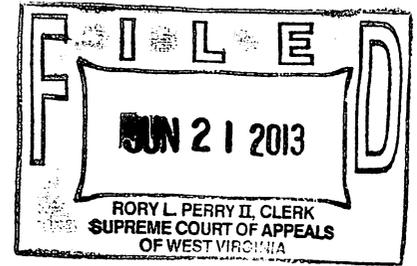


**BEFORE THE SUPREME COURT OF APPEALS OF THE
STATE OF WEST VIRGINIA**



OFFICE OF DISCIPLINARY COUNSEL,

Complainant,

v.

No. 12-0608

MICHAEL S. SANTA BARBARA,

Respondent.

REPLY BRIEF OF THE LAWYER DISCIPLINARY BOARD

Andrea J. Hinerman [Bar No. 8041]
Senior Lawyer Disciplinary Counsel
Office of Disciplinary Counsel
City Center East, Suite 1200C
4700 MacCorkle Avenue SE
Charleston, West Virginia 25304
(304) 558-7999
(304) 558-4015 – *facsimile*

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I. RESPONDENT'S CONDUCT

This matter is before the Court pursuant to the "Report of the Hearing Panel Subcommittee" issued on or about March 1, 2012, wherein the Hearing Panel Subcommittee found that the evidence established that Respondent violated 8.4(b) and 8.4(d) of the Rules of Professional Conduct due to Respondent's pleas of no contest to one (1) count of brandishing and one (1) count of carrying a concealed weapon.¹ Respondent's conviction for these crimes, especially since the misconduct occurred while Respondent was already facing disciplinary charges in another matter, reflect adversely on his honesty, trustworthiness, and fitness as a lawyer in other respects and is in direct violation of the Rules of Professional Conduct.

The Rules of Professional Conduct state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. Committee on Legal Ethics v. Keenan, 189 W.Va. 37, 40, 427 S.E.2d 471, 473 (1993) (*per curiam*); quoting Syl. Pt. 3, in part, Committee on Legal Ethics v. Tatterson, 173 W.Va. 613, 319 S.E.2d 381 (1984). Furthermore, the Preamble to the Rules of Professional Conduct provides that "[a] lawyer's

¹ This matter was initiated by the Office of Disciplinary Counsel pursuant to Rule 3.18 of the Rules of Lawyer Disciplinary Procedure after Respondent pled no contest on April 16, 2012, 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 Respondent's residential community. [ODC Ex. 2] He was fined \$500.00 and court costs on the brandishing 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 3.18 Petition initially sought a two (2) year suspension of Respondent's license to practice law. At the time of the incident on August 15, 2011, Respondent was facing disciplinary charges on unrelated matters and his license was ultimately suspended for one (1) year, among other sanctions, in Lawyer Disciplinary Board v. Michael S. Santa Barbara, 229 W.Va. 344, 729 S.E.2d 179 (2012).

conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs." It cannot be said that Respondent's conduct in this matter conforms to the expectations of conduct as stated in the Rules of Professional Conduct.

At this stage in the proceedings, this Court has held that "[t]he burden is on the attorney at law to show that the factual findings are not supported by reliable, probative, and substantial evidence on the whole adjudicatory record made before the Board." Lawyer Disciplinary Board v. Cunningham, 195 W.Va. 27, 34, 464 S.E.2d 181, 189 (1995); Committee on Legal Ethics v. McCorkle, 192 W. Va. 286, 290, 452 S.E.2d 377, 381 (1994). The evidence clearly establishes that Respondent acted in a manner wherein he exercised poor judgment in deciding to take a gun, as well as his daughter, with him when he went to investigate a crowd of young people at his residential community's river pavilion on the evening of August 15, 2011. Moreover, he used to personal vehicle to block the narrow road leading to the river pavilion, thus effectively preventing people from leaving the area. Respondent's conduct clearly deviates from that which is expected of an attorney.

Respondent correctly points out that the Office of Disciplinary misstated the length of sanction in the Brief of the Lawyer Disciplinary Board filed with this Honorable Court on May 6, 2013. The Hearing Panel Subcommittee adopted the stipulations entered into by the parties and which recommended to this Court the following sanctions: (A) That Respondent be suspended from the practice of law for a period of three (3) months. Further, that if this three (3) 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 three (3) 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 three (3) month suspension in this proceeding; (B) That Respondent shall continue with counseling as ordered in Supreme Court No. 10-4011 during this three (3) 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 three (3) 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. [Joint Ex. 1].

West Virginia's Rules of Lawyer Disciplinary Procedure provides the legal framework for governing lawyer discipline including disciplinary proceedings which are initiated against a lawyer based upon a final criminal conviction. Rule 3.18(c) of the Rules of Lawyer Disciplinary Procedure states that a plea or verdict of guilty or a conviction after a plea of *nolo contendere* shall be deemed a conviction within the meaning of this rule." Rule 3.18(e) further provides, in part, that "... the order or judgement, ... shall be conclusive evidence of the guilt of the crime or crimes which the lawyer has been convicted," Respondent's *nolo contendere* pleas provide a sufficient basis to find that Respondent's violated Rules 8.4(b) and 8.4(d) of the Rules of Professional Conduct.

II. ARGUMENT

The principle purpose of attorney disciplinary proceedings is to safeguard the public's interest in the administration of justice. For the public to have confidence in our disciplinary and legal systems, lawyers who enter guilty or no contest pleas to criminal charges which reflect adversely on their honesty, trustworthiness, or fitness to practice law in other respects should face discipline. Severe sanctions, such as a suspension, are also necessary to deter other lawyers who may be considering or who are engaging in similar conduct.

Regardless of Respondent's neighbors' views of his conduct, Respondent's misdemeanor criminal convictions for brandishing and carrying a concealed weapon remain a part of his record and clearly reflect poorly on the public perception of lawyers. As an officer of the Court and an attorney, albeit a currently suspended one, there can be no dispute that Respondent has an affirmative duty to comport his actions to that of the laws of this State. Respondent's actions in this matter violated his duties to the public, the legal system and the profession. 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 vehicles to back down the narrow road and return to the river front area. [Hrg. Trans. pgs. 123, 132, 135] At the very least, Respondent exercised extremely poor judgment in choosing his course of action on the night of August 15, 2011, and his conduct calls into question his fitness as a lawyer.

Respondent now argues that he did not intend to commit a criminal act when he armed himself and that his actions “were logical and taken to afford himself and his community with protection and were not taken with the conscious objective to violate any firearms law nor commit any criminal action.” [Brief of Respondent Michael S. Santa Barbara, p. 19] Respondent cannot now assert his innocence of the crimes to which he voluntarily pled no contest. [ODC Ex. 2]. If Respondent believed that he did not intend to commit a crime or that his actions did not amount to a criminal act, then the proper place to assert these arguments was in the underlying criminal action. In a matter involving attorney discipline after a *nolo contendere* plea to criminal conspiracy and obstruction of justice, the South Carolina Supreme Court, considering the respondent attorney’s arguments regarding the admission or exclusion of evidence pertaining to the circumstances of the *nolo* pleas, noted that “[t]o allow a respondent to assert his innocence of the crime for which he has been convicted would totally nullify the intentions of the Rule [Section 6 of the Rule on Disciplinary Procedure which reads, in part, ‘[a] certificate of conviction of an attorney for any crime shall be conclusive evidence of the commission of that crime in any disciplinary proceeding instituted against him based on the conviction.’] In the Matter of Rish, 256 S.E.2d 540, 541-42 (S.C.1979). West Virginia’s Rule 3.18(e) similarly provides, in part, that “. . . the order or judgement, . . . shall be conclusive evidence of the guilt of the crime or crimes which the lawyer has been convicted, . . .” In further explaining its position on this issue, the South Carolina Court cited with approval to a Maryland case, Bar Association of Baltimore City v. Siegal, 340 A.2d 710 (Md. 1975), in which the respondent attorney sought

to show that two U.S. Attorneys had recommended that he not be prosecuted, that the prosecution was overzealously pursued, and that his *nolo contendere* plea was entered into because his health did not permit him to undergo an extended trial. The Maryland Court stated:

[W]e cannot accept as “compelling extenuating circumstances” those proffers by the respondent which in essence call upon us to assess the integrity of the criminal conviction itself that prior adjudication is conclusive and thus cannot be attacked in a disciplinary proceeding by invoking this Court to reweigh or to re-evaluate the respondent’s guilt or innocence. *Id.*, 340 A.2d at 713.

Rish, 256 S.E.2d 540.

Moreover, Respondent voluntarily entered into Stipulations in this matter stating 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. Clearly, Respondent’s objective when he armed himself and drove down to the river pavilion was to address, once and for all, the alleged criminal activity taking place in his neighborhood. Respondent even used his vehicle to block the road so that none of the party attendees could leave the area before police arrived. Respondent, with the benefit of counsel, also acted knowingly when he entered his no contest pleas to the misdemeanor crimes of brandishing and carrying a concealed weapon. Finally, Respondent testified at the October 10, 2012 hearing that “[he] did this of his own accord.” [Hrg. Trans. pg. 141].

Respondent correctly points out that his misconduct caused no actual injury. However, there can be no question that Respondent’s actions certainly had the potential to

escalate the situation and cause injury to members of the public that night. Respondent exercised extremely poor judgement and displayed a disrespect for the law which is at odds with his duties as a lawyer. While no one disputes that one may carry a weapon that is properly registered for personal protection, there was no logical reason to purposely take that weapon, brandish it to a crowd of young. A lawyer, and certainly not one with Respondent's considerable experience, should not engage in vigilante-type justice especially when there legitimate and lawful means can be employed to accomplish the same goal and which do not involve resorting to conduct leading to criminal charges.

III. 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).

Respondent correctly states that upon consideration of the entirety of this matter, the parties and the Hearing Panel Subcommittee noted the most recent case in West Virginia dealing with brandishing a weapon in determining a sanction. See, 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.

A review of the record indicates that the Hearing Panel Subcommittee properly considered the evidence in making its 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. Finally, 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."² A fair and careful balancing of the factors in this case demonstrates that the evidence establishes that Respondent's conduct falls within the proscribed conduct warranting suspension.

IV. CONCLUSION

Therefore, a review of the record clearly indicates that the Hearing Panel Subcommittee properly considered this matter and made a proper recommendation to the Court. Wherefore, based upon the forgoing, the Office of Disciplinary Counsel respectfully requests that this Court accept and uphold the following recommended sanctions of the Hearing Panel Subcommittee:

² 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.

1. That Respondent be suspended from the practice of law for a period of three (3) months. Further, that if this three (3) 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 three (3) 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 three (3) month suspension;
2. That Respondent shall continue with counseling as ordered in Supreme Court No. 10-4011 during this three (3) 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 three (3) 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.

Respectfully submitted,
The Lawyer Disciplinary Board
By Counsel

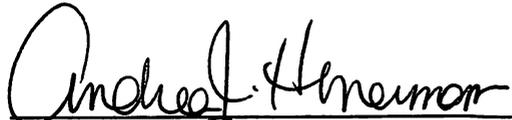


Andrea J. Hinerman [Bar No. 8041]
Senior Lawyer Disciplinary Counsel
Office of Disciplinary Counsel
City Center East, Suite 1200C
4700 MacCorkle Avenue SE
Charleston, West Virginia 25304
(304) 558-7999
(304) 558-4015 - *facsimile*

CERTIFICATE OF SERVICE

This is to certify that I, Andrea J. Hinerman, Senior Lawyer Disciplinary Counsel for the Office of Disciplinary Counsel, have this day, the 21st day of June, 2013, served a true copy of the foregoing "**Reply 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