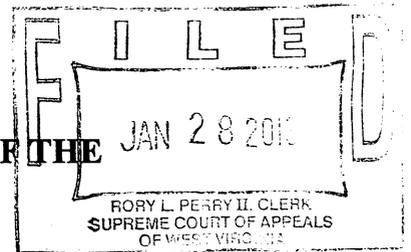


**BEFORE THE SUPREME COURT OF APPEALS OF THE
STATE OF WEST VIRGINIA**



LAWYER DISCIPLINARY BOARD,

Complainant,

v.

No. 11-0812

BARRY J. NACE,

Respondent.

REPLY BRIEF OF THE LAWYER DISCIPLINARY BOARD

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I. REPLY TO RESPONDENT'S BRIEF

This matter is before the Court pursuant to the "Report of the Hearing Panel Subcommittee" issued on March 21, 2012, wherein the Hearing Panel Subcommittee properly found that the evidence established that Respondent committed violations of 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. At this stage in the proceedings, this Court has held that "[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." Lawyer Disciplinary Board v. Cunningham, 195 W.Va. 27, 34, 464 S.E.2d 181, 189 (1995); Committee on Legal Ethics v. McCorkle, 192 W. Va. 286, 290, 452 S.E.2d 377, 381 (1994).

The Rules of Professional Conduct state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. Committee on Legal Ethics v. Keenan, 189 W.Va. 37, 40, 427 S.E.2d 471, 473 (1993) (*per curiam*); *quoting* Syl. Pt. 3, in part, Committee on Legal Ethics v. Tatterson, 173 W.Va. 613, 319 S.E.2d 381 (1984). Furthermore, the Preamble to the Rules of Professional Conduct provides that "[i]n all professional functions a lawyer should be competent, prompt and diligent." It cannot be said that Respondent's conduct in this case conforms to the expectations of the profession as stated in the Rules of Professional Conduct. The evidence clearly establishes that Respondent acted in a manner wherein it was negligent and deviated from the standard of care that a reasonable lawyer, let alone one with Respondent's considerable experience, would exercise in that situation.

1. This Court has jurisdiction over attorney disciplinary proceedings.

The Supreme Court of Appeals is the final arbiter of formal legal ethic charges and must make the ultimate decisions about public reprimands, suspensions or annulments of attorneys' licenses to practice law. Syl. Pt. 3, Committee on Legal Ethics v. Blair, 174 W.Va. 494, 327 S.E.2d 671 (1984); Syl. Pt. 7, Committee on Legal Ethics v. Karl, 192 W.Va. 23, 449 S.E.2d 277 (1994). The fact that the misconduct arose out of a bankruptcy case does not eliminate this Court's authority over the attorney misconduct. Respondent's misconduct occurred in the context of his role as Special Counsel for the U.S. Trustee of the Bankruptcy Court, which certainly is under the federal court system. This Court has previously sanctioned an attorney for his conduct in federal court concerning federal black lung proceedings. See Lawyer Disciplinary Board v. Smoot, 228 W.Va. 1, 716 S.E.2d 491 (2010). Any attorney licensed to practice law in West Virginia is subject to the jurisdiction of this Court regarding attorney disciplinary matters. Further, the bankruptcy court in the adversary proceeding has stayed that matter pending the conclusion of the disciplinary cases against Respondent and Mr. Burke in this Court.¹

¹ Respondent has filed a motion to lift the stay in bankruptcy court but that has not been ruled on by the time of the submission of this reply brief. Further, the 4th Circuit Court of Appeals appeal regarding the removal of the matter to federal court was dismissed on or about January 25, 2013 by voluntary dismissal and agreement by both parties.

2. Issues before the bankruptcy court regarding the possible exemption of Ms. Miller's medical malpractice do not affect Respondent's misconduct nor is Respondent allowed to raise such an issue.

Respondent and Mr. Burke represented the estate and U.S. Trustee as Special Counsel. (ODC Exhibit #1, p. 21.) The position taken by Respondent in regards to whether the U.S. Trustee failed to timely object to an exemption puts him in direct conflict with his own client. Special counsel for the U.S. Trustee is appointed under 11 U.S.C. § 327(e). “[B]y accepting employment pursuant to §327(e), [the attorneys] took on a very limited role — i.e., to litigate the first suit . . . Nothing in § 327(e) granted Special Counsel a broad, supervisory mandate to second-guess the decisions of the trustee on the myriad other issues which arise in a Chapter 7 bankruptcy case.” In re Johnson, 1994 WL 163911 (N.D.Cal. 1994). Respondent and Mr. Burke are now in a position wherein they are advocating a position against their own client in regards to the possible exemption that may apply.

The Johnson case stated:

“[n]one of this is meant to suggest that the trustee has unfettered discretion in conducting the liquidation of the estate. Indeed, if a trustee engages in misconduct sufficiently egregious so as to give cause for removal, the bankruptcy judge may remove and replace the trustee. 11 U.S.C. § 324. In such cases, of course, someone has to alert the bankruptcy judge of the trustee's defalcations. But for the reasons discussed above, special counsel for the estate cannot be the ones responsible for this task. Instead, this role is one best reserved for the creditors and the debtor.”

Id. If there is any wrongdoing by the U.S. Trustee in Ms. Miller's bankruptcy case, which Disciplinary Counsel does not concede, such issues should not be brought up by the U.S. Trustee's appointed Special Counsel. The issues presented regarding the possible exemption

of the medical malpractice case were not an issue that Respondent was to determine. He was to represent the bankruptcy estate in the medical malpractice case and turn over the funds to the bankruptcy estate when he received them. Respondent is not to become involved in the exemption issue as that is something for the debtor and creditors to raise. The problem with this disciplinary case is that the debtor and creditors were never able to raise the issue with the possible exemption because Respondent and Mr. Burke did not turn over the proceeds to the bankruptcy estate. Now, in an attempt to avoid the sanctions as a result of his misconduct, Respondent is trying to turn the focus over to the U.S. Trustee, which is also in violation of his duties as Special Counsel.

Respondent's state of mind and his actions are at issue. Respondent stated during the hearing in this matter that he is unfamiliar with bankruptcy law. (TR, Nace pp. 304.) Respondent signed the affidavit to be appointed as Special Counsel on February 24, 2005(ODC Exhibit #1, p. 23), he received a copy of the blank Order employing him as special counsel (ODC Exhibit #1, p. 12, TR, Nace pp. 274-275), and was certainly aware that the bankruptcy was pending. (TR, Nace pp. 273). Even after having those documents and knowledge, Respondent failed to turn over the proceeds to the bankruptcy estate and instead turned them over to Ms. Miller. Respondent's state of mind at that time he received the proceeds from the medical malpractice case did not include any thought about the possible exemption of the proceeds from the bankruptcy estate. Further, Respondent could not have raised those issues at that time because he was Special Counsel for the U.S. Trustee and still holds that position at this time.

While it is understandable that the Respondent wants this Court to look at the bankruptcy matter and take attention away from the misconduct that occurred in this case, it is not appropriate in the matter. No matter what the result of the bankruptcy proceeding, at the time of the judgment being entered in Barbara Miller's case, there was a Court Order entered by the bankruptcy court appointing Respondent and Mr. Burke as special counsel. (ODC Exhibit #1, p. 21). They had a duty to the U.S. Trustee and the bankruptcy estate to turn over the money to the bankruptcy estate. That can not be ignored nor can any attempt to argue about any exemptions change that fact. Those funds should have been turned over the bankruptcy estate. If Barbara Miller was entitled to certain exemptions, those matters should have been determined by the bankruptcy court and could have been argued by Mrs. Miller after Respondent and Mr. Burke turned over the money to the bankruptcy estate. Respondent may be trying to lift the Order appointing him as Special Counsel at this time, but the Order was in effect when Respondent received the money from the medical malpractice case. *See* Exhibit 1 to Respondent's Motion for Leave to File Reply to Response to Motion for Stay. With such Order in place, Respondent should have turned over the money to the bankruptcy estate. There is no indication that Respondent did not believe that the Order appointing him as Special Counsel was not valid when it was entered nor when he received the judgment in the medical malpractice case.

To ensure that this Disciplinary Counsel follows Rule 3.3 of the Rules Of Professional Conduct regarding candor to the tribunal, the level of injury or harm may have been lessened if the U.S. Trustee did not have any right to the proceeds of the medical malpractice.

“Rule 3.16 of the West Virginia Rules of Lawyer Disciplinary Procedure enumerates factors to be considered in imposing sanctions and provides as follows: ‘In imposing a sanction after a finding of lawyer misconduct, unless otherwise provided in these rules, the Court [West Virginia Supreme Court of Appeals] or Board [Lawyer Disciplinary 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.’”

Syl. pt. 4, Office of Lawyer Disciplinary Counsel v. Jordan, 204 W.Va. 495, 513 S.E.2d 722 (1998). There has been misconduct in this case in that Respondent failed to turn over the proceeds from the medical malpractice case to the bankruptcy estate which has resulted in several rule violations. The finding of misconduct is not incorrect. Once misconduct has been established, this Court considers the factors listed above and one such factor includes “the amount of the actual or potential injury caused by the lawyer’s misconduct.” Id. If the medical malpractice case was exempted from the bankruptcy estate, there may have been a lesser amount of injury in this case. However, it should be noted that the bankruptcy estate still has the pending adversary proceeding wherein fees are being accumulated by Mr. Trumble to recover the proceeds from the medical malpractice case. (TR, Trumble pp. 151-154). If those proceeds had been turned over to him by Respondent and ultimately found to be exempted, additional fees being accumulated by Mr. Trumble in the adversary proceeding would not have occurred in this case.

3. The U.S. Trustee is bound by the Rules of Professional Conduct

Mr. Trumble certainly had to follow certain provisions of the bankruptcy code to act as the U.S. Trustee. However, Mr. Trumble is also bound by the West Virginia Rules of Professional Conduct as an attorney in the State of West Virginia. (TR, Trumble pp. 7-8). One provision of the Rules of Professional Conduct requires that attorneys report a violation “that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.” (Rule 8.3(a) of the West Virginia Rules of Professional Conduct.) It has been obvious that there was a reason to believe that Respondent’s misconduct fit under Rule 8.3(a) because the complaint was opened, a Statement of Charges was issued, and the Hearing Panel Subcommittee found misconduct and recommended a suspension. The issue regarding the misconduct and sanction is now pending before this Court.

4. The Hearing Panel’s consideration of the evidence was appropriate.

The Hearing Panel’s refusal to consider the behavior of Mr. Trumble does not affect the misconduct committed by Respondent. There were various instances of where Respondent’s inactions in not turning over the money to the bankruptcy estate and turning over information to Disciplinary Counsel show Respondent’s true character and behavior in the matters. Respondent’s continual denial throughout this proceeding that he had no knowledge of the bankruptcy was shown to be false by the various documents, such as the affidavit, Order appointing Special Counsel, and the September 26, 2006 letter to Ms. Miller which specifically mentioned the bankruptcy case.

Respondent's payment of money to cover the amount of money due to the creditors in Ms. Miller's bankruptcy case was made only a few days before the hearing in this matter, such information was presented before the Hearing Panel, and they gave it the weight it needed to have. The bankruptcy estate of Ms. Miller is still in limbo as to payments to creditors and there is still a pending adversary proceeding. The proceeds from Ms. Miller's medical malpractice case is still not in the hands of the bankruptcy estate. Further, even at this stage, Respondent has failed to recognize his failure to turn over the proceeds from the medical malpractice case to the bankruptcy estate and makes arguments about the possible exemption of the medical malpractice case from the bankruptcy estate in direct conflict with his position as Special Counsel to the U.S. Trustee.

II. CONCLUSION

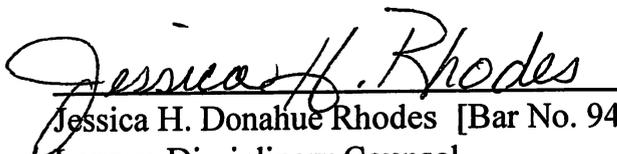
Respondent has violated the Rules of Professional Conduct and the aggravating factors far outweigh any effect of mitigating factors. Therefore, a review of the record clearly indicates that the Hearing Panel Subcommittee properly considered this matter with the evidence before it when it made its recommendation to the Court. Wherefore, based upon the foregoing, the Office of Disciplinary Counsel respectfully requests that this Court accept and uphold the following recommended sanctions of the Hearing Panel Subcommittee:

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.

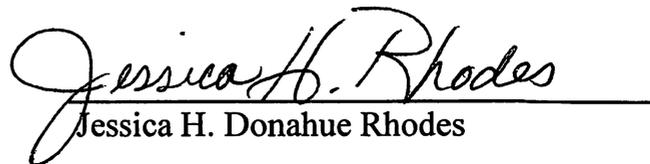
Respectfully submitted,
The Lawyer Disciplinary Board
By Counsel


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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 28th day of January, 2013, served a true copy of the foregoing "**Reply 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