent failure to recognize the magnitude of and his responsibility for his actions is deeply troubling and should aggravate any sanction issued in this case.

Instead, as Assistant Prosecuting Attorney Fred Giggenbach testified that Respondent's case was in a posture to proceed to trial on all four (4) counts of the Indictment on Monday, April 19, 2010, but the parties ultimately reached a plea agreement the day before trial was set to commence. [Transcript at 518]. APA Giggenbach testified that he believed going into the trial he had a very strong case against Respondent on all Counts of the Indictment. APA Giggenbach testified that it was important to him to secure a felony conviction with the plea because:

...the important part of the agreement for me was that— first of all, that there be a felony conviction, because when you see a progression of violent behavior, when you see a progression— and that's not even considering he's a lawyer, just as a person— a progression of violent behavior, starting with domestics with his wife, going back to '95 a violent act, and this culminating in what happened here in Charleston, at some point the person needs to have a felony conviction to stop him from owning a firearm, to have repercussions of possible prison time, and to make it a much more serious case than just a misdemeanor with— that had probation.
So I wanted a felony conviction in this case because the facts supported it too.

.....

I mean, if you look at the elements of unlawful wounding, they're very serious elements. It's the closest as you can get to attempted murder or murder that there is.

[Transcript at 513-514].

V. CONCLUSION

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. Given Respondent's misconduct, annulment is the only appropriate sanction in Respondent's case.

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 principal 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).

The evidence presented meets and exceeds the clear and convincing standard. Respondent has violated the Rules of Professional Conduct and the aggravating factors far outweigh any effect of mitigating factors. Respondent has a history of violent behavior documented back to 1995 and continuing until the incident that occurred in 2010 while he was incarcerated. There is no evidence to suggest that Respondent possesses the requisite fitness or character to hold a license to practice law in the State of West Virginia. There is no evidence to suggest that Respondent should receive anything other than the ultimate sanction afforded by the Supreme Court of Appeals of West Virginia in lawyer disciplinary matters: annulment of his law license.

Therefore, for the reasons set forth above, the Disciplinary Counsel urges this Honorable Court to adopt the following recommended sanctions:

1. That Respondent's law license be annulled;
2. That prior to petitioning for reinstatement of his law license that Respondent undergo a comprehensive psychological examination by an independent licensed psychiatrist to determine if Respondent is fit to practice law;
3. That Respondent fully comply with any and all treatment protocol expressed by this licensed psychiatrist;
4. That prior to petitioning for reinstatement of his law license that Respondent complete an extensive course recommended by the aforementioned licensed psychiatrist in Anger Management ;

4. That prior to petitioning for reinstatement, Respondent pay the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure; and
5. That, upon reinstatement, Respondent's practice be supervised for a period of two (2) years.

Respectfully submitted,
The Office of Disciplinary Counsel,
By counsel.

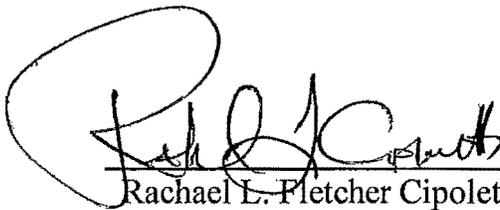


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CERTIFICATE OF SERVICE

This is to certify that I, **Rachael L. Fletcher Cipoletti**, Lawyer Disciplinary Counsel for the Office of Disciplinary Counsel, have this day, the 1st day of June, 2012, served a true copy of the foregoing "**Brief of the Office of Disciplinary Counsel**" upon Sherri D. Goodman, Esquire, Counsel for Respondent Joshua M. Robinson, by mailing the same via United States Mail, with sufficient postage, to the following address:

Sherri D. Goodman, Esquire
Post Office Box 1149
Charleston, West Virginia 25324



Rachael L. Fletcher Cipoletti