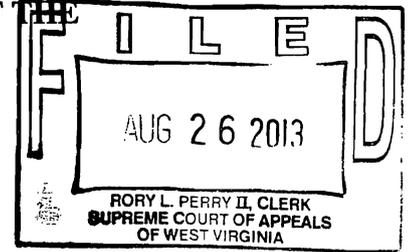


**BEFORE THE SUPREME COURT OF APPEALS OF THE
STATE OF WEST VIRGINIA**



LAWYER DISCIPLINARY BOARD,

Complainant,

v.

No. 12-0528

IRA M. HAUGHT,

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 Ira M. Haught, (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 April 27, 2012. Respondent was served with the Statement of Charges on May 2, 2012. Disciplinary Counsel filed her mandatory discovery on or about May 22, 2012. Respondent was granted an extension to file his Answer to the Statement of Charges and filed the same on or about July 26, 2012. Respondent also provided his mandatory discovery on July 26, 2012.

Thereafter, this matter proceeded to hearing on December 5, 2012, in Charleston, West Virginia. The Hearing Panel Subcommittee was comprised of Debra A. Kilgore, Esquire, Chairperson, Pamela D. Tarr, Esquire, and Mr. William R. Barr, Layperson. Jessica H. Donahue Rhodes, Lawyer Disciplinary Counsel, appeared on behalf of the Office of Disciplinary Counsel. Ancil G. Ramey, Esquire, appeared on behalf of Respondent, who also appeared. The Hearing Panel Subcommittee heard testimony from Gerald A. Heister, Linda B. Blizzard, Richard E. Blizzard, David L. Thompson, Wanda R. Wright and Respondent. In addition, ODC Exhibits 1-27 were admitted into evidence. The Hearing Panel also granted ODC’s motion to disclose relevant records from the Haught Family Trust at the conclusion of the Hearing on December 5, 2012 and gave Respondent until January 11, 2013, to disclose such records to ODC for review in order to determine if the hearing needed to be continued to allow the records to become part of the record. On or about January 11, 2013, Respondent’s counsel provided a “Response to Request for Supplement Document Production” which stated “Respondent has no documents responsive to the request by the Office of

Disciplinary Counsel.” On or about January 14, 2013, ODC sent a letter to the Hearing Panel asking that the record be closed. On or about January 16, 2013, the Hearing Panel entered an “Order Closing the Record.”

On or about June 6, 2013, the Hearing Panel Subcommittee issued its decision in this matter and filed with the Supreme Court of Appeals of West Virginia its “Report of the Hearing Panel Subcommittee” (hereinafter “Report”). The Hearing Panel Subcommittee properly found that the evidence established that Respondent violated Rules 1.15(a), 8.1(a), 8.4(b), 8.4(c) and 8.4(d) of the Rules of Professional Conduct.

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

- A. That Respondent’s law license be suspended for a period of three (3) years;
- B. Upon successful reinstatement to the practice of law, Respondent sign and follow a plan of supervised practice for a period of two (2) years with a supervising attorney, consistent with the specifications set forth by the ODC;
- C. Upon successful reinstatement to the practice of law, Respondent complete an additional nine (9) hours of CLE, during the CLE time period wherein he is reinstated, in the area of ethics and office management over and above that already required;
- D. Upon successful reinstatement to the practice of law, Respondent have a certified public accountant audit his office accounting records for two (2) consecutive years, consistent with the specifications set forth by the ODC; and
- E. Respondent be ordered to pay the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

B. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Respondent is a lawyer practicing in Harrisville, which is located in Ritchie County, West Virginia. (Ex. 10, p. 52; TR pp. 175-176.) Respondent was admitted to The West Virginia State Bar on May 17, 1983 (TR p. 175; Ex. 10, p. 54) 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.

COUNT I

I.D. No. 10-05-226

Complaint of Gerald A. Heister

Complainant Gerald A. Heister filed an ethics complaint against Respondent on May 27, 2010. Mr. Heister filed the complaint in his capacity as Chairman of the Board for the National Rendezvous and Living History Foundation (NRLHF). (TR p. 12, ODC Ex. 1) He alleged: 1) That Respondent was involved in a matter which resulted in criminal action being taken against Respondent's client, Linda Blizzard (ODC Ex. 1); 2) That on or about June 27, 2008, Mrs. Blizzard withdrew in excess of \$11,000.00 from a certificate of deposit owned by NRLHF and maintained by Wesbanco Bank. The money was issued to NRLHF in the form of a check. Mrs. Blizzard endorsed the check with her name and the NRLHF initials, purporting to be a representative of the Foundation (Id.); 3) That Mrs. Blizzard then received a second check made payable to herself and Respondent, which she and Respondent then endorsed (Id.); 4) That the second check was cashed by Respondent and Mrs. Blizzard on June 30, 2008 (Id.); 5) That on or about July 18, 2008, Respondent filed suit on behalf of Mr. and Mrs. Blizzard against the NRLHF (Id.); and 6) That it was his belief the money taken from the NRLHF funds was to be used for payment of the Blizards' legal fees with Respondent's knowledge. (Id.)

Respondent filed a brief verified response dated June 18, 2010, stating all of the issues set forth in the ethics complaint were resolved in the Circuit Court of Ritchie County, West Virginia. (ODC Ex. 3). He provided a copy of a “Dismissal Order” entered on September 10, 2009, for the case of *Linda B. Blizard and Richard E. Blizard, Jr. vs. the National Rendevous and Living History Foundation, Inc.*, Case No. 08-C-44, in the Circuit Court of Ritchie County, West Virginia. (ODC Ex. 3, p. 7). He also provided a copy of a “Release” signed on September 3, 2009, by counsel for the NRLHF. (ODC Ex. 3, pp. 9-11). In subsequent correspondence from Respondent, dated August 18, 2010, he stated his records showed he received “disputed funds from Richard and Linda Blizard in the amount of \$11,402.50”; that he did not cash a check in this amount; and he could not recall if the check required his endorsement before it was cashed by Mr. and Mrs. Blizard. (ODC Ex. 5, p. 13). Respondent said he received the disputed funds from Mr. and Mrs. Blizard on June 30, 2008, and none of those funds were used for attorney fees during the litigation (*Id.*). Respondent also provided a copy of his “Contract of Legal Representation and Fee Agreement”, which he signed on April 30, 2008. The fee agreement set forth hourly rates of One Hundred Fifty Dollars (\$150.00) out-of-court, and Two Hundred Dollars (\$200.00) in-court, to be assessed with a minimum fee of Five Hundred Dollars (\$500.00) (ODC Ex. 5, pp.15-16).

In response to Respondent’s August 18, 2010 letter, Mr. Heister provided a copy of the Wesbanco check made payable to Linda Blizard and Ira Haught, Attorney at Law, for the amount of Eleven Thousand Four Hundred Two Dollars and Fifty Cents (\$11,402.50). (ODC Ex. 6, TR pp. 13-14). One of the signatures on the back of the check appeared to be that of Respondent. (ODC Ex. 6, p. 21). This check was cashed on June 30, 2008. (*Id.*) At his sworn statement taken on December 7, 2010, Respondent stated: 1) That he received the disputed money in cash and he did

not deposit it to his IOLTA account; rather, he put the money in a safe in his office (ODC Ex. 10, p. 67); 2) That he did not recall seeing a check and did not have a copy of it in his file (ODC Ex. 10, p. 62); 3) That when he was shown a copy of the signature on the check, Respondent stated that it “absolutely” was his signature (ODC Ex. 10, p. 74); 4) That he may have endorsed the check over to Mr. and Mrs. Blizzard, but they cashed it (ODC Ex. 10, p. 70-71); 5) That Mr. and Mrs. Blizzard brought the Eleven Thousand Four Hundred Two Dollars and Fifty Cents (\$11,402.50) to him in cash and he held the cash in his office safe at his client’s request (ODC Ex. 10, pp. 67-68, 77); 6) That he was not holding these funds as attorney fees; that the Blizards paid his Five Hundred Dollar (\$500.00) retainer fee in May of 2008; and Four Thousand Three Hundred Forty Dollars (\$4,340.00) was paid at the end of the representation (ODC Ex 10, pp. 71-72); 7) That the case was settled at mediation and the Blizards were ordered to pay Five Thousand Dollars (\$5,000.00) back to the NRLFH (ODC Ex. 10, pp. 66-67); and 8) That he gave the Blizards the cash back when the dismissal order was entered. (ODC Ex. 10, p. 68).

During the course of the sworn statement, Disciplinary Counsel requested a copy of any receipts to show the attorney fee paid by Mr. and Mrs. Blizzard. (ODC Ex. 10, p. 78; ODC Ex. 12). By letter dated December 14, 2010, Respondent stated he could not find any receipts for the year 2008 to show any amounts paid by Linda Blizzard. (ODC Ex. 13). Following Respondent’s sworn statement on December 7, 2010, ODC served a Subpoena *Duces Tecum* to obtain records of Respondent’s IOLTA account maintained at Huntington National Bank. A review of those records showed the following transactions: 1) A check for Eleven Thousand Four Hundred Two Dollars and Fifty Cents (\$11,402.50) was deposited in Respondent’s account on June 30, 2008 (ODC Ex. 16, pp. 1053, 1056); 2) That on July 31, 2008, Respondent account balance was One Thousand Seven

Hundred Seventy Eight Dollars and Sixty Cents (\$1,778.60), which was less than the Eleven Thousand Four Hundred Two Dollars and Fifty Cents (\$11,402.50) that should have been in the account (ODC Ex. 16, p. 1058); 3) That none of the checks paid out from that account in July of 2008 were made payable to Linda Blizard, Richard Blizard or to the NRLHF (ODC Ex. 16, pp. 1058, 1064-1067); 4) That a year later, on August 31, 2009, the balance in Respondent's IOLTA account was \$1,118.47 (ODC Ex. 16, p. 1156); 5) That on September 10, 2009, respondent deposited \$9,600.27 to this account (ODC Ex. 16, p. 1166); and 6) That on September 11, 2009, Respondent wrote a check for Seven Thousand Sixty Two Dollars and Fifty Cents (\$7,062.50) to Richard and Linda Blizard from the IOLTA Account (ODC Ex. 16, pp. 1166, 1176).

Mr. Heister testified that after he became president of the NRLHF in October 2009, he learned a certificate of deposit in the amount of \$11,402.50 had been cashed by Linda Blizard and the funds had been paid to Linda Blizard and Respondent (TR pp. 14-16). When Mr. Heister learned about the cashing of the certificate of deposit, the suit between the Blizards and the NRLHF had already been settled (TR pp. 17, 55). The lawsuit between the NRLHF and the Blizards did not involve any claim by NRLHF that the Blizards had wrongfully taken the certificate of deposit (TR p. 55). Linda Blizard's employment with the NRLHF was terminated February 2007 (TR p. 26), prior to her cashing the certificate of deposit. Mrs. Blizard testified she cashed the certificate of deposit in June of 2008 upon Respondent's advice. She also admitted the money was not hers. (TR pp. 76-77).

Respondent acknowledged the settlement agreement between the Blizards and the NRLHF does not mention the certificate of deposit taken by Mrs. Blizard and that he did not tell the NRLHF he had the money in his possession. (TR pp. 178-179). Respondent also admitted advising Mrs.

Blizard in connection with the certificate of deposit, “if we got a judgment, it would be easier to collect it if we had the funds on hand . . .” and if she brought the funds in “he would hold them”. (TR pp. 277-278). Mrs. Blizard testified she brought a check in the amount of \$11,402.50 to Respondent’s office. It was payable to her and Respondent. Mrs. Blizard signed the check and left it at Respondent’s office. The money was to be held by Respondent until the conclusion of the lawsuit with NRLHF. Mrs. Blizard does not recall instructing Respondent how to hold the money. She just assumed he would put it “in his escrow account, like other lawyers do.” (TR pp. 62-65). Linda Blizard’s husband, Richard Blizard, testified he went with Mrs. Blizard to deliver the check to Respondent. According to Mr. Blizard, the money was delivered by check and they did not instruct Respondent how the money was to be held. (TR pp. 79-80).

At the hearing, Respondent acknowledged he received \$11,402.50 from the Blizards by check and he deposited that check to his IOLTA account on June 30, 2008. (TR pp. 184-188). Respondent testified he had been mistaken during his sworn statement on December 7, 2010, when he denied the money had been deposited to his IOLTA account and when he said the Blizards had delivered cash to him. (TR pp. 184-185, 190-191). Respondent also testified that because the Blizards requested the money be kept in his safe, he took cash already in his safe belonging to the Haught Family Trust, put that money in an envelope identified with the Blizard case number, and kept the envelope in his safe until their case was settled. (TR pp. 184-188). Respondent explained he had earlier denied receiving the money by check and depositing it to his IOLTA account because he had recalled the cash in the envelope in his safe, so he thought the Blizards had brought in cash. (TR pp. 184-185). Respondent testified he made no record in his client trust account. Instead, he made a bookkeeping entry in the Haught Family Trust records. (TR pp. 186-191).

At the conclusion of the NRLHF litigation, Respondent deducted his attorney's fee of \$4,340.00 and paid the Blizards the balance of the funds, \$7,062.50. (TR pp. 194-196). According to Respondent, when he paid the Blizards, he "would have taken the funds out of the Blizzard envelope and back in the Haught Family Trust envelope and made the entry in the Haught Family Trust records that money in the trust account at that point or at least that portion of it was in the Blizards." (TR pp. 194-195). Respondent wrote a check from his IOLTA account to Richard and Linda Blizzard dated September 11, 2009, in the amount of \$7,062.50. (TR p. 231).

As of August 31, 2009, the balance in Respondent IOLTA account was \$1,818.47. Respondent deposited \$9,600.27 into this account on September 10, 2009. Respondent was able to write the Blizzard check for \$7,062.50 because of the September 10 deposit. (TR pp. 231-233). Respondent does not know the source of that deposit on September 10, 2009, except "[i]t would have been something with the [Haught Family] trust." (TR p. 233). After the deposit to his IOLTA account of \$11,402.50 on June 30, 2008, until payment to the Blizards on September 11, 2009, there are multiple checks drawn on Respondent's IOLTA account payable to Respondent that make no reference to any case, client, or the purpose of the check. Respondent could not recall the purpose of many of those checks. (TR pp. 205-221). The Haught Family Trust was established by Respondent's parents. It manages, buys and sells real estate. Respondent is one of the trustees and he does legal work for this trust. He is also one of the beneficiaries. (TR pp. 236-238, 259). Respondent testified the IRS was claiming his parents owed taxes and the Haught Family Trust was their alter ego. So Respondent "ran" the Haught Family Trust money through his IOLTA account and kept Haught trust money in cash in his safe in order not to have large sums of money in an account where the IRS could find it. (TR pp. 189-190, 214, 238). During the period from June 30,

2008, to September 11, 2009, Respondent's IOLTA account had a negative balance on two occasions. Respondent could not recall what caused the overdrafts. (TR pp. 208, 218; ODC Ex. 16, pp. 1085, 1107).

Mrs. Blizzard testified she had no problem with the manner in which Respondent handled their money and she had no complaints about Respondent. (TR pp. 75-76). In response to questioning by the Hearing Panel Subcommittee, Respondent testified he made accounting entries in the Haught Family Trust records to document the transfer of Haught Family Trust cash to the Blizzard envelope. However, Respondent did not produce those documents at the hearing to substantiate his accounting, nor did he review the records prior to his testimony to verify his accounting. (TR pp. 274-277). At the conclusion of the hearing, the HPS granted ODC's motion for disclosure of the Haught Family Trust records from May 2008 to September 2009. (Tr pp. 298-300). On January 11, 2013, Respondent stated in his Response to Request for Supplement Document Production that he did not have the documents responsive to ODC's request.

Respondent is charged with violating Rule 1.15(a) of the Rules of Professional Conduct, which provides:

Rule 1.15. Safekeeping property.

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account designated as a "client's trust account" in an institution whose accounts are federally insured and maintained in the state where the lawyer's office is situated, or in a separate account elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

There is no dispute Respondent did not keep the Blizard money in his client trust account. According to Respondent, he kept the money in cash in a safe in his office. He argued that while RPC 1.15(a) requires client funds to be kept in a federally insured separate trust account, the rule also permits funds to be kept “in a separate account elsewhere with the consent of the client . . . “. Without reaching the issue of whether the rule permits client funds to be kept in an account other than in a federally insured institution, in any case, it must be with client consent. In this case, the Blizards did not give such consent. Mr. Blizard testified they did not direct Respondent how to hold the money and Ms. Blizard testified she assumed Respondent would put the money in an escrow account “like other lawyers do”. By failing to maintain the Blizard funds in his client trust account, the evidence is clear and convincing Respondent violated Rule 1.15(a).¹

Respondent is charged with violating Rules 8.4(b), 8.4(c) and 8.4(d) of the Rules of Professional Conduct, which provide:

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;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice

¹ ODC urged the HPS to find Respondent also violated Rule 1.15(a) by failing to keep complete records of his trust account for five years. Even though this conduct was not charges as a violation in the Statement of Charges, ODC argued pursuant to Lawyer Disciplinary Board v. Barber, 211 W.Va. 358, 365, 566 S.E.2d 245, 252 (2002), that such conduct is within the scope of the conduct and rules specifically charged. The HPS declined to find this violation. Bank records from Respondent’s IOLTA were maintained and produced. Rather, it was the Haught Family Trust records that were not provided. The failure to produce those records is outside the scope of the conduct specifically charged relating to the Blizard funds.

The Statement of Charges alleged Respondent violated these rules by converting the Blizard money of \$11,402.50 to his own personal use. The HPS does not find credible Respondent's claim he kept the Blizards' money as cash in his safe. This is because it is undisputed Respondent received the \$11,402.50 as a check payable to Linda Blizard and him. Respondent endorsed this check and deposited it to his IOLTA account. There was no legitimate reason for this account to be converted to cash and placed in Respondent's safe. Respondent claims his clients requested the money be held in his safe; however, Richard Blizard testified he gave no such instruction to Respondent and Linda Blizard assumed the money would be placed in an escrow account. Further, Respondent has no records to show cash from the Haught Family Trust was transferred from the Haught Family Trust envelope to an envelope designated for the Blizards. The only records produced show disbursements from Respondent's IOLTA account after the deposit of the Blizard money for Respondent's other business or Haught Family Trust purposes. By July 31, 2008, thirty days after the Blizard deposit, the account balance was \$1,778.60. The evidence, therefore, is clear and convincing that Respondent converted the Blizard money for his own personal use.

The conversion of the Blizard money is a criminal act that reflects adversely on Respondent's honesty, trustworthiness, and fitness as a lawyer in violation of RPC 8.4(b). The conversion of the Blizard money is dishonest in violation of RPC 8.4(c). The conversion of the Blizard money is conduct prejudicial to the administration of justice in violation of RPC 8.4(d).

Respondent is also charged with violating Rule 8.1(a) of the Rules of Professional Conduct, which provides:

Rule 8.1. Bar admission and disciplinary matters.

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

- (a) knowingly make a false statement of material fact.

During the course of ODC's investigation and this disciplinary proceeding, the evidence is clear and convincing Respondent knowingly made several false statements of material fact. The gravamen of Mr. Heister's complaint was the taking of the NRLHF certificate of deposit funds by Linda Blizard and the endorsement and cashing of the check representing these funds by Linda Blizard and Respondent. In Respondent's initial verified response to Mr. Heister's complaint, he simply stated "all the issues complained of" by Mr. Heister were resolved in the settlement and dismissal of the Blizards' suit against NRLHF. (ODC Ex. 3). In fact, the issue of the certificate of deposit was not a part of the litigation and Respondent later acknowledged this was not part of the settlement. Respondent further admitted he never even told NRLHF he had this money in his possession. Accordingly, Respondent knew his verified statement was false. Further, since Respondent's statement falsely implied the issue of the taking of the funds from the NRLHF certificate of deposit was resolved in the settlement of litigation with NRLHF, it was a material false statement of fact.

Following Respondent initial response, ODC sent a letter to Respondent dated August 2, 2010, asking Respondent to specifically "respond to the allegation that you endorsed and cashed a check June 30, 2008 from an account belonging to the National Rendevous and Living History Foundation ("NRLHF"). (ODC Ex. 4). Respondent replied by verified letter dated August 18, 2010, stating he may have endorsed the check, but he did not cash it. He stated it was cashed by the Blizards. (ODC Ex. 5). Then, at his sworn statement on December 7, 2010, when Respondent was confronted with the check he endorsed, he stated the Blizards cashed the check after he endorsed it and brought the cash to him. (TR pp. 73-77). He specifically denied depositing the money to his IOLTA account and swore he put the cash in his safe. (ODC Ex. 10, p. 67). After Respondent's sworn statement, ODC obtained Respondent's IOLTA account records. When Respondent was

confronted with those records at the hearing, he admitted the Blizzard money was not delivered in cash, but by check, and it was deposited to his IOLTA account. (TR pp. 184-188).

Respondent statements that he received the money in cash and did not deposit it to his IOLTA account were material and false. Respondent's claim that he mistakenly believed this to be true (TR p. 185) is no defense. Respondent is charged with the knowledge of his own records. Respondent also stated in his sworn statement that he returned cash to the Blizards at the end of his representation. (ODC Ex. 10, p. 68). When confronted with his bank records at the December 5, 2010 hearing, this statement also proved to be false. (TR p. 192). Finally, throughout Respondent's hearing testimony, he represented that the Haught Family Trust records would show the transfer of its cash to the Blizzard envelope as well as the reverse of that transaction in order to write the Blizards a check from his IOLTA account at the end of his representation. (TR pp. 186-191, 194-195, 274-277). In fact, Respondent had no such records as he was unable to produce any in response to ODC's post hearing request. The statements Respondent made about these records to the Hearing Panel Subcommittee were material and false.

COUNT II

I.D. No. 10-05-274

Complaint of Jack and Wanda Wright

Complainants Jack and Wanda Wright filed an ethics complaint against Respondent on July 6, 2010 (ODC Ex. 17, TR p. 114). The Wrights alleged that Respondent prepared a deed for them on or about July 19, 2006, but left out the oil, gas and mineral rights. (ODC Ex. 17, p. 1188). They contacted Respondent, who told them he would correct the matter. By December 4, 2009, the Wrights learned the deed still had not been corrected. They continued to call Respondent's office and left messages for him, but they were never able to speak to him. After the Wrights threatened

to file an ethics complaint, on May 13, 2010, they finally received a copy of a corrected deed which had earlier been sent to the Grantor. The Grantor now refuses to sign the corrected deed. (ODC Ex. 17, p. 1188-1189).

Respondent filed a verified response to the complaint dated July 20, 2010, stating: 1) On or about April 4, 2005, he “was retained by L.L. Tonkin” to prepare a deed for sale of property to David L. Thompson and the transaction was never completed because Mr. Thompson “never came up with the money to complete the transaction” (ODC Ex. 19, p. 1192); 2) “In the month of July, 2006 L.L. Tonkin requested that I prepare a Deed on the same properties to Jack D. and Wanda R. Wright” (Id.); 3) That he next wrote a letter on behalf of L.L. Tonkin to the Wrights dated July 28, 2006, advising that Mr. Tonkin had signed the deed and to remit to him \$14,282.60 to complete the transaction. This sum included: \$14,000.00 as the purchase price; transfer tax stamps of \$61.60; a recording fee of \$21.00; deed preparation of \$100.00; and a closing fee of \$100.00 (Id. at 1192, 1195); 4) The Wrights forwarded Respondent \$14,282.60. Respondent recorded the deed and closed his file (Id.); 5) In January 2010, Respondent received a phone call from Wanda Wright requesting a corrective deed to include oil, gas and mineral interests. Respondent then prepared a Corrective Deed January 14, 2010, and mailed it to Mr. Tonkin, but Mr. Tonkin did not respond. (Id.).

Finally, Respondent asserted in his verified response that he was “never retained by Jack D. Wright and/or Wanda Wright to perform any work on their behalf, however, I have attempted to obtain the Corrective Deed on their behalf pursuant to their request.” (Id. At 1193). During Respondent’s sworn statement of December 7, 2010, he stated he prepared the deed for L.L. Tonkin, not Jack and Wanda Wright (ODC Ex. 10, p. 81); that “in fact, I was contacted by Mr. Tonkin and then by Ms. Wright.” (Id. at p. 85); that he was first contacted by Mr. Tonkin about the deed with

the Wrights, and Mr. Tonkin requested he prepare the paperwork.” (Id. at 96-97). Respondent further stated during his sworn statement he did not consider the Wrights to be his clients and that Mr. Tonkin was his client.” (Id. at 104). Respondent explained that if the Wrights had requested a title opinion, then they would have been his clients. However, he was just preparing a deed for Mr. Tonkin.” (Id. at 104-105).

Respondent’s file in this matter shows the following: 1) David Thompson was referred to him by Pre-Paid Legal and Respondent’s file is opened in the name of David Thompson. The adverse is party is L.L. Tonkin (ODC Ex. 22, p. 1314); 2) An April 19, 2005 phone message stated “the Pre-Paid rep called & wants you to give Mr. Thompson a call” (ODC Ex. 22, p. 1319); 3) A May 19, 2005 phone message from Mr. Tonkin that stated “Deed looks okay. How is this going to close? Send deed to him to sign is preferred. He doesn’t want to come up here. Mr. Thompson is paying all costs correct? He will be there until 4:00 & then will be out until Wed.” (ODC Ex. 22, p. 1318); 4) A May 25, 2005 phone message from Mr. Tonkin that stated “Tim Tonkin 10 Meadow Road Charleston, WV 25314 his mailing address” (Id.); 5) A June 8, 2005 letter from Respondent to Mr. Thompson advising he had an executed deed from L.L. Tonkin, and the consideration to be paid for the deed is Thirteen Thousand Eight Hundred and Thirty Dollars (\$13,830.00), recording fees are Seventy Two Dollars and Sixty Cents (\$72.60), and Respondent’s fees are Five Hundred Dollars (\$500.00), for a total of Fourteen Thousand Four Hundred Two Dollars and Sixty Cents (\$14,402.60). Respondent asked that a check be forwarded to him for that amount to conclude the matter (ODC Ex. 22, p. 1272); 6) A June 12, 2005 phone message from Mr. Thompson that stated “take out mineral rights - (Tygart Resources, Inc.) - they aren’t to be included. Have you talked to Mr. Tonkin? He will call back tomorrow” (ODC Ex. 22, p. 1318); 7) A June 12, 2005 phone

message that Mr. Tonkin had called (ODC Ex. 22, p. 1319); 8) An August 30, 2005 letter from Respondent to Mr. Thompson that reflected the Respondent's fees in the matter were Six Hundred Dollars (\$600.00). Respondent asked that the fees be paid immediately (ODC Ex. 22, p. 1268); 9) A June 29, 2006 phone message from Mrs. Wright to Respondent. The message said "you did research on L.L. Tonkins land for a deed to Dave & Faye Thompson. The sale fell through. What would it cost Jack and Wanda Wright to have a deed done on the same property" (ODC Ex. 22, p. 1317); 10) A July 7, 2006 phone message from Mrs. Wright that stated "Tim Tonkin's work number is [xxx-xxx-xxxx]. She wants us to call him and see if he still wants to sell his interest in the property" (ODC Ex. 22, p. 1315); 11) A July 14, 2006 phone message from Mrs. Wright that stated "Tonkin still wants to sell. Let her know when the deed is ready" (Id.); 12) An August 1, 2006 check from Mrs. Wright to Respondent for Fourteen Thousand Two Hundred Eighty-Two Dollars and Sixty Cents (\$14,282.60) (ODC Ex. 22, p. 1259); 13) An August 21, 2008 phone message from Jack and Wanda Wright that stated "R/E Purchase 07/06 Jack D & Wanda R. Wright - L.L. Tonkin - Charleston - 150 ac. New Milton Area Problem w/ Tax Tickets - Something in Deed?" (ODC Ex. 22, p. 1315); and 14) A May 19th phone message, which did not provide a year, from Mrs. Wright that stated "Needs to hear something positive soon or she is going to have to call the Bar!" (Id.).

Respondent wrote to ODC by letter dated February 16, 2012, stating he "did not have any written representation contracts for L.L. Tonkin, David Thompson, or Jack & Wanda Wright." (ODC Ex. 24). David Thompson testified at the hearing that he was referred by Prepaid Legal to Respondent; that he called Respondent March 31, 2005; that he requested Respondent to prepare a deed for property owned by Mr. Tonkin; that he met with Respondent three times; that he paid Respondent \$600.00 to prepare the deed; and that he believed Respondent was his attorney and

acting on his behalf. (TR pp. 88-96). Mrs. Wright testified when she learned the sale between the Thompsons and Mr. Tonkin fell through, she called Respondent's office June 29, 2006, and spoke to Respondent. She asked him if he would prepare the same deed for her that he had prepared for the Thompsons. Respondent said he would. (TR pp. 117, 127). Mrs. Wright next called Respondent's office July 7, 2006, and left a message asking Respondent to call Mr. Tonkin to confirm the property and mineral rights to be sold. (TR pp. 129-130). Mrs. Wright left another message with Respondent on July 14, 2006, stating Mr. Tonkin still wants to sell and to let her know when the deed is ready. (TR pp. 130-131). Mrs. Wright paid Respondent for his services at the same time she paid the purchase price. (TR pp. 123, 126-127).

The deed to the Wrights was recorded August 14, 2006. Approximately a year later, Mrs. Wright testified when she went to Doddridge County to pay the taxes, she discovered the oil, gas and mineral rights had not been included in the deed. (TR pp. 118-121). Mrs. Wright called Respondent in July 2007 and spoke to him about this issue. Respondent told her she did not need a corrected deed and he would take care of it the next time he went to Doddridge County. (TR pp. 120-121). Mrs. Wright called Respondent's office a year later in August of 2008 because nothing had been done about correcting the deed. She never received a response. (TR pp. 133-134). Finally, in May 2010, Mrs. Wright left a message that she was going to contact the State Bar. After that, she received a copy of Respondent's January 14, 2010 letter to Mr. Tonkin enclosing a Corrective Deed. (TR pp. 135-136; ODC Ex. 22, pl 1216). Mr. Tonkin has never signed the corrective deed which includes the oil, gas and mineral rights that Mrs. Wright says should have been part of the transaction. Mrs. Wright believes Mr. Tonkin has now changed his mind about selling the oil, gas and mineral interests, but if Respondent had prepared the corrected deed when first requested, Mr.

Tonkin would have signed. (TR pp. 156-158). It appears the statute of limitations has expired on any claim Mrs. Wright might have against Mr. Tonkin. Mrs. Wright testified, however, she is not interested in “suing anybody”. (TR p. 159).

Respondent testified at the hearing he considers L.L. Tonkin his client in both the Thompson and Wright matters “[b]ecause he was the seller, and in real estate transactions, generally the seller is responsible for deed preparation and transfer tax stamps.” (TR pp. 239, 262-263). Respondent acknowledged David Thompson was referred to him by Prepaid Legal; that his file refers to David Thompson as his client; and that Mr. Thompson paid his fee. (TR pp. 241, 243). Respondent testified that he could not now remember whether he was first contacted by the Wrights or Mr. Tonkin. (TR pp. 242, 249). Respondent further admits Mrs. Wright requested that he prepare a deed for her. According to Respondent, Mrs. Wright “wanted to know what it would cost for me to change the deed to put their names on it instead of Mr. Thompson and then she wanted me to contact Mr. Tonkin and see if the deal was still good for them.” (TR p. 250). Respondent does not now have any specific recollection of talking to Mr. Tonkin about the deed for the Wrights. (TR p. 248).

Respondent’s records show a telephone message from Mrs. Wright on July 14, 2006, asking Respondent to let her know when the deed is ready. (TR p. 252; ODC Ex. 22, p. 1315). Respondent prepared the deed on July 19, 2006, after Mrs. Wright called asking about it. (TR pp. 251-253). Respondent further testified the Wrights requested a corrective deed, which he prepared and mailed to Mr. Tonkin. (TR pp. 270-271). At the hearing, the HPS asked Respondent if he understood Mrs. Wright’s frustration at Respondent’s lack of response and lack of communication from the second request for the deed to be corrected in August of 2008 to her May 2010 threat to contact the State Bar. (TR pp. 280-283). Respondent answered as follows:

I suspect I should have called her on more occasions to explain the situation to her, but at the same time my staff was getting frustrated with her calls when they answered her questions and she would call back with the same questions or similar questions. There just really wasn't much we could do to resolve the situation.

(TR p. 283).

Respondent is charged with violating Rules 8.1(a) and 8.4(c) of the Rules of Professional Conduct, which provide:

Rule 8.1. Bar admission and disciplinary matters.

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

(a) knowingly make a false statement of material fact.

and

Rule 8.4. Misconduct.

It is professional misconduct for a lawyer to:

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

Essentially, ODC argues Respondent “lied” to ODC during its investigation about the Wrights being his clients in order to “avoid detection”. (ODC’s Proposed Findings of Fact, Conclusions of Law and Recommended Sanctions p. 17, paragraph 18). Respondent’s position is that because generally in real estate transactions the seller is responsible for deed preparation and transfer taxes, he considered Mr. Tonkin, not the Wrights, to be his client. Our Supreme Court recognizes the existence of an attorney-client relationship depends on the facts of each case; that it can exist without a fee agreement; and that it can be implied from the conduct of the parties. State ex rel. DeFrances v. Bedell, 191 W.Va. 513, 446 S.E.2d 906 (1994). An attorney-client relationship begins:

As soon as the client has expressed a desire to employ an attorney, and there has been a corresponding consent on the part of the attorney to act for him in a professional capacity, the relation of attorney and

client has been established; and all dealings thereafter between them relating to the subject of the employment will be governed by the rules applicable to such relation.

Sylb. Pt. 1, Keenan v. Scott, 64 W.Va. 137, 61 S.E. 806 (1908); *see also* Lawyer Disciplinary Board v. Nace, ---- S.E.2d —, 2013 WL 1285981, W.Va., March 28, 2013, p. Supreme Court of Appeals, No. 11-0812, p. 20 (March 28, 2013).

In this case, Mrs. Wright testified and Respondent admitted she called him and requested he prepare the same deed for her that he had previously prepared for the Thompsons. Respondent prepared the deed. Later, Respondent admits Mrs. Wright requested he prepare a corrected deed, which he prepared. Thus, Mrs. Wright, on two separate occasions, expressed a desire to employ Respondent as her attorney and Respondent, by preparing the requested deeds, evidenced his consent to be so employed. The evidence, therefore, is that there existed an attorney-client relationship between the Wrights and Respondent.

Respondent's own records further evidence the attorney-client relationship with the Wrights. After Respondent's August 2005 letter to Mr. Thompson about Respondent's fees, all telephone messages are from the Wrights, and after Mrs. Wright called on July 14, 2006, asking if the deed was ready, Respondent prepared the deed on July 19. Moreover, despite Respondent's claim he never considered the Wrights to be his clients because generally the seller is responsible for deed preparation and payment of transfer taxes, Respondent's July 28, 2006 letter to the Wrights contradicts this position. In this letter, Respondent tells the Wrights that Mr. Tonkin has executed the deed and Wrights, not the seller, are to pay \$100.00 for the deed preparation and transfer taxes of \$61.60, as well as the purchase price of \$14,000.00, a recording fee of \$21.00, and a closing fee of \$100.00. (ODC Ex. 19, pp. 1192, 1195).

Further, even though Respondent claimed in his July 20, 2010 verified response that he wrote the July 28, 2006 letter to the Wrights “on behalf of L.L. Tonkin”, nothing in this letter states it was written on behalf of Mr. Tonkin. Also, there is no evidence this letter was copied to Mr. Tonkin, his claimed client. (ODC ex. 19, pp. 1192, 1195). In addition, in his July 20, 2010 verified response to the Wrights’ complaint, Respondent stated, unequivocally, “[i]n the month of July 2006 L.L. Tonkin requested I prepare a Deed . . . to Jack D. and Wanda R. Wright”; and that he was “never retained by Jack D. Wright and/or Wanda Wright to perform any work on their behalf . . .” (ODC Ex. 10, pp. 96-97). By the time of the hearing before the HPS, Respondent could not recall whether he had first been contacted by the Wrights or Mr. Tonkin. (TR pp. 242, 249). He now has no specific recollection of talking to Mr. Tonkin about the Wright deed. (TR p. 248). And, as set forth above, Respondent admitted Mrs. Wright requested he prepare the deed.

Based on Respondent’s testimony at the December 5, 2012 hearing and his client records, the evidence is clear and convincing that Respondent knowingly made false statements of material fact in his verified response and sworn statement about the nature of his relationship with Jack and Wanda Wright when he stated Mr. Tonkin requested he prepare the Wright deed and that he was first contacted by Mr. Tonkin. These statements violated RPC 8.1(a). These statements also misrepresented the existence of the attorney-client relationship in violation of RPC 8.4(c).

Respondent argues the existence of an attorney-client relationship is a matter of law and therefore one cannot make a material statement of fact about this issue. (Respondent’s Recommended Decision pp. 25-26, paragraphs 26 and 27). However, what the HPS correctly found is that Respondent made false statements of fact concerning his relationship with the Wrights and these statements are material to determining whether an attorney-client relationship existed.

II. SUMMARY OF ARGUMENT

Respondent was to hold money for his clients Linda Blizard and Richard Blizard in connection with their lawsuit against the National Rendevous and Living History Foundation. Respondent initially insisted to Disciplinary Counsel that he kept the money in cash in his office safe. However, Respondent's bank account statements for his IOLTA account show that a check was deposited into his IOLTA account on or about June 30, 2008. By the end of the next month, the account balance of the IOLTA account was below \$2,000.00. Respondent's clients testified that they did not instruct Respondent how to hold the money. In another case, Respondent denied in a response to Disciplinary Counsel that the Wrights were his clients. The Wrights had hired Respondent to redo a deed that Respondent had previously prepared. Because of the conversion of client money and providing false information to Disciplinary Counsel, Disciplinary Counsel respectfully submits that Respondent should be suspended for his misconduct.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Office of Disciplinary Counsel does not object to oral argument in this matter. The issues raised by Respondent and the findings made by the Hearing Panel Subcommittee do not address any new issues of law that would require Disciplinary Counsel to request oral argument pursuant to Rule 20 of the Rules of Appellate Procedure.

IV. ARGUMENT

A. STANDARD OF PROOF

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 charges against an attorney must be proven by clear and convincing evidence pursuant to Rule 3.7 of the Rules of Lawyer Disciplinary Procedure. See, Syl. Pt. 1, Lawyer Disciplinary Board v. McGraw, 194 W. Va. 788, 461 S.E.2d 850 (1995).

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 extensive record in this matter indicates that Respondent has transgressed all four factors set forth in *Jordan*.

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).

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

Lawyers owe duties of candor, loyalty, diligence and honesty to their clients. Members of the public should be able to rely on lawyers to protect their property, liberty, and their lives. Lawyers are officers of the court, and as such, must operate within the bounds of the law and abide by the rules of procedure which govern the administration of justice in our state. Furthermore, a lawyer's duties also include maintaining the integrity of the profession. The evidence in this case establishes by clear and convincing proof that Respondent violated his duties owed to his client, the public, the legal system, and the legal profession.

Respondent failed to properly safekeep the funds provided by Blizards to him in his representation of them which is a clear violation of his duty to his clients. Respondent stated in his responses in the investigation and sworn statement that he had received the Blizzard funds in cash but his bank account clearly showed that he received a check. (ODC Ex. 16, p. 1053, 1056). When questioned at the hearing about the check being placed into his IOLTA account, Respondent

responded that he “was mistaken on that.” (TR p. 185). Respondent was alerted that a check contained his signature on the back of it during his sworn statement and Respondent still asserted that he had received the Blizards’ funds in cash. It was only after the production of the bank records that Respondent stated that he did not receive the Blizards’ funds in cash.

At the hearing, Respondent alleged that he had taken the cash for the Blizards’ funds out of the cash that was already in his safe for the Haught Family Trust after he had deposited the check into his IOLTA account and after the Blizards asked him to maintain the money in the safe. However, neither Linda Blizzard nor Richard Blizzard indicated in their testimony that they asked Mr. Haught to keep the money in cash in a safe. (TR pp. 64-65, 80). Both Blizards testified that they did not instruct Respondent how to hold the money and Linda Blizzard believed that Respondent would hold the money however it was appropriate. (TR pp. 64-65). The only possible proof of the transfer of the cash from the Haught Family Trust to the Blizards would be in Haught Family Trust file (TR p. 190) which conveniently no longer exists. (See January 10, 2013 “Response to Request for Supplemental Document Production). Further, Respondent indicated that the \$11,402.50 that was in his IOLTA account now belonged to the Haught Family Trust. (TR p. 190). Respondent testified that he did not recall making any notation about where he placed or held the \$11,000.00. (TR p. 200). There were multiple checks written out of Respondent’s IOLTA account to himself that make no reference to a case or how the money was used. Respondent could not even recall what some of the checks written out of his IOLTA account were for. (TR pp. 205, 206, 207, 2099, 209-210, 210, 211, 212, 213, 213-214, 214-215, 215, 216, 217, 220-221,). On two separate occasions, on or about November 4, 2010, and on or around the end of January 2009, Respondent’s IOLTA account contained a negative balance. (TR pp. 208, 218; ODC Ex. 16, pp. 1085, 1107). Respondent

was even unsure about the purpose of a \$9,600.00 deposit which happened to be deposited only one day prior to Respondent writing a check from his IOLTA account to provide the Blizards with a refund minus his attorney fees of \$7,7062.50. (TR pp. 232-233). Respondent admitted that his trust account should not look as it did, that he should never carry a negative balance, and that he needed to develop a better system to keep track of the money going in and out of his trust account. (TR p. 235).

Respondent asserted that he was keeping a large amount of cash for the Haught Family Trust in the safe at his office because Haught Family Trust was facing some IRS issues. (TR p. 285). Respondent was unable to offer any clarification as to why he withdrew the \$11,000.00 and used it for the Haught Family Trust. (TR pp. 290-291). At the end of the hearing, the Hearing Panel ordered that Respondent disclose relevant records from the Haught Family Trust during the time frame involving the complaint filed by the Gerald Heister. (TR p. 298). Respondent provided a response dated January 11, 2013, indicating that he did not have any records regarding the Haught Family Trust.

The Blizards own testimony was that the money was to be kept by Respondent how he saw fit and they did not instruct him how to keep the money. While the Blizards had no complaint about the representation of Respondent, they were unaware of how their funds were not being safeguarded by Respondent. The fact that Respondent just happened to deposit additional funds into his IOLTA account and pay the Blizards their money is not an excuse for Respondent's failure to properly maintain his client trust account.

Respondent's testimony at the hearing in light of his verified responses to ODC and sworn statement under oath cannot be ignored. Respondent's false statements and misrepresentation during

the investigation shows Respondent's lack of honesty and integrity in dealing with the public, the legal system and the legal profession. Respondent's story regarding the funds evolved throughout the investigation and hearing in this matter because of Respondent's failure to be forthright and truthful.

In regards to the Wright complaint, Respondent denied that he was the attorney for Mr. Thompson or the Wrights. This is a violation of duties owed to clients, as well as the public, the legal profession and the legal system. Mr. Thompson was the one that searched for an attorney and found Respondent to prepare the deed. (TR p. 109). Mr. Thompson believed that Respondent was his attorney. (TR p. 89). Mr. Thompson paid attorney fees to Respondent. (TR p. 94). Mr. Thompson believed that Respondent was acting on his behalf and Mr. Thompson initiated contact with Respondent. (TR p. 95). Mr. Thompson felt that his meetings with Respondent, the preparation of the deed, and the payment of Respondent's fees demonstrates that Respondent was acting as the attorney for Mr. Thompson. (TR p. 96). Mr. Thompson further expected Respondent to make contact with Mr. Tonkin to effectuate the completion of the sale of the property. (TR pp. 107-108).

Not only did the Thompsons pay Respondent attorney fees, but also the Wrights paid attorney fees to Respondent. (TR p. 123). Mrs. Wright even left a message with Respondent's office about calling Mr. Tonkin regarding the possible sale of the property. (TR pp. 129-130). It appears from the messages left with Respondent by the Wrights that he did not even call Mr. Tonkin. (ODC Ex. 22, p. 1315; TR pp. 130-131). Mrs. Wright reasonably believed that Respondent was acting on her behalf. (TR pp. 138-139).

Respondent stated that he set up his file with David Thompson as his client because of the letter he received from PrePaid Legal. (TR p. 241). The file listed Mr. Thompson as the client and the adverse party as Mr. Tonkin. (ODC Ex. 22, p. 1209). However, Respondent testified that he felt that Mr. Tonkin was the client because he was the seller in the real estate transaction. (TR p. 239). Such does not make sense in the light that the Thompsons and subsequently the Wrights were asking Respondent to prepare the deed. During the time frame of the preparation of the deed for both the Thompsons and the Wrights, Respondent only received two (2) phone calls from Mr. Tonkin. (TR p. 247, ODC's Ex, p. 1318). Further, Mrs. Wright left repeated messages to Respondent about the status of the corrective deed from August of 2008 until the threat to file an ethics complaint in May of 2010. This conduct shows a lack of diligence and failure to communicate, which is a violation of his duties owed to his clients.

Respondent denied and still denies that the Thompsons and the Wrights were his clients. From the evidence provided, it is clear that Respondent did represent the Thompsons and the Wrights. It is also clear that Respondent tried to hide the fact that the Wrights were his clients from ODC. This is a clear injury upon the clients because they are offended by Respondent's refusal to acknowledge them as clients. Respondent had very little, if any, contact with Mr. Tonkin and the deceitfulness to claim Mr. Tonkin as the client can not be ignored.

Respondent's misconduct clearly violated duties owed to his clients. His failure to recognize his misconduct and his false statements regarding the misuse of the Blizards funds violated the duty of loyalty that he owes to his clients. Respondent's misconduct also violated duties owed to the public because the public is entitled to be able to trust lawyers to protect their property. In this regard, lawyers are to exhibit the highest standards of honesty and integrity, and lawyers have a duty

not to engage in conduct involving dishonesty, fraud or interference with the administration of justice. The duty to the legal system has also been violated by Respondent's failure to properly maintain his trust account, operating outside the bounds of the law by using funds in his trust account for personal use, giving false answers to the ODC, and engaging in improper conduct. Finally, Respondent has violated his duties to the profession by failing to maintain the integrity of the profession by his improper safeguarding of a client's funds and his dishonesty to the ODC.

2. Respondent acted intentionally and knowingly.

The evidence establishes that Respondent acted with intent and knowledge in this matter. Respondent's actions were not the result of simple negligence or mistake. The evidence also supports that Respondent intentionally converted the Blizards' client funds to his own personal use in violation of the duties Respondent owed to his clients, the public, and the legal profession. Moreover, Respondent's false statements about the cashing and deposit of the Blizzard check were made knowingly. Additionally, Respondent's own testimony and client files show that Respondent knowingly misrepresented his relationship with the Wrights.

3. The amount of injury caused by Respondent's misconduct.

While Respondent was able to pay the Blizards the money owed to them, the potential for injury was substantial because of Respondent's failure to properly maintain this money in his client trust account. With respect to the Wright complaint, there is conflicting evidence that Respondent is at fault for the omission of the oil, gas and mineral interests in the Wright deed. At least, however, if Respondent had communicated with the Wrights when this omission was first brought to his attention, perhaps this issue could have been resolved. As it now stands, it appears the statute of limitations has run and the Wrights may have no legal recourse.

4. There are several 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. 216, 579 S.E.2d 550, 557 (2003) quoting *ABA Model Standards for Imposing Lawyer Sanctions*, 9.21 (1992). In this matter, the aggravating factors are Respondent’s refusal to acknowledge wrongful nature of his misconduct and his substantial experience in the practice of law.

Rule 9.22(a) of the *ABA Model Standards for Imposing Lawyer Sanctions* also recognizes that prior disciplinary action is an aggravating factor. Respondent has been admonished by the Investigative Panel of the Lawyer Disciplinary Board in the past for his failure to file an appeal for a criminal defendant, failure to promptly notify or deliver client funds, and for providing financial aid to a client. (ODC Ex. 10, pp. 53-54).

Further, Respondent was not forthright or truthful during the ODC investigation and in his testimony at the public hearing. Rather, in connection with Mr. Heister’s complaint, Respondent presented an evolving story as he was confronted with new facts. The story evolved like this: First, in his verified response to Mr. Heister’s complaint about the taking of the certificate of deposit money by Mrs. Blizzard and Respondent, Respondent misrepresented that “all the issues complained of” by Mr. Heister were resolved by the settlement of and dismissal of the Blizards’ suit against the NRLHF. Next, ODC asked Respondent to specifically respond to the allegation he endorsed and cashed a June 30, 2008 check from an account belonging to the NRLHF. Respondent answered by

verified letter dated August 18, 2010, that he did not cash any such check; that he may have endorsed a check, but the Blizards brought cash to him, which he put in his safe. After that, in his sworn statement on December 7, 2010, Respondent specifically denied depositing any money from the Blizards in his IOLTA client trust account. However, when Respondent was later confronted with the check and the deposit to his IOLTA account at the December 5, 2012 hearing, Respondent, for the first time, claimed to have transferred cash in his safe belonging to the Haught Family Trust to an envelope in the name of the Blizards. Also, at his sworn statement, Respondent said he returned cash to the Blizards, but when he was later confronted with his bank records at the public hearing showing he wrote a check to the Blizards at the end of his representation, Respondent simply stated he had been mistaken at his sworn statement because he didn't do "a very good review" of the Blizzard file before the taking of his sworn statement. (TR p. 192). Finally, throughout his testimony before the HPS, Respondent repeatedly claimed the evidence of his cash transactions involving the Blizzard money and the Haught Family Trust would be reflected in the Haught Family Trust records. Yet he brought no such records to the hearing. (TR pp. 190, 194, 232, 274, 276 and 288). And when those records were requested at the conclusion of the hearing, Respondent was unable to produce them. Respondent's claim that he held cash for the Blizards at their request and that he transferred cash in his safe from one envelope to another is not credible. Rather, the HPS finds Respondent's evolving story to be attempts to obfuscate and misdirect.

The HPS also found as an aggravating factor Respondent's advice to Mrs. Blizzard to take money she had no authority to take. Respondent knew that Linda Blizzard had been terminated from her employment with the NRLHF in 2007 which would mean that she had no authority to take the funds from the NRLHF certificate of deposit in June of 2008. While Respondent did not testify he

specifically told Mrs. Blizard to take the money, he does acknowledgment he told her it would be easier to collect a judgment if “we had the funds on hand”. As any client would understand this statement, Mrs. Blizard testified simply that Respondent advised her to cash the certificate of deposit.

On another note, Respondent appears to be willing to defraud the IRS. As he testified, the IRS was claiming his parents owed taxes and the Haught Family Trust was their alter ego. Respondent “ran” the Haught Family Trust money through his IOLTA account and kept Haught Trust money in cash in a safe in order not to have large sums of money in an account where the IRS could find it. (TR pp. 189-190, 214, 238)

In addition, Respondent misrepresented his relationship with David Thompson. Respondent denied David Thompson was his client. However, Respondent’s own client files show Mr. Thompson was referred to him by Prepaid Legal; that his own client file was set up with Mr. Thompson named as the client; and Mr. Thompson paid for his services. Finally, when Respondent was asked at the hearing how he would respond to Mrs. Wright’s frustration at his lack of communication from August 2008 to May 2010, Respondent accepted little responsibility. Instead, Respondent blamed Mrs. Wright for frustrating his staff with repeated messages and questions.

Respondent also had a dishonest motive in these cases along with his false representations to ODC, has refused to acknowledge the wrongful nature of his conduct, and has substantial experience in the practice of law.

5. There are several mitigating factors.

The Scott Court also adopted mitigating factors in a lawyer disciplinary proceeding 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. 216, 579 S.E.2d 550, 557 (2003). Respondent has been licensed to practice law in West Virginia since May 17, 1983, and has no prior discipline from the West Virginia Supreme Court of Appeals. Further, the Blizards suffered no financial loss in their case with Respondent.

C. 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, 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).

The evidence establishes by clear and convincing proof that Respondent has violated the Rules of Professional Conduct by failing to properly safeguard client funds and in his attempt to deceive ODC. Furthermore, Respondent violated his duty to the legal system, the profession and the

public when he failed to properly safeguard client funds and through his false representations to ODC regarding his misconduct. It is clear from the evidence that Respondent violated Rule 1.15(a), 8.1(a), 8.4(b), 8.4(c), and 8.4(d).

In deciding an appropriate sanction, this Court must consider not only what sanctions would appropriately punish Respondent, but also whether the sanctions are adequate to serve as an effective deterrent to other members of the Bar and restore public confidence in the ethical standards of the legal profession. Committee on Legal Ethics v. Walker, 178 W.Va. 150, 358 S.E.2d 234 (1987). Standard 4.1 of the ABA Standards for Imposing Attorney Discipline states that an suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client. In addition, Standard 7.2 of the ABA Standards for Imposing Attorney Discipline states that a suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

Several attorneys have been suspended from the practice of law in West Virginia for such violations of the Rules of Professional Conduct. In Lawyer Disciplinary Board v. Cavendish, 226 W.Va. 327, 700 S.E.2d 779 (2010), the attorney had submitted vouchers to a third party for payment under the guise as work for the Public Defender Services when the attorney had not completed any of the work. The attorney was found to have co-mingled the fees with his own property and wrongfully converted the fees to his own use in violation of Rule 1.15. The attorney was also found to have violated Rule 8.4(c) for knowingly submitting documents to the third party that he knew were false. The attorney was suspended for three (3) years. In another case, Lawyer Disciplinary Board v. Martin, 225 W.Va. 387, 693 S.E.2d 461 (2010), an attorney was the executor of an estate

and wrote checks to himself from the estate for work that he did not do, in violation of Rule 1.15 regarding the safekeeping of property. The attorney was also found to have committed conduct prejudicial to the administration of justice due to the negative impact on the estate because of the attorney's actions and failure to work on the matter. The attorney was suspended for six (6) months for violating Rule 1.15(a), 1.15(b), 8.4(d) along with Rule 1.3 for failure to be diligent, Rule 1.16(d) to failure to return the client file, and Rule 3.4(c) for disobeying an obligation under the rules of the tribunal.

Another West Virginia disciplinary case found violations of Rules 8.1(a), 8.1(b), and 8.4(d) resulted in an indefinite suspension until certain conditions were met. In Lawyer Disciplinary Board v. Swisher, 203 W.Va. 603, 509 S.E.2d 884 (1998) the attorney was hired to represent a client in an automobile accident and the client ultimately sued the attorney for malpractice. The attorney and client reached a settlement of \$25,000.00 with the attorney paying \$10,000.00 immediately and the other \$15,000.00 to be paid within one year. The attorney failed to pay the additional \$15,000.00 and a district court entered a judgment Order for the \$15,000.00 plus interest until it was paid. Because the attorney made representations regarding the payments for settlement and failed to meet those obligations, he was found to have violated Rule 8.4(d). The violation of Rule 8.1 was the result of the attorney's failure to respond to the ethics complaint. Other states have ordered suspensions for using client funds without the client's consent and submitting false documents in the disciplinary case along with other rule violations. See Matter of Kouros, 735 N.E.2d 202 (2000) (Indiana) (an attorney suspended for at least 12 months). See Matter of Grochowski, 701 A.2d 1013 (1997) (Rhode Island) (an attorney suspended for a minimum of 15 months).

In this case, it is clear that Respondent had received client funds and did not properly safeguard those funds or keep and maintain complete records of the same. The fact that the Blizards did not suffer a loss of those funds does not eliminate Respondent's failure to follow the Rules of Professional Conduct. Further, Respondent failure to provide the correct information during the investigation of the matter is a serious issue. At no point in the matter did Respondent attempt to correct his statements and only provided minimal additional information at the hearing in this matter. Despite facing evidence to the contrary, Respondent continues to deny that he was hired by the Wrights and that he did anything improper with the client funds supplied by the Blizards.

In this case, Respondent's misconduct is apparent. Respondent's failure to acknowledge his misconduct and his false statements in the disciplinary matter do not help Respondent in this matter.

V. CONCLUSION

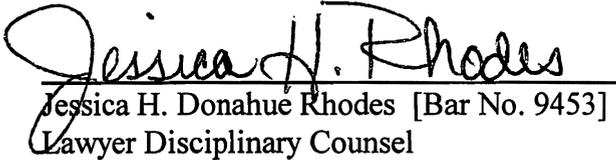
In reaching its recommendation as to sanctions, the Hearing Panel Subcommittee considered the evidence, the facts and recommended sanction, the aggravating factors and mitigating factors. For the reasons set forth above, the Hearing Panel Subcommittee recommended the following sanctions:

- A. That Respondent's law license be suspended for a period of three (3) years;
- B. Upon successful reinstatement to the practice of law, Respondent sign and follow a plan of supervised practice for a period of two (2) years with a supervising attorney, consistent with the specifications set forth by the ODC;
- C. Upon successful reinstatement to the practice of law, Respondent complete an additional nine (9) hours of CLE by during that CLE time period he is reinstated in the area of ethics and office management over and above that already required;

- D. Upon successful reinstatement to the practice of law, Respondent have a certified public accountant audit his office accounting records for two (2) consecutive years, consistent with the specifications set forth by the ODC; and
- E. Respondent be ordered to pay the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

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

Respectfully submitted,
The Lawyer Disciplinary Board
By Counsel


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CERTIFICATE OF SERVICE

This is to certify that I, Jessica H. Donahue Rhodes, Lawyer Disciplinary Counsel for the Office of Disciplinary Counsel, have this day, the 26th day of August, 2013, served a true copy of the foregoing "**Brief of the Lawyer Disciplinary Board**" upon Ancil G. Ramey, Esquire, counsel for Respondent Ira M. Haught, by mailing the same via United States Mail, both certified and regular, with sufficient postage, to the following address:

Ancil G. Ramey, Esquire
Post Office Box 2195
Huntington, West Virginia 25722



Jessica H. Donahue Rhodes