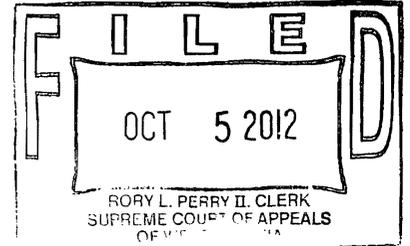


**BEFORE THE SUPREME COURT OF APPEALS OF THE  
STATE OF WEST VIRGINIA**



**LAWYER DISCIPLINARY BOARD,**

**Complainant,**

**v.**

**No. 12-0005**

**JOHN P. SULLIVAN,**

**Respondent.**

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**BRIEF OF THE LAWYER DISCIPLINARY BOARD**

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## I. STATEMENT OF CASE

### A. NATURE OF PROCEEDINGS AND RECOMMENDED DECISION OF THE HEARING PANEL SUBCOMMITTEE

This is a disciplinary proceeding against Respondent John P. Sullivan, Esquire, (hereinafter “Respondent”), arising as the result of a Statement of Charges issued against him and filed with the Supreme Court of Appeals of West Virginia on or about January 3, 2012. The charges were served upon Respondent by the Clerk of the Supreme Court of Appeals by certified mail on or about January 6, 2012. Respondent filed his answer to the Statement of Charges on or about February 22, 2012.

This matter proceeded to a telephonic hearing on March 12, 2012. The Hearing Panel Subcommittee was comprised of Sean D. Francisco, Esquire, Chairperson, Richard M. Yurko, Esquire, and William R. Barr, layperson. Renée N. Frymyer, Disciplinary Counsel, appeared on behalf of the Office of Disciplinary Counsel and Respondent appeared *pro se*. ODC Exhibits 1-5, and Joint Exhibit 1 were admitted into evidence.<sup>1</sup>

On June 5, 2012, the “Report of the Hearing Panel Subcommittee” (hereinafter “Report”) was filed with the Supreme Court of Appeals of West Virginia. The Hearing Panel Subcommittee found that the evidence established that Respondent violated Rules 1.3; 1.4(a); 1.4(b); and 8.1(b) of the Rules of Professional Conduct.

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<sup>1</sup> Joint Exhibit 1 is a document entitled “Stipulations Regarding Findings of Fact, Conclusions of Law and Recommendation as to Discipline.” The document was jointly submitted into evidence by Respondent and Disciplinary Counsel at the hearing in an effort to resolve all matters at issue.

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

- a. That Respondent be issued a reprimand pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure;
- b. That Respondent will sign and follow a plan of supervised practice for a period of two (2) years with a supervising attorney of Respondent's choice, said supervisor to be approved by the Office of Disciplinary Counsel and be available to respond to inquiries by the Office of Disciplinary Counsel;
- c. That Respondent shall complete an additional nine (9) hours of CLE during the 2012-2014 reporting period, specifically in the area of ethics and office management over and above that already required;
- d. Pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure, Respondent shall pay costs of this disciplinary proceeding

**B. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. Respondent is a lawyer practicing in Charleston, Kanawha County, West Virginia, and, as such, is subject to the disciplinary jurisdiction of the Supreme Court of Appeals of West Virginia and its properly constituted Lawyer Disciplinary Board. Respondent was admitted to the West Virginia State Bar on May 1, 1995.

**Count I**  
**Complaint of Anthony F. White**

2. Respondent, a Kanawha County Public Defender, was appointed to represent Mr. White in a criminal matter.
3. Mr. White entered a guilty plea in Kanawha County Circuit Court on December 7, 2009, and was sentenced this same date to serve a one to five (1-5) year prison term.
4. No sentencing order or penitentiary commitment was prepared or filed on Mr. White's behalf.
5. On or about September 24, 2010, a certified commitment was signed by the Circuit Court Judge memorializing the sentence but providing for an effective sentence date of September 7, 2010. However, this was a clerical error as the effective sentence date should have been the date of the original hearing, December 7, 2009.
6. In late 2010, when Mr. White was transferred into the custody of the West Virginia Division of Corrections, he discovered that he had been given the incorrect sentencing date and may not have been awarded the proper amount of time served, resulting in a parole eligibility date of October 1, 2011. Mr. White believed the accurate date he was eligible for parole to be April 11, 2011.
7. Respondent did not respond to Mr. White's inquiries regarding this matter or otherwise attempt to file a corrected Sentencing Order on Mr. White's behalf.
8. After not hearing from Respondent, on or about August 16, 2011, Mr. White filed an ethics complaint against Respondent.

9. By letter dated August 26, 2011, the Office of Disciplinary Counsel sent Respondent a copy of the complaint and directed him to file a response within twenty (20) days.
10. After receiving no response, on or about September 23, 2011, the Office of Disciplinary Counsel sent a second letter by certified and first class mail directing Respondent to file a response by October 5, 2011, and that his failure to do so may result in a subpoena *duces tecum* being issued for his appearance at the Office of Disciplinary Counsel for a sworn statement, or the allegations in the complaint would be deemed admitted and the matter would be referred to the Investigative Panel of the Lawyer Disciplinary Board.
11. Respondent failed to comply with Disciplinary Counsel's request.
12. Mr. White was paroled on October 18, 2011. Thus, it appears that Mr. White's parole eligibility date may have been improperly delayed for approximately six (6) months.
13. Because Respondent failed to pursue the matter on behalf of Mr. White, Respondent violated Rule 1.3 of the Rules of Professional Conduct, which provides:

**Rule 1.3 Diligence**

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

14. Because Respondent failed to keep Mr. White informed as to the status of the matter and failed to respond to his requests for information, Respondent violated Rule 1.4(a) and 1.4(b) of the Rules of Professional Conduct, which provides:

#### **Rule 1.4. Communication**

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

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

15. Because Respondent failed to comply with the Office of Disciplinary Counsel's lawful request for information, he violated Rule 8.1(b) of the Rules of Professional Conduct, which provides as follows:

#### **Rule 8.1 Bar admission and disciplinary matters**

[A] lawyer in connection with . . . a disciplinary matter, shall not:

(b) . . . knowingly fail to respond to a lawful demand for information from . . . disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

16. The existence of the following mitigating factors are present: (1) full and free disclosure to the Office of Disciplinary Counsel during the hearing stage; (2) a cooperative attitude toward proceedings during the hearing stage; and (3) remorse.
17. The existence of the following aggravating factors are present: (1) substantial experience in the practice of law; (2) prior disciplinary action by the Investigative Panel of the Lawyer Disciplinary Board;<sup>2</sup> (3) pattern and practice of failing to

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<sup>2</sup> The Investigative Panel of the Lawyer Disciplinary Board issued Admonishments to Respondent for violations of Rule 1.3 and 1.4 on May 25, 2001, November 18, 2006, and April 2, 2011, and Rule 8.1(b) on November 18, 2006, and April 2, 2011.

adequately communicate with clients; and (4) pattern and practice of failing to respond to requests from the Office of Disciplinary Counsel.

## II. SUMMARY OF ARGUMENT

The Supreme Court of Appeals of West Virginia has long recognized that attorney disciplinary proceedings are not designed solely to punish the attorney, but also to protect the public, to reassure the public as to the reliability and integrity of attorneys, and to safeguard its interests in the administration of justice. Lawyer Disciplinary Board v. Taylor, 192 W. Va. 139, 451 S.E.2d 440 (1994). Discipline must also serve as both instruction on the standards for ethical conduct and as a deterrence against similar misconduct to other attorneys. Factors to be considered in imposing appropriate sanctions are found in Rule 3.16 of the Rules of Lawyer Disciplinary Procedure. These factors consist of: (1) whether the lawyer has violated a duty owed to a client, to the public, to the legal system, or to the profession; (2) whether the lawyer acted intentionally, knowingly, or negligently; (3) the amount of the actual or potential injury caused by the lawyer's misconduct; and (4) the existence of any aggravating or mitigating factors. *See also* Syl. Pt. 4, Office of Disciplinary Counsel v. Jordan, 204 W. Va. 495, 513 S.E.2d 722 (1998). A review of the record in this matter clearly indicates that Respondent has transgressed all four factors set forth in Rule 3.16 and Jordan, and Disciplinary Counsel asserts that the Hearing Panel Subcommittee properly considered the evidence, the facts, the aggravating facts and mitigating factors and reached an appropriate recommendation in this matter.

### III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

On July 18, 2012, the Office of Disciplinary Counsel stated to the Supreme Court of Appeals that it had no objection to the recommendation of the Hearing Panel Subcommittee. On or about September 5, 2012, this Honorable Court rejected the recommendation of the Hearing Panel Subcommittee and set this matter for oral argument and consideration under Rule 19 of the Revised Rules of Appellate Procedure.

### IV. ARGUMENT

#### A. STANDARD OF REVIEW

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

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

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

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

## **B. ANALYSIS**

### **1. Whether the lawyer has violated a duty owed to a client, to the public, to the legal system, or to the legal profession.**

The evidence clearly establishes that Respondent did not diligently represent the interests of Mr. White or promptly comply with Mr. White’s reasonable requests for information. Although Mr. White had entered a plea in the matter and been sentenced by the Court, Mr. White had issues related to serving a correct sentence pursuant to the plea agreement Respondent assisted in obtaining for his client. After he received notice from his client, Respondent had a duty to his client to inquire into and analyze these important post-sentencing issues which clearly related to the subject of Respondent’s representation. Unless the client-lawyer relationship is terminated as provided in Rule 1.16 of the Rules of Professional Conduct, a lawyer should carry through to conclusion all matters.

Respondent acknowledged in his Answer to the Statement of Charges that he believed he was still under an obligation to effectively communicate with his client at this stage of

representation and he failed to do so. Respondent also acknowledged that Mr. White and his family made numerous requests for Respondent to have his parole eligibility date corrected and despite assurances that Respondent would do so, he did not. Respondent stated in his Answer that he never reviewed Mr. White's court file and never obtained a copy of the erroneous penitentiary commitment, which turned out to be clearly incorrect on its face. Respondent stated that the only actions he took were reviewing the Division of Corrections website and the computerized Circuit Clerk docket for Mr. White's case and then assuming that Mr. White was confused regarding his parole eligibility date. Respondent also admitted that upon making the assumption that Mr. White was not correct, he simply did not communicate with his client further. Thus, Respondent's communication in this matter was woefully inadequate.

Lawyers owe duties of candor, loyalty, diligence and honesty to their clients and the Hearing Panel Subcommittee properly found that there was clear and convincing proof that Respondent violated these duties. It was evident to the Hearing Panel Subcommittee that Respondent fell short of his obligations to Mr. White and had no justification for doing so. Had Respondent acted diligently, a corrected sentencing order could have resulted in an earlier parole date for Mr. White. Mr. White and other members of the public should be able to rely on lawyers to protect their property, liberty, and their lives.

The Hearing Panel Subcommittee also properly found that Respondent violated a duty to the legal system and the profession in not responding to requests from the Office of

Disciplinary Counsel. The integrity of the legal profession suffers when lawyers do not abide by the rules of procedure which govern the administration of justice in our state. Respondent admittedly failed to comply with requests from Disciplinary Counsel and offered no justification or explanation for his failure to do, aside from admitting at the hearing that his arrogance may have played a role.

**2. Whether the lawyer acted intentionally, knowingly, or negligently.**

The evidence establishes and the Hearing Panel Subcommittee appropriately found that Respondent actions were negligent in this matter.

**3. The amount of actual or potential injury caused by the lawyer's misconduct.**

The evidence clearly demonstrated that Respondent's client, Mr. White, suffered an actual injury in being delayed parole eligibility for six (6) months due to Respondent's failure to correct his effective sentencing date. The delay in liberty that Mr. White suffered was clearly unjust and irreversible. The Hearing Panel Subcommittee also found there was potential injury to the reputation and integrity of the profession from Respondent's actions in this matter. Failing to respond to requests from Disciplinary Counsel for information about these complaints has brought the legal system and legal profession into disrepute.

**4. The existence of any aggravating or mitigating factors.**

Aggravating factors are considerations enumerated under Rule 3.16 of the Rules of Lawyer Disciplinary Procedure for the Court to examine when considering the imposition of sanctions. Elaborating on this rule, the *Scott* court held "that aggravating factors in a

lawyer disciplinary proceeding ‘are any considerations, or factors that may justify an increase in the degree of discipline to be imposed.’” Lawyer Disciplinary Board v. Scott, 213 W.Va. 209, 216, 579 S.E. 2d 550, 557(2003) *quoting* ABA Model Standards for Imposing Lawyer Sanctions, 9.21 (1992).

In addition to adopting aggravating factors in Scott, the Scott court also adopted mitigating factors in a lawyer disciplinary proceedings and stated that mitigating factors “are any considerations or factors that may justify a reduction in the degree of discipline to be imposed.” Lawyer Disciplinary Board v. Scott, 213 W.Va. 209, 579 S.E.2d 550, 555 (2003) *quoting* ABA Model Standards for Imposing Lawyer Sanctions, § 9.31. It should be clear that mitigating factors were not envisioned to insulate a violating lawyer from discipline.

The Hearing Panel Subcommittee determined the existence of the following aggravating factors: (1) substantial experience in the practice of law; (2) prior disciplinary action by the Investigative Panel of the Lawyer Disciplinary Board;<sup>3</sup> (3) pattern and practice of failing to adequately communicate with clients; and (4) pattern and practice of failing to respond to requests from the Office of Disciplinary Counsel. The Hearing Panel Subcommittee also determined the existence of the following mitigating factors: (1) full and free disclosure to the Office of Disciplinary Counsel during the hearing stage; (2) a cooperative attitude toward proceedings during the hearing stage; and (3) remorse.

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<sup>3</sup> The Investigative Panel of the Lawyer Disciplinary Board issued Admonishments to Respondent for violations of Rule 1.3 and 1.4 on May 25, 2001, November 18, 2006, and April 2, 2011, and Rule 8.1(b) on November 18, 2006, and April 2, 2011.

## V. CONCLUSION

The principle purpose of attorney disciplinary proceedings is to safeguard the public's interest in the administration of justice. Syl. pt. 3, Daily Gazette v. Committee on Legal Ethics, 174 W.Va. 359, 326 S.E.2d 705 (1984); and Syl. pt. 2, Lawyer Disciplinary Board v. Hardison, 205 W.Va. 344, 518 S.E.2d 101 (1999).

“A sanction is to not only punish the attorney, but should also be designed to reassure the public confidence in the integrity of the legal profession and deter other lawyers from similar conduct.” Syl. pt 2, Committee on Legal Ethics v. White, 189 W.Va. 135, 428 S.E.2d 556 (1993); Syl. pt 3, Committee on Legal Ethics v. Walker, 178 W.Va. 150, 358 S.E.2d 234 (1987); Syl. pt. 5, Committee on Legal Ethics v. Roark, 181 W.Va. 260, 382 S.E.2d 313 (1989); Syl pt. 3, Lawyer Disciplinary Board v. Friend, 200 W.Va. 368, 489 S.E.2d 750 (1997); and Syl pt. 3, Lawyer Disciplinary Board v. Keenan, 208 W.Va. 645, 542 S.E.2d 466 (2000).

The Rules of Professional Conduct state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. Syl.pt. 3, in part, Committee on Legal Ethics v. Tatterson, 173 W.Va. 613, 319 S.E.2d 381 (1984), cited in Committee on Legal Ethics v. Morton, 186 W.Va. 43, 45, 410 S.E.2d 279, 281 (1991). Respondent, a lawyer with considerable experience, has demonstrated conduct which has fallen below the minimum standard for attorneys, and discipline must be imposed.

The American Bar Association has recognized that a reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed to a client, the public, or the legal profession and causes injury or potential injury to a client, the public or the legal system. *See, ABA Model Standards for Imposing Lawyer Sanctions, § 4.13.*

A public reprimand was issued and supervised practice was ordered by the Supreme Court of Appeals for conduct involving lack of diligence, lack of communication and failure to respond to disciplinary counsel in Lawyer Disciplinary Board v. Geraldine Roberts, 217 W.Va. 189, 617 S.E.2d 539 (2005). *See also, Lawyer Disciplinary Board v. Brentton W. Wolfingbarger, No. 29973 (WV 3/13/02): lawyer reprimanded for violations of Rules 1.4 and 8.1 and ordered to undergo supervised practice for eighteen (18) months (unreported case); Lawyer Disciplinary Board v. Lee F. Benford, No. 31795 (WV 1/19/05): lawyer reprimanded for violations of Rules 1.3, 1.4(a), and 8.1(b) and ordered to undergo supervised practice for two (2) years (unreported case); Lawyer Disciplinary Board v. Reggie R. Bailey, No. 31799 (WV 3/9/05): lawyer reprimanded for violations of Rules 1.3, 1.4 and 8.1 and ordered to undergo one (1) year of supervised practice (unreported case); Lawyer Disciplinary Board v. Richard L. Vital, No. 32229 (WV 5/25/05): lawyer reprimanded for violations of Rules 1.3, 1.4, and 8.1(b) and ordered to undergo supervised practice for two (2) years (unreported case); Lawyer Disciplinary Board v. David S. Hart, No. 33328 (WV 9/14/07): lawyer reprimanded for violations of Rules 1.3, 1.4, and 8.1(b) (unreported case); Lawyer*

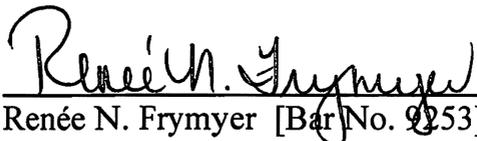
Disciplinary Board v. April D. Conner, No. 35434 (WV 10/27/10): lawyer reprimanded for violations of Rules 1.3, 1.4, 8.1(b), 1.15(b), and Rules 1.16(b) and ordered to undergo supervised practice for one (1) year (unreported case).

The Hearing Panel Subcommittee, having considered the nature of Respondent's conduct, recommended the following as sanctions in this matter:

- a. That Respondent be issued a reprimand pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure;
- b. That Respondent will sign and follow a plan of supervised practice for a period of two (2) years with a supervising attorney of Respondent's choice, said supervisor to be approved by the Office of Disciplinary Counsel and be available to respond to inquiries by the Office of Disciplinary Counsel;
- c. That Respondent shall complete an additional nine (9) hours of CLE during the 2012-2014 reporting period, specifically in the area of ethics and office management over and above that already required;
- d. Pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure, Respondent shall pay costs of this disciplinary proceeding.

In reaching its recommendation as to sanctions, the Hearing Panel Subcommittee properly considered the evidence presented at the hearing, the recommended stipulated facts and the aggravating factors and mitigating factors. Accordingly, the sanctions recommended by the Hearing Panel Subcommittee should be upheld.

*Respectfully submitted,*  
The Lawyer Disciplinary Board  
By Counsel



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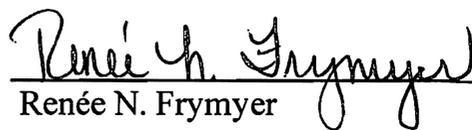
**CERTIFICATE OF SERVICE**

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This is to certify that I, Renée N. Frymyer, Lawyer Disciplinary Counsel for the Office of Disciplinary Counsel, have this day, the 5<sup>th</sup> day of October, 2012, served a true copy of the foregoing **“Brief of the Lawyer Disciplinary Board”** upon Respondent John P. Sullivan, by mailing the same via United States Mail, with sufficient postage, to the following address:

John P. Sullivan, Esquire  
Post Office Box 2827  
Charleston, West Virginia 25330

  
\_\_\_\_\_  
Renée N. Frymyer