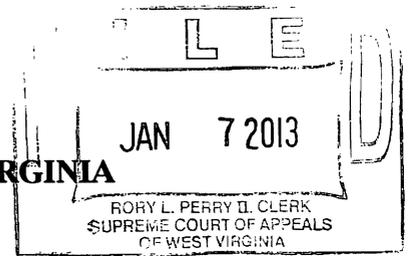


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



No. 11-0812

LAWYER DISCIPLINARY BOARD,

Petitioner,

vs.

BARRY J. NACE,

Respondent.

RESPONDENT BARRY J. NACE'S BRIEF

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RESPONDENT BARRY J. NACE'S BRIEF

Now comes Respondent Barry J. Nace, by counsel, pursuant to this Court's Corrected Order dated November 7, 2012, and Rules 35 and 38, *West Virginia Rules of Appellate Procedure*, and files his brief in this lawyer disciplinary proceeding and in response to the Statement of Charges filed against him, the Report of Hearing Panel Subcommittee dated March 21, 2012, and the Brief of the Lawyer Disciplinary Board filed on December 7, 2012.

Statement of the Case

For more than 40 years, Respondent Barry J. Nace ("Nace") has been a tireless supporter of both the bench and bar. He has served his profession in a myriad of ways – from president of ATLA, now AAJ, to presenting educational seminars to others interested in trial practice. As president for two consecutive years of the National Board of Trial Advocacy, the ABA sponsored professional certifying agency for trial advocacy, Nace was instrumental in its advancement to a position of national recognition and prominence. In serving as president of the Metropolitan D.C. Trial Bar and appointed member of the D.C. Court of Appeals Unauthorized Practice of Law Committee, he has consistently demonstrated his dedication to professionalism and ethics. However, his continued participation in the American Law Institute, the American Board of Professional Liability Attorneys and the National Board of Legal Specialty Certification hangs in the balance with the decision in this proceeding. This lawyer is not unethical; and his entire reputation and good standing in this Bar and in the Bars in Maryland, Pennsylvania and the District of Columbia would be stained with an adverse decision in this proceeding, where he, at most, made a mistake in not knowing or fully understanding the expectations of others with whom he had little or no communication.

Procedural History and Related Proceedings

This lawyer disciplinary proceeding against Nace began as a result of the Bankruptcy Court's authorizing his appointment as Special Counsel to the interim bankruptcy trustee in his client's Chapter 7 case, under 11 U.S.C. § 327(e). All duties, legal and ethical, which Nace is charged with violating arose under the bankruptcy case. Thus, this proceeding falls squarely within the United States District Court's (and Bankruptcy Court's) original and exclusive jurisdiction as stated in 28 U.S.C. § 1334(e)(2) and is a "core proceeding" under 28 U.S.C. § 157(b)(2)(A) as it involves the administration of Nace's client's bankruptcy estate. However, without regard to jurisdiction, Robert W. Trumble ("Trumble") filed his Complaint with the Lawyer Disciplinary Board ("LDB") on July 13, 2009 (ODC Ex. 1, pp. 1-2), which resulted in the Statement of Charges filed with this Court on May 17, 2011.

In response thereto, Nace filed his Answer and Affirmative Defenses on July 13, 2011. Nace affirmatively asserted in the First Defense that, if it were later held that he was appointed as Special Counsel to the Trustee, he would assert a federal jurisdictional basis for removal. He also asserted *laches* and time bar under Rule 2.14, *West Virginia Rules of Lawyer Disciplinary Procedure*; estoppel based upon the conduct of Trumble; and lack of notice resulting in the absence of mutual assent to the formation of an attorney-client relationship between Nace and Trumble in the underlying Bankruptcy Court case. Nace affirmatively alleged in his Ninth Defense:

[A]ny issue, error, mistake, problem or occurrence set forth in the Statement of Charges which affect the relationship between the complaining party and the Respondent were inadvertent, without Respondent's knowledge, unintentional and were not done in a manner or with a conscious state of mind which would support a finding of any violation of any West Virginia Rule of Professional Conduct in this case.

The evidentiary hearing was held before the Hearing Panel Subcommittee (“HPS”) on October 10, 2011. Prior to the hearing, Nace served his Motion to Dismiss Statement of Charges, asserting that the discovery materials failed to establish any “knowing or intentional violation” of any of the rules cited in the Statement of Charges. The Motion to Dismiss was based upon the holding and *dicta* of this Court’s decision in *Committee on Legal Ethics v. Mullins*, 159 W.Va. 647, 226 S.E.2d 427 (1976), recently cited approvingly by the Office of Disciplinary Counsel (“ODC”) in its brief in another disciplinary proceeding in this Court.

At the direction of the HPS following the hearing, Nace served his Findings of Fact and Conclusions of Law and Recommended Decision on December 21, 2011. His submission focused upon the relevant facts and captured his asserted affirmative defenses, the arguments made in his Motion to Dismiss, and the application of fact to law which he deemed necessary as part of this disciplinary proceeding. On January 10, 2012, Nace filed his Response and Objection to Disciplinary Counsel’s Proposed Findings of Fact, Conclusions of Law and Recommended Sanctions. The HPS issued its Report of Hearing Panel Subcommittee on March 21, 2012. ODC then designated and submitted the adjudicatory record to this Court on March 23, 2012. On April 9, 2012, Nace filed Respondent’s Rule 3.11 Objection.

Nace filed his Notice of Removal to the United States District Court for the Northern District of West Virginia, on April 24, 2012. This Court entered its Order Staying this Disciplinary Proceeding on May 7, 2012. The United States District Court filed its Order Granting Petitioner’s Motion to Remand on November 7, 2012. Upon receipt of the District Court’s Order, this Court entered its scheduling order on November 7, 2012. Nace filed his Notice of Appeal of the District Court’s Order to the United States Court of Appeals for the

Fourth Circuit on November 21, 2012. On November 29, 2012, Nace filed his Motion for Stay with this Court. As of this date, the Court has not acted upon the Motion to Stay.

The undersigned is advised that a Motion for Rehearing has been filed by Michael D. Burke (“Burke”) in the related disciplinary proceeding of *Lawyer Disciplinary Board v Burke*, ___ S.E.2d ___ (WV), (2012 WL 5479137) (decided November 9, 2012). The dissent in Burke’s case appropriately focuses discussion on the application of the *Mullins* decision to the largely undisputed collection of facts in this case, which establish that, at most, Nace made a simple mistake or error that should not constitute a basis for discipline. Related judicial proceedings in which Nace and Burke were involved and are directly implicated by the Statement of Charges include: (1) Barbara A. Miller’s (“Miller”) Chapter 7 Bankruptcy Case docketed in the United States Bankruptcy Court for the Northern District of West Virginia, No. 3:04-bk-03365; and, (2) the bankruptcy adversary proceeding initiated by Trumble by his Complaint filed on October 5, 2010, against Nace and Burke alleging professional negligence and seeking recovery of money for Miller’s bankruptcy estate docketed as Chapter 7 Bankruptcy Case No. 3:10-ap-00136. The record in this proceeding also references the State Court civil action filed on June 17, 2005, by Nace and Burke in Miller’s deceased husband’s wrongful death medical malpractice case (“husband’s case”), docketed in the Circuit Court of Berkeley County, West Virginia, Civil Action No. 05-C-418.

Record Factual Information

This disciplinary proceeding is unique due to the number of interconnected judicial proceedings and the relative roles, legal burdens and responsibilities, and relationships of each of the lawyers involved therein. This section, expressing the chronological background of the case, is broken into three subparts below.

(1) **From Date of (Client) Miller Retention of Burke to Trumble’s Knowledge of Nace**

For Nace and Burke, this case originated as an ordinary wrongful death, medical malpractice case, encompassed by the Wrongful Death Act, *West Virginia Code* §§ 55-7-5 through 8 and the Medical Professional Liability Act, *West Virginia Code* §§ 55-7B-1, *et seq.* Following her husband’s death in 2003, Miller employed Burke to review her husband’s case. She signed his standard contingency fee contract in her representative capacity as “admin’x of the Estate of Paul D. Miller” on February 5, 2004. Nace Ex. 2, ODC Ex. 19, p. 25, Hearing Transcript (“Tr.”) 189. Thereafter, Burke obtained the medical records and sent them to Nace to “do an initial review” to determine whether he felt the case should be pursued. Tr. 192.

During their 20-year professional relationship in handling medical malpractice cases together, Burke typically received calls to his office concerning potential cases and he would screen them, “handle discussions with the clients, acquire the records, send the records” to Nace who then decided “whether to take the case.” Tr. 192. This general process was utilized in the Miller case. Tr. 191.

On September 24, 2004, while Burke and Nace were still in the preliminary stage of reviewing her husband’s case, Miller retained separate legal counsel¹ and filed her Bankruptcy Chapter 7 Voluntary Petition as a “no asset” case. ODC Ex. 19, p. 341. **SCHEDULE B – PERSONAL PROPERTY** attached to the bankruptcy petition listed “Malpractice Suit in re: deceased husband (D. Michael Burke, Attorney)” as property of the estate with an “unknown” current market value of Debtor’s interest in the property. ODC Ex. 19, p. 352. Miller also filed a **SCHEDULE C – PROPERTY CLAIMED AS EXEMPT**, which specifically exempted the

¹ William A. O’Brien, Esquire, (“O’Brien”) represented Ms. Miller in the preparation and filing of her petition and throughout the bankruptcy case. He had no contact with Respondent Nace throughout the entire period.

“Malpractice Suit in re: deceased husband (D. Michael Burke, Attorney)” under the provisions of the *West Virginia Code* § 38-10-4 and stated “unknown” for both the value of the claimed exemption and the current market value of the exempt property. ODC Ex. 19, p. 354.

On the same date the bankruptcy case was filed, the Bankruptcy Court filed and served its “**Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines**” with its designation of the case as a “no asset” case. ODC Ex. 19, pp. 312 and 372; Tr. 56. The notice identified O’Brien as Miller’s attorney and Trumble as Interim Bankruptcy Trustee, and scheduled the Section 341 Meeting of Creditors for October 21, 2004. The notice expressly provided the Bankruptcy Rule 4003 mandated 30-day deadline to object to exemptions claimed by Miller. ODC Ex. 19, p. 372.

During examination at the hearing in this proceeding, Trumble acknowledged that his duties as trustee in Miller’s case arose under Title 11 of the United States Code, (§704) and the Handbook for Chapter 7 Trustees (“Trustee Handbook”). Nace Ex. 2, Tr. 48-49. The trustee’s duties relating to the debtor’s claimed exemptions are set forth in two separate sections of the Trustee Handbook. Nace Ex. 2.

The first section, Chapter 6-DUTIES OF A TRUSTEE, mandates:

3. EXAMINING THE DEBTOR’S EXEMPTIONS AND STATEMENT OF INTENTION, § 704(3)

.....

The trustee must object to improper debtor exemptions within 30 days after the conclusion of the § 341(a) meeting
..... If the trustee does not file a timely objection to an exemption, it is deemed allowed. See Taylor v. Freeland and Krantz, 503 U.S. 638 (1992). [Emphasis added]

Nace Ex. 2, p. 6-5.

The second section, Chapter 8-ADMINISTRATION OF A CASE, states:

A debtor must list property claimed as exempt on the schedule of assets filed with the court. FRBP 4003(a). . . . The trustee must object to improper debtor exemptions within 30 days after the conclusion of the § 341(a) meeting or the filing of any amendment to the list or supplemental schedules, unless, within such period, further time is granted by the court. FRBP 4003(b). See FRBP 4003(b) and Taylor v. Freeland and Krontz, 503 U.S. 638 (1992). . . . If an objection is not filed in a timely manner, the exemption will be allowed by the court.

....
.... Section 522 sets forth allowable exemptions under federal bankruptcy law. The trustee must know which states have opted out of the federal exemptions. If a state has opted out, the state property exemptions apply instead of those provided in § 522(d), although other non-bankruptcy federal exemptions will apply...[Emphasis added]

Nace Ex. 2, p. 8-2.

Notably, *West Virginia Code* § 38-10-4(k)(2) provides any debtor domiciled in West Virginia may exempt an unlimited amount for “a payment on account of the wrongful death of an individual of whom the debtor was dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor,” from the estate in the federal bankruptcy proceeding under the provisions of 11 U.S.C. § 522. The statutory exemption of wrongful death payments is significant because West Virginia is a “opt out” state under § 522; and her husband’s case and payments it would produce were the precise subject matter for which Nace and Burke had been retained by Miller and is unlimited in amount. As noted below, her husband’s case was also the same matter which Trumble sought to retain Burke and Nace as Special Counsel.

On October 21, 2004, Miller appeared at the meeting of creditors where she testified in support of her case. She signed an **AUTHORIZATION** permitting the release of documents and records relating to her husband’s case to Trumble. ODC Ex. 1, p. 8. Trumble’s first attempt to contact any attorney potentially involved in Miller’s husband’s case occurred five

days after the meeting of creditors when he sent correspondence dated October 26, 2004, to Mark Jenkinson, Esquire, at Burke's firm. ODC Ex. 1, pp. 6-7. Although the **SCHEDULE B - PERSONAL PROPERTY** listed Burke as counsel in her husband's case, Trumble sent correspondence to an attorney in his office that was unaware of Miller and her case. ODC Ex. 19, p. 6-7, Tr. 193. There is no information developed in the record that Burke received the correspondence sent to his partner or otherwise learned of its existence. Other than a possible telephone call to Trumble to alert him that Mr. Jenkinson had no involvement in the case, no other response was made to the errant correspondence. Tr. 13 and 193.

Notably, Trumble's October 26, 2004, correspondence reads, "please advise me of your valuation as to the potential recovery which the Debtor may expect to receive as a result of this medical malpractice claim and whether this case is being handled by your office on a contingent or hourly basis," and, "I will advise you whether I intend to administer this claim as part of this Bankruptcy Estate or abandon my interest in the same." ODC Ex. 1, p. 7. Nace had no knowledge of this correspondence. Trumble's correspondence did not mention Miller's claimed exemption of her interest in her husband's case. Under bright line federal bankruptcy law, any interested party, meaning trustee or creditor, has only 30 days from the date of the meeting of creditors to object to a claimed exemption or the property or interest therein is no longer an asset in the Debtor's estate under Section 541.² Miller's interest in her husband's case was as the personal representative, the fiduciary and a potential statutory beneficiary. This would have been known to Trumble at the meeting of creditors. No other filings, including objections, were made in the bankruptcy case from the date of the meeting of creditors until the Bankruptcy Court entered the **DISCHARGE OF DEBTOR** on December 21, 2004, under

² For reference in this case, Title 11, U.S.C. § 541(a)(1) provides that the estate includes, "all legal or equitable interests of the debtor in property as of the commencement of the case."

Section 727. ODC Ex. 19, pp. 312 and 380. Review of Miller's bankruptcy case filings, docket report and corresponding record reveals that neither Burke nor Nace was ever served with the **Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines** on September 27, 2004, or the **DISCHARGE OF DEBTOR** on December 23, 2004. Important for later discussion is that service of all Bankruptcy Court notices and orders is handled by an independent corporation under the Bankruptcy Noticing Center (BNC).³ BAE Systems did so in the Miller bankruptcy case.

Further review of the record reveals that Trumble did two important things on January 11, 2005. At that time, it was 81 days post the Section 341 meeting of creditors held October 21, 2004, and 21 days post the Section 727 discharge of Miller as a Chapter 7 debtor, entered December 21, 2004. No objection was filed by Trumble or any other creditor as of January 11, 2005, to Miller's claimed exemption of her husband's case or to her discharge as an individual Chapter 7 debtor.

The first action of Trumble on January 11, 2005, was that he filed his **DESIGNATION AS AN ASSET CASE AND REQUEST TO ISSUE CLAIMS NOTICE** in Miller's bankruptcy case. ODC Ex. 19, p. 380. Trumble did not identify the asset he was claiming existed in Miller's bankruptcy case in the publicly reviewable record, nor did Burke or Nace receive service of Trumble's **DESIGNATION** or the **NOTICE OF NEED TO FILE PROOF OF CLAIM DUE TO RECOVERY OF ASSETS** and form Proof of Claim, issued by the Bankruptcy Court.⁴ The document set identified as Document 9 on Miller's bankruptcy case

³ The Administrative Office of the United States Courts contracted with BAE Systems, Enterprise Systems Incorporated, of Reston, Virginia, to manage the Bankruptcy Noticing Center (BNC) and to be responsible for mailing and electronic distribution of bankruptcy notices and orders.

⁴ It is important that as a "no asset" case, the interim trustee receives \$60 for his work. Nace Ex. 3, p. 17. In an asset case, he is entitled to a graduated percentage fee starting at 25% based upon recovery made by him or Special Counsel. Tr. 30-31, 11 U.S.C. §§ 330 & 326, Nace Ex. 2, p. 8-29. ODC elicited testimony

docket sheet in Bankruptcy Petition: 3:04-bk-00365 includes the Certificate of Service, which shows neither Burke nor Nace were served these important documents. ODC Ex. 19, pp. 311 and 315.

The second action by Trumble (or actually his legal assistant) on January 11, 2005, was to send correspondence to Burke, with a copy to O'Brien. Nace Ex. 8. The letter contained a verbatim recitation of the October 26, 2004 correspondence mistakenly sent to Mr. Jenkinson, with the only change being that Burke was the new addressee. Again, Nace was not provided a copy and his involvement in the case was, indeed, unknown to Trumble at this time. Thus, Nace knew nothing of Miller's bankruptcy case nor Trumble's involvement until receiving his correspondence dated January 27, 2005.

By January 11, 2005, Trumble, as an interim trustee since 1994, and since his bankruptcy practice consumed "between 40 and 50 percent" of his time, would have known these important facts: (Tr. 46)

1. The case was designated "no asset" and discharged on December 21, 2004;
2. He knew absolutely nothing about the wrongful death case, its potential value (recovery), its chances of prevailing or the time period expected for action;
3. He had no contact with Nace or Burke about Miller's husband's case;
4. He had not objected to Miller's claimed exemption of her interest in her husband's case;
5. He had no factual basis on which to base a change in the designation of her case to one with assets, since Nace was the only person evaluating her husband's case, and;
6. He had not publicly identified her husband's case as an asset of the estate in the designation filed with the Court.

This was the status of the case as of the date he decided to first contact Burke and to seek information about the husband's case.

from Mr. Trumble that the resulting unpaid creditor claims approximated \$12,000, but his claim now included fees for his firm's representing him in the adversary proceeding at the time of the hearing in the amount of \$62,487.00. Tr. 152; 158-161; 487. The amount claimed by Mr. Trumble's law firm now is greater than all debts and creditor claims filed initially in her bankruptcy case. ODC Ex. 19, p. 362.

(2) From Date of Trumble’s Knowledge of Nace to Bankruptcy Court’s Service of March 4, 2005 Order on March 6, 2005

On January 25, 2005, Burke responded to Trumble’s January 11, 2005,

correspondence and stated:

Dear Mr. Trumble,

The potential claim of Barbara Miller is being investigated by Barry J. Nace, my co-counsel who is from Washington, D.C.

Until the medical review is done, it will be impossible to evaluate her case or even the likelihood of recovery.

Medical Malpractice cases do not settle with the same frequency that automobile accidents and other types of torts do. They are always very difficult cases, are hotly contested and result in trial more frequently tha(n)[sic] in settlement.

I wish I could give you a more accurate picture of Ms. Miller’s case, but unfortunately I am unable to do so.

If you need any additional information, please do not hesitate to contact me.

Sincerely,
D. Michael Burke

ODC Ex. 1, p. 11. A copy of this correspondence was sent to O’Brien but not to Nace. ODC Ex. 1, p. 11. At the hearing, Trumble readily acknowledged that his receipt of Burke’s correspondence of January 25, 2005, was “the first time that we had been introduced to Mr. Nace as co-counsel.” Tr. 14, 62-63. On the other hand, Trumble testified that he has known Burke since moving to the Eastern Panhandle in 1992. Tr. 113. Trumble and Burke enjoyed both a social and professional relationship prior to the events giving rise to this case. Tr. 114. Trumble’s prior experience with Burke was, “in a couple cases like this where he represented originally a client who had a personal injury case of some type and later declared bankruptcy.” Burke confirmed he had done so on two or three occasions in personal injury cases. These cases did not involve Nace. Tr. 114-115, 193-4.

In contrast, Trumble admitted during the hearing, “I was not familiar with Nace’s body of work prior to – prior to when Burke identified him as a co-counsel.” Tr. 131.

Understandably, because of their long-term, prior relationship in similar matters, Trumble exclusively utilized Burke as the sole point of telephone contact and the individual to whom written requests for information about the case were sent. Tr. 77-78, 119, 192, 125-126. However, this does not justify him asserting, ODC arguing or HPS finding that contact with Burke was actual or constructive notice to Nace. Yet, it was Burke to whom Trumble turned initially in October of 2008 when the issues giving rise to the dispute in this case arose. Tr. 122-123.

Since Nace's state of mind and his actions here are under review, it is important to understand the long-term working relationship between Burke and Nace. At the hearing, Burke related he first met Nace in 1980 when Nace volunteered to teach a week-long trial practice seminar. Tr. 217. Burke regularly got Nace involved in his medical negligence cases as he was aware of Nace's reputation as "one of the most experienced and skilled medical malpractice lawyers for plaintiffs in this region." Tr. 218. Burke testified that Nace was honest and ethical and had a positive attitude toward and adherence for all the rules of professional conduct. Tr. 220. Located in West Virginia, Burke served as local counsel in the cases they shared.

Next, on January 27, 2005, Trumble's legal assistant forwarded to both Burke and Nace "an Application to Employ Special Counsel, Order and an Original Affidavit," in response to Burke's letter of January 25, 2005. ODC Ex. 1, p.12; Nace Ex. 10. The TRUSTEE'S APPLICATION TO EMPLOY SPECIAL COUNSEL provided, "[T]he undersigned Trustee deems it necessary and in the best interest of this estate to employ D. Michael Burke, Esquire, and Barry J. Nace, Esquire as Trustee's legal counsel to pursue **the Debtor's personal injury claim as a result of a vehicular accident . . .**" ODC Ex. 19, pp. 381-382, Nace Ex. 10 [Emphasis added]. The affidavits provided to Burke and Nace were identical, provided no factual information about them or the matter at issue, and stated that they were "experienced in

rendering legal services of the same nature” for which they were being employed and that they were “willing to accept employment by the Trustee on the basis set forth in the Application to Employ filed simultaneously herewith.” ODC Ex. 19, pp. 383-384⁵. The proposed ORDER AUTHORIZING TRUSTEE TO EMPLOY SPECIAL COUNSEL provided for the hiring of Burke and Nace to “serve as special counsel for the Trustee on a contingency fee basis in connection with the pursuit of **the Debtor’s personal injury claim...**” [Emphasis added]. ODC Ex. 19, p. 392. Clearly these documents prepared by Trumble for submission to the Bankruptcy Court wrongly referred to Miller’s husband’s case as a “personal injury claim” due to a vehicular accident. These documents are fatally flawed and are of no force and effect for the reasons cited below.

When asked at the hearing why he signed the Affidavit when he had no information about the bankruptcy case, it’s Trustee or whether a viable medical legal case existed at that time, Nace candidly stated:

Because I recall calling up Mr. Burke and asking about this. ‘I have this affidavit.’ And basically he said to me, ‘Well, you have to sign that and send it back.’ I said, ‘Okay.’

At that point in time, when he started this in January of ’05, I still had not taken the case. I was still at that point investigating, and I had not yet decided to take the case.

Mr. Burke asked me to sign this because it was something that had to be done, and I did it. And I was satisfied if Mike thought I should do it, I’d do it. I had faith in Mike, so I signed it and sent it back. Tr. 276-277.

The record establishes that, at the time Trumble’s legal assistant sent this document set to Nace, there had been no discussion or exchange of case information between Trumble and Nace

⁵ The scant affidavits clearly did not meet the requirements of Bankruptcy Rule 2014 and provided the Bankruptcy Court with no clear information about the nature or scope of work for which the lawyers were being employed.

concerning Miller's husband's case. Nace had no knowledge of Miller's bankruptcy case and had never been served with any of the notices or orders entered in her case. In essence, these documents received were unexpected and foreign to Nace. Therefore, Nace acted reasonably when he called Burke, his long-time friend, professional colleague and local counsel, to discuss what was required.

Based upon the assurances and instruction of Burke, the referring attorney who had previously communicated with Trumble a couple days before and had previously worked with Trumble as court appointed Special Counsel in other debtor claims, Nace signed and returned the Affidavit to Trumble on February 24, 2005. ODC Ex. 1, p. 20. For Nace to have contacted Burke to inquire about the bankruptcy documents sent to him unexpectedly by an attorney whom he had never met or spoken to seems reasonable under these circumstances. In hindsight, Nace, who is admittedly not knowledgeable about any aspect of bankruptcy law and who, unlike Burke, never had a client who filed bankruptcy, should have refused to sign the Affidavit indicating his "willingness" to accept employment. His signing of the Affidavit under these circumstances was an honest error and mistake-not unethical or negligent conduct. Each member of this Court and all experienced trial attorneys know it is common practice among lawyers with this level of expertise and decades of experience working as co-counsel to rely on each other to handle ministerial acts. Nace faithfully relied on Burke's direction to sign the Affidavit. This is certainly nothing sinister, negligent or unethical in having done so.

Nace's correspondence of February 24, 2005, to Trumble returning the signed Affidavit specifically stated as follows:

Dear Mr. Trumble:

Enclosed please find the signed Affidavit in the above captioned matter.

I understand that Mr. Burke has already sent his Affidavit to you.

I would ask you to also note that I am a member of the West Virginia bar. Also, please note that as of March 5, 2005 my office address will be changed to the following “1615 New Hampshire Avenue, NW, Washington DC, 20009.”

Very truly yours,
Barry J. Nace

[Emphasis added.] ODC Ex. 1, p. 20, Nace Ex. 13.

On March 4, 2005, without hearing, the Bankruptcy Court entered the Order authorizing Trumble to employ Burke and Nace as special counsel “in connection with the pursuit of the Debtor’s personal injury claim.” ODC Ex. 19, p. 393. Miller never had an individual personal injury claim; and the medical malpractice case arose from her deceased husband’s last course of medical care and death and was not an individual claim that she possessed under West Virginia law. She employed Burke to pursue the investigation of her husband’s case, as the administratrix of his estate. Her only individual interest in the matter was as one of the potential statutory distributee under *West Virginia Code* § 55-7-6(b). She had no individual right of action to pursue this case.

Yet, prior to the entry of the Order on March 4, 2005, the Bankruptcy Court was never specifically advised that the case for which Burke and Nace were being employed concerned a wrongful death case involving the debtor’s deceased husband as opposed to a personal injury case involving the debtor individually. Nor was the Bankruptcy Court ever advised that Miller exempted her interest in the case with no objection to same. Consequently, the Bankruptcy Court had no reason to believe anything was amiss and had no notice that Trumble’s filings were fatally flawed and unlawful, *ab initio*, and provided no legal basis to invoke jurisdiction over the wrongful death case as an asset of the estate under § 541.

The certificate of service for the March 4, 2005 Order filed by BAE Systems on March 6, 2005, clearly shows that Nace was served by first class mail at the wrong address. Nace Ex. 41. Recall by correspondence dated February 24, 2005, Nace specifically advised Trumble that “as of March 5, 2005 my office address will be changed to the following ‘1615 New Hampshire Avenue, NW, Washington DC, 20009.’” Nace Ex. 13. In spite of being advised of Nace’s address change, Trumble filed his application on March 3, 2005, and in it certified that service had been made upon Nace at “1814 N. Street NW, Washington, DC 20036,” without providing notice to the Bankruptcy Court and BAE Systems of the important address change. This significant error provides the factual basis for the threshold legal State Court defense in this case –Nace’s lack of notice of being retained as Special Counsel, resulting in the absence of mutual assent to the formation of any attorney-client relationship.

Throughout this entire proceeding, Nace has maintained and argued that he never received the service copy of the Order entered by the Bankruptcy Court on March 4, 2005, which was served upon him at the incorrect address by BAE Systems on March 6, 2005. Tr. 319. Nace was unaware that any official action had been taken by the Bankruptcy Court with regard to the Affidavit he signed on February 24, 2005. Nace’s position has been consistent and credible throughout this entire proceeding as demonstrated in his August 11, 2009 Verified Response to the Complaint, ODC Ex. 3, pp. 53-59, in his sworn statement to ODC, dated April 7, 2010, ODC Ex. 9, pp. 129, and during his hearing testimony on October 10, 2011, Tr. 318-319. Nace testified “I did not receive the signed order.” Tr. 319.

In support of Nace’s position, Trumble himself provided relevant deposition testimony in the adversary proceeding as follows:

Q. Okay. Did you ever send Mr. Nace a copy of the order allowing you to employ him as special counsel?

- A. I don't have any—I don't have any knowledge of doing that.
- Q. Do you have—did you have any communications with his office after the order was entered on March 4th, 2005, about this case?
- A. Not until October of 2008.

Nace Ex. 3A, pp. 43-44. Thus, there is no credible, admissible and reliable proof in this record that contradicts or negates Nace's assertion concerning his lack of contact with Trumble and that he did not receive any notice of entry of the March 4, 2005 Order. Even Burke testified that he did not believe Nace knew he had been appointed as Special Counsel. Tr. 233.

(3) No contact from Trumble after Entry of March 4, 2005 Order until November 2008

From February 24, 2005, until November 2008, Nace heard not one word from Trumble, from anyone in Trumble's office or from anyone at the Bankruptcy Court; nor did he receive a service copy of any notice or order filed in Miller's bankruptcy case. Actually, the last contact made with Trumble's office was by Nace in response to receipt of the document set containing the Affidavit, sent by his legal assistant. Although there were instances of correspondence sent by Trumble's office to Burke concerning the matter, there was never any telephone call or correspondence during this period of time exchanged between Trumble and Nace.

Specifically, the record establishes that on May 18, 2005, Trumble wrote to Burke regarding the status of the husband's case. Nace was not copied on the letter. When asked why he did not send the letter to Nace, Trumble replied that, "I didn't know Mr. Nace. I was informed that Mr. Nace had to be employed as co-counsel, and so therefore we made the application to employ Mr. Nace." Tr. 23. He also said, "The second reason is I've dealt with Mr. Burke in the past. I've known him for years. He has represented me as a bankruptcy trustee

in other cases, so I'm familiar with his body of work." Tr. 23. He then admitted, "I felt that he [Burke] was familiar with the procedures utilized by a trustee when administering an asset of this nature. To be candid with you, it's more convenient than it is anything else." Tr. 23. Burke responded to Trumble on May 24, 2005, and provided an accurate status update on the case. ODC Ex. 1, p. 28; Nace Ex. 17. Again, no copy of Burke's correspondence to Trumble was ever sent to Nace.

By correspondence on June 13, 2005, Nace provided the Complaint to Burke to be filed in the State Court wrongful death case. Nace Ex. 17. The Complaint was filed by him on June 17, 2005, and the civil action was docketed as Case No. 05-C-418, in the Circuit Court of Berkeley County.

In March 2006, Miller testified at a deposition in her husband's case. She was asked on three occasions about her bankruptcy case. As Nace recalled at the hearing in the instant case, Miller testified that her bankruptcy case had been completed and her debts discharged. Nace Ex. 44, attachment 2, pp. 20-21. When confronted at the hearing with his September 26, 2006 correspondence to Miller concerning the pre-trial settlement of \$75,000.00 with the hospital and the statement therein, "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," he immediately recalled his client's deposition testimony.⁶ TR. 347. Nace does not deny he was made aware of Miller's bankruptcy filing in February 2005 when he received and signed the Affidavit sent to him by Trumble's office. Yet, ODC and HPS have refused to simply accept the record facts that Nace heard and received nothing about the case, from the Bankruptcy Court, from Trumble or from Burke, until November of 2008 and honestly believed that his client's

⁶ Had Miller done what Nace had requested, now we know O'Brien would have confirmed that her bankruptcy case was completed and her husband's case was exempt and not a part of her 541 estate.

case had been completed. Only a careful and diligent review of this entire record by this Court can rectify the improper characterization of this issue. Thereafter, Circuit Judge Sanders entered the Final Order Approving Settlement of Wrongful Death Claim, directing that attorney fees and expenses be paid, together with all liens for medical bills, funeral bills and burial expenses, and “that the remainder of the settlement proceeds shall be distributed according to the law of intestacy.” ODC Ex. 10, pp. 52-55. There was no suggestion that Nace failed to safeguard the proceeds and distribute them in accordance with Judge Sander’s order. The trial of Miller’s husband’s case resulted in a favorable jury verdict on November 9, 2006. ODC Ex. 16, pp. 446-448. Judge Sanders entered the Judgment Order on January 4, 2007. ODC Ex. 16, pp. 449-453, and this Court rejected the petition for appeal on February 12, 2008. ODC Ex. 16, p. 497. Nace again properly safeguarded and handled all monies received; and there is no suggestion that he acted dishonestly or negligently in this regard. The pre-trial settlement and the trial and jury verdict all occurred long before Trumble ever again attempted to contact Burke about the status of the case. Contrary to what ODC argues, Nace would have had no reason, whatsoever, to avoid Trumble if he had simply been contacted about the case.

ODC argued, and HPS concluded, that somehow Nace had received Trumble’s correspondence sent to Burke on July 27, 2007, by eliciting testimony that Burke had instructed his legal assistant to send same to Gabriel Assaad (“Assaad”), an associate in Nace’s office at the time. Tr. 201, 204. There was reference made by ODC to a fax cover sheet dated August 8, 2007, which was in someone else’s handwriting, “Per Gabe, send it to him. He will handle.” Tr. 215. Another note in Burke’s file referred to by ODC indicated that Trumble’s July 27, 2007 letter was “mailed to Gabe and faxed.” Tr. 215. Neither of these writings contained Burke’s handwriting, and he admittedly did not communicate directly with Respondent Nace concerning

receipt of Trumble's correspondence. The documents amount to nothing more than double hearsay without any corroboration. Neither Assaad nor Burke's legal assistant were called by ODC to testify to these acts or to authenticate the writing. Nace denied receiving the July 27, 2007, correspondence. Tr. 292. It defies logic to believe that, had Nace received a fax concerning Miller's husband's case or a message regarding same, he would not simply have called Burke and advised him that the case had been settled and the balance tried to jury verdict. Had the information been communicated as suggested by ODC, Nace, Trumble and Burke would all have been happy to discuss the positive result in her husband's case. Trumble even acknowledged that Nace certainly earned his fee; and there was no financial motive for Nace to have refused to communicate with him.

In spite of ODC's unsuccessful attempt to establish that Trumble's correspondence received by Burke was then sent to and received by Nace, the overwhelming weight of the evidence establishes otherwise because Assaad never worked on Miller's husband's case. Furthermore, there was nothing seen or recovered from a review of Nace's file to indicate that Assaad received and filed the documentation or brought it to Nace's attention; and Burke testified about the matter. Tr. 280. Most importantly, Burke testified unequivocally at the hearing that he and Nace never discussed the Miller case from June of 2005 until they received Trumble's "Second Request" letter in November 2008. Burke testified "I have no idea" whether or not his secretary faxed over or sent over any correspondence to Gabe Assaad and whether it was ever received by Nace. Tr. 222-223. Burke further testified that, until November 14, 2008, when he received Trumble's Second Notice requesting a status update, he "assumed Mr. Trumble was keeping in contact with him on a regular basis as he had with me before I let his office know I was out." Tr. 250. Burke also testified at the hearing that he was not directed

by Nace to speak to Assaad about the case and that it was something that either he or his secretary did on their own. Tr. 2001. Also, Burke testified that it was his impression that Nace did not know he was working as attorney for the trustee. Tr. 231. The record reveals no reference to any testimony or documentation presented that any further contact was initiated by Trumble's office with Burke or Nace until the October 10, 2008, correspondence was sent to both. ODC Ex. 1, pp. 30-31.

This was puzzling because Trumble testified that he "learned that Mr. Burke had not been involved in the case prior to October 10, 2008." Tr. 135. Trumble further admitted that he kept no record or notes of any telephone calls he had in 2006 with Burke regarding the status of the case and Nace's involvement in it. Tr. 144. Not surprisingly, a copy of Trumble's October 10, 2008 letter was again sent to Nace at the wrong address, this time to 1814 "North" Street, NW, Washington, DC. ODC Ex. 1, pp. 30-31. It was not until Trumble's legal assistant sent correspondence dated November 14, 2008, again to Burke and Nace, now at his correct address, that Nace knew of Trumble's inquiry and belief that he was his Special Counsel. ODC Ex. 1, p. 32.

Nace promptly responded to Trumble's correspondence by letter dated December 1, 2008, and indicated his willingness to collect the information sought. He requested that Trumble send him documentation supporting the assertions being made in his correspondence of October 10, 2008. In spite of the obvious failure of communication and lack of understanding among the lawyers involved, Trumble's correspondence dated January 5, 2009, to Nace with a copy to Burke directed Nace to place his legal malpractice carrier on notice and threatened that he, "will be contacting the appropriate state bars in which you are admitted to report your

disregard for the Rules of Professional Conduct as it relates to the representation of me as trustee with regard to this matter.” ODC Ex. 1, pp. 36-37.

With correspondence dated February 4, 2009, Nace responded to the terse tone and aggressive and threatening statements contained in Trumble’s January 5, 2009 correspondence and attempted to explain his understanding and knowledge of the events which had transpired over the years during his representation of Miller as the administratrix of her husband’s case. ODC Ex. 1, pp. 48-50. Trumble did not respond to Nace’s correspondence to explain his knowledge and interpretation of the events. Instead, he filed the instant ethics complaint on July 13, 2009, without first bringing the matter to the knowledge of the Bankruptcy Court, or filing a “turnover motion,” or seeking issuance of a rule to show cause, or even attempting to provide sufficient information so that Nace and Burke could attempt to resolve the matter. The matter involved a claim for monies potentially due to Miller’s bankruptcy estate for her Section 541 “interest” in the settlement and verdict proceeds generated by the litigation efforts of Nace in the State Court wrongful death medical malpractice action, a claim which never lawfully existed in the first place. ODC Ex. 19, p. 354.⁷

The undisputed record evidence establishes that the wholesale lack of communication among the lawyers in this case is striking and profound, as it was clearly the duty of Trumble as interim trustee, the estate’s fiduciary and as an officer of the Bankruptcy Court, to supervise his Special Counsel in the underlying State Court wrongful death case under 11 U.S.C. § 704 and the Trustee Handbook. Specifically, his duties are mandatory and clearly defined in

⁷ Trumble admitted that the goal of filing the ethics complaint was to recover money from Nace. Tr. 137. This was also the purpose of filing the Adversary Proceeding and claiming that Nace had acted negligently. ODC Ex. 17, pp. 280-285. Ironically, when Trumble served the application to retain his own firm to represent him as Special Counsel in the Adversary Proceeding case, he and the Bankruptcy Court again served Nace at the wrong address. This time, unlike the first, the undelivered mail was returned. ODC Ex. 19, p. 377.

Chapter 8-ADMINISTRATION OF A CASE, Section M. EMPLOYMENT AND SUPERVISION OF PROFESSIONALS, Subpart 4. SUPERVISION OF PROFESSIONALS:

The trustee is a fiduciary and representative of the estate. Trustees cannot avoid or abdicate their responsibilities by employing professionals and delegating to them certain tasks. It is critical that the trustee oversees the work performed by professionals and exercises appropriate business judgment on all key decisions.

The trustee must actively supervise estate professionals to ensure prompt and appropriate execution of duties, compliance with required procedures and reasonable and necessary fees and expenses. ...[Emphasis added]

Nace Ex. 2, pp. 8-24.

Standard of Judicial Review and Burden of Proof

Since announcing its decision in *Committee on Legal Ethics v. McCorkle*, 192 W.Va. 286, 452 S.E.2d 377 (1994), resolving all doubts as to the applicable standard of review in lawyer disciplinary proceedings, this Court has consistently held:

A de novo standard applies to a review of the adjudicatory record made before the Committee on Legal Ethics of the West Virginia State Bar [currently, the Hearing Panel Subcommittee of the Lawyer Disciplinary Board] as to questions of law, questions of application of the law to the facts, and questions of appropriate sanctions; this Court gives respectful consideration to the Committee's recommendations while ultimately exercising its own independent judgment. On the other hand, substantial deference is given to the Committee's findings of fact, unless such findings are not supported by reliable, probative, and substantial evidence on the whole record.

Syl. pt. 3, *McCorkle*; Syl. pt. 2, *Lawyer Disciplinary Bd. v. McGraw*, 194 W.Va. 788, 461 S.E.2d 850 (1995). In *Committee on Legal Ethics v. Blair*, 174 W.Va. 494, 327 S.E.2d 671 (1984), this Court described its ultimate authority in lawyer disciplinary proceedings and held: "This Court is the final arbiter of legal ethics problems and must make the ultimate decisions about public reprimands, suspensions or annulments of attorneys' licenses to practice law." Syl. pt. 3, *Blair*.

This Court held in *Lawyer Disciplinary Bd. v. McGraw*, 194 W.Va. 788, 461 S.E.2d 850 (1995), that, “Rule 3.7 of the Rules of Lawyer Disciplinary Procedure requires the Office of Disciplinary Counsel to prove the allegations of the formal charge by clear and convincing evidence.” Syl. pt. 1, *McGraw*. This Court has further stated that the factual findings and conclusions made by the Hearing Panel Subcommittee are subject to substantial deference so, “[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 [subcommittee panel of the Board].” *McCorkle*, 192 W.Va. at 290, 452 S.E.2d at 381; *see also*, *Lawyer Disciplinary Bd. v. Santa Barbara*, 229 W.Va. 344, 729 S.E.2d 179 (2012). These standards and burdens have been faithfully applied by the Court in its most recent decisions in lawyer disciplinary proceedings through the end of 2012.

Summary of Statement of Charges

The investigative panel of the Lawyer Disciplinary Board issued its Statement of Charges on April 11, 2011. Respondent Nace was charged with violating Rules 1.1 (Competence), 1.3 (Diligence), 1.4(a) (Communication), 1.5 (Fees), 1.15(b) (Safekeeping Property), and 8.4(c) and (d) (Misconduct). Respondent Nace adamantly denies any knowing, intentional or negligent violation any of these specific rules of professional conduct and contends ODC has failed to prove any violation of them by clear and convincing evidence.

Summary of Argument

Nace is an active, experienced, dedicated, well-known and respected trial lawyer who maintains the highest professional and ethical standards as a core component of all aspects of his legal practice. The charges leveled against him accuse him of negligently and unethically representing a client. Under West Virginia law, an attorney cannot be guilty of negligence

unless he has formed an attorney-client relationship with a client and has breached a legal duty to him. *See, Jack v. Fritts*, 193 W.Va. 494, 457 S.E.2d 431 (1995). In this proceeding, Nace argues that no attorney-client relationship was ever formed with Trumble because the March 4, 2005 Order, authorizing his retention as Special Counsel is void *ab initio* and he was never advised that any action had been taken by the Bankruptcy Court to authorize his appointment, resulting in the absence of mutual assent required to establish this required contractual relationship. Absent an attorney-client relationship, no legal or ethical duties are required to be performed by an attorney.

Nace contends his duty of loyalty, diligence and competence was to his only client, Miller, as personal representative of her husband's estate and plaintiff in his case. The settlement and verdict proceeds were properly accounted for and distributed under Circuit Court Order. He has not stolen any money, lied to anyone, or knowingly and intentionally violated any order or law. Should this Court find his arguments to be lacking then, at worst, he made a mistake in not understanding his role and the expectations placed upon him by others with whom he had no communication.

Finally, HPS' statement that it "makes no finding whatsoever about whether the bankruptcy Trustee acted appropriately or inappropriately in this matter" reveals its refusal to objectively evaluate and consider Nace's legitimate, credible factual and legal defense in this most important matter. It seems as though HPS was offended by the vigorous defense presented. Such action by the HPS is arbitrary and violates Nace's constitutional due process rights in providing a factual and legal defense to the charges and arguing same in mitigation.

Statement Regarding Oral Argument and Decision

Nace asserts that oral argument is necessary pursuant to the criteria contained in Rule 18(a), West Virginia Rules of Appellate Procedure. ODC does not object to oral argument being granted, and it is understood that this Court has scheduled this case on the Court's argument docket for Tuesday, February 19, 2013.

ARGUMENT

I. THIS COURT LACKS SUBJECT MATTER JURISDICTION TO DETERMINE THE VALIDITY, CONSTRUCTION AND EFFECT OF THE BANKRUPTCY COURT'S MARCH 4, 2005 ORDER APPOINTING NACE AND BURKE AS SPECIAL COUNSEL UNDER 11 U.S.C. § 327(e) AND THEIR DUTIES AND RESPONSIBILITIES ARISING THEREUNDER.⁸

Since ODC has argued and HPS has found that Nace was appointed as Special Counsel under Section 327(e) pursuant to the March 4, 2005 Order, it necessarily follows that this Court is without subject matter jurisdiction to determine the validity, legal effect and construction of said Order. Jurisdiction is original and exclusively vested in the United States District Court and the Bankruptcy Court pursuant to the provisions of 28 U.S.C. §§ 1334(e) and 157. The mandatory jurisdictional enactment states, in relevant part:

(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction --

...

(1) over all claims or causes of action that involve construction of section 327 of title 11, United States Code, or rules relating to disclosure requirements under section 327.

The Statement of Charges, the evidence presented at the hearing, HPS' findings, and the Complaint in the Adversary Proceeding bring this proceeding directly within this limited but specific jurisdictional arena.

⁸ In making this argument, Nace is not being disrespectful or unmindful of this Court's jurisdiction and its ultimate authority in lawyer disciplinary proceedings, but simply contends that the Order by which he was purportedly retained as trustee's Special Counsel must be first examined by the Bankruptcy Court.

The Court will know from its careful review of the adjudicatory record in this matter that the ethics complaint filed by Trumble, the Statement of Charges, and the Complaint filed by Trumble in the Adversary Proceeding all arise from the same set of specific facts, circumstances and events involving Nace and Burke. Those relevant facts for the purpose of this argument are: 1) these lawyers represented Miller; 2) she filed a Chapter 7 bankruptcy case; 3) the lawyers were contacted by the interim trustee; 4) he sought their appointment as Special Counsel under § 327(e); and, 5) they allegedly failed to perform their duties thereunder. Therefore, it is respectfully argued that this Court wholly lacks subject matter jurisdiction to determine whether Nace was actually appointed as Special Counsel under § 327(e) and whether he was negligent in the performance of his duties as argued by ODC and concluded by HPS in this proceeding. If the Bankruptcy Court ultimately decides he was appointed and acted improperly, then the matter should be referred to this Court or ODC and LDB for investigation.⁹

II. TRUMBLE WAS NOT NACE’S CLIENT IN THIS CASE FOR PURPOSES OF APPLICATION OF THE RULES OF PROFESSIONAL RESPONSIBILITY BECAUSE:

(a) AS TRUSTEE, HE HAD NO RIGHT OR AUTHORITY TO ASSERT CONTROL OVER MILLER’S INDIVIDUAL INTEREST IN THE WRONGFUL DEATH MEDICAL MALPRACTICE CASE AS SAME WAS EXEMPT AND NOT AN ASSET OF THE ESTATE UNDER § 541

As noted above, Miller and her bankruptcy counsel properly and timely filed the schedule of estate property and claimed exemptions under *West Virginia Code* § 38-10-4 and 11 U.S.C. § 522(b). Trumble failed to object to the claimed exemption of her husband’s case. *See*, §

⁹ Also, please compare the procedural and factual circumstances presented in *Lawyer Disciplinary Board v. Smoot*, 228 W.Va. 1, 716 S.E.2d 491 (2010), where the United States District Court took official action and entered an Order indicating that Mr. Smoot’s failure to comply with an order was a basis for sanctions, but untimely raised, and then directed the file be made available to ODC “for such action as that agency deems appropriate.” Here, the Bankruptcy Court has not yet made any such reference or finding against Nace.

522(l). Under Bankruptcy Rule 4003 and the holding in *Taylor v. Freeland & Kronz*, 503 U.S. 638, 112 S.Ct. 1644 (1992), which held:

A trustee may not contest the validity of a claimed exemption after the Rule 4003(b) 30-day period has expired, even though the debtor had no colorable basis for claiming the exemption.

Id. at 644. The *Taylor* holding was applied by Bankruptcy Judge Flatley in the Northern District of West Virginia in *In re Stout*, 348 B.R. 61 (2006), where he said, “the court cannot ignore the holding of the supreme court in *Taylor v. Freeland & Kronz* . . . which denied a bankruptcy trustee’s untimely objection to exemption even though the debtor had no colorable statutory basis for claiming the exemption,” and then denied the relief sought by the trustee in the pending adversary proceeding.

Since Miller’s individual interest in her husband’s case as a potential statutory distributee and heir at law was exempt at the time Trumble sent the Affidavit to Nace for signature and at the time the Bankruptcy Court entered its Order, there was no property or interest in property relating to her husband’s case which could or should have been deemed a part of her Section 541 estate. Trumble had no legal or ethical right or authority to claim Miller’s individual interest as a potential statutory beneficiary or heir at law in her husband’s case in her Section 541 estate. Also, as noted above, the Bankruptcy Court had no jurisdiction at that time over property not lawfully in the debtor’s Section 541 estate. Therefore, the actions of both Trumble in seeking the appointment of Nace and Burke as Special Counsel and the Bankruptcy Court’s entry of the March 4, 2005 Order are void *ab initio* under *Singh, infra*.

(b) BANKRUPTCY COURT LACKED JURISDICTION TO ENTER THE MARCH 4, 2005 ORDER AND, AS SUCH, IT IS VOID *AB INITIO* AND OF NO LEGAL FORCE OR EFFECT.

In *Rutherford Hospital, Inc. v. RNH Partnership*, 168 F.3d 693 (4th Cir. 1999), the

Court held:

Under the federal bankruptcy laws, a debtor's estate consists, *inter alia*, of 'all legal and equitable interests of the debtor and property at the commencement of the case.' 11 U.S.C. § 541(a). The estate under § 541(a) succeeds only to those interests that the debtor had in property prior to commencement of the bankruptcy case. *In re FCX, Inc.*, 853 F.2d 1149, 1153 (4th Cir. 1988).

On point here, the Court in *Rutherford* also held, "a bankruptcy court's jurisdiction does not extend to property that is not part of a debtor's estate." *Id.* at 699; *see also*, *In re Signal Hill-Liberia Ave. Ltd. Partnership*, 189 B.R. 648, 652 (Bkrtcy. E.D.Va. 1995); *In re Murchison*, 54 B.R. 721, 727 (Bkrtcy. N.D.Tex 1985). Miller's individual interest in her husband's case was not a part of her bankruptcy estate at the time Nace and Burke signed their Affidavits stating their willingness to accept employment and, on March 4, 2005, when the Bankruptcy Court entered its Order because Trumble failed to object to her exemption of it. *See*, *Taylor v. Freeland & Kronz, infra*.

In *Gardner v. United States*, 913 F.2d 1414 (10th Cir. 1990), the Court, in commenting upon the jurisdiction of the Bankruptcy Court, said, "[W]hen property leaves the bankruptcy estate, however, the bankruptcy court's jurisdiction typically lapses, . . . and the property's relationship to the bankruptcy proceeding comes to an end. *Id.* at 1518. In *Cissell v. American Home Assur. Co.*, 521 F.2d 790, 792 (6th Cir. 1975), the Court said, "a trustee may not sue upon claims not belonging to the estate even if they were assigned to him by creditors for convenience or other purposes."

Nace relies upon the holding in *Singh v. Mooney*, 261 Va. 48, 541 S.E.2d 549 (2001) to define void *ab initio* as the term is used here. Accordingly, the March 4, 2005 Order is void *ab initio* because it was entered “in the absence of jurisdiction of the subject matter” and “the court had no power to render it,” or “the mode of the procedure used by the court was one that the court could ‘not lawfully adopt.’” *Id.* at 551. The Court in *Singh* stated: “[t]he lack of jurisdiction to enter an order under of these circumstances renders the order a complete nullity and it may be ‘impeached directly or collaterally by all persons, anywhere, at any time, or in any manner.’” *Id.* at 551. Therefore, this Court must hold that the March 4, 2005 Order is void *ab initio* and created no attorney-client relationship between Nace and Trumble.

(c) THE ORDER SUBMITTED TO AND ENTERED BY THE BANKRUPTCY COURT ON MARCH 4, 2005, WAS FATALLY FLAWED AND UNLAWFUL AND VOID *AB INITIO* AND OF NO LEGAL FORCE AND EFFECT

The Bankruptcy Court, as with all courts, speaks and commands only through its orders. Here, the March 4, 2005 Order appointing Nace and Burke as Special Counsel was entered upon the application “to pursue the Debtor’s personal injury claim as a result of a vehicular accident.” ODC Ex. 19, p. 387. ODC and Trumble now attempt to pass this procedural problem off as a simple clerical error. Even to this date, no one, including the Trustee who clearly had a duty to correct the error, has done so. The Order actually entered commands Nace and Burke to serve the trustee, “in connection with the pursuit of the ‘Debtor’s personal injury claim.’” ODC Ex. 19, p. 393.

As a matter of fact and law, neither Nace nor Burke could have ever complied with the commands of the Order because it was legally and factually impossible and impracticable to do so since no personal injury case ever existed in which Miller had an interest. This Court has recognized the doctrine of impossibility and impracticability and it should be

applied it this proceeding. *See, Waddy v. Riggleman*, 216 W.Va. 250, 606 S.E.2d 222 (2004). As no personal injury claim existed, it could not now, by legal fiction, be created and become a part of Miller's Section 541 estate. Under the rule in *Rutherford*, the Bankruptcy Court did not have jurisdiction to enter a lawful or enforceable order in a non-existent case or even one wholly exempted by the Debtor. Thus, the March 4, 2005, Order was void *ab initio* and had no effect on Nace or Burke and created no ethical or legal duties to perform.¹⁰

(d) THERE WAS A CONFLICT OF INTEREST WHICH PREVENTED NACE AND BURKE FROM BEING APPOINTED AS SPECIAL COUNSEL UNDER § 327(e) SINCE MILLER WAS ACTING AS THE PERSONAL REPRESENTATIVE OF HER HUSBAND'S ESTATE AND NOT INDIVIDUALLY IN THE WRONGFUL DEATH CASE AND WAS THE FIDUCIARY FOR ALL POTENTIAL STATUTORY DISTRIBUTEES.

Assuming *arguendo* that Miller's individual interest in her husband's case was not exempted and became a part of her Section 541 estate, then she, as fiduciary for all other potential beneficiaries under *West Virginia Code* § 55-7-6(b), and Nace had a clear conflict of interest with the duties ostensibly owed to Trumble. The Bankruptcy Court in *In re Dow*, 132 B.R. 853 (Bankr. S.D.O. 1991), stated, "[p]ursuant to Section 541 and 704(1) of the Code, the trustee stands in the debtor's shoes and thereby is empowered to pursue the causes of action of the debtor." *Id.* at 861. In the instant case, this Court should harken back to its statement in *Sturm, infra*, that only the personal representative for a deceased can initiate a wrongful death action under West Virginia law and no individual claim can be pursued under the law of this State. In order to maximize the recovery for the debtor's estate, it is the duty of the trustee acting in place of the debtor, being represented by special counsel under § 327(e), to do all things necessary to place the debtor's interest in a position of advantage over the other beneficiaries.

¹⁰ The fatal flaws in this Order also negatively affect the mutual assent required in the formation of the attorney-client relationship with Trumble which ODC strives to prove and Nace denies ever existed.

This places the debtor and the trustee in a direct adversarial position with the other individual beneficiaries. However, her highest legal duty as the personal representative and fiduciary under § 55-7-6(b) is to protect the interests of all beneficiaries. In sum, Nace could not represent Miller in both capacities under Rule 1.7.

It has been held that bankruptcy courts do not have the authority to allow employment of a professional who has a conflict of interest. *In re Mercury*, 280 B.R. 35 (2002); *see also, In re Federated Department Stores, Inc.*, 44 F.3d 1310, 1318 (6th Cir. 1995); *In re BBQ Resources, Inc.*, 237 B.R. 639, 642 (Bankr. E.D.Ky. 1999). The Court in *Mercury* stated, “to condone employment of an attorney who has a conflict of interest to assist the Chapter 7 trustee in her duties ‘would erode the confidence of other parties in the administration of that estate to say nothing of public confidence in the administration of justice in bankruptcy courts.’” [Citations omitted.] *Id.* at 55. The Bankruptcy Court in *In re Southern Kitchens, Inc.*, 216 B.R. 819 (Bankr. D.Minn. 1988), stated that where an attorney had an interest adverse to the bankruptcy estate with respect to the matter for which he would be employed as Special Counsel, he then would be prevented from serving as such under § 327(e). A clear conflict existed in the instant case which makes the Order void *ab initio*.

III. TRUMBLE, AS INTERIM BANKRUPTCY TRUSTEE IN MILLER’S CHAPTER 7 CASE, EXCEEDED HIS POWER AND AUTHORITY TO ACT WHEN HE FILED THE ETHICS COMPLAINT AGAINST NACE AND BURKE; THEREFORE, THIS PROCEEDING MUST BE TERMINATED.

It is recognized by federal courts that a, “Chapter 7 trustee is an officer of the court.” *See*, 18 U.S.C. § 153; *In re Grand Jury Proceedings*, 119 B.R. 945 (U.S.E.D. MI 1990). In *Evangeline Refining Co.*, 890 F.2d 1312, 1323 (5th Cir. 1989), the Court held, “when persons perform duties in the administration of the bankruptcy estate, they act as ‘officers of the court and not private citizens.’” *Citing, Callahan v. Reconstruction Finance Corp.*, 297 U.S. 464, 468,

56 S.Ct. 519 (1935). The Court in *Evangeline Refining Co.* stated also that, “as such, trustees and attorneys for trustees are held to high fiduciary standards of conduct.” *Id.* at 1323.

In *Cissel v. American Home Assur. Co.*, *supra.*, the Court held, “the trustee is a creature of statute and has only those powers conferred thereby.” *Id.* at 792. *See also, In re Benny*, 29 B.R. 75, 760 (U.S.N.D. CA 1983). The trustee’s limited enumerated powers are specifically defined by 11 U.S.C. §§ 704 and 541. Such enumerated powers do not include the right to file state legal ethics charges against special counsel to a trustee purportedly appointed under 11 U.S.C. § 327(e).¹¹ He, in essence, lacks legal standing to file the ethics complaint. *See, O’Halloran v. First Union Nat’l Bank*, 350 F.3d 1197, 1202 (11th Cir. 2003); *Official Committee of Unsecured Creditors of PSA, Inc. v. Edwards*, 437 F.3d 1145 (2006); *In re Beach First Nat. Bancshares, Inc.*, ___ F.3d ___ (WL 6720911, decided December 28, 2012) (trustee acquires no rights or interest greater than those of debtor under § 541 and only has standing to assert any cause of action which debtor could have brought). The exclusive jurisdiction for such action, is the United States Bankruptcy Court under 28 U.S.C. § 1334(e)(2), not this lawyer disciplinary proceeding. Therefore, this proceeding as it is now postured is constitutionally and procedurally defective.

IV. NO ATTORNEY CLIENT RELATIONSHIP WAS FORMED BETWEEN NACE AND TRUMBLE BY THE MARCH 4, 2005 ORDER BECAUSE LACK OF NOTICE OF ITS ENTRY RESULTED IN THE ABSENCE OF MUTUAL ASSENT TO ITS FORMATION.

This Court knows that the existence of an attorney-client relationship is not determined by the rules of professional conduct. Whether an attorney-client relationship exists

¹¹ Instead of bringing the dispute to the Bankruptcy Court’s attention by motion or otherwise, or continuing a dialogue with Nace and Mr. Burke, he instructed Nace to “place his malpractice carrier on notice,” ODC Ex. 1, pp. 36-37, did not respond to Nace’s correspondence of February 4, 2009, ODC Ex. 1, pp. 48-50, filed the instant ethics complaint on July 13, 2009, and initiated the adversary proceeding against the lawyers on October 5, 2010.

for any specific purpose will necessarily depend upon the circumstances presented. This Court said in *State ex rel. DeFrances v. Bedell*, 191 W.Va. 513, 446 S.E.2d 906 (1994) that the relationship of attorney and client is a matter of contract, express or implied. A necessary prerequisite to the creation of such an important relationship is notice to the attorney that he has been employed, especially as here where Trumble lacked the legal capacity as trustee to hire Nace on his own, and such employment did not occur as a result of the signing of the Affidavit as ODC argues and HPS concluded. Trumble testified at the hearing that only the bankruptcy court could authorize such employment under Section 327(e); see, *Matter of Ladycliff College*, 35 B.R. 111, 113 (1983). Tr. 76; Nace Ex. 3, p. 34. Mutuality of assent is an essential element of all contracts. *Wheeling Downs Racing Ass'n v. West Virginia Sportservice, Inc.*, 158 W.Va. 935, 216 S.E.2d 234 (1975). In *Ways v. Imation Enterprises Corp.*, 214 W.Va. 305, 589 S.E.2d 36 (2003), this Court said, “[t]he fundamentals of a legal ‘contract’ are competent parties, legal subject-matter, valuable consideration, and mutual assent. There can be no contract, if there is one of these essential elements upon which the minds of the parties are not in agreement.” [Citations omitted.] *Id.* at 313. The record evidence in this proceeding proves conclusively that no contract existed between these attorneys because the subject matter of the endeavor belonged to the debtor individually and did not become a part of her trustee-controlled Section 541 bankruptcy estate.

V. NACE’S ONLY CLIENT WAS MILLER, AND HE DID NOT VIOLATE ANY LEGAL OR ETHICAL DUTY TO HER OR THE JUDICIAL SYSTEM AND WAS NOT NEGLIGENT OR DISHONEST, AS ARGUED BY ODC.

West Virginia Code § 55-7-6 sets forth the rights and mandatory procedures which must be followed in all wrongful death civil actions filed in this State. Of great importance here is the fact that, “[t]he West Virginia wrongful death statute envisions recovery

in the legal capacity of a personal representative rather than individually.” *Strum v. Swanson*, 221 W.Va. 205, 216, 653 S.E.2d 667, 678 (2007). This Court has also stated under “our wrongful death statute, the personal representative has a fiduciary obligation to the beneficiary of the deceased because the personal representative is merely a nominal party and any recovery passes to the beneficiaries designated in the wrongful death statute and not to the decedent’s estate.” Syl. pt. 4, *McClure v. McClure*, 184 W.Va. 649, 403 S.E.2d 197 (1991). The personal representative’s role in wrongful death cases was explained in *Trail v. Hawley*, 163 W.Va. 626, 628, 259 S.E.2d 423, 425 (1979), when this Court said that a wrongful death action “must be brought by the personal representative of decedent’s estate; however that representative serves not as a representative of the deceased but as a trustee for the heirs who will receive any recovery.” It was also emphasized “therefore, that the personal representative stands in a fiduciary relationship to the ultimate distributees and must act in their best interests.” *Id.*

Nace and Burke in this proceeding only represented Miller in her official capacity as personal representative and administratrix of her deceased husband’s estate for purposes of the wrongful death action they pursued. Thus, it clearly follows that her only interest (for purposes of a Section 541 analysis as to what property or assets of her bankrupt estate could be accessed and controlled by Trumble as interim bankruptcy trustee) would have been her individual interest as one of the potential statutory distributees under § 55-7-6(b), and nothing more. As she had personal bankruptcy counsel attending to her individual interest in all matters of Debtor’s estate property, Trumble had no authority to hire Nace or Burke to represent his interests as Trustee in the underlying bankruptcy proceeding. Having done so caused a clear conflict of interest and thrust Miller and her counsel into a breach of fiduciary duty scenario which is untenable under

any analysis of state or federal law. Therefore, Trumble did not become Nace's client; and the order appointing Nace as Special Counsel was void *ab initio*.

VI. NACE OPPOSES THE FINDINGS AND RECOMMENDATIONS MADE BY HPS BECAUSE:

(a) HPS HAS WRONGFULLY SHIFTED THE BURDEN OF CONTROL AND SUPERVISION AND THE PERFORMANCE OF MANDATORY DUTIES IMPOSED UPON THE TRUSTEE TO HIM.

When the Court examines HPS' Report and the record, it will see the outright refusal to consider Trumble's conduct in this case amounts to clear error and violates Nace's constitutionally protected due process rights. In not considering Trumble's conduct, HPS focused solely on Nace's actions and assertions presented in the defense of the charges. HPS failed to consider the undisputed and admitted fact that Trumble's power and duties as interim trustee emanated from § 704 and the Trustee Handbook. The handbook is clear that his non-delegable duty as an officer of the Bankruptcy Court and the estate fiduciary is to directly and actively supervise all professionals (lawyers, auctioneers, appraisers, *etc.*) retained under § 327(e). By only focusing on Nace's conduct, it wrongfully shifted the burden to him at the outset since he was only retained for a specific purpose, to-wit: the prosecution of the wrongful death case, and not to administer the debtor's estate. It necessarily follows that Trumble's duties and responsibilities to supervise must have included communication with and a discussion as to his expectations, requirements and scope of work required of and from Nace. HPS has failed to consider that this specialized Bankruptcy Court relationship begins at a different point than the typical attorney-client relationship under state contract law and guided by the Rules of Professional Conduct. In normal cases, the attorney employed by a private citizen client has the affirmative duties to be diligent, competent and to communicate with his client. In the § 327(e) scenario, it is the interim trustee who bears the initial responsibility as supervisor, much like a

managing member in a law firm would have over a younger or less experienced attorney in his firm.

The fundamental disconnect between the typical attorney-client relationship as understood by most counsel and envisioned by the Rules of Professional Conduct and the special counsel relationship contemplated by federal bankruptcy law sets up the basis for contention between Nace and ODC and HPS and explains why his continued assertions have been found to be incredible and false and seen as an attempt to blame others. A careful review of the record does not support these findings.

(b) ODC HAS INCORRECTLY CHARACTERIZED HIS STRENUOUS ASSERTIONS THAT THE TRUSTEE FAILED TO PERFORM HIS MANDATORY DUTIES AS AN ATTEMPT TO SHIFT BLAME, ACCUSE OTHERS AND TO DENY RESPONSIBILITY WHEN THE RECORD PROVES OTHERWISE.

At each stage of the proceeding, Nace strenuously asserted that Miller was his only client and that he did not receive notice that the Bankruptcy Court took action to appoint him as special counsel to the interim trustee. During the hearing, specific facts were repeatedly developed to show that he was not contacted by Trumble or his staff or Burke or his client's bankruptcy attorney throughout the entire course of the wrongful death litigation. ODC and HPS concluded, albeit incorrectly, that Nace was being dishonest, attempting to blame others and presenting false testimony and documentation. This simply was not the case, and the Court must examine the record to determine deference is not justified and that such findings are unwarranted.

As it applies to mitigation and the overall tone of this proceeding, ODC and HPS recommend that Nace has denied responsibility, blamed others and shown no remorse for his actions. On the contrary, Nace has always accepted responsibility for what he did and knew in

this case. He admitted receipt of the affidavit he signed and returned to Trumble. There is nothing else he can or should say about that matter because that is all that was done. He certainly knew that his client filed bankruptcy when he received the Affidavit and called Burke and was told to sign it. Aside from the initial information concerning his client's bankruptcy, the only other time he was confronted with the issue was during the Miller discovery deposition in the death case, more than a year later. This is what the record shows; nothing more. HPS finds he should have been more careful in reviewing his file and proactive in contacting Trumble to determine what course he should take. This finding is based upon its refusal to accept Nace's uncontradicted testimony that he never received the Order authorizing his retention. The record does not permit the HPS, on evidentiary grounds, to refuse to give any weight to his testimony on this point in the absence of contradictory testimony and evidence, which does not exist in this record.

Its findings about what Nace should have done demonstrate the complete shifting of the burden and diversion from the mandatory obligations of the trustee to control everything with regard to Nace's retention and the case he was required to prosecute on behalf of the debtor's estate. This all assumes that the husband's case and his client's interest in it was an asset of her bankruptcy case as has been ODC's contention and the express finding of HPS, both of which are clearly wrong as a matter of fact and law on the record as it is constituted now. The bottom line is that without examining Trumble's role and conduct in this case, there can be no proper resolution in this proceeding. The Bankruptcy Court is the required forum for this examination, and it will be done in some proper form in the near future in the adversary proceeding Trumble initiated in 2010.

(c) HPS FAILED TO CONSIDER A NUMBER OF GENUINE MITIGATING FACTORS ESTABLISHED IN THE CASE AND IMPROPERLY ASSIGNED AGGRAVATING FACTORS TO HIM IN ITS CONSIDERATION OF THE SEVERE SANCTION IT RECOMMENDS.

In accordance with the holding in *Lawyer Disciplinary Board v. Scott*, 213 W.Va. 209, 579 S.E.2d 550 (2003), where the Court applied factors under Rule 3.16 and adopted the mitigating factors proposed by the American Bar Association, *Standards for Imposing Lawyer Sanctions* (1992) Nace contends that HPS has failed to consider a number of important mitigating factors in determining its severe recommended sanctions. The mitigating factors which HPS did consider were his absence of any prior disciplinary record during his more than 40 years of active practice and his excellent reputation as a Plaintiffs' medical malpractice lawyer. It did not, however, consider his timely good faith effort to make restitution or rectify the consequences of his alleged misconduct when he submitted into Bankruptcy Court the amount finally received from Trumble represented as the creditor claims presented in the Miller bankruptcy case. Nace Ex. 1A. HPS also failed to consider the absence of any dishonest or selfish motive in the case. Trumble's testimony during the hearing establishes a factual basis for this mitigating factor and its application to Nace. Tr. 182. Given the number of years devoted by Nace to the advancement of his profession in a number of important local and national legal organizations and the amount of voluntary service rendered by him, a four-month suspension of his license is unduly harsh. The punishment recommended does not fit the crime (mistake) in this case.

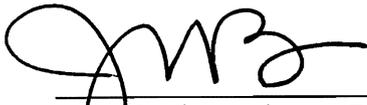
Lastly and most importantly, there was no harm to the trustee, the debtor's estate or the Bankruptcy Court in this case because Miller's husband's case and her interest in it was never an asset of the § 541 estate. Neither Trumble nor the Bankruptcy Court had jurisdiction over the property after it was exempted and no objection was filed within 30 days of the meeting

of creditors. Therefore, on the single most important aggravating factor found by the HPS in support of its recommended severe sanction, it was clearly wrong.

Conclusion

Nace requests that the Court dismiss this proceeding because no attorney-client relationship was formed and no ethical duties were violated. If the Court concludes otherwise, Nace requests that the Court consider his failures to be inadvertent mistakes and not disciplinable conduct. Should the Court disagree, then Nace requests that the mitigating facts outweigh the aggravating and a less severe non-suspension sanction be imposed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, J. Michael Benninger, counsel for Barry J. Nace, Esquire, do hereby certify that on January 7, 2013, the foregoing **Respondent Barry J. Nace's Brief** was duly served upon counsel of record by depositing a true and exact copy thereof in the regular course of the United States Mail, First Class, postage prepaid, addressed as follows:

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