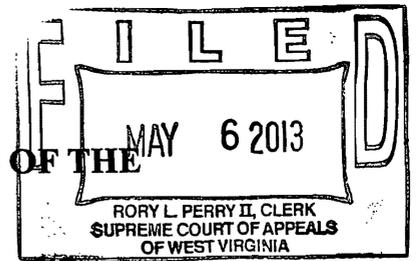


**BEFORE THE SUPREME COURT OF APPEALS OF THE
STATE OF WEST VIRGINIA**



OFFICE OF DISCIPLINARY COUNSEL,

Complainant,

v.

No. 12-0608

MICHAEL S. SANTA BARBARA,

Respondent.

BRIEF OF THE LAWYER DISCIPLINARY BOARD

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I. STATEMENT OF THE CASE

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

This is a disciplinary proceeding against Respondent Michael S. Santa Barbara (hereinafter "Respondent"), arising as the result of a petition filed by the Office of Disciplinary Counsel on May 6, 2012, pursuant to Rule 3.18 of the Rules of Lawyer Disciplinary Procedure seeking a suspension of Respondent's law license. Respondent pled no contest to a crime that reflected adversely on his honesty, trustworthiness, and fitness as a lawyer, in direct violation of the Rules of Professional Conduct. On or about June 7, 2012, Respondent submitted an Answer to Statement of Charges and Demand for Mitigation Hearing. By Order entered on or about June 19, 2012, Debra A. Kilgore, Chairman *Pro Tem* of the Hearing Panel Subcommittee, granted Respondent's request for a mitigation hearing.

The matter then proceeded to hearing in Martinsburg, West Virginia, on October 10, 2012. Robert H. Davis, Jr., Esquire, and J. Michael Cassell, Esquire, appeared on behalf of Respondent, who also appeared. Andrea J. Hinerman, Senior Lawyer Disciplinary Counsel, appeared on behalf of the Office of Disciplinary Counsel. The Hearing Panel Subcommittee, comprised of John W. Cooper, Esquire, Chairperson; Timothy E. Haught, Esquire; and Ms. Cynthia L. Pyles, laymember, presided over the proceedings.

The Hearing Panel Subcommittee heard testimony from Walter H. Eifert, John Bittle, Robert Vern Mahaffey, Kathy Santa Barbara and Respondent. The Hearing Panel

Subcommittee also admitted into evidence Joint Exhibits 1 and 2, the Office of Disciplinary Counsel's Exhibits 1 - 4, and Respondent's Exhibits 1 - 8.

On or about March 1, 2013, the Hearing Panel Subcommittee issued its decision in this matter and filed with the Supreme Court of Appeals of West Virginia its "Order of Hearing Panel Subcommittee in Mitigation Hearing Recommending Adoption of Stipulations of Findings of Fact, Conclusions of Law and Recommended Discipline" (hereinafter "Order"). The Hearing Panel Subcommittee properly found that the evidence established that Respondent violated 8.4(b) and 8.4(d) of the Rules of Professional Conduct.

On March 20, 2013, a "Stipulated Agreed Order" was filed for the above-referenced matter. This Order was submitted to make a correction to paragraph 10 of the "Order of Hearing Panel Subcommittee in Mitigation Hearing Recommending Adoption of Stipulations of Findings of Fact, Conclusions of Law and Recommended Discipline".

The Hearing Panel Subcommittee issued the following recommendation as the appropriate sanction: (A) That Respondent be suspended from the practice of law for a period of six (6) months. Further, that if this six (6) month period of suspension should commence while Respondent is still serving his one (1) year suspension period from Supreme Court Case No. 10-4011, then this six (6) month suspension shall begin to run concurrently with said suspension from Supreme Court No. 10-4011, provided that Respondent shall not petition for reinstatement until he has finished this six (6) month suspension; (B) That Respondent shall continue with counseling as ordered in Supreme Court No. 10-4011 during this six (6) month suspension and that the treating counselor is directed

to submit at least one (1) progress report to the Office of Disciplinary Counsel during this six (6) month period; and (C) That prior to petitioning to be reinstated to the practice of law that Respondent be required to pay the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

B. FINDINGS OF FACT

Respondent is a suspended member of the West Virginia State Bar who practiced in Martinsburg, 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.¹ Respondent was admitted to The West Virginia State Bar on January 15, 1991.

On April 16, 2012, Respondent pled no contest to one (1) count of brandishing and one (1) count of carrying a concealed weapon based on an incident that had occurred on August 15, 2011, wherein Respondent allegedly brandished a weapon at a group of people who had congregated at a private dock located within the residential community where Respondent lived. [ODC Ex. 2] He was fined \$500.00 and court costs on the brandishing

¹ By Opinion issued on June 7, 2012, and its subsequent Mandate issued on July 9, 2012, the Supreme Court of Appeals of West Virginia suspended Respondent's license to practice law for a period of one (1) year, among other sanctions including a direction that during the period of suspension that Respondent commence and continue to undergo psychological and/or psychiatric counseling to deal with depression and alcohol issues until such time that it is determined by the treating psychologist or psychiatrist that treatment is no longer necessary. Respondent was also ordered to complete eight (8) hours of continuing legal education in office management and office practice within the next twenty-four (24) months, complete one (1) year of supervised practice upon reinstatement, and pay the costs of the proceeding. *See, Lawyer Disciplinary Board v. Michael S. Santa Barbara*, 229 W.Va. 344, 729 S.E.2d 179 (2012). This matter was heard by a Hearing Panel Subcommittee of the Lawyer Disciplinary Board on May 4 and May 5, 2011. By Hearing Panel Subcommittee Report dated December 2, 2011, the Hearing Panel Subcommittee found that Respondent had violated committed multiple violations of Rules 1.3, 1.4(a) and 1.4(b), and single violations of Rules 1.1 and 1.15(a) of the Rules of Professional Conduct.

charge; and sentenced to thirty (30) days in jail but with the alternative sentence of fifty (50) hours of community service to be served in lieu of serving jail time and court costs for the concealed weapon charge. [ODC Ex. 3, Bates 59, 64]

The events surrounding this disciplinary proceeding centered around a subdivision or common interest community in Berkeley County where Respondent resides. On August 14th and 15th, 2011, and prior thereto, [Respondent] served as vice-president of the home owners association of Whiting's Neck Subdivision. [See generally Hrg. Trans. pg. 13] The subdivision and its homeowners had encountered recurrent vandalism, destruction of property, and burglaries which had existed over the past several years prior to the incident which gives rise to these proceedings. The level of crime in the subdivision had risen to its highest level in the year 2011 immediately prior to the time of Respondent's gun-related incident. [Hrg. Trans. pgs. 54-55]

Whiting's Neck is comprised of approximately 40 homes in Berkeley County. The subdivision includes commonly owned areas (tennis courts, basketball court, an area with trash dumpsters for the common use of residents) in addition to the roads and homes in the subdivision. [Hrg. Trans. pg. 13] The 250 acre subdivision is divided into two primary parts: (1) the area where Respondent's home and the other residents' homes are located, and (2) a separate common area along the Potomac River where residents have both a recreational area with a pavilion for private parties for community residents and several privately owned docks for boats owned by some of the residents. [Hrg. Trans. pgs. 13-14] Most of the homes are on 5 to 6 acre tracts located on bluffs about 125 feet above the Potomac River. [Hrg. Trans.

pg. 23] The road leading down the hill from the bluffs to the “river front area” had an electronic gate with lock that was vandalized in 2011 so that the lock no longer worked. A chain and lock were placed on the gate to limit access to that area. Respondent and his wife own one of the docks in the “river front area” and have had a boat at the dock at various times during the years they have lived in Whiting’s Neck. [Hrg. Trans. pg. 14]

The criminal activities which markedly increased in 2011 included mailbox vandalism for several homes in the development, automobile break-ins, removal of lug nuts from one owner’s automobile, destruction or damage to gated areas in the subdivision and similar acts. [Hrg. Trans. pgs. 9, 11] Shortly before the incident giving rise to these proceedings, strangers in a Jeep approached and frightened young children who were immediate neighbors and friends of Respondent and his family. [Hrg. Trans. pg. 11]. The incident occurred in August of 2011 while the parents of the children were at work. The occupants of the vehicle drove onto common property of the subdivision where the tennis courts and trash dumpsters are located and started screaming at the young children and telling them to get off the property. [Hrg. Trans. pgs. 11, 51]

Residents in Whiting’s Neck have an email network system in their homeowners association through which they regularly communicate. [Hrg. Trans. pg. 10, Respondent’s Ex. 2-7] The criminal activity of 2011 became a frequent topic of the email communications and the residents became quite concerned about their own safety and especially the safety of their children after the occurrence of the Jeep incident. [Hrg. Trans. pg. 50] Additionally, a back gate near Respondent’s home which had been chained and secured with a lock had

been vandalized and unauthorized people were gaining access to the subdivision through that location. [Hrg. Trans. pg. 12] One cannot see the “river front area” from the Respondent’s home because the lot is wooded. It is a several minute drive from the Santa Barbara home to the “river front area”. [Hrg. Trans. pgs. 25-26]

Immediately after the Jeep incident, community members were very alarmed and frightened and a special homeowners meeting was called on August 12, 2011, to address the problem. [Hrg. Trans. pg. 16] Up to that time, a community watch system had been employed and members had undertaken private patrolling of the community. [Hrg. Trans. pgs. 26-28] Some members carried firearms when they were patrolling on the neighborhood watch. [Hrg. Trans. pg 42] In the prior criminal incidents, resident apparently called for police assistance on several occasions, but response times were often 45 minutes to an hour and no arrests were made. [Hrg. Trans. pg. 15] The witnesses perceived that calling law enforcement was not adequately addressing the problem, although they continued to seek police assistance when incidents occurred. [Hrg. Trans. pgs. 29-30]

Respondent and his wife were not in attendance at the August 12, 2011 meeting, as they were on vacation with their daughters at the beach. [Hrg. Trans. pgs. 84, 117] However, they were made aware of the happenings through communications from the email network of the Whiting’s Neck homeowner’s association. [Hrg. Trans. pgs. 83, 84, 117-118] While the Santa Barbara family was on vacation, the motion detection security device in their home was activated and it alerted Respondents on their cell phone of a possible problem, so they contacted one of the neighbors who went to Respondent’s home to investigate. [Hrg.

Trans. pg. 43] No burglar was observed, but the neighbor testified he was carrying a firearm for protection when he went to their home. [Hrg. Trans. pg. 43]

The father of the children who had been intimidated by the strangers in the Jeep testified that prior to that incident, the only firearms in his home were in a locked gun cabinet, but after the incident he took a shotgun from the cabinet into his bedroom, along with shells because of his concern for his family's safety and security. [Hrg. Trans. pg. 52] There are no prohibitions in the by-laws of Whiting's Neck which preclude the carrying of firearms. [Hrg. Trans. pg. 38] Indeed, several of Respondent's witnesses testified that they possessed firearms for their own protection. [Hrg. Trans. pgs. 43, 52]

On the night of August 14th and early morning of August 15, 2011, Respondent and his family had just returned from their vacation and the electric power in much of the subdivision had been lost, and it was completely dark in their part of the subdivision. [Hrg. Trans. pgs. 86, 88, 119-120] One of the residents who lived near the "river front area" called Mr. Santa Barbara to seek his assistance because the caller reported that a large crowd of unauthorized persons had traveled down the road to the "river front area" and there was a lot of loud noise. [Hrg. Trans. pgs. 88-89, 120-121] The caller lived in the home closest to the "river front area" and he indicated he told Mr. Santa Barbara he heard loud conversation, girls screaming and what he thought were multiple shots of gunfire. [Hrg. Trans. pg. 121] Prior to speaking with Mr. Santa Barbara, he had tried without success to reach other homeowners. After calling Mr. Santa Barbara, he spoke with another resident (the president

of the homeowners association) who indicated that the police had been contacted. [Hrg. Trans. pgs. 75-76]

After receiving this call, Respondent grabbed a handgun and drove to the road to the “river front area”, got out of his car when a group from the crowd surrounded him in a threatening manner. [Hrg. Trans. pg. 122]. It was at this juncture that he pulled out the gun to protect himself. [Hrg. Trans. pg. 124] In that action, he displayed the handgun as a warning, but did not aim it at anyone or shoot it at anyone. [Hrg. Trans. pgs. 137-138]

As it turned out, the crowd was comprised of a large group of persons in their late teens and early twenties, and they were having a party. [Hrg. Trans. pgs. 123-124] All but one of the group were trespassers, and the party was not authorized by the homeowners’ association. [Hrg. Trans. pgs. 36-37, 136-137] Eventually, the police responded and several young persons in attendance were identified. [Hrg. Trans. pg 139].

Immediately after the incident, Respondent apologized to the owners’ association, resigned from his position as vice-president, and fully cooperated with law enforcement in its investigation of the incident. [Hrg. Trans. pgs. 125-126]

Although Respondent pleaded “no contest” to the gun related misdemeanor charges, which are the predicate acts for the instant disciplinary proceedings, the HPS is of the opinion that he very likely would have been acquitted had he chosen to contest the charges given the background events leading up to his confrontation with the young people at the party, because he was acting out of concern for his safety and property and that of others in the subdivision, not for a criminal purpose.

In fact, the Respondent's actions that night were generally appreciated because the vandalism and criminal activity in Whiting's Neck stopped after that incident and the media publicity which followed. [Hrg. Trans. pgs. 20, 38, 56] At a minimum, the public opinion in his subdivision about lawyers certainly was not adversely affected by Respondent's behavior, although the media accounts of the story may have had some adverse effect in the wider community area where the story was circulated. ODC offered no rebuttal testimony to controvert the evidence of the impact Respondent's actions may have had on the public's perception about lawyers nor Respondent's fitness to practice law.

Although no injuries resulted from Respondent brandishing the handgun, there certainly was the potential that someone may have been harmed or seriously injured if the situation had accelerated that evening.

The Office of Disciplinary Counsel and Respondent jointly moved to dismiss the Rule 8.4(c) violation alleged in ¶ 11 of the Petition which provided, in pertinent part, that Respondent engaged in "conduct involving dishonesty, fraud, deceit or misrepresentation;"

C. CONCLUSIONS OF LAW

Rule 3.18(c) of the Rules of Lawyer Disciplinary Procedure provides that "[a] plea or verdict of guilty or a conviction after a plea of nolo contendere shall be deemed to be a conviction within the meaning of this rule." Rule 3.18(d) of the Rules of Lawyer Disciplinary Procedure provides that "[a] lawyer shall be deemed to have been convicted within the meaning of this rule upon the entry of the order or judgment of conviction and

such lawyer's license may be suspended or annulled thereupon notwithstanding the pendency of an appeal from such conviction." "Where there has been a final criminal conviction, proof on the record of such conviction satisfies the Committee on Legal Ethics' burden of proving an ethical violation arising from such conviction." Syl. Pt. 2, Committee on Legal Ethics v. Six, 181 W.Va. 52, 380 S.E.2d 219 (1989). Furthermore, Respondent did not forward to the Office of Disciplinary Counsel, as is required by Rule 3.18(a) of the Rules of Lawyer Disciplinary Procedure, a copy of the order or judgment within thirty (30) days of the entry of the same. Rule 3.18(a) of the Rules of Professional Conduct further provides that "[f]ailure to forward a copy shall constitute an aggravating factor in any subsequent disciplinary proceeding."

Because he has been convicted of the criminal acts of brandishing and carrying a concealed weapon, Respondent has violated Rule 8.4(b) and Rule 8.4(d) of the Rules of Professional Conduct which state in pertinent part:

Rule 8.4. Misconduct.

It is professional misconduct for a lawyer to:

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

* * *

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

II. SUMMARY OF ARGUMENT

Respondent intentionally and knowingly entered pleas of *nolo contendere* to the misdemeanor crimes of brandishing and carrying a concealed weapon and these convictions

reflect adversely on trustworthiness and fitness as a lawyer and his misconduct is in direct violation of the Rules of Professional Conduct. 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). As a duly licensed attorney and an officer of the Court, Respondent has an affirmative duty to comport his actions to that of the laws of this State and has therefore, based upon his conduct in this matter, violated his duties to the public, the legal system and the profession.

Under the provisions of Rule 3.18 of the Rules of Lawyer Disciplinary Procedure, Respondent has been deemed convicted of the misdemeanor crimes of brandishing and carrying a concealed weapon. In order to effectuate the goals of the disciplinary process, the Hearing Panel Subcommittee issued the following recommendation as the appropriate sanction: (A) That Respondent be suspended from the practice of law for a period of six (6) months. Further, that if this six (6) month period of suspension should commence while Respondent is still serving his one (1) year suspension period from Supreme Court Case No. 10-4011, then this six (6) month suspension shall begin to run concurrently with said suspension from Supreme Court No. 10-4011, provided that Respondent shall not petition for reinstatement until he has finished this six (6) month suspension; (B) That Respondent shall continue with counseling as ordered in Supreme Court No. 10-4011 during this six (6) month suspension and that the treating counselor is directed to submit at least one (1)

progress report to the Office of Disciplinary Counsel during this six (6) month period; and
(C) That prior to petitioning to be reinstated to the practice of law that Respondent be required to pay the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

By Order entered March 28, 2013, this Honorable Court stated that the Court did not concur with the Hearing Panel Subcommittee's recommended disposition and pursuant to Rule 19 the Revised Rules of Appellate Procedure, set this matter for oral argument for September 10, 2013.

IV. ARGUMENT

A. STANDARD OF PROOF

“Where there has been a final criminal conviction, proof on the record of such conviction satisfies the [Office of Disciplinary Counsel’s] burden of proving an ethical violation arising from such conviction.” Syl. Pt. 2, Committee on Legal Ethics v. Six, 181 W.Va. 52, 380 S.E.2d 219 (1989). Rule 3.18(c) of the Rules of Lawyer Disciplinary Procedure provides that “[a] plea or verdict of guilty or a conviction after a plea of *nolo contendere* shall be deemed to be a conviction within the meaning of this rule.” Clearly, ODC has met its burden of proof establishing an ethical violation as Respondent knowingly and intelligently entered his plea of *nolo contendere* to (1) count of brandishing and one (1) count of carrying a concealed weapon.

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 ethic charges and must make the ultimate decisions about public reprimands, suspensions or annulments of attorneys' licenses to practice law. Syl. Pt. 3, Committee on Legal Ethics v. Blair, 174 W. Va. 494, 327 S.E.2d 671 (1984); Syl. Pt. 7, Committee on Legal Ethics v. Karl, 192 W. Va. 23, 449 S.E.2d 277 (1994).

**B. ANALYSIS OF SANCTION UNDER RULE 3.16 OF THE
RULES OF LAWYER DISCIPLINARY PROCEDURE**

Syl. Point 4 of Office of Disciplinary Counsel v. Jordan, 204 W.Va. 495, 513 S.E.2d. 722 (1998) holds: Rule 3.16 of the Rules of Lawyer Disciplinary Procedure provides that when imposing a sanction after a finding of lawyer misconduct, the Court shall consider: (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. A review of the record in this matter indicates that Respondent has transgressed all four factors set forth in *Jordan*.

1. Respondent has violated his duties owed to the public, to the legal system and to the legal profession.

As a duly licensed attorney and an officer of the Court, Respondent has an affirmative duty to comport his actions to that of the laws of this State. Respondent's actions in this matter, by carrying a concealed weapon and brandishing a gun to a crowd of young adults and entering a pleas of *nolo contendere* to these criminal charges, violated his duties to the public, the legal system and the profession. While Respondent did not violate any duties owed to a client in the matter, Respondent's actions on the night of August 15, 2011, clearly did not comport with behavior expected by the public of an attorney licensed by the State of West Virginia and clearly have an impact on the public's confidence in the integrity of the members of the West Virginia State Bar. Not only did Respondent brandish a weapon to a group of

young adults, he had his teenage daughter with him when he went to confront the crowd even after being told that a gun shot might have been heard and that women were also heard to be screaming. [Hrg. Trans. pgs 122, 132] Respondent also testified that he used his vehicle to prevent people from leaving the area and even used his vehicle to force the other cars back down to the river front area. [Hrg. Trans. pgs. 123, 132, 135] At the very least, Respondent exercised extremely poor judgment in choosing the course of action he did on the night of August 15, 2011, and calls into question his fitness as a lawyer.

The clear and convincing evidence proves that Respondent's conviction for brandishing and carrying a concealed weapon meets the Office of Disciplinary Councils burden of proof in establishing that Respondent violated his duties owed to the public, the legal system, and the profession. Moreover, at the time Respondent committed the criminal acts of brandishing and carrying a concealed weapon on August 15, 2011, he was facing a Statement of Charges alleging multiple violations of the Rules of Professional Conduct and in fact, had participated in a two (2) day hearing just three (3) months earlier and was awaiting a decision by the Hearing Panel Subcommittee.

2. Respondent acted intentionally and knowingly.

Respondent stipulated that he acted in an intentional manner. [Joint Ex. 1, p. 6]. "Intent" as defined by the American Bar Association is the conscious objective or purpose to accomplish a particular result. Respondent also acted knowingly when he entered his no contest pleas to the misdemeanor crimes of brandishing and carrying a concealed weapon.

At the October 10, 2012 hearing, Respondent testified “[he] did this of his own accord.” [Hrg. Trans. pg. 141].

3. The amount of actual or potential injury caused by Respondent’s misconduct.

Respondent’s misconduct did not cause actual injury to any clients or members of the public but his actions certainly had the potential to injure members of the public. Respondent took a gun with him with the intent of taking action against party goers at his neighborhood’s recreational pavilion. Respondent testified that he also used his vehicle to block the access road to prevent party-goers from leaving and brandished his weapon to the crowd of young people with the purpose of intimidation. Moreover, Respondent had his teenage daughter with him during these all of these events. Respondent’s actions had the potential to injure members of the public and did injure the reputation and integrity of the legal profession. Moreover, Respondent’s exhibited extremely poor judgement and a disrespect for the law which is at odds with his duties as a lawyer.

4. The existence of any aggravating 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). Respondent stipulated to the following aggravating factors: (1) prior disciplinary record and (2) substantial experience in the practice of law.

Prior discipline is aggravating on the issue of sanction because it calls into question a lawyer's fitness to practice a profession imbued with the public's trust. Syl. pt. 5, Committee on Legal Ethics v. Tatterson (Tatterson II), 177 W. Va. 356, 352 S.E.2d 107 (1986); Lawyer Disciplinary Board v. Veneri, 206 W.Va. 384, 524 S.E.2d 900 (1999).

5. The existence of any mitigating factors.

In addition to adopting aggravating factors in Scott, the 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 (1992).² However, it should be clear that mitigating factors were not envisioned to insulate a violating lawyer from discipline.

In this case, the Hearing Panel Subcommittee found that Respondent was contrite, fully cooperated with law enforcement, did not contest the criminal charges, and that he had immediately resigned his position as an officer with the homeowner's association. The

² The Scott Court held that mitigating factors which may be considered in determining the appropriate sanction to be imposed against a lawyer for violating the Rules of Professional Conduct include: (1) absence of a prior disciplinary record; (2) absence of a dishonest or selfish motive; (3) personal or emotional problems; (4) timely good faith effort to make restitution or to rectify consequences of misconduct; (5) full and free disclosure to disciplinary board or cooperative attitude toward proceedings; (6) inexperience in the practice of law; (7) character or reputation; (8) physical or mental disability or impairment; (9) delay in disciplinary proceedings; (10) interim rehabilitation; (11) imposition of other penalties or sanctions; (12) remorse; and (13) remoteness of prior offenses.

Hearing Panel Subcommittee also found that at the time of the October 10, 2012 hearing, Respondent had been receiving the counseling as directed in this Court's Opinion Order entered June 7, 2012, and that he had been cooperating with other sanctions as outlined in the Court's Order.

C. SANCTION

Rule 3.15 of the Rules of Lawyer Disciplinary Procedure provides that the following sanctions may be imposed in a disciplinary proceeding: (1) probation; (2) restitution; (3) limitation on the nature or extent of future practice; (4) supervised practice; (5) community service; (6) admonishment; (7) reprimand; (8) suspension; or (9) annulment. Given Respondent's misconduct and that fact that at the time, he was already facing disciplinary charges at the time he committed the criminal acts, suspension is an appropriate sanction.

The Rules of Professional Conduct state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. Syllabus Pt. 3, *in part*, Committee on Legal Ethics v. Tatterson, 173 W.Va. 613, 319 S.E.2d 381 (1984), *cited in* Committee on Legal Ethics v. Morton, 186 W.Va. 43, 410 S.E.2d 279, 281 (1991). In addition, discipline must serve as both instruction on the standards for ethical conduct and as a deterrent against similar misconduct to other attorneys. In Syllabus Point 3 of Committee on Legal Ethics v. Walker, 178 W.Va. 150, 358 S.E.2d 234 (1987), the Court stated:

In deciding on the appropriate disciplinary action for ethical violations, this Court must consider not only what steps would appropriately punish the respondent attorney, but also whether the discipline imposed is adequate to serve as an effective deterrent to other members of the Bar and at the same time

restore public confidence in the ethical standards of the legal profession.

Moreover, a principle purpose of attorney disciplinary proceedings is to safeguard the public's interest in the administration of justice. Daily Gazette v. Committee on Legal Ethics, 174 W.Va. 359, 326 S.E.2d 705 (1984); Lawyer Disciplinary Board v. Hardison, 205 W.Va. 344, 518 S.E.2d 101 (1999). "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). For the public to have confidence in our disciplinary and legal systems, lawyers who plead to and are convicted of criminal conduct which adversely reflect on their fitness and personal integrity should be disciplined. A severe sanction is also necessary to deter lawyers from engaging in similar conduct that reflect adversely on the members of the West Virginia State Bar.

Standard 5.12 of the *ABA Standards for Imposing Lawyer Sanctions*, which falls under Section 5.1 entitled "Failure to Maintain Personal Integrity," provides that absent aggravating or mitigating circumstances, suspension is generally appropriate "when a lawyer knowingly

engages in criminal conduct which does not contain the elements listed in Standard 5.11 and that seriously adversely reflects on the lawyer's fitness to practice."³

It is clear that the Hearing Panel Subcommittee determined that an additional six (6) months suspension and continued counseling during the additional period of suspension was appropriate, given that Respondent's prior disciplinary proceeding was pending at that the time of the criminal conduct, that Respondent intentionally and knowingly pled to the criminal charges, and that by the time of the hearing in this instant matter was suspended from the practice of law for the period of one (1) year.

A review of the record indicates that the Hearing Panel Subcommittee properly considered the evidence and made an appropriate recommendation to this Court. Moreover, in the past this Court has looked to the overall history of the lawyer, including such things as prior wrongdoing and discipline, when determining what sanction to impose. Syl. pt. 5, Committee on Legal Ethics v. Tatterson (Tatterson II), 177 W. Va. 356, 352 S.E.2d 107 (1986) (prior discipline aggravating because it calls into question a lawyer's fitness to practice a profession imbued with the public's trust). Additionally, 9.22(a) of the *ABA Standards for Imposing Lawyer Sanctions* states that any prior discipline of an attorney should also be viewed as an aggravating factor.

³ Standard 5.11. Disbarment is generally appropriate when (a) a lawyer engages in serious criminal conduct a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale distribution or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses; or (b) the lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

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

However, as the Hearing Panel Subcommittee noted, a recent case in West Virginia dealing with brandishing a weapon is Lawyer Disciplinary Board v. Jennifer D. Hewitt, Supreme Court No. 35515 (unreported). In that case, this Court issued a three (3) month suspension and required the attorney to undergo counseling after the attorney, who had been engaged in improper relations with her client, brought a gun with her when she accompanied her now former client and who was then her boyfriend to a disagreement with her boyfriend's child's mother at the child's mother's home. The attorney was ultimately charged and

convicted of trespass. *But see*, Lawyer Disciplinary Board v. Albers, 219 W.Va. 704, 639 S.E.2d 769 (2006), wherein this Court considered an indefinite suspension of nearly three years as having been appropriate for an attorney, with no prior disciplinary record, for conduct leading to convictions for misdemeanor trespass of property.

Other jurisdictions have considered whether to discipline attorneys for misdemeanor crimes involving weapons. In the Matter of Phillip Franscinella, 1 Cal. State Bar. Ct. Rptr. 543 (1991), the California State Bar Court determined that an attorney's conviction, after entering no contest pleas, to two (2) counts of exhibiting a replica firearm in a threatening manner to cause fear of bodily harm warranted discipline. The State Bar Court determined that "[i]t was not of consequence that no one was physically injured by respondent's acts. (See, In re Mostman, [(1989) 47 Cal.3d 725] 47 Cal.3d at p. 740, fn. 6) Respondent's acts were intended by respondent to be perceived as, and were in fact perceived by his victims to be life-threatening." In the Matter of Franscinella, 1 Cal. State Bar Ct. Rptr. 543, 550. In the Matter of William Ervin, 387 S.C. 551, 694 S.E.2d 6 (2010), the Supreme Court of South Carolina issued a six (6) month suspension retroactive from the date of the interim suspension after an attorney was arrested for his actions in a road rage incident where the attorney had presented and pointed a firearm at the other driver. In that case, the attorney successfully completed a pre-trial diversion program and his criminal charges were expunged from his record. In the Matter of Ervin, 387 S.C. at 554, 694 S.E.2d at 8. Nonetheless, the Supreme Court found that the attorney had "exercised extremely poor judgment in allowing an avoidable situation to escalate into a dangerous incident." In the Matter of Ervin, 387 S.C.

at 556, 694 S.E.2d at 9.⁴ The South Carolina Supreme Court found that the attorney had violated the following Rules of Professional Conduct: Rules 8.4(a) (misconduct to violate the Rules of Professional Conduct) and 8.4(b) (committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respect). Id.

V. CONCLUSION

For the public to have confidence in our disciplinary and legal systems, lawyers who engage in the type of misconduct exhibited by Respondent must be disciplined. Respondent, while facing a disciplinary proceeding in which he was later suspended for a period of one (1) year, pled no contest to brandishing and carrying a concealed weapon after he deliberately took a gun with him to break up a party involving young adults. Not only did he display his weapon to the crowd at the pavilion, he use his personal vehicle, with his teenage daughter inside with him, to block the access road to prevent the party goers from leaving the party. In fact, he forced the people who were already on the road to return to the party and then

⁴*But see, Iowa Supreme Court Attorney Disciplinary Board v. Keele*, 795 N.W.2d 507 (2011) wherein the Iowa Supreme Court dismissed a disciplinary action against an attorney who had been found guilty of knowingly possessing a firearm while being an unlawful user of, or addicted to, a controlled substance in violation of 18 U.S.C. §§ 922(g)((3) and 924(a)(2)(2006). The Court determined that the attorney's conviction was an isolated incident and did not demonstrate a pattern of criminal conduct or disrespect for the law. Keele, 795 N.W.2d 507, 514. The Court stated that "in past cases, in this jurisdiction and elsewhere, where an attorney's illegal possession and/or use of a firearm was found to reflect adversely on his fitness to practice law, a sufficient nexus between the illegal conduct and the attorney's ability to function as a lawyer was present." Keele, 795 N.W.2d at 513. The Court indicated that cases in which an attorney was disciplined occurred wherein the attorney displayed the weapon in a threatening manner or discharged it, thereby showing disrespect for the law, a lack of judgment, and placing the public at great risk. Keele, 795 N.W.2d at 513-514. In Keele's case, the Court determined that the attorney did not display the weapon, use the weapon during an act of domestic violence, or otherwise victimize any person with the weapon. While the Court agreed that the criminal conduct was serious, the attorney's otherwise lawful possession of an his client's unloaded weapon in his closet, packed away in a cloth case, and with no ammunition found in the house posed no real risk of actual or potential injury to a victim. Keele, 795 N.W.2d at 514.

confronted the group of young people with his weapon above his head with the intent to threaten them, or show them that he had a gun, until police could arrive at the scene. Respondent did testify that he brandished the weapon after he felt threatened himself but he had deliberately retrieved the weapon from his house before heading down to the situation at the pavilion. He did not have to take the gun with him to assess the situation at the pavilion. Respondent clearly exhibited extremely poor judgment and exhibited disrespect for the law and placed himself, his daughter and members of the public at risk. A license to practice law is a revokable privilege and when such privilege is abused as it clearly was in this case, the privilege should be revoked. Such sanction is also necessary to deter other lawyers from engaging in similar conduct and to restore the faith of the public, in general, as to the integrity of members of the legal profession. This type of misconduct has an impact on the public's confidence in the integrity of the Bar and a period of suspension is the appropriate sanction.

In reaching its recommendation as to sanctions, the Hearing Panel Subcommittee considered the evidence, the facts and recommended sanction, the aggravating factors and mitigating factors. For the reasons set forth above, the Hearing Panel Subcommittee recommended the following sanctions:

1. That Respondent be suspended from the practice of law for a period of six (6) months. Further, that if this six (6) month period of suspension should commence while Respondent is still serving his one (1) year suspension period from Supreme Court Case No. 10-4011, then this six (6) month suspension shall begin to run concurrently with said suspension from Supreme Court No. 10-4011, provided that Respondent shall not petition for reinstatement until he has finished this six (6) month suspension;

2. That Respondent shall continue with counseling as ordered in Supreme Court No. 10-4011 during this six (6) month suspension and that the treating counselor is directed to submit at least one (1) progress report to the Office of Disciplinary Counsel during this six (6) month period; and
3. That prior to petitioning to be reinstated to the practice of law that Respondent be required to pay the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

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

Respectfully submitted,
The Lawyer Disciplinary Board
By Counsel

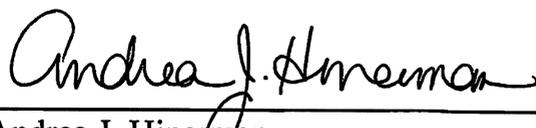


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CERTIFICATE OF SERVICE

This is to certify that I, Andrea J. Hinerman, Senior Lawyer Disciplinary Counsel for the Office of Disciplinary Counsel, have this day, the 6th day of May, 2013, served a true copy of the foregoing "**Brief of the Lawyer Disciplinary Board**" upon Robert H. Davis, Jr., Esquire, counsel for Respondent Michael S. Santa Barbara, by mailing the same via United States Mail, both certified and regular, with sufficient postage, to the following address:

Robert H. Davis, Jr., Esquire
121 Pine Street
Harrisburg, Pennsylvania 17101



Andrea J. Hinerman