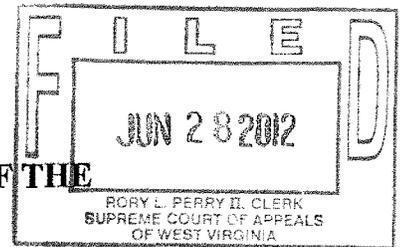


**BEFORE THE SUPREME COURT OF APPEALS OF THE
STATE OF WEST VIRGINIA**



LAWYER DISCIPLINARY BOARD,

Complainant,

v.

No. 35667

DAVID A. ALESHIRE,

Respondent.

BRIEF OF THE LAWYER DISCIPLINARY BOARD

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I. STATEMENT OF THE CASE

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

This is a disciplinary proceeding against Respondent David A. Aleshire, (hereinafter “Respondent”), arising as the result of a Statement of Charges issued against him and filed with the Supreme Court of Appeals of West Virginia On July 7, 2010. The Clerk attempted service of process upon Respondent by certified mail on July 7, 2010, but the green card indicated that service was never returned to the Court. The Office of Disciplinary Counsel then obtained service on Respondent on August 11, 2010, and Respondent participated in a scheduling conference on that same date. Disciplinary Counsel filed its mandatory discovery On August 31, 2010. Respondent failed to file his Answer to the Statement of Charges, which was due on or before September 13, 2010. Respondent also failed to provide his mandatory discovery, which was due on or before September 30, 2010. Disciplinary Counsel then filed a Motion to Exclude Testimony of Witnesses And/or Documentary Evidence or Testimony of Mitigating Factors on October 15, 2010.

Based on Respondent’s representations that the Answer had been filed, the Hearing Panel Subcommittee did not grant Disciplinary Counsel’s motions at the telephonic prehearing held on October 27, 2010. Instead, Respondent was directed to provide a copy of his answer. Respondent provided a two page “Answer to Statement of Charges”, which was not dated, signed or verified by Respondent. Moreover, Respondent’s “Answer to Statement of Charges” had not previously been filed with the Clerk of the Supreme Court of

Appeals of West Virginia. The Hearing Panel Subcommittee met in executive session on October 29, 2010, to discuss the matter. The Panel determined that it wished to proceed on the merits of the case and ordered a continuance of the November 15, 2010 hearing date. The Panel further ordered that a scheduling conference would be held on November 15, 2010.

On November 15, 2010, Respondent was given leave to submit his discovery documents and witness list to the Office of Disciplinary Counsel by 5:00 p.m. on December 3, 2010. Respondent was ordered to provide a confirming letter with a copy of the Certificate of Service to the Hearing Panel Subcommittee. In addition, Disciplinary Counsel was ordered to file any additional discovery by January 14, 2011; all depositions were to be taken and any supplemental discovery submitted on or before January 31, 2011; and all motions were to be filed on or before January 31, 2011. The November 15, 2010 hearing was continued to February 23, 2011.

At the February 16, 2011 prehearing, Disciplinary Counsel advised the Hearing Panel Subcommittee that Respondent had failed to provide any discovery materials or a list of possible witnesses and renewed her motion to "Exclude Testimony of Witnesses and Documentary Evidence or Testimony of Mitigating Factors". The Hearing Panel Subcommittee granted this motion.

Thereafter, this matter proceeded to hearing in Charleston, West Virginia, on February 23, 2011 and July 26, 2011. The Hearing Panel Subcommittee was comprised of Pamela D. Tarr, Esquire, Chairperson, J. Miles Morgan, Esquire, and Dr. Robert J. Rufus, layperson.

Rachael L. Fletcher Cipoletti, Chief Lawyer Disciplinary Counsel, appeared on behalf of the Office of Disciplinary Counsel. Respondent appeared *pro se*. The Hearing Panel Subcommittee heard testimony from Nedra Vance, Carol J. Harless, James M. Sturgeon, Jr., Esquire, Jo Ann Walker, John R. Weaver, Paul M. Carper, Jr., Clayton G. Anderson, Esquire, and Respondent. In addition, ODC Exhibits 1-34 were admitted into evidence at the hearing. The Hearing Panel Subcommittee requested that Attorney Clayton G. Anderson provide a billing statement for the work he performed on behalf of Mr. and Mrs. Harless in *Ernest Harless and Carol Harless v. Mountain Financial Solutions, LLC, David Aleshire and Clarence Aleshire*, Civil Action No. 10-C-1046 (Hon. Louis Bloom) and the same is included as ODC Exhibit 35.

On April 2, 2012, the Hearing Panel Subcommittee issued its decision in this matter and filed with the Supreme Court of Appeals of West Virginia its "Report of the Hearing Panel Subcommittee" (hereinafter "Report"). The Hearing Panel Subcommittee properly found that the evidence established that Respondent violated Rules 1.2, 1.3, 1.4(a), 1.4(b) and 8.1(b) of the Rules of Professional Conduct with regard to Count I; and Rules 1.2, 1.5, 8.1(b), 8.4(b), 8.4(c) and 8.4(d) of the Rules of Professional Conduct with regard to Count II.

On or about April 18, 2012, ODC filed a notice that it did not object to the Hearing Panel Subcommittee recommendation.

On or about May 23, 2012, this Honorable Court issued an Order that indicated it did not concur with the recommended disposition. The Court ordered the parties to submit briefs

and set this case for oral argument pursuant to Rule 19 of the Revised Rules of Appellate Procedure.

B. FINDINGS OF FACT AND CONCLUSIONS OF LAW

David A. Aleshire (hereinafter “Respondent”) is a lawyer practicing in Charleston, Kanawha County, West Virginia, and, as such, is subject to the disciplinary jurisdiction of the Supreme Court of Appeals of West Virginia and its properly constituted Lawyer Disciplinary Board. After passing the West Virginia Bar Examination, Respondent was admitted to The West Virginia State Bar on May 1, 1995.

**Count I
Complaint of Nedra Vance
I.D. No. 09-03-056**

In 2004, Complainant Nedra Vance hired Respondent to handle her personal and business taxes and provide her with legal advice regarding other tax matters. Respondent did not prepare a letter of engagement concerning the work he was to perform for Complainant Vance. Complainant stated that she provided all documentation that Respondent requested to pursue the matters for which he had been retained, including documents relating to her personal and business taxes, and the original deed for her property. Complainant stated that in approximately 2007, she began experiencing problems with Respondent. She attempted to telephone him numerous times and was unsuccessful. Complainant stated she also sent several letters requesting the status of her tax matters, none of which were answered.

By letter dated November 21, 2008, Complainant requested the return of her documents so she could retain a Certified Public Accountant to pursue these tax matters on

her behalf. The certified letter to Respondent was returned to her unopened marked “unclaimed” On December 9, 2008. ODC Exhibit 1, Bates No. 003. Complainant testified that after she received notice from the Internal Revenue Service that her tax matters needed to be addressed post haste, she hired a Certified Public Accountant to pursue the same. She further testified that her Certified Public Accountant also attempted to secure Complainant’s documents from Respondent and was also unsuccessful. Complainant Vance terminated her attorney/client relationship with Respondent in November 2008. Day 1 Transcript at 79. ODC Exhibit 1, Bates No. 003-006.

On January 28, 2009, Complainant Vance filed a complaint with the Office of Disciplinary Counsel against Respondent. ODC Exhibit 1. On January 29, 2009, the Office of Disciplinary Counsel sent Respondent a letter directing him to file a response to the complaint within twenty days. ODC Exhibit 2. After receiving no response, on March 10, 2009, the Office of Disciplinary Counsel sent a second letter by certified mail and first class mail to Respondent directing him to file a response within ten days. ODC Exhibit 3. On March 31, 2009, the certified letter was returned as “unclaimed”. ODC Exhibit 4.

The Office of Disciplinary Counsel subsequently attempted to contact Respondent by telephone. The Office of Disciplinary Counsel left voice mail messages for Respondent on at least two occasions, but never received a return telephone call. On June 23, 2009, the Office of Disciplinary Counsel sent Respondent another letter by certified mail and first class mail directing him to file a response to the complaint on or before July 8, 2009. ODC Exhibit

5. On July 13, 2009, the certified letter was returned to the Office of Disciplinary Counsel as “unclaimed”. ODC Exhibit 6.

On September 17, 2009, the Office of Disciplinary Counsel requested the issuance of a Subpoena *duces tecum* to take the sworn statement of Respondent on October 22, 2009. ODC Exhibit 8. On October 22, 2009, the subpoena was returned to the Office of Disciplinary Counsel by the Kanawha County Sheriff’s Office. The notation on the subpoena indicated that the Sheriff’s Office was unable to serve Respondent. It further stated that Respondent was “not home or not answering door [sic]. Did not return phone msg. [sic]. ODC Exhibit 9.

On November 3, 2009, the Office of Disciplinary Counsel requested the issuance of a second Subpoena *duces tecum* for Respondent’s appearance for a sworn statement on December 9, 2009. Because of the failed attempt to serve via the Sheriff’s Office, on November 5, 2009, the Office of Disciplinary Counsel hired process server John R. Weaver, of Weaver Investigations, to attempt service of process. In addition to testifying at the hearing, Mr. Weaver issued a report dated November 23, 2009, that detailed two telephone messages left at Respondent’s home and five attempts at service of process upon Respondent at his home and indicated that each attempt was unsuccessful. Day 1 Transcript at 206-215; ODC Exhibit 10.

Complainant Vance testified that initially she was satisfied with Respondent’s services as a tax lawyer. At the onset of their business relationship in 2004, Respondent was a Certified Public Accountant. Respondent’s licensure as a Certified Public Accountant

expired on June 30, 2007. Day 1 Transcript at 166, 176-177, 190. At some point prior to the termination of their relationship in 2008, Complainant Vance learned that Respondent was no longer a Certified Public Accountant. Day 1 Transcript at 62-65. Complainant Vance testified that she filed the complaint against Respondent because he refused to return her tax documents so her Certified Public Accountant could prepare her tax returns. As of the date of the hearing, Complainant Vance testified that she still had not received any documents back from Respondent. Day 1 Transcript at 32-33.

Because Respondent failed to abide by Complainant's stated objectives of the representation and otherwise failed to diligently pursue her tax matters or advise her that he no longer wished to represent her, Respondent has violated Rule 1.2 and Rule 1.3 of the Rules of Professional Conduct. Because Respondent failed to keep Complainant informed about her case and or provide her with information that permitted her to make reasonable decisions about her tax matters, Respondent has violated Rule 1.4 of the Rules of Professional Conduct. Because Respondent failed to respond to multiple requests for information from the Office of Disciplinary Counsel he has violated Rule 8.1(b) of the Rules of Professional Conduct.

Count II
Complaint of Carol J. Harless
I.D. No. 10-03-007

Complainant Carol J. Harless purchased a piece of property from Respondent's real estate company, Mountain Financial Solutions, LLC, of which Respondent is a member. Complainant Harless stated that on November 18, 2009, she sent Respondent a check in the

amount of \$6,540.00. Of that amount, \$6,500.00 was the purchase price of the property and \$40.00 was for “closing costs”. ODC Exhibit 13, Bates No. 083-084. On November 23, 2009, Respondent deposited the same into his IOLTA account at City National Bank. ODC Exhibit 19, Bates No. 126.

Respondent’s bank records demonstrate that, upon deposit of Complainant Harless’s check into his IOLTA account, Respondent immediately began using that money as his own and writing checks out of the account made payable to himself and various other entities. ODC Exhibit 19. Pursuant to the Real Estate Purchase and Sales Agreement (“Sales Agreement”) drafted by Respondent, Complainant Harless then asked Respondent to deliver the deed to the property. ODC Exhibit 13, pp. 64, 66, 69-70, 78-80. Respondent replied via email that he was “waiting for the check” to clear. Complainant Harless testified that after Respondent cashed the check on November 23, 2009, and he stopped communicating with Complainant Harless and her husband. Complainant Harless sent Respondent several emails, left telephone messages for him and sent him two letters asking for the deed. She received no response. ODC Exhibit 13, Bates No. 057-072.

When Complainant Harless called the West Virginia Board of Accountancy to complain about Respondent’s conduct, she learned that, despite the notation on his business card that Respondent gave her in November of 2009, he was no longer a certified public accountant. ODC Exhibit 56 and ODC Exhibit 21.

On January 6, 2010, a complaint was filed at the Office of Disciplinary Counsel against Respondent. ODC Exhibit 13. On January 6, 2010, the Office of Disciplinary

Counsel sent Respondent a letter directing him to file a response to the complaint within twenty days. ODC Exhibit 14. On January 8, 2010, the Office of Disciplinary Counsel requested the issuance of a third Subpoena *duces tecum* for Respondent's appearance for a sworn statement on February 24, 2010. Because of the prior failed attempt by the Sheriff and a process server, on January 13, 2010, the Office of Disciplinary Counsel hired investigator P.M. Carper, to attempt service of process. In addition to testifying at the hearing, Mr. Carper issued a written report dated March 10, 2010, documenting his seven attempts at service of process upon Respondent at his home and indicating that each attempt was unsuccessful. Day 1 Transcript at 223-228; ODC Exhibit 11.

Complainant Harless testified that, despite her repeated requests for the same, Respondent refused to transfer the deed to the property to her or to provide Complainant with a copy of the signed Sales Agreement. Day 1 Transcript at 139-149; Day 2 Transcript at 33, 35. Unable to resolve the matter on her own, Complainant hired an attorney, Clayton G. Anderson, Esquire, to pursue this matter. Day 1 Transcript at 110-111. Attorney Anderson testified that he attempted on multiple occasions to communicate with Respondent, both via telephone and letter, to resolve the situation informally. Day 2 Transcript at 87; ODC Exhibit 28, Bates No. 0941; 0933; and 0934. Unable to communicate with Respondent or otherwise resolve the matter informally, on June 15, 2010, Attorney Anderson filed an Amended Complaint and Motion for Preliminary Injunction and Permanent Injunction (10-C-1046) on Complainant Harless' behalf against Respondent in the Circuit Court of Kanawha County, West Virginia. ODC Exhibit 27, Bates No. 731-740.

On August 6, 2010, Respondent produced in the civil proceeding pending in Kanawha County Circuit Court for the first time a “revised” Sales Agreement that listed the purchase price for the property as Six Thousand Nin Hundred Sixty Dollars (\$6,960.00), or Four Hundred and Sixty Dollars (\$460.00) more than the original agreed upon and previously paid price. ODC Exhibit 28, Bates No. 0815-0817. The “revised” Sales Agreement was produced by Respondent at a hearing before Kanawha County Circuit Court Judge Louis Bloom. Respondent appeared at the August 6th hearing without his file containing the relevant documents. Judge Bloom permitted Respondent to return to his home to retrieve his file. Respondent returned to Court with the “revised” Sales Agreement which Respondent represented as accurately reflecting the original agreement between the parties. Day 1 Transcript at 111, 127. Until Respondent produced the “revised” Sales Agreement with the “new” purchase price on August 6, 2010, there is no evidence to corroborate Respondent’s contention that he previously communicated to Complainant Harless that he believed she owed him additional money for the real estate purchase. Day 2 transcript at 200. Additionally, Respondent admitted that he never provided Complainant Harless with a signed copy of the original Sales Agreement. Day 2 Transcript at 261.

As part of the settlement negotiations in the civil case, Respondent demanded that Complainant Harless pay the sum of \$210.00 for half of the outstanding closing costs; pay him \$935.00 which he indicated represented half of his legal fees incurred from defending

himself in the disciplinary action¹; and conditioned the settlement upon Complainant's withdrawal of the disciplinary complaint. ODC Exhibit 28, Bates No. 0818. Attorney Anderson testified that he promptly informed Respondent that he could not enter into a settlement agreement whereby the condition of the withdrawal of the ethics complaint since such a condition would violate the Rules of Professional Conduct. Day 2 Transcript at 99; 159-160. Attorney Anderson advised Respondent by letter dated August 9, 2010, that, to settle the civil action, his client would pay the sum of Nine Hundred Dollars (\$900.00) and write a letter to ODC advising that all matters between the parties had been resolved. ODC Exhibit 28, Bates No. 0819-0820.

By letter dated August 10, 2010, Attorney Anderson sent Respondent a Mutual Release and Settlement Agreement. ODC Exhibit 28, Bates No. 793. By letter dated August 20, 2010, Attorney Anderson sent Respondent a follow-up letter inquiring about the status of the release. ODC Exhibit 28, Bates No. 798. By letter dated August 31, 2010, Attorney Anderson sent Respondent a second letter inquiring about the executed agreements. ODC Exhibit 28, Bates No. 800. On September 9, 2010, Attorney Anderson filed a Motion to Enforce Settlement in the Circuit Court of Kanawha County, West Virginia. ODC Exhibit 27, Bates No. 0712-0717. On September 16, 2010, Attorney Anderson filed Plaintiff's Motion for Default Judgment. ODC Exhibit 27, Bates No. 0706-0709. The motions were noticed for hearing for October 5, 2010. ODC Exhibit 27, Bates No. 710. On October 4,

¹It is noted that as of August 6, 2010, Respondent had in no way participated in the investigation or defense of the instant disciplinary complaint and therefore this claim for attorney fees is false.

2010, Attorney Anderson filed Plaintiff's Motion for Attorney Fees and Costs. ODC Exhibit 27, Bates No. 700-703.

A hearing was held before Judge Bloom on October 5, 2010, and the settlement terms were read into the Court record. ODC Exhibit 27, Bates No. 630-640. By letter dated November 2, 2010, Attorney Anderson sent a copy of the Dismissal Order he had prepared to Respondent, requesting Respondent to execute the same and return it to him for entry with the Court. He also enclosed the necessary settlement documents for Respondent's execution. ODC Exhibit 27, Bates No. 629. The Dismissal Order was entered by the Court On November 24, 2010. ODC Exhibit 27, Bates No. 627.

Following entry of the Dismissal Order, Respondent again refused to communicate with Attorney Anderson and/or execute the necessary settlement documents. On January 11, 2011, Attorney Anderson sent a letter to Respondent indicating that, if Respondent did not respond, he would seek Court intervention. On February 3, 2011, Attorney Anderson filed an Amended Motion to Enforce Settlement. ODC Exhibit 27, Bates No. 605. An Order Approving Compromise and Settlement and Dismissing Claims was entered by the Court On February 25, 2011. ODC Exhibit 27, Bates No. 564-566. By letter dated March 9, 2011, Attorney Anderson requested Respondent to provide a date to comply with the terms of the settlement agreement. ODC Exhibit 28, Bates No. 0788. By letter dated March 15, 2011, Attorney Anderson again requested Respondent comply with the terms of the February 2011 settlement Order. Attorney Anderson indicated that his clients had previously sent Respondent a \$900.00 settlement check that had not been cashed or returned and had mailed

letters to ODC and the Board of Accountancy advising these agencies that the parties had reached a settlement in the civil action. ODC Exhibit 28, Bates No. 0866-0870.

By letter dated March 24, 2011, Respondent requested that Complainant make the check payable to "David Aleshire, Attorney" for deposit into his IOLTA account. Respondent also proposed two meetings dates to resolve the matter: March 29, 2011 at 2pm or March 30, 2011, at 2pm. ODC Exhibit 28, Bates No. 0781. By letter dated March 30, 2011, Attorney Anderson expressed his frustration with the matter and indicated that it was his intention to resolve this matter on behalf of his clients on March 30, 2011 at 2pm. ODC Exhibit 28, Bates No. 0783-0784. On March 30, 2011, Attorney Anderson and his clients arrived at the arranged meeting place with a check made payable to the defendants in the civil suit for \$900.00 and a release. Day 2 Transcript at 150. Respondent did not show up for this March 30, 2011, but instead sent his father, Clarence Aleshire, who is also a member of Mountain Financial Solutions, LLC. Day 2 Transcript at 151. The matter was still not resolved at this March 30, 2011 meeting.

By letter dated May 16, 2011, Attorney Anderson again wrote to Respondent and outlined Respondent's father's concerns with (a) the party to whom the check had been made payable and (b) the proposed language in the release at the March 30, 2011 meeting. Attorney Anderson indicated that he was "open to a "breath of fresh air" on this issue" and requested Respondent put "something to me in writing as to how we can put this matter behind all of us". ODC Exhibit 31, Bates No. 981-982. Respondent did not respond to this letter, either in writing or by telephone. Day 2 Transcript at 111; 243-245.

On July 7, 2011, another Motion to Enforce Settlement was filed by Attorney Anderson. ODC Exhibit 32, Bates No. 0984; ODC Exhibit 34. Attorney Anderson testified that, as of July 26, 2011, the matter still had not been resolved; another hearing was set before Judge Bloom for September 8, 2011. Day 2 Transcript at 111-112.

Pursuant to the Hearing Panel Subcommittee's request, Attorney Anderson submitted his billing records in this matter. Through August 1, 2011, Attorney Anderson had expended 40.2 hours in representing Complainant Harless and her husband in the Kanawha County civil action. ODC Exhibit 35. Attorney Anderson testified that he had not charged the Harlesses "a red cent for my time." Day 2 Transcript at 15.

Respondent conceded during his testimony at the hearing that the actual purchase price of the property in question is Six Thousand Five Hundred Dollars (\$6,500.00). Day 2 Transcript at 216-218, 283. Respondent further conceded that the "revised" Sales Agreement that contained a purchase price of Six Thousand Nine Hundred Sixty Dollars (\$6,960.00) misrepresented the actual purchase price of the property. Day 2 Transcript at 285-286, 361-362. Respondent admitted that the additional Four Hundred Sixty Dollars (\$460.00) contained in the "revised" Sales Agreement reflected a charge for Complainant's alleged portion of his fees for legal services performed in relation to the "closing". Day 2 Transcript at 281-292. Respondent did not provide a copy of the settlement statement he claimed he prepared in relation to the closing. Day 2 Transcript at 369-371. Complainant testified that she was never presented with a settlement statement or "any kind of cost breakdown". Day 2 Transcript at 412-413. Respondent alleged that the following were the legal services he

performed in relation to the “closing” for which the Complainant was billed: paying the delinquent taxes on the property for 2009 and prior years and providing Complainant with a receipt to show that the delinquent taxes had been paid, preparing the settlement sheet which Complainant testified she never received, and being physically present at the closing. Day 2 Transcript at 303. However, pursuant to both versions of the Sales Agreement, it is the responsibility of Mountain Financial Solutions, LLC, the company of which Respondent is a principal, (a) to see that delinquent taxes on the property for 2009 and before were paid; and (b) for all of the seller’s legal fees related to the sale of the land. Day 2 Transcript at 387-388, 399.

Complainant was deprived of both the purchase price of the property in question in the amount of Six Thousand Five Hundred Dollars, as well as the use of the property itself since November 2009 over a dispute with Respondent concerning his bill for legal services in the amount of Four Hundred Sixty Dollars (\$460.00). Day 2 Transcript at 393. There is no evidence to corroborate Respondent’s contention that he was retained by Complainant to serve as the Harlesses’ counsel during the closing, that the Harlesses understood the nature and extent of legal services to be provided by Respondent in relation to the closing, or that the Harlesses ever received any settlement statement setting out the legal services for which they were being charged. Day 2 Transcript at 395-396, 405-406. Finally, in requiring the Harlesses to pay a portion of the closing costs related to the payment of delinquent property taxes, Respondent was reducing the amount of legal fees that were actually the responsibility

of Mountain Financial Solutions, LLC, a company in which Respondent has a financial interest. Day 2 Transcript at 406.

On September 24, 2011, Attorney Anderson advised the Office of Disciplinary Counsel that all matters in the Kanawha County civil action had finally been resolved on September 8, 2011, the date of the Motion to Enforce the Settlement hearing before Judge Bloom.

Because Respondent negotiated for and accepted money for the purchase of property and then failed to deliver the property per the Sales Agreement solely due to a dispute related to his legal fees which were largely the responsibility of the seller, and because he knowingly misrepresented the amount of the actual purchase price in a circuit court proceeding, Respondent has violated Rule 8.4(b); 8.4(c) and 8.4(d) of the Rules of Professional Conduct. Because Respondent failed to respond to multiple requests for information from the Office of Disciplinary Counsel he again violated Rule 8.1(b) of the Rules of Professional Conduct. Because Respondent admitted at the hearing that, despite the express language contained in the Sales Agreement which Respondent himself drafted requiring the seller to be responsible for all of seller's fees related to the sale of the land, he improperly charged for half of the legal fees associated with the closing transaction without the knowledge and/or the express or implied consent of Complainant Harless, he has violated Rule 1.5; 1.2; and 8.4(c) of the Rules of Professional Conduct. Moreover, Respondent's conduct after the Statement of Charges was filed against him and his conduct in the resulting civil action which necessitated the filing of multiple motions to enforce the Settlement Agreement that he himself had

negotiated is conduct that is prejudicial to the administration of justice. Consequently, he has further violated Rule 8.4(d) of the Rules of Professional Conduct as previously stated herein.

II. SUMMARY OF ARGUMENT

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, the Hearing Panel Subcommittee of the Lawyer Disciplinary Board recommends to this Honorable Court that Respondent's license to practice law in the State of West Virginia be suspended from the practice of law for one (1) year. The Board further recommends that because the legal fees charged by Respondent were neither authorized or earned that Respondent pay restitution to Complainant Harless. The Board further believes that prior to petitioning for reinstatement Respondent must demonstrate a basic knowledge of the professional responsibilities of a lawyer by passing the MultiState Professional Responsibility Exam and taking an additional twelve (12) hours of Continuing Legal Education in the area of legal ethics. Moreover, that in an effort to protect the public that if Respondent is reinstated to the practice of law that he be on probation for a period of 2 years with his practice supervised by a member in good standing of the West Virginia State Bar whose practice includes tax and real estate matters. Finally, the Board believes that

Respondent should be assessed the costs of the disciplinary proceedings and be required to pay the same prior to petitioning this Court for reinstatement.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Court's May 23, 2012 Order set this matter for oral argument and consideration under Rule 19 of the Revised Rules of Appellate Procedure.

IV. ARGUMENT

A. STANDARD OF PROOF

In lawyer disciplinary matters, a *de novo* standard of review applies to questions of law, questions of application of the law to the facts, and questions of appropriate sanction to be imposed. Roark v. Lawyer Disciplinary Board, 207 W. Va. 181, 495 S.E.2d 552 (1997); Committee on Legal Ethics v. McCorkle, 192 W. Va. 286, 452 S.E.2d 377 (1994). The Supreme Court of Appeals gives respectful consideration to the Lawyer Disciplinary Board's recommendations as to questions of law and the appropriate sanction, while ultimately exercising its own independent judgment. McCorkle, 192 W. Va. at 290, 452 S.E.2d at 381.

Substantial deference is to be given to the Lawyer Disciplinary Board's findings of fact unless the findings are not supported by reliable, probative, and substantial evidence on the whole record. McCorkle, Id.; Lawyer Disciplinary Board v. Cunningham, 195 W. Va. 27, 464 S.E.2d 181 (1995). At the Supreme Court level, "[t]he burden is on the attorney at law to show that the factual findings are not supported by reliable, probative, and substantial

evidence on the whole adjudicatory record made before the Board." Cunningham, 464 S.E.2d at 189; McCorkle, 192 W. Va. at 290, 452 S.E.2d at 381.

The charges against an attorney must be proven by clear and convincing evidence pursuant to Rule 3.7 of the Rules of Lawyer Disciplinary Procedure. *See*, Syl. Pt. 1, Lawyer Disciplinary Board v. McGraw, 194 W. Va. 788, 461 S.E.2d 850 (1995).

The Supreme Court of Appeals is the final arbiter of formal legal ethic charges and must make the ultimate decisions about public reprimands, suspensions or annulments of attorneys' licenses to practice law. Syl. Pt. 3, Committee on Legal Ethics v. Blair, 174 W. Va. 494, 327 S.E.2d 671 (1984); Syl. Pt. 7, Committee on Legal Ethics v. Karl, 192 W. Va. 23, 449 S.E.2d 277 (1994).

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

The Supreme Court of Appeals of West Virginia has long recognized that attorney disciplinary proceedings are not designed solely to punish the attorney, but also to protect the public, to reassure the public as to the reliability and integrity of attorneys, and to safeguard its interests in the administration of justice. Lawyer Disciplinary Board v. Taylor, 192 W. Va. 139, 451 S.E.2d 440 (1994).

Factors to be considered in imposing appropriate sanctions are found in Rule 3.16 of the Rules of Lawyer Disciplinary Procedure. These factors consist of: (1) whether the lawyer has violated a duty owed to a client, to the public, to the legal system, or to the profession; (2) whether the lawyer acted intentionally, knowingly, or negligently; (3) the

amount of the actual or potential injury caused by the lawyer's misconduct; and (4) the existence of any aggravating or mitigating factors. *See also*, Syl. Pt. 4, Office of Disciplinary Counsel v. Jordan, 204 W.Va. 495, 513 S.E.2d 722 (1998).

1. Respondent violated duties to his clients, to the public, to the legal system and to the legal profession.

Respondent violated the duty of diligence, the duty of effective communication and the duty of candor when dealing with Complainant Vance. Moreover, the community at large expects lawyers, such as Respondent, to exhibit the highest standards of honesty and integrity, and Respondent clearly violated his duty to the public by engaging in conduct that involved dishonesty in his dealings with Complainant Harless and while representing himself and Mountain Financial Solutions, LLC in civil proceedings pending before the Circuit Court of Kanawha County, West Virginia. Respondent violated his duty to the legal system by attempting to circumvent the disciplinary process by not participating in the same and later attempting to force a settlement term of the termination of an ethics complaint. Finally, Respondent violated his duty to the legal profession by charging unauthorized legal fees in Complainant Harless's case and otherwise failing to maintain the integrity of the profession.

2. Respondent acted intentionally, knowingly or negligently.

The evidence in this case demonstrates that Respondent acted intentionally and knowingly when he prepared a "revised" Sales Agreement which misrepresented the purchase price and submitted the "revised Sales Agreement as evidence in litigation in the Circuit Court of Kanawha County. Moreover, the Hearing Panel Subcommittee found that Respondent's selective "receipt" of mail containing checks as opposed to mail from clients,

opposing counsel, the Office of Disciplinary Counsel and the Board of Accountancy also was deceitful. However, the Hearing Panel Subcommittee noted that in response to questioning from members of the Hearing Panel Subcommittee, Respondent clearly appeared to be unfamiliar with the Rules of Professional Conduct and out of his depth in his substantive areas of practice. *See* Day 2 Transcript at pp. 362, 384-385, 393-394, 396.

3. The injury to the Complainants is real and monetary.

As a result of Respondent's actions, both Complainant Vance and Complainant Harless have suffered actual monetary damage. In addition, Respondent's conduct has brought the legal system and legal profession into disrepute.

4. There are several aggravating factors present

The Hearing Panel Subcommittee found that in addition to no prior disciplinary sanctions against Respondent, there was evidence that many of Respondent's actions were a result of ignorance. However, the Hearing Panel Subcommittee also found there were numerous aggravating factors in this case. Aggravating factors are considerations enumerated under Rule 3.16 of the Rules of Lawyer Disciplinary Procedure for the Court to examine when considering the imposition of sanctions. Elaborating on this rule, the Scott Court held "that aggravating factors in a lawyer disciplinary proceeding 'are any considerations, or factors that may justify an increase in the degree of discipline to be imposed.'" Lawyer Disciplinary Board v. Scott, 213 W.Va. 216, 579 S.E. 2d 550, 557 (2003) *quoting* *ABA Model Standards for Imposing Lawyer Sanctions*, 9.21 (1992).

In this case, the following factors should be considered as aggravating factors: 1. dishonest or selfish motive; 2. multiple offenses; 3. failure to cooperate in the investigation

of the disciplinary complaints; 4. failure to participate in the companion civil proceedings; 5. refusal to acknowledge wrongful nature of conduct; and 6. Respondent's requirement that Complainant withdraw her ethics complaint in order to settle the civil matter is in violation of Legal Ethics Opinion 88-03 "Settlement Agreements Requiring Complainants to Withdraw Ethics Complaints".

However, it is noted that the Hearing Panel Subcommittee found that the evidence adduced failed to prove that Respondent held himself out as a licensed Certified Public Accountant to Complainant Vance after June 30, 2007, the date his licensure expired. Moreover, Respondent's licensure as a Certified Public Accountant was not germane to any legal services performed for Complainant Harless. The Hearing Panel Subcommittee noted that his presentation to Complainant Harless of a business card in November 2009 advising her he was a Certified Public Accountant is already the subject of a complaint filed with the Board of Accountancy.

Clearly, the multiple and egregious aggravating factors in this case outweigh the mitigating factors in Respondent's case.

V. CONCLUSION

The Rules of Professional Conduct state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. Syllabus Pt. 3, *in part*, Committee on Legal Ethics v. Tatterson, 173 W.Va. 613, 319 S.E.2d 381 (1984), *cited in* Committee on Legal Ethics v. Morton, 410 S.E.2d 279, 281 (1991). In addition, discipline must serve as both instruction on the standards for ethical conduct and as a deterrent against

similar misconduct to other attorneys. In Syllabus Point 3 of Committee on Legal Ethics v. Walker, 178 W.Va. 150, 358 S.E.2d 234 (1987), the Court stated:

In deciding on the appropriate disciplinary action for ethical violations, this Court must consider not only what steps would appropriately punish the respondent attorney, but also whether the discipline imposed is adequate to serve as an effective deterrent to other members of the Bar and at the same time restore public confidence in the ethical standards of the legal profession.

Moreover, a principle purpose of attorney disciplinary proceedings is to safeguard the public's interest in the administration of justice. Daily Gazette v. Committee on Legal Ethics, 174 W.Va. 359, 326 S.E.2d 705 (1984); Lawyer Disciplinary Board v. Hardison, 205 W.Va. 344, 518 S.E.2d 101 (1999).

“A sanction is to not only punish the attorney, but should also be designed to reassure the public confidence in the integrity of the legal profession and deter other lawyers from similar conduct.” Syl. pt 2, Committee on Legal Ethics v. White, 189 W.Va. 135, 428 S.E.2d 556 (1993); Syl. pt 3, Committee on Legal Ethics v. Walker, 178 W.Va. 150, 358 S.E.2d 234 (1987); Syl. pt. 5, Committee on Legal Ethics v. Roark, 181 W.Va. 260, 382 S.E.2d 313 (1989); Syl pt. 3, Lawyer Disciplinary Board v. Friend, 200 W.Va. 368, 489 S.E.2d 750 (1997); and Syl pt. 3, Lawyer Disciplinary Board v. Keenan, 208 W.Va. 645, 542 S.E.2d 466 (2000). For the public to have confidence in our disciplinary and legal systems, lawyers such as Respondent must be removed from the practice of law for a period of time. Respondent, a lawyer with considerable experience, has demonstrated conduct which has fallen below the minimum standard for attorneys, and discipline must be imposed.

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. The Hearing Panel Subcommittee recommended that for his course of conduct that Respondent's license should be SUSPENDED.

The ABA Standards for Imposing Lawyer Sanctions § 4.42 indicates that:

Absent aggravating or mitigating circumstances, ... the following sanctions are generally appropriate in cases involving a failure to act with reasonable diligence and promptness in representing a client:

Suspension is generally appropriate when:

- (a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client; or
- (b) a lawyer engages in a pattern of neglect causes injury or potential injury to a client.

The ABA Standards for Imposing Lawyer Sanctions §4.6 indicates that:

Absent aggravating or mitigating circumstances, ... the following sanctions are generally appropriate in cases where a lawyer engages in fraud, deceit, or misrepresentation directed toward a client:

Suspension is generally appropriate when a lawyer knowingly deceives a client, a causes injury or potential injury to a client.

The ABA Standards for Imposing Lawyer Sanctions §7.2 indicates that:

Absent aggravating or mitigating circumstances, ... the following sanctions are generally appropriate in cases involving false or misleading communications about the lawyer or the lawyer's services, ... unreasonable or improper fees, ... improper withdrawal from representation, ...

Suspension is generally appropriate when a lawyer knowingly engages in conduct that is in violation of a duty owed as a professional and causes injury or potential injury to a client, the public or the legal system.

In reaching its recommendation as to sanctions, the Hearing Panel Subcommittee considered the evidence, the facts and recommended sanction, the aggravating factors and mitigating factors. The facts in this case were peculiar in nature. Respondent's lack of candor, lack of knowledge and lack of cooperation made the decision as to the length of the suspension a difficult issue for the Hearing Panel Subcommittee. Clearly, the recommended sanctions of the Hearing Panel Subcommittee could have been much more severe.² While the Hearing Panel Subcommittee found Respondent's misconduct to be deceitful, intentional, and uncooperative, based on their finding that Respondent lacked basic knowledge as to the Rules of Professional Conduct and substantive law, the Hearing Panel Subcommittee elected to reject ODC's recommendation as it pertained to the length of the suspension and instead recommend a one (1) year suspension. In an attempt to address Respondent's clear deficits and protect the public, the Hearing Panel Subcommittee instead recommended that if Respondent was successfully reinstated, he should have an additional two (2) years of probation with supervision of his law practice by a real estate law or tax law practitioner in good standing.

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

1. That Respondent be suspended from the practice of law for one (1) year;
2. That because Respondent had no authority to charge Complainant Harless legal fees and did so without her knowledge or consent, and because those

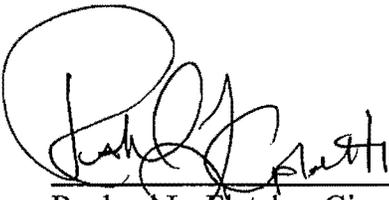
²It is noted that ODC recommended a 3 year suspension to the Hearing Panel Subcommittee in its initial Proposed Findings of Fact, Conclusions of Law and Recommended Sanction.

subject legal fees, according to the contract drafted by Respondent, were actually the responsibility of Mountain Financial Solutions, LLC as the seller, he was ordered to pay restitution in the amount of \$500.00 to Complainant Carol Harless;

3. That Respondent comply with the duties of a suspended lawyer pursuant to Rule 3.28 of the Rules of Lawyer Disciplinary Procedure;
4. That Respondent provide proof that restitution was paid to Complainant Carol Harless prior to petitioning for reinstatement;
5. That Respondent be required to petition for reinstatement to the practice of law;
6. That prior to petitioning for reinstatement, Respondent must sit for and receive a passing score on the MultiState Professional Responsibility Exam;
7. That prior to petitioning for reinstatement, Respondent shall be required to take an additional twelve (12) hours of Continuing Legal Education in the area of legal ethics;
8. That if Respondent's petition for reinstatement is successful he shall undergo two (2) years of supervised practice by a member in good standing of the West Virginia State Bar whose practice includes tax and real estate matters; and
9. That pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure that Respondent shall be ordered pay the costs incurred in this disciplinary proceeding; and

10. That prior to petitioning for reinstatement, that Respondent shall pay the costs associated with these disciplinary proceedings.

Respectfully submitted,
The Lawyer Disciplinary Board
By Counsel



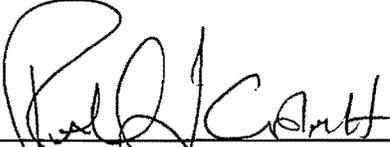
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CERTIFICATE OF SERVICE

This is to certify that I, Rachael L. Fletcher Cipoletti, Chief Lawyer Disciplinary Counsel for the Office of Disciplinary Counsel, have this day, the 28th day of June 2012, served a true copy of the foregoing "**Brief of the Lawyer Disciplinary Board**" upon Respondent David A. Aleshire by mailing the same via United States Mail, with sufficient postage, to the following addresses:

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Charleston, West Virginia 25339

David A. Aleshire, Esquire
2602 Rummelbrown Drive
Charleston, West Virginia 25302



Rachael L. Fletcher Cipoletti