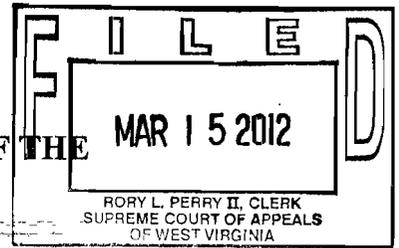


**BEFORE THE SUPREME COURT OF APPEALS OF THE
STATE OF WEST VIRGINIA**



OFFICE OF DISCIPLINARY COUNSEL,

Complainant,

v.

No. 35705

JOHN W. ALDERMAN, III,

Respondent.

BRIEF OF THE LAWYER DISCIPLINARY BOARD

Rachael L. Fletcher Cipoletti [Bar No. 8806]
Chief Lawyer Disciplinary Counsel
Office of Disciplinary Counsel
2008 Kanawha Boulevard, East
Charleston, West Virginia 25311
(304) 558-7999
(304) 558-4015 – facsimile

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
I. NATURE OF PROCEEDINGS AND RECOMMENDED DECISION OF THE HEARING PANEL SUBCOMMITTEE	1
II. FINDINGS OF FACT AND CONCLUSIONS OF LAW	3
III. DISCUSSION	25
IV. CONCLUSION	31

TABLE OF AUTHORITIES

Cases:

<u>Committee on Legal Ethics v. Roark</u> 181 W.Va. 260, 382 S.E.2d 313 (1989)	27,28
<u>Committee on Legal Ethics v. White</u> 189 W.Va. 135, 428 S.E.2d 556 (1993)	27,28
<u>Lawyer Disciplinary Board v. L. Dante DiTrapano</u> Not reported No. 33227	29
<u>Office of Disciplinary Counsel v. Galford</u> 202 W.Va. 587, 505 S.E. 2d 650 (1998)	27,28

West Virginia Statutes and Rules:

R. Professional Conduct Rule 8.4(b)	24,25
R. Professional Conduct Rule 8.4(c)	24,25
R. Professional Conduct Rule 8.4(d)	24,25

Other:

Title 18 USC § 922 (g)(3)	29
Title 18 USC § 924 (a)(2)	29

I. NATURE OF PROCEEDINGS AND RECOMMENDED DECISION OF THE HEARING PANEL SUBCOMMITTEE

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 John W. Alderman with the Clerk of the Supreme Court of Appeals on or about October 15, 2010.¹ Respondent filed a request for a mitigation hearing with the Chairperson of the Lawyer Disciplinary Board on or about November 12, 2010. Disciplinary Counsel had no objection. 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 February 14, 2011. Respondent filed his mandatory discovery on March 17, 2011.

Thereafter, this matter proceeded to hearing in Charleston, West Virginia, on June 28, 2011. The Hearing Panel Subcommittee was composed of David A. Jividen, Esquire, Chairperson, J. Miles Morgan, Esquire, and Katharine B. Becker, layperson. Respondent appeared with Counsel, Ancil G. Ramey, 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 Lynn Alderman; Charles L. Urling, Jr.; George Daugherty, Esquire; Paul D. Ellis, Esquire; Tommy Clay; Derrick Cox; Shane Polen; James B. Bennett; and Respondent. In addition, the Hearing Panel Subcommittee admitted Joint Exhibits 1-18 into evidence.

¹The prayer within the petition is clear that Disciplinary Counsel was seeking a two (2) year suspension when filing the petition with the Court.

On or about December 27, 2011, the Hearing Panel Subcommittee of the Lawyer Disciplinary Board adopted the joint recommendation from the parties that recommended :

1. Based upon his two misdemeanor convictions, Mr. Alderman should be suspended for a period of 2 years.
2. Mr. Alderman should receive a retroactive suspension for a period of one year based upon his voluntary withdrawal from the practice of law, upon notice to the Office of Lawyer Disciplinary Counsel, for a period of fifteen months.
3. The Hearing Panel subcommittee noted that the second year of suspension was a dilemma. The Panel finally concluded that upon consideration of all factors in this case, they would recommend to this Honorable Court that the additional year of suspension be held in abeyance pending two years of supervision of Mr. Alderman's practice by a qualified attorney practicing law in Kanawha County who shall provide quarterly reports to the Office of Lawyer Disciplinary Counsel regarding Mr. Alderman's compliance with the other terms and conditions of his supervised practice. Upon successful completion of these conditions, the additional year suspension would be rescinded.
4. Mr. Alderman should attend AA or NA meetings on average of at least once daily for a period of two years, with monthly proof of such attendance supplied, in writing, to his supervising attorney.
5. Mr. Alderman should attend regular counseling sessions with his current counselor for a period of two years, with quarterly reports by his counselor to

Mr. Alderman's supervising attorney.

6. Mr. Alderman should participate as a volunteer and member of the Lawyers Assistance Committee for a total of thirty hours of service over a period of two years, with quarterly reports by another member of the Lawyers Assistance Committee to Mr. Alderman's supervising attorney.
7. At his own expense, Mr. Alderman should be subject to random drug screens upon two-hour notice by the Office of Lawyer Disciplinary Counsel for a period of two years, with reports of the result of any drug screen to be provided to Mr. Alderman's supervising attorney.
8. Mr. Alderman should reimburse the Office of Lawyer Disciplinary Counsel for its reasonable costs incurred about the prosecution of this matter.
9. Mr. Alderman should be subject to a one-year suspension if, at any time during his two years of supervised practice, he commits a substantial violation of the foregoing terms and conditions on his supervised practice.

On or about February 9, 2012, this Honorable Court rejected the recommendation of the Hearing Panel Subcommittee and ordered the parties to prepare briefs in support of their respective positions.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. John W. Alderman, III, hereinafter Respondent, is a member of the West Virginia State Bar who most recently practiced in Cross Lanes, 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.

2. Respondent was admitted to the West Virginia State Bar on May 12, 1993.
3. Respondent has been married to Lynn Alderman, a former cardiac care nurse, since 1997, and they have three children, Rachael, John, and Samuel, who are ages twelve, ten, and seven. Tr. at 21.
4. One of those children, John, was born with a congenital heart defect which required open heart surgery when he was only seven months old. Tr. at 25.
5. Respondent's father, who is deceased, was an alcoholic, which created difficulties for Respondent. Tr. at 21-22.
6. As his wife, Lynn Alderman, testified: "That was hard on him. I know growing up his mom and dad divorced. I believe John was four or five years old when that happened. He would just tell me stories of his dad coming to take him places as a child, and his dad would be drunk . . . I also had a father that was an alcoholic so I understand how that was." Tr. at 21-22.
7. After Respondent became an adult, his wife described how he would try to assist his father with getting treatment: "His father went into treatment a few times. John did assist him at one point in taking him to a place in Virginia, I believe, and I believe his father stayed sober for the last five years or so of his life" Tr. at 22.
8. In the early 1990s, Respondent sustained nerve damage to his throat and chest during a routine biopsy of his lymph nodes. Verified Response at ¶1; Tr. at 25-26.
9. Ms. Alderman described Respondent's pain as follows: "He had a lot of nerve

pain. . . . He had difficulty wearing a suit and tie, and just constantly complaining of nerve pain in his neck” Tr. at 25-26.

10. As a result of the severe, peripheral nerve damage, Respondent began taking non-narcotic pain medication in the mid-1990s. Verified Response at ¶2.

11. The pain in his neck and chest was so severe that he received steroid throat injections. Verified Response at ¶3.

12. Respondent spent several years consulting with pain management professionals who employed a variety of treatment plans to address this nerve damage. Verified Response at ¶ 4.

13. After several years of non-surgical treatment, Respondent underwent surgery by R. Lee Dillon, M.D., at Johns Hopkins in 1997, which required Respondent’s throat to be opened by incision on the right side. Verified Response at ¶ 5; Tr. at 26.

14. During this 1997 surgery, damage nerves were identified and removed and peripheral nerves were realigned in an effort to alleviate Respondent’s pain. Verified Response at ¶ 6.

15. Unfortunately, after the surgery, Respondent continued to experience severe and persistent pain in his upper chest, throat, and lower jaw. Verified Response at ¶ 7; Tr. at 27.

16. Ms. Alderman described Respondent’s problems as follows: “[H]e came home and he went to a pain clinic in Charleston several times, and . . . they gave him a TENS unit, which he wore. They would do non-narcotic treatments. I believe he had some sort of

steroid injections and different things to try to treat the pain. Nothing seemed to help.” Tr. at 27.

17. Thereafter, having exhausted other options, Respondent was prescribed narcotic medications to treat his pain. Verified Response at ¶ 8; Tr. at 27.

18. Eventually, Respondent required increasing amounts of this medication to treat his pain and became addicted to OxyContin. Verified Response at ¶ 9; Tr. at 27.

19. Indeed, as Ms. Alderman described, Respondent sought treatment for his addiction to OxyContin: “[H]e became addicted to the OyxContin. . . . We went to a hospital in Florida where they had a program where – it was called rapid detox – where they would inject – where they would flush – flush your body out with solution, flush all the medication out, and hopefully give you a fresh start is the theory.” Tr. at 27-28.

20. After completing this detoxification program, Respondent was prescribed a number of other medications to deal with his chronic pain, but unfortunately that treatment was unsuccessful and Respondent turned to illegal drugs after becoming dependent on those prescription medications. Verified Response at ¶ 10; Tr. at 28; Tr. at 42.

21. On June 3, 2009, a criminal complaint was filed in the Magistrate Court of Kanawha County charging Respondent with the felony offense of possession with intent to deliver and a misdemeanor offense of possession of a controlled substance. Exhibit 1, Bates No. 002-003 and Verified Response at ¶ 11.

22. The complaint stated that approximately 2.6 grams of cocaine was found in an eye glass case in Respondent’s car. Id.

23. Respondent was arrested and subsequently released on bond. Id.

24. Shortly thereafter, Respondent voluntarily participated in a 6-week in-patient residential drug rehabilitation program at the Farley Center at Williamsburg Place in Williamsburg, Virginia. Verified Response at ¶ 12; Tr. at 28.

25. Ms. Alderman described what occurred as follows: “Initially John – after he was arrested, that’s really when I realized the true seriousness of the addiction, and we did set up a place for him in Williamsburg to go to for rehab, and he did go and he stayed for about six weeks. And it was difficult. It was – it was a very difficult time for me and for the family.” Tr. at 28.

26. Unfortunately, as Ms. Alderman testified, the six-week treatment program in Williamsburg was unsuccessful: “Myself and my children went to visit him in July, and he looked really good. He was very positive that the treatment had worked, and he felt like he was ready to come home, and we all wanted him home. We missed him. And so we brought him home, but he wasn’t ready to come home, and he relapsed within a week after.” Tr. at 28-29.

27. Ms. Alderman described the relapse as follows: “What happens to you – when you have a relapse like that after being sober for so long Generally it’s a very severe relapse. And that was what happened.” Tr. at 43.

28. The Aldermans then sought outpatient treatment in August 2009 at Thomas Memorial Hospital.

29. On or about September 1, 2009, another criminal complaint was filed in the Magistrate Court of Kanawha County charging Respondent with possession of a controlled substance; obstructing an officer; failure to stop at a traffic control signal; and defective equipment. Exhibit 1, Bates No. 0023-0026.

30. The complaint stated that Respondent was traveling on Route 119 in Kanawha County and failed to stop at a stop light. Id.

31. Respondent was stopped by police and his vehicle was searched. Id.

32. The complaint further stated that two homemade smoking pipes were found along with two Xanax pills were found inside the vehicle. Id.

33. The pipes and pills were placed on the hood of the police vehicle while the police officer continued the search of Respondent's vehicle. Id.

34. The complaint stated that when the officer returned to his vehicle, the smoking pipes were missing. Id.

35. The officer then reviewed the video recording located in his vehicle and observed that while he as searching Respondent's vehicle, Respondent took the smoking pipes and threw them off the interstate bridge where he was stopped. Id.

36. Following his arrest, Respondent was incarcerated for five days during which he executed a power of attorney giving his wife control over the family's finances while arrangements were made for his admission to another treatment program. Tr. at 29-31; Exhibit 0084-0089.

37. Eventually, on September 6, 2009, Respondent was voluntarily admitted to

Cumberland Heights' Traditional Adult/Professional Program in Nashville, Tennessee for a 90 day program of intensive treatment of addiction. Verified Response at ¶15 and Exhibit B; Tr. at 48.

38. After Respondent's initial 90 day inpatient treatment program ended on December 7, 2009, Respondent successfully transitioned from Cumberland Heights' to its intensive outpatient treatment program for chemical dependency. Verified Response at ¶ 16 and Exhibit C; see also Exhibit 0083.

39. Ms. Alderman testified, "When the three months came to an end and I suggested that he needed to rent an apartment there and stay with other people in recovery and continue meetings and continue rehab, he was – he was very willing. I was shocked. He did everything he could to get to where he is right now, where he has been sober for almost two years. And I really feel like with the guidance of my therapist and his willingness to participate that he has made a complete turnaround." Tr. at 32-33.

40. The decision was based upon the recommendation of Ms. Cassis, the family's counselor, "She felt like it was very risky if he were to come home at the end of three months." Tr. at 50.

41. Respondent's counselor at Cumberland Heights also reported, "Throughout his stay, Mr. Alderman has been engaged in his treatment process, his attitude and outlook have continue[d] to improve and his behavior is indicative of one who is committed to working a successful personal program of recovery. The prognosis for Mr. Alderman's long term sobriety is reasonably good, so long as he follows thru with Continuing Care

recommendations.” Verified Response at ¶ 17 and Exhibit B; see also Exhibit 0082.

42. In addition to family counseling, Ms. Alderman described Mr. Alderman’s recovery activities following his six months at Cumberland Heights: “His participation is very strong in AA and NA. He goes to meetings every day. Many times he’ll go to two meetings a day. He talks recovery with people. He meets people. He has helped already three, four, five people with their addictions. He drove a young kid – teenager to Cumberland Heights for treatment. He is very active in the groups. Very active, very dedicated.” Tr. at 33-34.

43. Ms. Alderman testified that, “I am so proud of where he has come from two years ago to right now;” that Respondent has “told me a person to contact” if she has any concerns about his recovery; and that although he is still bothered by neck pain, “he just takes Tylenol.” Tr. at 35, 51, 53.

44. Following his arrest on June 3, 2009, and his admission to the Williamsburg treatment center, Respondent ceased the practice of law for a period of fifteen months until October 2010, when he began taking a few cases as a sole practitioner. Tr. at 58.

45. This placed a financial hardship on his family as described by Ms. Alderman, “We had to dip into our savings considerably to pay for the rehab and to pay for the year that he didn’t work, and we had an extra apartment and extra expenses.” Tr. at 59; see also Exhibit 0078.

46. Respondent’s decision to withdraw from the practice of law during the 15-month period he was pursuing treatment and engaged in recovery was done so with notice

to the Office of Lawyer Disciplinary Counsel. Verified Response at § 28.

47. During that period, Respondent became actively involved in Alcoholics Anonymous. Id.

48. Several witnesses testified at the hearing about Respondent's active involvement in AA.

49. Charles Lee Urling, Jr., a Cross Lanes businessman and the Aldermans' neighbor, testified about Respondent's involvement in AA. Tr. at 67-84.

50. Mr. Urling testified, "[W]hen John went out of state to seek treatment, my wife and I were made aware of this. My wife actually reached out to his wife with some Al-Anon information, and I reached out to John, and we started a kind of communication. And since his return . . . we have our own meetings. We go to most generally every day noon to 1:00 at Serenity Club in Dunbar. I see John there. . . . John has not only maintained his, but he's helped me improve my sobriety. He's at meetings daily. He interacts with others. I know that he sponsors other people, which is where we take new people and we help – we help them engage in the 12 steps of recovery." Tr. at 69-70.

51. Indeed, with respect to Respondent's involvement in AA, Mr. Urling testified, "I think he's a leader in the recovery community." Tr. at 77.

52. Mr. Urling testified about his observations concerning Respondent's fitness to practice law: "For me, I know that John has two years of good sobriety . . . and I would engage him as an attorney as many – on many different levels. . . . And I think that to there being an interruption in his ability to practice law, it is just going to be a hardship upon his

family.” Tr. at 72; see also Exhibit 0076-0077.

53. Paul D. Ellis, Charleston City Attorney, also testified about Respondent’s involvement in AA. Tr. at 124-155.

54. Mr. Ellis is a member of the board of Roark-Sullivan, which operates a men’s homeless shelter in Charleston and the Veterans’ Transitional Living Facility, both of which provide assistance to those with drug and alcohol addiction, and a member of the West Virginia Lawyers Assistance Committee and, in that capacity, has assisted Respondent in his recovery efforts. Tr. at 125, 128.

55. Mr. Ellis testified that Respondent attends AA meetings on a regular basis; that Mr. Alderman has sponsored other AA members; and that Respondent “has been very committed.” Tr. at 130-132.

56. Mr. Ellis described how Respondent has assisted others outside the context of AA meetings: “I can recall at least one time – maybe more than once, but I can recall one time when John came in pro bono representing at – representing somebody who had some criminal charges against them. And as I recall, there were a bunch . . . but seven or eight related to alcohol.” Tr. at 133-134.

57. Finally, Mr. Ellis testified that he would be comfortable retaining Respondent for services as an attorney; that he would be willing to continue to work with Respondent in Mr. Ellis’ capacity as a member of the Lawyers Assistance Committee; and that he believes Respondent would be an asset as a Kanawha County member of the Lawyers Assistance Committee providing support for other lawyers in recovery. Tr. at 139-140, 146-149; see

also Exhibit 0074-0075.

58. Respondent's AA sponsor, George Daugherty, a Charleston attorney, also testified. Tr. at 85-124.

59. Mr. Daugherty has practiced law in West Virginia since 1958; was an original member of the Impaired Lawyers Committee, which was the predecessor to the Lawyers Assistance Committee; has been involved with AA for thirty-two years; and is Mr. Alderman's AA sponsor. Tr. at 85-91.

60. Mr. Daugherty summarized his interactions with Respondent as follows: "John has astounded me in reality. . . . the whole idea of taking the time off and going down to Nashville and working with others and really devoting not only his time, but his efforts and his money and going way beyond the call of duty. . . . I think his record of trying to get and keep himself in recovery is probably unparalleled in my experience." Tr. at 92-93.

61. Mr. Daugherty testified that he averages a daily AA meeting; that Respondent attends practically every meeting he attends; and that Ms. Alderman knows to contact him if she senses any problem with Respondent's continued sobriety. Tr. at 88, 99-100.

62. Mr. Daugherty testified that he is willing to continue to serve as Respondent's sponsor; to make any periodic reporting required as part of Respondent's disciplinary proceedings; and that it would be prudent in Respondent's case to submit to random drug testing. Tr. at 95-96, 100, 117-118.

63. With respect to any suspension of Respondent's law license, Mr. Daugherty testified, "With respect to a suspension, when a man is already in good recovery and when

he is going to the length that John has gone on his own, I believe that it would – you know, it isn't the sense of giving him a reward by permitting him to continue, but I think it's a thing – a recognition that he has done this well.” Tr. at 113-114; see also Exhibit 0072-0073.

64. Finally, Mr. Daugherty testified that supervised practice, rather than a suspension, would assist the Lawyers Assistance Committee in working with other impaired attorneys: “[W]hen we work with the next lawyer, if we can say . . . ‘Look what happened. You can get in recovery and you can . . . get to the point where you're not totally destroyed professionally, and I'm a good example of it.’” Tr. at 116.

65. Several witnesses testified about Respondent's post-rehabilitation services as an attorney and/or his work with others dealing with substance abuse issues.

66. Tommy Clay, a member of the First Bank board of directors and a local businessman, testified on Respondent's behalf. Tr. at 155-171.

67. Mr. Clay met Respondent in 1998 while Respondent served as general counsel to City National Bank and one of Mr. Clay's companies provided services to the bank. Tr. at 157.

68. After Respondent entered into private practice in October 2010, Mr. Clay began engaging Respondent to provide legal services to Mr. Clay's companies, including commercial transactions, administrative law, and other services. Tr. at 159-161.

69. Mr. Clay described Respondent's legal services as “First class” and testified that he recommended Respondent to a colleague, Kevin Medford, who owns a trucking company, and that Mr. Medford has also retained Respondent to provide legal services to his

company. Tr. at 161.

70. Mr. Clay also described Respondent's efforts to assist other individuals dealing with addiction, including two of Mr. Medford's sons. Tr. at 162-164.

71. Derrick Cox, Chief of Police of Belle, also testified on Respondent's behalf. Tr. at 171-179.

72. Chief Cox testified that there is quite a bit of prescription drug abuse in the Town of Belle and that his department has scarce resources in dealing with the problem. Tr. at 172-173.

73. Chief Cox testified that Mr. Clay suggested that Respondent, who had gone through extensive drug rehabilitation, might be a valuable resource in counseling addicts. Tr. at 173, 176.

74. Chief Cox stated that he contacted Respondent and "John and I became friends, exchanged phone numbers, that kind of thing, and on a number of occasions I have sought his advice and counsel on trying to get folks over the hump that were even at the time still using drugs and trying to get started into programs, and then folks who had relapsed and just several different applications that I've spoke with John about." Tr. at 173.

75. Chief Cox testified, "I know that he has actually gone so far as to accompany, I think, on different occasions both of them or maybe one of them two different times out of state to take them to rehab because he know the importance of escorting them basically right to the front door." Tr. at 174.

76. Chief Cox described Respondent's assistance in another matter as follows:

“I’m personally familiar with a case here in town. It’s a female that’s currently in jail. Her mother has basically been through this for a number of years. And I actually called John and said, you know, ‘The girl doesn’t have any insurance’ And, actually, that’s something he’s still trying to piece together right now.” Tr. at 174-175.

77. Shane Polan, a Huntington businessman, also testified on behalf of Respondent. Tr. at 179-188.

78. Mr. Polan described Respondent’s legal services as “Great. Like I said, I wish I’d have used him on all my matters.” Tr. at 180.

79. Mr. Polan further described Respondent’s efforts to help a member of Mr. Polan’s family with addiction issues: “I’ve got a brother who is 44 and has been an addict for about, you know, pushing 30 years. . . . And John has actually been quite helpful To be honest with you, like I say, I’ve been exposed to it, and I’ve never seen anybody recover as well as he has.” Tr. at 181.

80. A Charleston substance abuse counselor, James B. Bennett, testified on Mr. Alderman’s behalf. Tr. at 247-264.

81. Mr. Bennett is a counselor at Cassis Therapy Associates and has engaged in substance abuse counseling for about twenty years. Tr. at 248-249.

82. About forty percent of Mr. Bennett’s practice involves counseling those with substance abuse, including counseling professionals, including physicians, pharmacists, and attorneys, and previously served as an expert witness in disciplinary proceedings involving his clients. Tr. at 249.

83. Mr. Bennett testified that Mr. Alderman began counseling with Mr. Bennett following completion of Respondent's six months of rehabilitation at the Cumberland Center. Tr. at 250.

84. In addition to periodic counseling sessions with Respondent in his office, Mr. Bennett testified that he sees Respondent on a regular basis at Charleston AA meetings. Tr. at 251.

85. Mr. Bennett described Respondent's status as follows: "John's doing very well. He's progressing very well. He has sponsored people. He's actually sponsoring another client of mine who I asked him to kind of watch out for. He's working the steps. He shares openly in meetings. He shares surprisingly openly in meetings. I think he's doing well." Tr. at 252.

86. Mr. Bennett indicated that he intended to see Respondent on a regular basis and, as he does with some other professionals whom he counsels, he would be willing to make periodic reports regarding Respondent's progress as part of any disciplinary order. Tr. at 252.

87. Respondent testified on his own behalf. Tr. 188-247; Tr. 264-312.

88. Respondent, a native of Huntington, graduated from the University of Mississippi School of Law in 1988 and, for a few years, worked for a New Orleans law firm. Tr. at 190-191.

89. Eventually, in 1993, he and his wife moved back to West Virginia to be closer to their families and Mr. Alderman was employed at Steptoe & Johnson. Tr. at 191-192.

90. In 1997, Respondent became employed as general counsel at City National Bank of West Virginia, handling mergers and acquisitions, commercial transactions, financial regulatory matters, employment matters, and litigation management. Tr. at 192-194.

91. Respondent testified that the problems with his neck began in about 1994, shortly after his return to West Virginia: “I had no idea what was causing that. So I saw a series of specialists from LSU to John[s] Hopkins to the University of Virginia, and nobody could really tell me what the problem was.” Tr. at 196-197.

92. Respondent testified that he received steroid injections, a TENS unit, and other treatment without substantial reduction in his pain. Tr. at 198.

93. Eventually, it was determined that he had suffered nerve damage during the biopsy of a swollen lymph node and he underwent surgery to attempt to repair the damage. Tr. at 197-198.

94. The surgery, however, did not provide the anticipated relief, and Respondent was prescribed Neurontin and Klonopin. Tr. at 199-200.

95. Eventually, when he continued to suffer pain, Respondent was prescribed OxyContin in 2003 or 2004. Tr. at 200.

96. Unfortunately, Respondent ultimately became addicted to OxyContin. Tr. at 201.

97. When Respondent became aware that it required more OxyContin to obtain the same level of relief, he consulted with various physicians, some of whom prescribed additional medications, including Xanax, to which Respondent also became addicted. Tr.

at 202-203.

98. Eventually, as Ms. Alderman testified, Respondent went to a detoxification program in Florida to attempt to break his addictions to OxyContin and Xanax. Tr. at 204-205.

99. Following his detoxification, however, Respondent was prescribed additional medication, including Vyvanse, which is used to treat attention deficit hyperactivity disorder or ADHD, to which Respondent also became addicted. Tr. at 207-208.

100. Eventually, in early 2009, Respondent began the illegal use of cocaine and, on June 3, 2009, a criminal complaint was filed in the Magistrate Court of Kanawha County charging Respondent with the felony offense of possession with intent to deliver and a misdemeanor offense of possession of a controlled substance. Exhibit 1, Bates No. 002-003 and Tr. at 208-209.

101. The complaint stated that approximately 2.6 grams of cocaine was found in an eye glass case in Respondent's car. Id.

102. Respondent was arrested and subsequently released on bond. Id.

103. Following that arrest, Respondent went to the Farley Center in Williamsburg, Virginia for treatment.

104. On or about May 12, 2010, Respondent plead no contest in the Magistrate Court of Kanawha County to simple possession of cocaine, and was given an ninety day suspended sentence. Tr. at 210-211; Exhibit 1, Bates No. 0061-0064.

105. Respondent was also sentenced to unsupervised probation for a period of one

year. Id.

106. He was further directed by the Court to continue a substance abuse treatment plan and to pay costs and fees totaling \$159.50. Id.

107. As Ms. Alderman testified, Respondent's treatment in Williamsburg was not successful: "I made the mistake of leaving there to return to work. My FMLA was running out. That was actually like the last day of my family medical leave. I had used it intermittently for my neck problem, so I only had like 45 working days left. So I came back, which was a mistake, and I relapsed and got arrested" Tr. at 212.

108. Respondent's sobriety date is August 27, 2009, Tr. at 274, but when he was ostensibly pulled over for a traffic offense, he still had paraphernalia in his vehicle.

109. On or about September 1, 2009, another criminal complaint was filed in the Magistrate Court of Kanawha County charging Respondent with possession of a controlled substance; obstructing an officer; failure to stop at a traffic control signal; and defective equipment. Exhibit 1, Bates No. 0023-0026.

110. The complaint stated that Respondent was traveling on Route 119 in Kanawha County and failed to stop at a stop light. Id.

111. Respondent was stopped by police and his vehicle was searched. Id.

112. The complaint further stated that two homemade smoking pipes were found along with two Xanax pills were found inside the vehicle. Id.

113. The pipes and pills were placed on the hood of the police vehicle while the police officer continued the search of Respondent's vehicle. Id.

114. The complaint stated that when the officer returned to his vehicle, the smoking pipes were missing. Id.

115. The officer then reviewed the video recording located in his vehicle and observed that while he was searching Respondent's vehicle, Respondent took the smoking pipes and threw them off the interstate bridge where he was stopped. Id.

116. Following his September 1, 2009, arrest, Respondent described how his time in jail was the beginning of his recovery: "[W]hen you land in jail and you look around, you really have to realize you have a problem. . . . I felt like I really hit a bottom by going to jail. . . . And my arrest was picked up, put in the paper, so I had a tremendous amount of shame. I would actually call it incomprehensible humiliation, demoralization. It really, really affected me. And I knew that if I didn't do something about it, I'd die quickly." Tr. at 213, 227.

117. Respondent also described how a member of the Lawyers Assistance Committee came to jail to meet with him: "And so I met a guy in recovery who came to visit me in jail. I talked to my wife on the phone. My legal counsel was in agreement, my wife was in agreement, and I was in agreement, that I wasn't going to leave there unless I went straight to a long-term facility." Tr. at 213.

118. Respondent described his first 90 days as an inpatient at the Cumberland Center; his next 90 days as an outpatient living in an apartment in Nashville to be near and work with Robert Whitaker, the leader of a Narcotics Anonymous chapter in Nashville; and his regular attendance at meetings, after completion of his inpatient program, at regular

meetings on Tuesday, Wednesday, and Friday nights, meeting and assisting judges, lawyers, professionals, and others in recovery. Tr. at 214-219, 232-235.

119. Respondent described his sacrifices in being separated from his family for nearly a year: "And the hard part was staying away from my family, because I had three kids. I have three kids I absolutely love." Tr. at 220.

120. Respondent testified that between his arrest on June 3, 2009, and October 1, 2010, a period of about 15 months, he did not engage in the practice of law, but concentrated, first at Williamsburg and then in Nashville, on his recovery. Tr. at 222.

121. On or about January 11, 2010, Respondent pleaded no contest in the Magistrate Court of Kanawha County to obstructing an officer, and was given a thirty day suspended sentence. Exhibit 17, Bates No. 105-106.

122. Respondent was also sentenced to unsupervised probation for a period of one year and fined \$50.00. Id.

123. He was further directed by the Court to pay costs and fees totaling \$159.50. All other charges were dismissed. Id.

124. Respondent also testified that the treatment he received in Florida, in Williamsburg, and in Nashville cumulatively cost over \$70,000.00, which did not include his living expenses while he voluntarily resided in Nashville for most of 2010. Tr. at 225-226; Exhibit Bates No. 0090-0100.

125. Respondent funded these costs by taking out a home equity loan. Tr. at 226.

126. Respondent described his gradual transition from Nashville back to Charleston:

“[I] wanted to come back to Charleston when my program here was strong, when I found good meetings to go to, meetings where I could learn from. . . . And towards the end of 2010 my program back here started getting better. I found the meeting at the Serenity Club, which is a real good meeting. I made contact with George [Daugherty].” Tr. at 236.

127. With respect to his attendance and participating in AA and NA meetings, Respondent testified, “I go to a meeting at least every day in Dunbar at the Serenity Club or the NA place in Charleston, downtown Charleston. I go to Panera, that meeting on Friday’s. I go out to Cross Lanes some. I go to one meeting a day, and I sponsor a few people, and I spend every day on the phone. One of the rules of sponsorship is I have my sponsees call me at least once a day.” Tr. at 238.

128. In addition to the testimony of Mr. Urling, Mr. Ellis, Mr. Clay, Mr. Polan, and Chief Cox, Respondent testified about assisting Brennan Medford, Jamie Johnson, John Johnson, and Robert Whitaker with their recoveries. Tr. at 266-269.

129. With respect to Respondent’s resumption of the practice of law, he testified, “[M]y balance sheet was getting bad. Expenses were getting paid, no income was coming in. So I needed to – I have to earn money for my family. I’ve got three kids, a wife, that I need to support, so I had to start working. So I started practicing and working for clients.” Tr. at 244.

130. In addition to the testimony of Mr. Clay and Mr. Polan regarding Respondent’s services as an attorney, Respondent testified about work performed for other clients since October 2010, including Harold Arbaugh, Regina Swimm, Amy Duke, Jerry Dawson, Kevin

Meford, and William Croyle, including commercial transactions, estate matters, insurance issues.

131. In total, Respondent at the time of the hearing had about 30 clients with about 50 matters; employed a part-time paralegal and secretary; and was awaiting the outcome of these disciplinary proceedings before signing a lease for office space. Tr. at 281-282.

132. During the hearing in this matter, Respondent and the Office of Lawyer Disciplinary Counsel reached an agreement on recommended discipline which was placed on the record, under oath, by Respondent. Tr. at 269-274.

CONCLUSIONS OF LAW

Respondent pled guilty to two misdemeanor crimes that reflect adversely on his honesty, trustworthiness, and fitness as a lawyer and are in direct violation of the Rules of Professional Conduct.² Respondent violated Rules 8.4(b), 8.4(c) and 8.4(d) of the Rules of Professional Conduct, which state in pertinent part as follows:

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.

²“Where there has been a final criminal conviction, proof on the record of such conviction satisfies the Committee on Legal Ethics' 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).

Rule 8.4(d) Misconduct

It is professional misconduct for a lawyer to: . . .

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

III. DISCUSSION

Rule 3.16 of the Rules of Lawyer Disciplinary Procedure provides “[i]n imposing a sanction after a finding of lawyer misconduct, unless otherwise provided in these rules, the Court or Board shall consider the following factors: (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.”

First, there is no evidence that Respondent violated any duty to a client, but he violated his duty to the public in the sense that his conduct was illegal. Second, the only actual injury caused by Respondent’s conduct was to himself, his family and the public’s perception of lawyers.

With respect to aggravating and mitigating factors, this Hearing Panel Subcommittee viewed the following as aggravating factors: 1. Respondent was previously admonished for testimony in a private deposition and for his failure to report a prior misdemeanor *nolo contendere* plea; 2. Respondent engaged in illegal activities, including that which involved the use of controlled substances; 3. Respondent exhibited a pattern of misconduct that included multiple criminal offenses; and at the time of the misconduct, Respondent had substantial experience in the practice of law.

The Hearing Panel viewed the following as mitigating factors: 1. after Respondent became addicted to prescription medication and before he began using illegal drugs, he sought treatment both from local physicians and at a detoxification program in Florida; 2. after Respondent was arrested on June 3, 2009, he sought treatment at an inpatient drug rehabilitation program in Williamsburg; 3. after Respondent was arrested and jailed on September 1, 2009, he transferred control of the family's finances to his wife; 4. he met with a member of the Lawyers Assistance Committee while in jail; and 5. he agreed to a 90-day inpatient treatment program in Nashville; 6. after completing the 90-day inpatient treatment program in Nashville, Respondent continued to reside in Nashville and voluntarily participated in an additional 90-day outpatient treatment program in Nashville; 7. after completing the additional 90-day outpatient treatment program in Nashville, Respondent continued to reside in Nashville and attend AA and NA meetings for most of the rest of 2010; 8. Respondent ceased the active practice of law in June 2009 and resumed the practice of law in October 2010 only after assuring that his treatment program in Kanawha County was strong; 9. Respondent's sponsor, George Daugherty, one of West Virginia's preeminent attorneys involved in the substance abuse community testified about Respondent's extraordinary efforts and successes; 10. Respondent's wife, Lynn Alderman, testified about the various factors, including the alcoholism of Respondent's father, the ovarian cancer suffered by Respondent's mother, the congenital heart defect suffered by Respondent's youngest son, the dispute over the estate of Respondent's father, and Respondent's long-standing medical problems that impacted upon Respondent's addiction, as well as

Respondent's extraordinary efforts in overcoming his addiction; 11. Respondent's fellow AA members, Chip Urling, Paul Ellis, and James Bennett, testified about Respondent's firm commitment and participation in AA and how Respondent has used his experience to attempt to assist many others in dealing with their addiction; 12. Respondent's clients, Tommy Clay and Shane Polan, testified about the excellent work provided by Respondent since his return to the practice of law, as well as Respondent's commitment to sobriety and assisting others seeking to find or sustain their sobriety; 13. Chief Derrick Cox of the Belle Police Department testified about the assistance provided by Respondent to Belle residents dealing with addiction issues; 14. Respondent has maintained his sobriety for over two years and has engaged in the active practice of law for nearly a year without complaint; and Mr. Alderman testified about his struggles to deal with his addiction; how he has spent over \$70,000.00 in seeking treatment at three different programs in Florida, Virginia, and Tennessee; how his incarceration, public humiliation, and threat of the loss of his family inspired him to commit a year of his life to treatment in Nashville; how he faithfully attends AA meetings and otherwise works to maintain his sobriety; and how he has attempted to use what he has learned through his experiences to assist others dealing with addiction.

The Hearing Panel Subcommittee concluded that the mitigating factors far outweigh the aggravating factors in this proceeding. Respondent's criminal conduct is admittedly in violation of the Rules of Professional Conduct and he should be sanctioned for his misconduct. But, without question this is a difficult case. Under Roark; Galford and White a two (2) year suspension as recommended by the Hearing Panel Subcommittee seems

appropriate for the two misdemeanor convictions. In Committee on Legal Ethics v. Roark, Respondent, who at the time of the offense was a public official making his misconduct more egregious, was suspended for a period of three (3) years based upon his plea of guilty to six (6) counts of the federal misdemeanor offense of possession of cocaine. Committee on Legal Ethics v. Roark, 181 W.Va. 260, 382 S.E.2d 313 (1989). In Committee on Legal Ethics v. White, Respondent, who at the times was a prosecutor and therefore subject to a higher ethical standard, was suspended for a period of two (2) years based upon his plea to three (3) federal misdemeanor charges for possession of cocaine, marijuana and percocet. Committee on Legal Ethics v. White, 189 W.Va. 135, 428 S.E.2d 556 (1993). In Office of Disciplinary Counsel v. Galford, Respondent was suspended for a period of one (1) year based upon his plea of *nolo contendere* to a charge of conspiracy to commit a misdemeanor based on suggested forgery of a client's will. Office of Disciplinary Counsel v. Galford, 202 W.Va. 587, 505 S.E. 2d 650 (1998).

The more difficult issue is the retroactive nature of the first year of suspension as well as the second year of suspension being held in abeyance that was recommended by the parties as well as the Hearing Panel Subcommittee. It is noted that Disciplinary Counsel refused to entertain the request that the three (3) months that Respondent was in-house drug rehabilitation be included³, but based on the circumstances presented, agreed to request that Respondent should be granted the near 1 year of credit that he did not practice towards his

³The months of June through September 2009 are not relevant as clearly Respondent was either admitted to an in-patient rehabilitation center or again using illegal drugs and thus violating the laws of the State of West Virginia.

suspension. This decision was based upon the following: 1. Respondent self-reported the arrests to ODC; 2. Respondent cooperated fully in the investigation by ODC; 3. Respondent did not engage in any unlawful activities during the period he is seeking retroactive credit; 4. Respondent voluntarily withdrew from the practice of law for a period of fifteen (15) months to focus solely on recovery and rehabilitation; 5. Overwhelming evidence of interim and sustained rehabilitation; 6. Respondent put the interests of his clients ahead of his own monetary interests by voluntarily withdrawing from the practice of law; 7. Respondent generated no fees from the practice of law and there has been no evidence presented to demonstrate that Respondent engaged in the practice of law during this time period; and 8. Respondent was not subject to any incarceration, involuntary commitment, home confinement, or supervised probation during the relevant time period.

The most recent disciplinary case before this Court wherein there was a request for retroactive application was L. Dante DiTrapano, an unpublished case before this Court. [Order disbaring DiTrapano and Order denying request for retroactivity attached]. Respondent DiTrapano was disbarred based upon Respondent's guilty plea to felony Count I of a three count indictment charging him with possession of seven firearms by a person who is an unlawful user of or addicted to a controlled substance in violation of Title 18 USC § 922 (g)(3) and 924 (a)(2). Respondent was sentenced in the federal criminal matter on or about October 10, 2006. Respondent was sentenced to six (6) months imprisonment and was assessed \$10,100.00 in criminal monetary penalties. Respondent was disbarred by this Court by Order entered May 10, 2007.

By and through counsel, Respondent DiTrapano filed a motion with this Court seeking to receive retroactive application of his disbarment back to the date that he was suspended by a Rule 3.27 Petition on or about September 14, 2006. ODC objected to the same and argued that Respondent continued to violate the laws of the State of West Virginia as evidenced by his August 2006 positive drug screen, was incarcerated at times, and most notably his April 2007 arrest for possession of methamphetamine. The Court denied Respondent DiTrapano's motion for retroactivity.

The facts before this Court in this case are vastly different. During the relevant time period that ODC agreed to Respondent's request for retroactivity, Respondent was not incarcerated, was not on home confinement, was not on supervised probation, and was not involuntarily committed to a drug treatment facility. There is no evidence or even mere suggestion that Respondent engaged in any criminal or unethical activities from the November 2009- October 2010 time period that he seeks retroactivity. However, it is noted that Respondent was placed on unsupervised probation as a result of his January 2010 and May 2010 misdemeanor pleas in Magistrate Court. Supervised probation arising from cases before a court of record, can have rather strict conditions that persons must follow and report on a timely basis to the probation office. *See* W.Va. Code § 62-12-9. Conditions of release on probation. There are no probation officers assigned to the individuals with unsupervised probation. In contrast to supervised probation, other than adhering to the laws of the land, there are no additional requirements placed upon a person subject to unsupervised probation as ordered by Magistrate Court.

As this Honorable Court has stated that it wishes to be consistent, but still address the merits on a case by case basis, it should be clear that if any of the circumstances outlined in Respondent's case were different, *i.e.* if he were incarcerated, arrested, involuntarily committed, on home confinement or on supervised probation during this time period, ODC would not have agreed to the request for retroactivity.

IV. CONCLUSION

The parties and the Hearing Panel Subcommittee in this case endeavored to craft a sanction in this case that was punitive, constructive and protective of the public in the future. As such, Disciplinary Counsel requests that this Honorable Court adopt the recommendations made by the Hearing Panel Subcommittee in this matter.

Respectfully submitted,
The Lawyer Disciplinary Board
By counsel



Rachael L. Fletcher Cipoletti [Bar No. 8806]
Chief Lawyer Disciplinary Counsel
2008 Kanawha Boulevard, East
Charleston, West Virginia 25311
(304) 558-7999
(304) 558-4015 facsimile

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 15th day of March, 2012, served a true copy of the foregoing **“BRIEF OF THE LAWYER DISCIPLINARY BOARD”** upon Ancil G. Ramey, Esquire, counsel for Petitioner John W. Alderman, III, by mailing the same via United States Mail, with sufficient postage, to the following address:

Ancil G. Ramey, Esquire
Post Office Box 2195
Huntington, West Virginia 25722



Rachael L. Fletcher Cipoletti

ATTACHMENT A

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 10th of May, 2007, the following order was made and entered:

Office of Lawyer Disciplinary Counsel, Petitioner

vs.) No. 33227

Louis Dante DiTrapano, a suspended member of The West Virginia State Bar, Respondent

On a former day, to-wit, November 16, 2007, came the Office of Disciplinary Counsel, by Rachael L. Fletcher, its attorney, pursuant to Rule 3.18 of the Rules of Lawyer Disciplinary Procedure, and presented to the Court its petition seeking the annulment of the license to practice law of the respondent, Louis Dante DiTrapano, for the reasons stated therein.

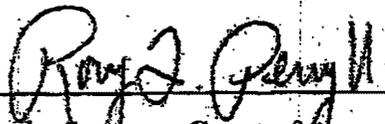
Thereafter, on the 9th day of March, 2007, came the respondent, Louis Dante DiTrapano, by Michael J. Del Giudice, Ciccarello, Del Giudice & LaFon, his attorney, and presented to the Court his written objections thereto.

Upon consideration whereof, the Court is of opinion to and doth hereby grant said petition. It is therefore ordered that the respondent's license to practice law in the State of West Virginia be, and it hereby is, annulled.

Service of a copy of this order upon the respondent and petitioner shall constitute sufficient notice of the contents herein.

A True Copy

Attest:


Clerk, Supreme Court of Appeals

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 27th of October, 2010, the following order was made and entered:

Office of Disciplinary Counsel, Petitioner

vs.) No. 33227

L. Dante DiTrapano, a former member of The West Virginia State Bar, Respondent

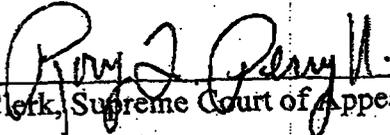
On a former day, to-wit, September 14, 2010, came the respondent, L. Dante DiTrapano, by Robert H. Davis, Jr., his attorney, and presented to the Court his motion for clarification of order of annulment, for the reasons set forth therein.

Thereafter, on October 4, 2010, came the petitioner, Office of Disciplinary Counsel, by Rachael L. Fletcher Cipoletti, its attorney, and presented to the Court its written response thereto.

Upon consideration whereof, the Court is of opinion, that pursuant to Rule 3.33, Rules of Lawyer Disciplinary Procedure, the effective date of the respondent's disbarment is the date of annulment of respondent's license to practice law in the State of West Virginia, to-wit, May 10, 2007.

A True Copy

Attest:


Clerk, Supreme Court of Appeals