

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

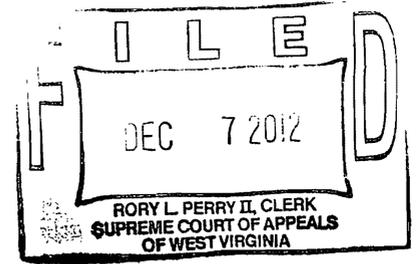
LAWYER DISCIPLINARY BOARD,

Complainant,

v.

BARRY J. NACE,

Respondent.



No. 11-0812

BRIEF OF THE LAWYER DISCIPLINARY BOARD

Jessica H. Donahue Rhodes [Bar No. 9453]
Lawyer Disciplinary Counsel
Office of Disciplinary Counsel
City Center East, Suite 1200C
4700 MacCorkle Avenue SE
Charleston, West Virginia 25304
(304) 558-7999
(304) 558-4015 – facsimile

TABLE OF CONTENTS

| | |
|---|-----|
| TABLE OF AUTHORITIES | iii |
| I. STATEMENT OF THE CASE | 1 |
| A. NATURE OF PROCEEDINGS AND RECOMMENDATION OF THE HEARING PANEL SUBCOMMITTEE | 1 |
| B. FINDINGS OF FACT | 2 |
| C. CONCLUSIONS OF LAW | 13 |
| II. SUMMARY OF ARGUMENT | 15 |
| III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION | 15 |
| IV. ARGUMENT | 16 |
| A. STANDARD OF PROOF | 16 |
| B. ANALYSIS OF SANCTION UNDER RULE 3.16 OF THE RULES OF LAWYER DISCIPLINARY PROCEDURE | 17 |
| 1. Respondent violated duties to his clients, to the public, to the legal system and to the legal profession. | 17 |
| 2. Respondent acted negligently. | 23 |
| 3. The amount of real injury is great. | 24 |
| 4. There are several aggravating factors present. | 24 |
| 5. There are several mitigating factors present. | 29 |
| V. CONCLUSION | 30 |

TABLE OF AUTHORITIES

Cases:

| | |
|--|----|
| <u>Attorney Grievance Commission v. Nichols</u> 405 Md. 207, 950 A.2d 788 (Md. 2008) | 31 |
| <u>Columbus Bar Association v. Cooke</u> 111 Ohio St.3d 290, 855 N.E.2d 1226 (Ohio 2006) | 32 |
| <u>Committee on Legal Ethics v. Blair</u> 174 W.Va. 494, 327 S.E.2d 671 (1984) | 17 |
| <u>Committee on Legal Ethics v. Karl</u> 192 W.Va. 23, 449 S.E.2d 277 (1994) | 17 |
| <u>Committee on Legal Ethics v. McCorkle</u> 192 W.Va. 286, 452 S.E.2d 377 (1994) | 16 |
| <u>Committee on Legal Ethics v. Morton</u> 186 W.Va. 43, 410 S.E.2d 279 (1991) | 30 |
| <u>Committee on Legal Ethics v. Tatterson</u> 173 W.Va. 613, 319 S.E.2d 381 (1984) | 30 |
| <u>Committee on Legal Ethics v. Walker</u> 178 W.Va. 150, 358 S.E.2d 234 (1987) | 30 |
| <u>Daily Gazette v. Committee on Legal Ethics</u> 174 W.Va. 359, 326 S.E.2d 705 (1984) | 30 |
| <u>Disciplinary Proceeding Against Preszler</u> 169 Wash.2d 1, 232 P.3d 1118 (Wash. 2010) | 31 |
| <u>Lawyer Disciplinary Board v. Cunningham</u> 195 W.Va. 27, 464 S.E.2d 181 (1995) | 16 |
| <u>Lawyer Disciplinary Board v. Hardison</u> 205 W.Va. 344, 518 S.E.2d 101 (1999) | 31 |

| | |
|---|--------|
| <u>Lawyer Disciplinary Board v. McGraw</u> | |
| 194 W.Va. 788, 461 S.E.2d 850 (1995) | 16 |
| <u>Lawyer Disciplinary Board v. Scott</u> | |
| 213 W.Va. 209, 579 S.E. 2d 550 (2003) | 24, 29 |
| <u>Lawyer Disciplinary Board v. Taylor</u> | |
| 192 W.Va. 139, 451 S.E.2d 440 (1994) | 17 |
| <u>Office of Disciplinary Counsel v. Jordan</u> | |
| 204 W.Va. 495, 513 S.E.2d. 722 (1998) | 17 |
| <u>Roark v. Lawyer Disciplinary Board</u> | |
| 207 W.Va. 181, 495 S.E.2d 552 (1997) | 16 |

West Virginia Statutes and Rules:

| | | |
|-------------------------|--------------------|---------------|
| R. Appellate Proc. | Rule 20 | 15 |
| R. Law Disc. Proc. | Rule 3.7 | 13 |
| R. Law Disc. Proc. | Rule 3.15 | 2, 32, 33 |
| R. Law Disc. Proc. | Rule 3.16 | 17, 24 |
| R. Professional Conduct | Rule 1.1 | 2, 13, 14, 31 |
| R. Professional Conduct | Rule 1.3 | 2, 13, 14, 31 |
| R. Professional Conduct | Rule 1.4(a) | 2, 13, 14, 31 |
| R. Professional Conduct | Rule 1.4(b) | 2, 13, 14, 31 |
| R. Professional Conduct | Rule 1.5(a) | 2, 13, 14, 15 |
| R. Professional Conduct | Rule 1.15(b) | 2, 13, 14, 31 |
| R. Professional Conduct | Rule 8.4(c) | 2, 13, 14, 31 |
| R. Professional Conduct | Rule 8.4(d) | 2, 13, 14, 31 |

Other:

ABA Model Standards for Imposing Lawyer Sanctions, § 4.12 31

ABA Model Standards for Imposing Lawyer Sanctions, § 4.42 31

ABA Model Standards for Imposing Lawyer Sanctions, § 4.52 31

ABA Model Standards for Imposing Lawyer Sanctions, § 9.21 24

I. STATEMENT OF THE CASE

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

This is a disciplinary proceeding against Respondent Barry J. Nace, (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 or about May 17, 2011. Respondent was served with the Statement of Charges on May 23, 2011, and filed a timely response thereto.

Thereafter, this matter proceeded to hearing in Martinsburg, West Virginia, on October 10, 2011. The Hearing Panel Subcommittee was comprised of Debra A. Kilgore, Esquire, Chairperson, Sean D. Francisco, Esquire, and Ms. Cynthia L. Pyles, layperson. Jessica H. Donahue Rhodes, Lawyer Disciplinary Counsel, appeared on behalf of the Office of Disciplinary Counsel. J. Michael Benninger appeared on behalf of Respondent, who also appeared. At the commencement of the hearing, the Hearing Panel Subcommittee denied Respondent's Motion to Dismiss and granted a motion for Respondent Nace's case to be heard simultaneously with the companion proceeding against D. Michael Burke, Esquire. Mr. Burke's counsel also moved to consolidate the hearings. The misconduct of Respondent and Mr. Burke arise out of the same case and facts.

The Hearing Panel Subcommittee heard testimony from Robert W. Trumble, J. Michael Burke and Respondent. In addition, ODC Exhibits 1-19 and Respondent's Exhibits 1A-7A and 1-45 were admitted into evidence.

On or about March 23, 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 1.1, 1.3, 1.4(a), 1.4(b), 1.15(b), 8.4(c) and 8.4(d) of the Rules of Professional Conduct. The Hearing Panel Subcommittee did not find a violation of Rule 1.5(a). The Hearing Panel Subcommittee issued the following recommendation as the appropriate sanction:

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

1. That Respondent be suspended from the practice of law for 120 days without any requirement for reinstatement;
2. That Respondent provide community service through *pro bono* work for a total of fifty (50) hours;
3. That Respondent satisfy any obligations imposed on him, if any, in any final disposition of the pending adversary proceeding filed by the bankruptcy trustee; and
4. Respondent be ordered to pay the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

B. FINDINGS OF FACT

Barry J. Nace ("Respondent" herein) is a lawyer practicing in Washington, D.C. Respondent is licensed to practice law in West Virginia, and, as such, is subject to the

disciplinary jurisdiction of the Supreme Court of Appeals of West Virginia and its properly constituted Lawyer Disciplinary Board. Respondent was admitted to The West Virginia State Bar on March 19, 1997. He has been practicing law since 1970 and is admitted in Pennsylvania (now inactive by choice), Maryland, and Washington, D.C. (TR, Nace pp. 268, 314-316.) On February 5, 2004, Barbara Ann Miller entered into a "Contract of Employment and Authority to Represent" with Attorney D. Michael Burke regarding her medical malpractice case involving her deceased husband. The agreement stated Forty Percent (40%) of the proceeds would be paid to the firm for the representation. (ODC Exhibit #1, p. 25.)

On September 27, 2004, Barbara Ann Miller filed a Chapter 7 Voluntary Petition in the U.S. Bankruptcy Court in the Northern District of West Virginia, Bankruptcy Petition #: 3:04-bk-03365 in Martinsburg, West Virginia. (ODC Exhibit #19, pp. 341-342.) On September 27, 2004, Robert W. Trumble was appointed as Interim Trustee. (ODC Exhibit #18, p. 312.) On December 21, 2004, an Order discharging Ms. Miller was entered. (Id.)

On January 11, 2005, Robert Trumble, the bankruptcy Trustee, sent a letter to Michael Burke advising he had been appointed Trustee to handle the bankruptcy estate of Barbara Miller and she had testified at the Meeting of the Debtor that Mr. Burke was handling a medical malpractice claim on her behalf. Mr. Trumble asked for a valuation of the case. (ODC Exhibit #1, p. 9.) On January 12, 2005, Mr. Trumble filed a "Trustee's Notice of Assets & Request for Notice to Creditors with Request to Issue Claims." (Id.) On January 13, 2005, Mr. Trumble filed the "Notice to Creditors to File Claims." (Id.)

On January 25, 2005, D. Michael Burke sent a letter to Mr. Trumble stating "[t]he potential claim of Barbara Miller is being reviewed by Barry J. Nace, my co-counsel . . ." and that any evaluation could not be done until a medical review was completed. Respondent also appears as "of counsel" on Mr. Burke's firm letterhead. (ODC Exhibit #1, p.11.) Although Respondent appears as "of counsel" on Mr. Burke's law firm's letterhead, he is a member of a separate law firm, Paulson and Nace, located in Washington, D.C. On January 27, 2005, Mr. Trumble sent Mr. Burke and Respondent separate correspondence with a copy of the "Application to Employ Special Counsel", a proposed "Order Authorizing Trustee to Employ Special Counsel" and an "Affidavit" for them to sign regarding their appointment as Special Counsel. The January 27, 2005 letter also requested Respondent to review the enclosed documents and if they met with his approval, to sign the Affidavit. Mr. Trumble further advised that upon receipt of the signed Affidavit, he would transmit "the documentation to the Bankruptcy Court for approval." (ODC Exhibit #1, pp. 12-18.)

On February 1, 2005, Mr. Burke signed an "Affidavit" wherein he stated he is "willing to accept employment by the Trustee on the basis set forth in the Application to Employ." (ODC Exhibit #1, p. 24.) On February 24, 2005, Respondent also signed an "Affidavit" wherein he stated he is "willing to accept employment by the Trustee on the basis set forth in the Application to Employ." The Affidavit also states: "I am experienced in rendering legal services of the same nature for which I am being employed on behalf of the Bankruptcy Estate." (ODC Exhibit #1, p. 23.) Respondent forwarded the signed "Affidavit" to Mr.

Trumble by letter dated February 24, 2005, and noted his new address as of March 5, 2005. (ODC Exhibit #1, p. 20.)

On March 3, 2005, Mr. Trumble filed with the bankruptcy court the Trustee's Application to Employ Special Counsel. Within that application, Mr. Trumble stated that he found "it necessary and in the best interest of this estate to employ D. Michael Burke, Esquire, and [Respondent], Esquire as Trustee's legal counsel to pursue the Debtor's personal injury claim as a result of a vehicular accident, under a contingency fee arrangement."¹ (ODC Exhibit #1, pp. 21-22.) On March 4, 2005, the Order Authorizing Trustee to Employ Special Counsel was entered by the bankruptcy court and served by the court on all parties, including Respondent. (ODC Exhibit #1, p. 26; TR, Trumble p. 22; Nace Exhibit #41.)

Respondent claims he never received a copy of the Order entered March 4, 2005. However, there was no return to the court indicating Respondent was not served with the Order. (TR, Trumble p. 96; Nace pp. 302-304.) Mr. Trumble testified the signing of the Affidavit is the attorney's agreement to act as special counsel in the bankruptcy case; and that when Respondent signed the Affidavit, he believed "we had an agreement for representation." (TR, Trumble pp. 17-18, and 72.) Mr. Burke understood when he signed the Affidavit that at that point he had been retained by the Trustee as special counsel regardless of whether he received an Order from the Court authorizing his employment. (TR,

¹ The reference to the Miller claim as a personal injury resulting from a vehicular accident, rather than a medical malpractice claim, was a clerical error. (TR, Trumble pp. 16-17.)

Burke, pp. 262-263.) Mr. Trumble then communicated with Mr. Burke and relied on Mr. Burke to communicate with Respondent since he understood they were acting as co-counsel in the Miller case. (TR, Trumble pp. 78-79.)

Respondent states he signed the Affidavit because Mr. Burke asked him; that the fact Ms. Miller filed for bankruptcy "meant nothing to me"; that he was not "familiar at all" with bankruptcy law; and that once he signed the Affidavit, "it was out of [my] mind". (TR, Nace pp. 272-273, 275-277, and 302.) Respondent position is the Affidavit he signed was not his agreement to be employed, just an expression of his "willingness" to be employed (TR, Nace p. 340), and that he was not employed until the Court entered an Order and he received it. (TR, Nace pp. 303-304.)

On May 18, 2005, Mr. Trumble sent a letter to Mr. Burke about "the status of the Debtor(s) medical malpractice claim which is an asset of [the] Bankruptcy Estate." (ODC Exhibit #1, p. 27.) By letter dated May 24, 2005, Mr. Burke replied to Mr. Trumble explaining that his "co-counsel" had notified the potential defendants that "our expert has determined [they] were at fault . . .", and Respondent and co-counsel were waiting for a response from the defendants. Mr. Burke further stated the case "can be expected to take several years to complete." (ODC Exhibit #1, p. 28.) Mr. Burke instructed his secretary to mail a copy of Mr. Trumble's May 18, 2005 letter to Respondent. Mr. Burke's secretary noted on the letter it had been mailed to Respondent's office May 23, 2005. (TR, Burke pp. 199-200; ODC Exhibit – Burke #3, p. 69.) Respondent says he never received this letter.

(TR, Nace pp. 280-281.) Mr. Burke testified the May 23, 2005 mailing to Respondent was not returned to his office. (TR, Burke pp. 200-201.)

On June 17, 2005, a complaint of medical malpractice was filed in the Circuit Court of Berkeley County by Respondent and Mr. Burke on behalf of Ms. Miller as plaintiff against Defendants Jesse B. Jalazo, M.D., Martinsburg Internal Medicine Associates, Inc., James M. Carriers, M.D., Timothy K. Bowers, M.D., Old Mill Internists, Ltd., and City Hospital, Inc. Mr. Burke's signature is signed by Lawrence Schultz, Esquire, who noted his name and his Bar Number, 4293. (ODC Exhibit #16, pp. 421-427.) On July 8, 2005, Respondent filed an Amended Complaint with only his name on the complaint. (ODC Exhibit #16, pp. 428-434.) On July 25, 2005, D. Michael Burke withdrew as Ms. Miller's attorney due to a personal conflict of interest, but informed Ms. Miller that Respondent would continue as her counsel. (ODC Exhibit-Burke #9, p. 185.) No written withdrawal notice or motion to withdraw was submitted to the bankruptcy court or bankruptcy Trustee.

In September of 2006, a partial settlement with Defendant City Hospital, Inc. was reached in Ms. Miller's medical malpractice claim for Seventy-Five Thousand Dollars (\$75,000.00). (ODC Exhibit #10, pp. 243-255.) On September 27, 2006, Ms. Miller signed a "Statement of Account Paul Miller" regarding the Seventy-Five Thousand Dollars (\$75,000.00) Gross Settlement. Ms. Miller received Ten Thousand One Hundred Twenty-Six and 16/100 (\$10,126.16). The balance of the money was applied to attorney fees and expenses. (ODC Exhibit #10, p. 251.)

Respondent wrote to Ms. Miller by letter dated September 26, 2006, outlining the partial settlement and enclosing a Release and other documents for Ms. Miller to sign. Respondent instructed Ms. Miller to contact Mr. Burke's secretary to have her signature notarized. Respondent also stated: "presumably you have a bankruptcy attorney and if so that person should call me so I know whether or not a check can be written to you". (ODC Exhibit–Burke #9, p. 296.) Respondent does not remember following up with Ms. Miller or her bankruptcy attorney about the status of the bankruptcy case in September of 2006. (TR, Nace pp.348-349.) Respondent admits the Affidavit he signed agreeing to be employed by the Trustee was in his file at that time. (TR, Nace p. 349.) In Respondent's initial response to the ethics complaint made in this proceeding, he states that at the time he disbursed the \$75,000.00 partial settlement, "[h]ad I been aware then or at any time that she was in bankruptcy proceedings, I would have done whatever I was Ordered to do by the Court." (ODC Exhibit #3, p. 58, paragraph 43.) Respondent did not seek permission from the bankruptcy Trustee to partially settle the case or distribute the proceeds. (TR, Nace p. 285.)

On October 30, 2006, Ms. Miller's case proceeded to jury trial against the other defendants. (TR, Nace p. 285.) On November 9, 2006, the jury returned a verdict against Defendant Dr. Jesse B. Jalazo for a total of Five Hundred Thousand Dollars (\$500,000.00). Ms. Miller recovered no judgment from Defendants James Carrier, M.D., and Timothy Bowers, M.D. (Id.) Judgment was entered upon the jury verdict on January 4, 2007, awarding Plaintiff \$425,000.00, thereby reducing the \$500,000.00 award by the settlement of \$75,000.00. (Id.)

On July 27, 2007, Mr. Trumble sent a letter to Mr. Burke again asking about "the status of the Debtor(s) medical malpractice claim which is an asset of [the] Bankruptcy Estate." On July 27, 2007, Defendant Dr. Jesse B. Jalazo filed an appeal of the judgment. (ODC Exhibit #16, pp. 454-496.) On August 8, 2007, Mr. Burke faxed and mailed a copy of Mr. Trumble's July 27, 2007 letter to Gabriel Assad, an associate in Respondent's office. A "Fax Cover Memorandum" from Mr. Burke's office shows it was delivered to "Gabriel", from "Lacy", on August 8, 2007. Lacy Godby is Mr. Burke's secretary. Handwriting also states: "per Gabe send to him he will handle 8/8/07." (TR, Burke p. 204, 247; ODC Exhibit-Burke #9, pp. 294-295.) Respondent says he did not receive this letter. (TR, Nace p. 292.)

On February 12, 2008, the Supreme Court of Appeals for West Virginia refused the petition for appeal. (ODC Exhibit #16, p. 497.) On February 28, 2008, Ms. Miller signed a "Statement of Account Paul Miller" wherein the net proceeds to the client was to be Two Hundred Twenty Thousand Four Hundred Sixty-Seven Dollars and Forty-Five Cents (\$220,467.45). (ODC Exhibit #10, p. 268.) On March 5, 2008, Respondent sent a letter to Ms. Miller which included a check for the verdict in the matter. Respondent paid the costs and fees in the matter, and the balance went to Ms. Miller. Respondent sent Ms. Miller a check for Two Hundred Twenty Thousand Four Hundred Sixty-Seven Dollars and Forty-Five Cents (\$220,467.45). (ODC Exhibit #10, pp. 268-273.) Respondent and Mr. Burke had previously stated that a small referral fee was paid to Mr. Burke, but at the October 10, 2011

hearing, both Respondent and Mr. Burke testified there was no such payment. (TR, Burke p. 211; Nace pp. 301-302.)

On October 10, 2008, Mr. Trumble sent a letter to Mr. Burke and Respondent noting that both individuals were employed as special counsel to him. Mr. Trumble indicated that he discovered the medical malpractice case "was resolved and that all of the proceeds were turned over to the Debtor, Barbara Miller." Mr. Trumble stated that he "was not contacted by either [individual] to obtain [his] authority as to the settlement of [the] matter, nor did [Mr. Trumble] receive any documentation relating to the settlement, or any of the settlement proceeds." Mr. Trumble requested copies of all documents regarding the settlement and indicated that any amount of the settlement proceeds that exceeded what Ms. Miller was allowed would force him to seek recovery of the Estate's portion of the settlement proceeds. The letter was sent to Respondent at Paulson & Nace, 1814 North Street NW, Washinton, D.C. 20036. (ODC Exhibit #1, pp. 30-31.) On November 14, 2008, Mr. Trumble sent a second request to Respondent and Mr. Burke for settlement documents referred to in his October 10, 2008 letter. The letter was sent to Respondent at Paulson & Nace, 1615 New Hampshire Avenue, NW, Washington, D.C., 20009-2520. The first letter to Respondent was sent to the wrong address. (ODC Exhibit #1, p. 32; TR, Trumble p. 31.)

On December 1, 2008, Respondent sent a letter to Mr. Trumble advising Mr. Trumble that he did not receive the October 10, 2008 letter due to the wrong address. Respondent said he had been contacted several months ago by someone regarding the status of the case. Respondent further stated he informed the person "that there was not any settlement and that

the case was tried to jury verdict and then went on appeal and reported by the Court of Appeals when they declined to accept the defendants' petition." In addition, Respondent said: "I am not sure why you would expect us to contact you to obtain authority as to a settlement since there was no settlement." (ODC Exhibit #1, p. 34.) Respondent further stated in his December 1, 2008 letter that he would attempt to collect the documentation requested by Mr. Trumble and he asked to be advised about the "Debtor's allowable exemption". (Id.)

On January 5, 2009, Mr. Trumble sent a letter to Respondent stating that Respondent was hired to represent the Trustee's interest in the medical malpractice action regardless of the case being settled, tried before a jury or resolved on appeal. Mr. Trumble stated "as the Trustee of the Bankruptcy Estate and your client, I should have been informed as to the ultimate disposition of this matter and should have received the proceeds from the recovery on the judgment which you obtained." Mr. Trumble stated the allowable exemption for Ms. Miller was Twenty-Five Thousand Seven Hundred and Sixty-Eight Dollars (\$25,768.00) and after Respondent took his fees and expenses, the rest of the proceeds recovered in the matter should have been turned over to Mr. Trumble as Trustee. Thereafter he would provide Ms. Miller with her allowable exemption and distribute the rest to creditors in the bankruptcy estate. Mr. Trumble informed Respondent that he violated his duty to Mr. Trumble as a client and asked that Respondent put his malpractice carrier on notice. (ODC Exhibit #1, pp. 36-37.)

By letter dated February 4, 2009, Respondent responded to Mr. Trumble stating that he had not heard anything from Mr. Trumble since signing the affidavit in February of 2005 and that he had never received the "Trustees Application to Employ Special Counsel." Respondent pointed out that the application referred to a personal injury claim as the result of a "vehicular accident," and he did not represent Ms. Miller or her deceased husband's estate in a vehicular accident case. Respondent also said he never received a copy of the "Order Authorizing Trustee to Employ Special Counsel" until he received Mr. Trumble's January 5, 2009 letter. Finally, Respondent stated he had no notice from Mr. Trumble or the Court that the Order had been entered appointing Respondent as special counsel. (ODC Exhibit #1, pp. 48-50.)

On July 13, 2009, Mr. Trumble filed an ethics complaint against Respondent because of Respondent's distribution of the proceeds from the medical malpractice case to without regard to the bankruptcy estate. (ODC Exhibit #1, pp. 53-59.) On August 25, 2009, Respondent filed his response to the complaint. Within his response, Respondent admitted to signing the affidavit but denied ever seeing a copy of the trustees' application or Order employing him as special counsel. (ODC Exhibit #4, pp. 53-59.) On October 5, 2010, Mr. Trumble filed a "Trustee's Complaint for Breach of Contract and Legal Negligence" in the U.S. Bankruptcy Court for the Northern District of West Virginia, Case Number 04-03365 against Respondent and Mr. Burke based upon Respondent's failure to turn over proceeds from the medical malpractice case to the Trustee. (ODC Exhibit #17, pp. 280-283.)

C. CONCLUSIONS OF LAW

Rule 3.7 of the Rules of Lawyer Disciplinary Procedure provides: “[i]n order to recommend the imposition of discipline of any lawyer, the allegations of the formal charge must be proven by clear and convincing evidence.” Respondent was charged with violating Rules 1.1, 1.3, 1.4(a), 1.4(b), 1.5(a), 1.15(b), 8.4(c) and 8.4(d) of the Rules of Professional Conduct, which state as follows:

Rule 1.1. Competence.

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Rule 1.3. Diligence.

A lawyer shall act with reasonable diligence and promptness in representing a client.

Rule 1.4. Communication

(a) A lawyer shall explain a client reasonable informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Rule 1.5. Fees.

(a) A lawyer’s fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. . . . [A] lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive.

Rule 1.15. Safekeeping property.

(b) [A] lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive. . .

Rule 8.4. Misconduct.

It is professional misconduct for a lawyer to:

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

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

The evidence is clear and convincing that Respondent violated Rule 1.1 - competence, Rule 1.3 - failure to act with diligence, Rule 1.4(a) - failure to keep a client reasonable informed, Rule 1.4(b) - failure to reasonably explain matters to a client, Rule 1.15(b)- failure to promptly notify client of receipt of funds and failure to promptly deliver funds to client, Rule 8.4(c) - conduct involving dishonesty, fraud deceit or misrepresentation, and Rule 8.4(d) - conduct that is prejudicial to the administration of justice. Respondent was also charged with violations of Rule 1.5(a) - charging an unreasonable fee. ODC conceded in its

Proposed Findings of Fact, Conclusions of Law and Recommended Sanctions, and the Hearing Panel Subcommittee agreed, that there was no evidence Respondent violated Rule 1.5(a). The charge against Respondent for violating Rule 1.5(a) should be dismissed.

II. SUMMARY OF ARGUMENT

Respondent was special counsel for the U.S. Trustee in relation to a medical malpractice case wherein Respondent represented Barbara Miller. The result of Ms. Miller's medical malpractice case included the settlement of Seventy-Five Thousand Dollars (\$75,000.00) and a jury verdict which was reduced to Four Hundred and Twenty-Five Thousand Dollars (\$425,000.00). Upon receipt of the settlement and verdict money, Respondent took his portion of attorney fees and costs and gave the rest of the money to Ms. Miller instead of turning over the money to the bankruptcy estate. As a result of the failure to turn over the money, the bankruptcy estate experienced a substantial loss of funds and the bankruptcy estate is still trying to recover those funds. Because of Respondent's acts in this matter, Disciplinary Counsel respectfully submits that Respondent should be suspended for his misconduct.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

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

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.

Lawyers owe duties of candor, loyalty, diligence and honesty to their clients. Members of the public should be able to rely on lawyers to protect their property, liberty, and their lives. Lawyers are officers of the court, and as such, must operate within the bounds

of the law and abide by the rules of procedure which govern the administration of justice in our state. Furthermore, a lawyer's duties also include maintaining the integrity of the profession. The evidence in this case establishes by clear and convincing proof that Respondent violated his duties owed to his client, the public, the legal system, and the legal profession.

Essentially, in this case, Respondent and Mr. Burke jointly undertook to represent Ms. Miller and determine the viability of her medical malpractice claim. Mr. Burke represented to the Trustee that he and Respondent were co-counsel, and Respondent is listed as “of counsel” on Mr. Burke’s office letterhead. Therefore, the Trustee reasonably relied upon Mr. Burke to communicate with Respondent. Respondent became involved in Barbara Miller's case after being contacted by D. Michael Burke. In the past, Respondent and Mr. Burke had co-counseled in medical malpractice cases. Respondent did not sign a contingency fee contract with Ms. Miller and was just using the contingency fee contract entered into between Mr. Burke and Ms. Miller, which was for forty percent (40%) of any recovery in the matter. Such arrangement was always used between Respondent and Mr. Burke, and specifically, Respondent would not enter into a separate employment contract with the medical malpractice clients. (TR, Nace p. 272). Respondent worked on the case to see if it was a viable medical malpractice case. Soon after, Ms. Miller filed for bankruptcy and listed the medical malpractice claim as an asset.

Robert W. Trumble, U.S. Bankruptcy Trustee, then contacted Mr. Burke about the matter. Mr. Burke indicated that the case was being reviewed by Respondent to determine

the viability of the case. On January 25, 2005, the Trustee sent separate correspondence to Respondent and Mr. Burke enclosing an Application to Employ Special Counsel, a proposed Order Authorizing Appointment as Special Counsel, and an Affidavit. While Respondent indicated that he did not see the application or the order, the same were found in his files. (TR, Nace pp. 274-275.) The affidavit specifically stated "I am willing to accept employment by the trustee on the basis set forth in the application to employ filed simultaneously herewith." (ODC Exhibit #1, p. 23.) Respondent said he did not read any additional documents before signing the affidavit and only signed the affidavit because Mr. Burke told him to do so. (TR, Nace p. 276.) On February 24, 2005, Respondent signed the affidavit. Respondent has also admitted that he was not familiar with bankruptcy law during this time frame. (TR, Nace pp. 277-278.)

Respondent signed the Affidavit, apparently relying on Mr. Burke for his knowledge of the duties and obligations of special counsel since Respondent admits he signed the Affidavit even though he had no knowledge of bankruptcy law. Further, Respondent says he signed the Affidavit because Mr. Burke requested him to do so. Thereafter, by his own admission, he gave the matter no more thought. Respondent denies that he ever received a copy of the order granting the application to employ special counsel, but Mr. Trumble testified that the electronic mailing system of the bankruptcy court indicated that Respondent was sent the order and there was not any indication that the order came back to the court.

Nevertheless, even though Respondent gave his employment status as special counsel no more thought, he is still charged with knowledge of that responsibility. He is also charged

with knowledge of the entire contents of his client's files, which included, at the very least, his signed Affidavit to be employed as special counsel. When Mr. Burke later withdrew from representing Ms. Miller, Respondent assumed sole responsibility for representing not only Ms. Miller but the bankruptcy Trustee. Significantly, Mr. Burke withdrew on July 25, 2005, just five months after Respondent signed the Affidavit on February 24, 2005. If Respondent had been relying on Mr. Burke to advise him of his responsibilities as special counsel, when Mr. Burke withdrew, a reasonably competent and diligent attorney would have, at that time, taken notice of the Affidavit and made some effort to determine his duties and responsibilities.

Respondent continued to work on the Miller case and obtained a settlement of Seventy-Five Thousand Dollars (\$75,000.00) in September 2006 from one of the defendants. Respondent did not inform the Trustee or obtain his authority to settle. Respondent's defense is that he had nothing in his file at that time about the bankruptcy. As Respondent testified, "[t]here wasn't anything in [our] file that was saying anything about bankruptcy." (TR, Nace p. 285.) In this regard, Respondent initially maintained in his sworn statement to ODC that he did not receive copies of the Application to Employ Special Counsel and the proposed Order to Employ Special Counsel referenced in the Trustee's January 25, 2005 letter. (ODC Exhibit #9, p. 124.) Further, in Respondent's response to the initial complaint in this matter, Respondent stated that "Ms. Miller never mentioned anything about a bankruptcy to me, nor had her bankruptcy attorney, Mr. O'Brien, ever contacted me. Had I been aware then or at any time that she was in bankruptcy proceedings, I would have done whatever I was Ordered

to do by the Court.” (ODC Exhibit #3, p. 58.) However, at the hearing, Respondent was confronted by the letter he had written to Ms. Miller on September 26, 2006, stating, “presumably you have a bankruptcy attorney, and if so, that person should call me so I know whether or not a check can be written to you.” (ODC Exhibit–Burke #9, p. 296.) Respondent then admitted that the Affidavit, at least, was in his files at the time he settled for Seventy-Five Thousand Dollars (\$75,000.00) with one of the defendants. (TR, Nace p. 349.) Also, by the time of the hearing in this matter, Respondent testified he had found the Application to Employ and proposed Order. (TR, Nace pp. 274-275.) Thus, as developed during the hearing, Respondent’s initial defense that he had no knowledge of the bankruptcy proceedings at the time of the Seventy-Five Thousand Dollar (\$75,000.00) partial settlement and that he had no documents in his file reflecting any bankruptcy proceedings was false.

Respondent proceeded in Ms. Miller's medical malpractice case and ultimately filed a civil complaint on June 27, 2007. Mr. Burke had a personal conflict in the case and did not proceed in the case when the civil complaint was filed in the matter. Respondent continued to work on the case and obtained a settlement of Seventy-Five Thousand Dollars (\$75,000.00) around September of 2006 from one of the defendants and proceeded to a jury trial on the claims against the other defendants. However, Respondent did not seek permission of the bankruptcy court to settle with the first defendant. (TR, Nace p. 285.) In fact, Respondent testified that “[t]here wasn't anything in [his] file that was saying anything about bankruptcy.” *Id.* Further, in Respondent’s response to the opening of the complaint in this matter, Respondent stated that “Mrs. Miller never mentioned anything about a

bankruptcy to me, nor had her bankruptcy attorney, Mr. O'Brien, ever contacted me. Had I been aware then or at any time that she was in bankruptcy proceedings, I would have done what ever I was Ordered to do by the Court." (ODC Exhibit #3, p. 58.) However, Respondent was confronted with a September 26, 2006 letter from him to Ms. Miller that stated "[p]resumably you have a bankruptcy attorney, and if so, that person should call [Respondent] so [Respondent] know[s] whether or not a check can be written to you." Respondent did take a large portion of that settlement to cover his fees and expenses in the matter, and provided the rest to Ms. Miller. (TR, Nace p. 286.)

A jury trial was held against the other defendants and a jury verdict was reached in favor of Ms. Miller on November 9, 2006, in the amount of Five Hundred Thousand Dollars (\$500,000.00). The jury verdict was appealed and denied by the Supreme Court of Appeals of West Virginia on February 12, 2007. After the appeal was denied, Respondent received Four Hundred and Twenty-Five Thousand Dollars (\$425,000.00) for the verdict in the matter, which was offset by Seventy-Five Dollars (\$75,000.00) because of the earlier settlement. Respondent did not submit this money either to the bankruptcy estate. (TR, Nace p. 294.)

Mr. Burke testified that he sent a copy of a July 27, 2007 letter from Complainant to Respondent, but Respondent denied receiving the letter and denied that a copy of the letter was in his file. (TR, Nace p. 292.) As a result of Respondent's actions, the U.S. Trustee did not receive the funds from the medical malpractice case, which resulted in the adversary proceeding being filed against Respondent and which is still pending at this time. Respondent has provided a deposit into the bankruptcy court to cover the costs of the

creditors in the bankruptcy proceeding but that amount does not include the amount that Mr. Trumble has expended to recover the proceeds from the medical malpractice case due to Respondent's misconduct.

Respondent's misconduct, as describe above, is a violation of duties owed to his client. His failure to recognize his misconduct and his false statements regarding his knowledge of the bankruptcy violated duties he also owed to the legal system. Respondent's misconduct also violated duties owed to the public because the public is entitled to be able to trust lawyers to protect their property. In this regard, lawyers are to exhibit the highest standards of honesty and integrity, and lawyers have a duty not to engage in conduct involving dishonesty, fraud or interference with the administration of justice. Finally, Respondent has violated his duties to the profession by failing to turn over the money to the bankruptcy court and failing to maintain the integrity of the profession.

2. Respondent acted negligently.

The evidence establishes that Respondent acted negligently in this matter. The ABA Standards for Imposing Lawyer Sanctions define negligence as the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in that situation. Respondent asserts that he was unaware of the bankruptcy or his position as a special counsel for the U.S. Trustee even though the evidence shows that he received the order appointing him as special counsel and he was aware of the bankruptcy when he delivered funds to his

client. Respondent had an obligation to maintain his client files and check the files. He also had a responsibility to learn his obligations and duties as special counsel.

3. The amount of real injury is great.

Respondent failed to turn over any of the Five Hundred Thousand Dollars (\$500,000.00) he received from Ms. Miller's medical malpractice case to the Trustee. As a result, the Trustee has not been able to resolve the claims against the bankruptcy estate and no creditors have received any of their portion of that money. Further, the Trustee has had to file an adversary proceeding against Respondent and Mr. Burke to recover those funds.

4. There are several aggravating factors present.

Aggravating factors are considerations enumerated under Rule 3.16 of the Rules of Lawyer Disciplinary Procedure for the Court to examine when considering the imposition of sanctions. Elaborating on this rule, the Scott court held “that aggravating factors in a lawyer disciplinary proceeding ‘are any considerations, or factors that may justify an increase in the degree of discipline to be imposed.’” Lawyer Disciplinary Board v. Scott, 213 W.Va. 209, 216, 579 S.E. 2d 550, 557(2003) *quoting ABA Model Standards for Imposing Lawyer Sanctions*, 9.21 (1992). In this matter, the aggravating factors are Respondent’s refusal to acknowledge wrongful nature of his misconduct, his false statements during this proceeding, and his substantial experience in the practice of law.

Throughout these proceedings, Respondent has refused to acknowledge the slightest blame or fault for failing to keep the Trustee informed about the Miller malpractice case and failing to obtain approval prior to the settlement, and prior to disbursement of the settlement

and judgment proceeds. Instead, Respondent blames the Trustee for failing to properly supervise and failing to notify and contact Respondent. (TR, Nace pp. 329-334; Nace Exhibit #2; and Respondent, Barry J. Nace's Finding of Fact and Conclusions of Law and Recommended Decision pp. 41-45.)² But as Mr. Trumble pointed out in his letter to the ODC dated September 3, 2009, it is the attorney, not the client, who is obligated by the Rules of Professional Conduct to act with reasonable diligence and to reasonably keep his client informed. (ODC Exhibit #5, p. 67.)

Respondent had no knowledge of the bankruptcy proceedings. However, Respondent had no knowledge because of his failure to maintain his client files and take notice of the documents in the files that would have reminded him of his employment as special counsel, including, at the very least, the Affidavit where he agreed to such employment. Yet, Respondent does not even acknowledge this responsibility or this failure.

Further, Respondent replied to the initial ethics complaint in this matter by letter dated August 4, 2009. In that letter, Respondent stated when he made the distribution of the Seventy-Five Thousand Dollars (\$75,000.00) partial settlement, he did not know then about the bankruptcy; that "Mrs. Miller never mentioned anything about a bankruptcy to me . . . [and] [h]ad I been aware then or at any time that she was in bankruptcy proceedings, I would have done whatever I was Ordered to do by the Court." (ODC Exhibit #3, p. 58, paragraph 43.) Respondent attached to this letter a copy of the Statement of Account showing the

² The Hearing Panel Subcommittee makes no finding whatsoever about whether the bankruptcy Trustee acted appropriately or inappropriately in this matter.

distribution of the Seventy-Five Thousand Dollars (\$75,000.00) and a copy of the check to Ms. Miller for her share of the proceeds. However, since Respondent's case was heard simultaneously with Michael Burke's case, the Hearing Panel Subcommittee discovered a September 26, 2006 letter from Respondent to Ms. Miller in ODC exhibits for Mr. Burke. This letter had been provided by Mr. Burke in his response to ODC. (ODC Exhibit–Burke #9, p. 296.) With the September 26, 2006 letter, Respondent enclosed a release for Ms. Miller to sign, discussed the amount she would receive from the settlement, and stated “[p]resumably you have a bankruptcy attorney and if so that person should call me so I know whether or not a check can be written to you.” Obviously, then, Respondent knew at that time of the bankruptcy and that maybe the bankruptcy estate and not Ms. Miller should receive the proceeds. Notably, however, when Respondent was confronted with this letter at the hearing, he avoided responding to the question about whether he did in fact have knowledge of the bankruptcy proceedings at the time of the \$75,000.00 settlement. (TR, Nace, pp. 345-348.)

Respondent did not disclose the September 26, 2006 letter to ODC. In response to the Investigative Subpoena Duces Tecum (ODC Exhibit #8), Respondent produced several records and pleadings from the Miller medical malpractice case, including the Release of All Claims signed by Ms. Miller, an Agreed Final Order Approving Settlement of a Wrongful Death Claim as to Defendant City Hospital, Inc., and the Statement of Account for distributing the Seventy-Five Thousand Dollars (\$75,000.00) settlement money. But, he did not include the September 26, 2006 letter. When Respondent was asked about that at the

hearing, he blamed counsel for ODC for not requesting it. (TR, Nace, pp. 349-351.) Respondent then filed a post-hearing Affidavit emphasizing, again, that ODC had only requested his “Trumble file”; that ODC did not request his “‘entire file’ on the Miller matter . . .”; and that he had only produced what “I thought would be relevant to this issue.” (Id. At paragraph 18.) Apparently, he did not think the September 26, 2006 letter he wrote to Ms. Miller asking about the bankruptcy proceedings, which thereby demonstrated his knowledge of the bankruptcy proceedings at the time of the partial settlement, was relevant to the issue of his representation of the bankruptcy Trustee. Clearly, Respondent’s excuse for failing to disclose the September 26, 2006 letter is disingenuous at best.

There can also be no question the September 26, 2006 letter was in Respondent’s files because he produced this letter as an attachment to his post hearing Affidavit stating:

29. Included as exhibit 1 are documents pertaining to the partial settlement of \$75,000.00. These are in my Miller correspondence file, consecutively, and are attached so that one can see what was going on, in the file, around that period of time. Nothing has been taken out.

30. In the midst of this exhibit is the letter of September 26, 2006 . . .

(Id.)

In fact, whether documents are in Respondent’s files is a recurrent theme in this case. Before being confronted at the hearing, Respondent testified that at the time of the September 2006 settlement, there was nothing in his files about the Miller bankruptcy (TR, Nace p. 285.); yet he signed the Affidavit consenting to be employed as special counsel

approximately one and one-half years earlier on February 24, 2005. Respondent also maintained at his sworn statement to the ODC that he never received the Application to Employ Special Counsel or the proposed Order from the Trustee (ODC Exhibit #9, p. 124); yet the Application to Employ Special Counsel has attached to it a Certificate of Service to Respondent dated January 27, 2005 (ODC Exhibit #1, pp. 14-15) and in Respondent's deposition in the bankruptcy adversary proceeding, he admitted his office address on this Certificate of Service was correct. (Nace Exhibit #3, pp. 64-65, and 344-345.)

Respondent also claims he did not receive the entered Order Authorizing Trustee to Employ Special Counsel. However, given the documents that Respondent claims he never received because they are not in his files, yet later turn up in his files, this claim is not credible. Further, Respondent's argument that he did not know he was employed as special counsel because he did not know the Order had been entered by the Court is disingenuous. In the first place, Respondent admitted he knew nothing about bankruptcy law and further admitted he did not even know that such an Order was a prerequisite to being employed. (Tr, Nace pp. 277-278.) Moreover, had Respondent known this, a reasonably diligent attorney, upon consenting to be employed, would have followed up to determine if the Order had been entered. Respondent never did this.

Respondent also denies receiving from Mr. Burke the May 18, 2005 and July 27, 2007 letters from Mr. Trumble inquiring about the status of the Miller case. Of course, if these letters were "found" in Respondent's files, there would be no question that Respondent had knowledge and notice of the bankruptcy and his employment as special counsel to the

Trustee. However, as with the Application, proposed Order, and Order entered and served by the Court, Respondent claims he never received these letters. The Hearing Panel Subcommittee finds the claim that Respondent did not receive two letters mailed and faxed to him two years apart incredible. Mr. Burke testified he instructed his secretary to mail a copy of the May 18, 2005 letter to Respondent and his secretary even noted mailing this on May 23, 2005. The mailing was not returned to Mr. Burke as undeliverable. Mr. Burke also testified on that on August 8, 2007, he faxed and mailed a copy of Mr. Trumble's July 27, 2007 letter to Gabriel Assad, an associate in Respondent's office. Respondent also conceded there had never been a problem with communication between his office and Mr. Burke's office and that it was perfectly acceptable for Mr. Burke to speak with an associate or a secretary if he was not available. (TR, Nace pp. 309-310.) Respondent blames Mr. Burke's secretary Lacy Godby, Respondent's associate Gabriel Assad, and Mr. Trumble's paralegal Kristi Hook for not receiving the letters and faxed. (TR, Nace, pp. 280-281, pp. 336-337.)

5. There are several mitigating factors present.

The Scott Court also adopted mitigating factors in a lawyer disciplinary proceeding and stated that mitigating factors "are any considerations or factors that may justify a reduction in the degree of discipline to be imposed." Lawyer Disciplinary Board v. Scott, 213 W.Va. 216, 579 S.E.2d 550, 557 (2003).

The following mitigating factors are present: absence of a prior disciplinary record and an excellent professional reputation. Respondent has been licensed to practice law in West Virginia since March 19, 1997, and has no prior discipline from either the Investigative

Panel of the Lawyer Disciplinary Board or the West Virginia Supreme Court of Appeals. Respondent is also licensed to practice in Washington, D.C., Maryland and Pennsylvania. He has no history of any ethics violations in these jurisdictions. There is also no dispute that Respondent has an excellent reputation as a lawyer representing plaintiffs in medical malpractice actions.

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, 186 W.Va. 43, 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).

Standard 4.12 of the ABA Standards for Imposing Lawyer Sanctions states that a suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client. In addition, Standard 4.42 (b) of the ABA Standards for Imposing Lawyer Sanctions states that a suspension is generally appropriate when a lawyer engages in a pattern of neglect causes injury or potential injury to a client. Suspension is also generally appropriate under Standard 4.52 of the ABA Standards for Imposing Lawyer Sanctions when a lawyer engages in an area of practice in which the lawyer knows he is not competent, and causes injury or potential injury to a client.

In deciding an appropriate sanction, the Hearing Panel Subcommittee must consider not only what sanctions would appropriately punish Respondent, but also whether the sanctions are adequate to serve as an effective deterrent to other members of the Bar and restore public confidence in the ethical standards of the legal profession. The evidence in this case demonstrates that Respondent violated several Rules of Professional Conduct. Respondent has violated Rules 1.1, 1.3, 1.4(a), 1.4(b), 1.15(b), 8.4(c), and 8.4(d). Other jurisdictions have suspended attorneys for settling claims without notifying the bankruptcy trustee. *See Attorney Grievance Commission v. Nichols*, 405 Md. 207, 950 A.2d 778 (Md. 2008) (an attorney indefinitely suspended for failing to list personal injury claim as an asset on bankruptcy petition, settling claim without notifying bankruptcy trustee, and in deducting a fee without obtaining prior permission of bankruptcy court); Disciplinary Proceeding

Against Preszler, 169 Wash.2d 1, 232 P.3d 1118 (Wash. 2010) (an attorney suspended for three (3) years for charging unreasonable fee, giving mistaken legal advice, filing false documents with a tribunal, failing to supervise paralegal, and not obtaining the approval from the bankruptcy court before distributing proceeds of client's personal injury claim to himself); Columbus Bar Association v. Cooke, 111 Ohio St.3d 290, 855 N.E.2d 1226 (Ohio 2006) (attorney indefinitely suspended for failing to disclose client's intention to seek a personal injury claim in bankruptcy filing and for settling the personal injury claim while the bankruptcy was pending).

In this case, it is clear that Respondent improperly handled money that should have been turned over to the U.S. Trustee. Respondent has failed to acknowledge his position as special counsel to the U.S. Trustee. This failure contributed to the bankruptcy estate not receiving the substantial funds from the medical malpractice case. The aggravating factors far outweigh the mitigating factors in this case and contribute substantially to the recommended discipline.

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.

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 120 days without any requirement for reinstatement;

2. That Respondent provide community service through *pro bono* work for a total of fifty (50) hours;
3. That Respondent satisfy any obligations imposed on him, if any, in any final disposition of the pending adversary proceeding filed by the bankruptcy trustee; and
4. Respondent be ordered to pay the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

Accordingly, the Office of Disciplinary Counsel urges that this Honorable Court uphold the sanctions recommended by the Hearing Panel Subcommittee.

Respectfully submitted,
The Lawyer Disciplinary Board
By Counsel


Jessica H. Donahue Rhodes [Bar No. 9453]
Lawyer Disciplinary Counsel
Office of Disciplinary Counsel
City Center East, Suite 1200C
4700 MacCorkle Avenue SE
Charleston, West Virginia 25304
(304) 558-7999
(304) 558-4015 - *facsimile*

CERTIFICATE OF SERVICE

This is to certify that I, Jessica H. Donahue Rhodes, Lawyer Disciplinary Counsel for the Office of Disciplinary Counsel, have this day, the 7th day of December, 2012, served a true copy of the foregoing "**Brief of the Lawyer Disciplinary Board**" upon J. Michael Benninger, Esquire, counsel for Respondent Barry J. Nace, by mailing the same via United States Mail, both certified and regular, with sufficient postage, to the following address:

J. Michael Benninger, Esquire
Post Office Box 623
Morgantown, West Virginia 26507



Jessica H. Donahue Rhodes