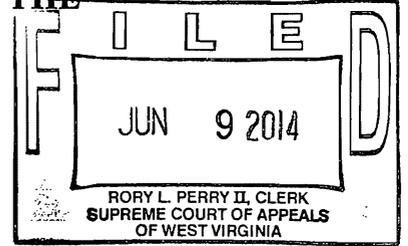


**BRIEF FILED
WITH MOTION**

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



LAWYER DISCIPLINARY BOARD,

Complainant,

v.

No. 11-0728

JOHN C. SCOTCHEL, JR.,

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 John C. Scotchel, Jr., (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, 2011. Respondent was served with the Statement of Charges on May 3, 2011. Disciplinary Counsel filed her mandatory discovery on or about May 23, 2011. Respondent filed a motion for an extension of his discovery deadline, and was granted an extension until August 5, 2011 to file the same. Respondent’s filed his discovery on or about August 10, 2011. Respondent was granted an extension until July 26, 2011 to file his Answer to the Statement of Charges, and the same was filed on or about July 26, 2011.

Respondent also moved to take the depositions of Lewis Snow, Sr., and Deborah Robinson, and was granted leave to do so. Respondent also took the depositions of Jeanne Russell and Teresa Brewer. Ms. Robinson’s deposition was taken a second time, as well. On February 20, 2012, Respondent filed a Motion to Dismiss the Statement of Charges. The Hearing Panel Subcommittee entered an Order in October 2012, denying the Motion.

Thereafter, this matter proceeded to hearing in Morgantown, West Virginia, on February 26 and 27, 2013, and July 15, 2013. The Hearing Panel Subcommittee was comprised of David A. Jividen, Esquire, Chairperson, Paul T. Camilletti, Esquire, and Ms. Cynthia L. Pyles, Layperson. Jessica H. Donahue Rhodes, Lawyer Disciplinary Counsel,

appeared on behalf of the Office of Disciplinary Counsel (hereinafter "ODC"). Respondent appeared with his counsel J. Michael Benninger. The Hearing Panel Subcommittee heard testimony from Lewis Snow, Sr., Debbie Robinson, Phillip M. Magro, Roger Cutright, Mary Beth Renner, Ami Schon, Dimas Reyes, Brian Knight, Eugene Sellaro, Deborah Yost Vandervort, Allan N. Karlin, Daniel C. Cooper, John A. Smith, Vickie Willard, Robert H. Davis, Jr., and Respondent. In addition, ODC Exhibits 1-59, Respondent's Exhibits R1-R44, and Joint Exhibit 1 were admitted into evidence.

On or about April 16, 2014, 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 1.5(a), 1.5(b), 1.5(c), 1.15(b), 8.1(b), 8.4(c) and 8.4(d) of the Rules of Professional Conduct.

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

- A. That Respondent's law license be annulled;
- B. That upon reinstatement, Respondent's practice shall be supervised for a period of two (2) years by an attorney agreed upon between the Office of Disciplinary Counsel and Respondent;
- C. That Respondent shall complete twelve (12) hours of CLE in ethics in addition to such ethics hours he is otherwise required to complete to maintain his active

license to practice, said additional twelve (12) hours to be completed before he is reinstated; and

- D. That 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

Respondent is a lawyer practicing in Monongalia County, West Virginia, and, as such, is subject to the disciplinary jurisdiction of the Supreme Court of Appeals of West Virginia and its properly constituted Lawyer Disciplinary Board. Respondent was admitted to The West Virginia State Bar on May 15, 1984.

On or around October, 2002, Respondent began work for Lewis Snow, Sr. to sell Mr. Snow's sanitation business. ODC Ex. 3, p. 7; ODC Ex. 9, p. 21. Mr. Snow could not afford to pay Respondent's hourly rate of Five Hundred Dollars (\$500.00) an hour, or any hourly rate for that matter. Respondent testified he had never charged anyone Five Hundred Dollars (\$500.00) per hour, but an IRS Agent had suggested to him that he should charge Five Hundred Dollars (\$500.00) per hour. ODC Ex. 3, p. 7; ODC Ex. 9, p. 21-22. The agreement was for a flat fee of Twenty-Five Thousand Dollars (\$25,000.00) if the sanitation business was sold. ODC Ex. 3, p. 7; ODC Ex. 9, p. 22. If the sanitation business was not sold, then no money would be paid. ODC Ex. 9, p. 22. There is no 2002 written contract regarding this agreement. Id.

On or about January 28, 2003, Mr. Snow was charged with two (2) different criminal misdemeanor charges in Monongalia County, West Virginia. The charges were Operating

a Solid Waster Facility without a Permit, Case No. 03-M-225, ODC Ex. 32, 369, and Operating an Open Dump, Case No. 03-M-226. ODC Ex. 32, p. 442-443. On or about February 13, 2003, Eugene J. Sellaro, Esquire filed a “Request for Production and Discovery” in 03-M-225 and 03-M-226. ODC Ex. 395-396. On or about March 5, 2003, Mr. Snow signed his “Initial Appearance: Rights Statements” in 03-M-225 and 03-M-226, wherein he wanted an attorney to represent him and listed Eugene Sellaro. ODC Ex. 32, p. 370-371.

On or about March 12, 2003, Mr. Sellaro filed a “Motion for Jury Trial” in the Operate a Solid Waste Facility w/o Permit charge, 03-M-225. ODC Ex. 32, p. 397-398. On or about March 19, 2003, Mr. Sellaro filed a “Motion for Continuance” in the Operate a Solid Waste Facility w/o Permit charge 03-M-225. ODC Ex. 32, p. 400-401. On or about May 15, 2003, Mr. Sellaro filed a “Motion to Withdraw Trial by Jury” in Operate a Solid Waste Facility w/o Permit charge, 03-M-225, and Open Dump charge, 03-M-226. ODC Ex. 32, p. 409-410. On or about June 2, 2003, Mr. Sellaro filed a “Defendant’s Witness List” for the Operate a Solid Waste Facility w/o Permit charge, 03-M-225, and Open Dump charge, 03-M-226. ODC Ex. 32, p. 413, 415-417. On or about June 30, 2003, Mr. Sellaro filed a “Motion to Continue,” “Motion to Withdraw,” and “Order of Continuance/Withdraw” in the Operate a Solid Waste Facility w/o Permit charge, 03-M-225, and Open Dump charge, 03-M-226. ODC Ex. 32, p. 403-406. The reason listed in the “Motion to Continue” and “Motion to Withdraw” was that Mr. Sellaro was “closing his legal office.” *Id.* On or about July 2, 2003, Monongalia County, West Virginia Magistrate Alan Wheeler signed the “Order of

Continuance/Withdraw” in the Operate a Solid Waste Facility w/o Permit charge, 03-M-225, and Open Dump charge, 03-M-226 regarding Mr. Sellaro. ODC Ex. 34, p. 1681.

On or about September 30, 2003, Respondent filed a “Motion to Withdrawal Request for a Jury Trial and Notice of a Plea” in the Operate a Solid Waste Facility w/o Permit charge, 03-M-225, and Open Dump charge, 03-M-226. ODC Ex. 32, p. 411-412. Such was granted on or about October 1, 2003. Id. On or about December 1, 2003, a plea was entered in the Operate a Solid Waste Facility w/o Permit charge, 03-M-225, and Open Dump charge, 03-M-226. ODC Ex. 32, p. 376. Mr. Snow agreed to plea guilty to Operating a Solid Waste Facility without a permit, 03-M-225 and the Open Dump, 03-M-226, would be dismissed. Id. Sentencing in the case was for a Five Hundred Dollar (\$500.00) fine plus court costs and suspended Fifteen (15) days in jail. Id.

On or about January 31, 2003, Mr. Snow was charged with an Illegal Salvage Yard in the Magistrate Court of Monongalia County, West Virginia, through citation No. SD 21951. ODC Ex. 32, p. 465. On or about February 7, 2003, Mr. Snow signed his “Initial Appearance: Rights Statements” for the Illegal Salvage Yard citation, SD 21951, wherein he requested an attorney to represent him and listed Eugene Sellaro. ODC Ex. 32, p. 459-460. The case was also assigned the caption Monongalia County Magistrate Court Case No. 03-M-318. Id. On or about March 10, 2003, Mr. Sellaro filed a “Motion for Continuance” in the Illegal Salvage Yard charge, 03-M-318. ODC Ex. 32, p. 466-467. On or about April 22, 2003, a criminal complaint was filed against Mr. Snow for the Illegal Salvage Yard in the Magistrate Court of Monongalia County, West Virginia, Case. No. 03-M-318. ODC Ex. 32,

p. 458. On or about April 22, 2003, the charge was dismissed after a bench trial. ODC Ex. 32, p. 457. Counsel in the case for Mr. Snow was Eugene Sellaro and Respondent was not involved in the case. Id.

On or about December 22, 2004, Mr. Snow filed an application through the West Virginia Public Service Commission to increase rates and charges for Snow's Sanitation Service, Case No. 04-2003-MC-19A. ODC Ex. 34, p. 881; ODC Ex. 54, p. 2799. On or about January 7, 2005, a request was filed in Case No. 04-2003-MC-19A to transfer the case to the Division of Administrative Law Judges and require Mr. Snow to make several mailings by March 14, 2005 and March 28, 2005. Id. On or about January 19, 2005, Case No. 04-2003-MC-19A was ordered to be referred to the Division of Administrative Law Judges. Id. Also included in the Order was that Mr. Snow mail notices to customers by March 14, 2005, with proof of mailings by March 28, 2005, that staff file a report by April 11, 2005, and that a decision in the case be made by August 19, 2005. ODC Ex. 34, p. 881-882; ODC Ex. 54, p. 2799-2800.

On or about March 17, 2005, Mr. Snow provided proof of the mailing of the notices in Case No. 04-2003-MC-19A . ODC Ex. 34, p. 882; ODC Ex. 54, p. 2800. On or about April 8, 2005, staff filed the audit report which recommenced a 28.7% rate increase. Id. On or about April 15, 2005, an Order was entered Case No. 04-2003-MC-19A that required Mr. Snow to provide notice to customers of the recommended increased rates and file the required form by May 12, 2005. Id. On or about May 12, 2005, Mr. Snow filed a copy of his

published notice, but not an affidavit of publication or a completed form for Case No. 04-2003-MC-19A. Id.

On or about May 13, 2005, the Monongalia County Solid Waste Authority filed a letter of protest due to Mr. Snow's various alleged violations of the Commission's rules over the years and the significant number of complaints about the service of Mr. Snow's business in Case No. 04-2003-MC-19A. Id. On or about May 26, 2005, Mr. Snow was ordered to submit the affidavit of publication and the completed form by June 6, 2005, in Case No. 04-2003-MC-19A. ODC Ex. 34, p. 883; ODC Ex. 54, p. 2801. The matter was scheduled for a hearing on July 6, 2005, in Morgantown, West Virginia. Id. On or about June 3, 2005, Mr. Snow provided the affidavit of publication for Case No. 04-2003-MC-19A. Id. On or about June 6, 2005, Mr. Snow provided the completed form for Case No. 04-2003-MC-19A. Id.

On or about June 27, 2005, Respondent filed a "Conditional Notice of Appearance" for Case No. 04-2003-MC-19A, Id., ODC Ex. 34, p. 814-815, as well as a motion to continue the July 6, 2005 hearing and motion to extend the decision date in the case. ODC Ex. 34, p. 883, ODC Ex. 54, p. 2801, ODC Ex. 34, p. 820-822. Respondent noted in his "Conditional Notice of Appearance" that the "notice is conditional because of the conflict and lack of time to prepare for the hearing scheduled for July 6, 2005 at 10:00 a.m." ODC Ex. 34, p. 814-815. Respondent's "Motion to Request to Extend the Due Date" stated

"Just so the record is clear, if this Motion to Extend the Due Date for Issuance of Recommended Decision is denied or applicant's second Motion for Continuance is denied, the undersigned attorney withdraws his Notice of Appearance and by copy of this Motion to the Applicant, advises

applicant to seek representation from another attorney.”
[Emphasis not added.] ODC Ex. 34, p. 817-818. Respondent’s Motion to Continue states **“Just so the record is clear, if this Motion for Continuance is denied or Applicant’s Motion to extend the due date for the issuance of recommended decisions is denied, the undersigned attorney withdraws his Notice of Appearance and by copy of this Motion to the Applicant, advises applicant to seek representation from another attorney.”** [Emphasis not added.] ODC Ex. 34, p. 821.

On or about June 28, 2005, the decision due date for Case No. 04-2003-MC-19A was extended until December 19, 2005 by Order. ODC Ex. 34, p. 883; ODC Ex. 54, p. 2801.

On or about June 30, 2005, a letter in Case No. 04-2003-MC-19A was filed stating that the notice of hearing had not been published. *Id.* On or about June 30, 2005, the July 6, 2005 hearing was cancelled by Order. *Id.* On or about July 13, 2005, an Order set a hearing in Case No. 04-2003-MC-19A for August 9, 2005. *Id.* On or about July 28, 2005, Respondent filed a Motion to Continue the August 9, 2005 hearing in Case No. 04-2003-MC-19A. *Id.* On or about July 28, 2005, Deputy Director Thornton Cooper filed a letter wherein he did not object to the continuance and gave certain dates to reschedule the hearing that were agreeable to all parties. *Id.*

On or about July 29, 2005, Deputy Director Cooper filed a letter in Case No. 04-2003-MC-19A stating Mr. Snow had not published notice of the August 9, 2005 hearing. *Id.* On or about July 29, 2005, the August 9, 2005 hearing was cancelled and rescheduled for October 4, 2005 by Order. ODC Ex. 34, p. 883-884; ODC Ex. 54, p. 2801-2802. On or about September 23, 2005, the Authority filed a Motion to Continue the October 4, 2005 hearing

date and Motion to Request Extension of Due Date for the Issuance of the Recommended Decision set for December 19, 2005 for Case No. 04-2003-MC-19A. Id. On or about September 27, 2005, Deputy Director Cooper filed a letter in Case No. 04-2003-MC-19A wherein it was indicated that Respondent informed him that Mr. Snow intended to apply for transfer of his Public Service Commission Certificate. Id. Deputy Director Cooper gave indication that rate increase applications are usually dismissed if a certificate transfer application is made and Mr. Snow may move to dismiss his application for rate increases without prejudice. Id. Deputy Director Cooper wanted Respondent to inform the Commission whether Mr. Snow wanted to have Case No. 04-2003-MC-19A dismissed without prejudice. Id.

On or about September 28, 2005, an Order was entered in Case No. 04-2003-MC-19A that denied the Authority's Motion to Continue the October 4, 2005 hearing. Id. On or about September 29, 2005, Respondent filed a fax requesting the withdrawal of Mr. Snow's application for rate increases due to him being in the process of selling his business and seeking to transfer his certificate to the purchaser for Case No. 04-2003-MC-19A. Id., ODC Ex. 34, p. 887. If Mr. Snow was unable to sell his business, he would re-file the application for rate increases and indicated he would not be at the October 4, 2005 hearing. Id.

On or about September 30, 2005, Deputy Director Cooper filed a letter requesting for Case No. 04-2003-MC-19A be dismissed. ODC Ex. 34, p. 884-885; ODC Ex. 54, p. 2802-2803. On or about September 30, 2005, an Order was entered in Case No. 04-2003-MC-19A that cancelled the October 4, 2005 hearing. ODC Ex. 34, p. 885; ODC Ex. 54, p. 2803. On

or about October 26, 2005, an Order was entered in Case No. 04-2003-MC-19A that granted Mr. Snow's Motion to Withdraw his application for rate increases, and the case was dismissed and removed from the Commission's docket. ODC Ex. 34, p. 881-886; ODC Ex. 54, p. 2799-2804.

On or about August 4, 2006, the West Virginia Public Service Commission Motor Carrier Section forwarded a letter to Mr. Snow advising him that his certificate would be suspended on October 1, 2006, if Mr. Snow failed to pay the required annual assessment and properly register vehicles with the Commission. ODC Ex. 55, p. 2808. Such letter was returned to the Commission marked "Insufficient Address, Unable to Forward." ODC Ex. 55, p. 2807. On or about October 3, 2006, a second letter was forwarded to Mr. Snow advising him that his certificate was suspended on October 1, 2006, due to the failure to pay the required annual assessment and properly register vehicles with the Commission. ODC Ex. 55, p. 2811. The letter also stated continued operation would be illegal until the suspension was lifted. Id. The letter stated the suspension would be lifted expeditiously if Mr. Snow applied for and obtained vehicle identification card and paid annual assessment by November 1, 2006. Id.

On or about December 21, 2006, Mr. Snow's certificate for Snow's Sanitation Service was conditionally revoked by the West Virginia Public Service Commission under Case No. 06-1714-MC-M due to the failure to pay required annual assessment and properly register vehicles with the Commission. ODC Ex. 55, p. 2818-2819. The Order also stated the Commission would issue an Order finally revoking the certificate unless Mr. Snow filed a

letter requesting a hearing in the matter by January 3, 2007. Id. On or about January 2, 2007, Mr. Snow himself filed a letter regarding his efforts to comply with the requests in Case No. 06-1714-MC-M. ODC Ex. 55, p. 2829. On or about January 8, 2007, a staff attorney for the Public Service Commission filed a memorandum wherein it stated that Mr. Snow had filed the proof of insurance and recommended the suspension be lifted. Id. On or about January 9, 2007, the October 1, 2006 suspension was lifted and Case No. 06-1714-MC-M was dismissed and removed from the Commission's docket. ODC Ex. 55, 2828-2831.

On or about November 9, 2006, Mr. Snow was charged with the misdemeanor offense of Failure to Provide Certain Records in Monongalia County, West Virginia, Case No. 06—3447. ODC Ex. 32, p. 473-474. On or about December 11, 2006, Mr. Snow signed his “Initial Appearance: Rights Statements” in 06-M-3447 wherein he gave up his right to an attorney. ODC Ex. 32, p. 475-476. On or about May 8, 2007, a no contest plea was entered into by Mr. Snow in the Failure to Provide Certain Records charge, Case No. 06-M-3447, with a Hundred Dollar (\$100.00) fine and no jail time. ODC Ex. 32, p. 479. Respondent is listed as counsel for Mr. Snow in the “Plea Agreement.” Id.

On or about June 27, 2007, Mr. Snow received a letter from the Office of the Insurance Commissioner regarding a default to Workers' Compensation obligations. ODC Ex 34, p. 1792. On or about July 11, 2007, Mr. Snow received a letter from the Offices of the Insurance Commissioner regarding the denial of his request for an exemption from coverage for West Virginia Workers' Compensation. ODC Ex. 57, p. 2882. This was due to an October 2, 2006 report from the West Virginia Division of Labor that advised Mr. Snow

had four (4) employees at that time when Mr. Snow did not have Workers' Compensation coverage. Id. The letter advised that it was a "felony to knowingly and willingly make false statements respecting any information required to be provided under the WV Workers' Compensation Act." Id.

On or about November 6, 2007, Roger L. Cutright, Esquire, in his capacity as counsel for the purchaser, sent Respondent a letter stating he had been advised by his client that Respondent represented Mr. Snow in selling his business. Mr. Cutright asked for Respondent to send the proposed terms and conditions of the sale. ODC Ex. 34, p. 2088. On or about November 8, 2007, Respondent sent Mr. Cutright a response for the sale of the business at Three Hundred Thousand Dollars (\$300,000.00). ODC Ex. 34, p. 2090. On or about December 10, 2007, Roger L. Cutright sent Respondent a letter stating "enclosed please find the purchase agreement to acquire public service commission certificate with respect to Lewis Snow, Sr., dba Snow's Sanitation Service, for your client's review and execution." ODC Ex. 34, p. 2078.

On or about February 19, 2008, Respondent received a letter from Roger L. Cutright that stated "[e]nclosed please find two (2) duplicate original execution versions of the Purchase Agreement to acquire Mr. Snow's Public Service Commission Certificate. Please have Mr. Snow execute and acknowledge the Purchase Agreement and Form 11 in front of a notary and return both originals to my office." ODC Ex. 34, p. 1825. On or about February 21, 2008, Respondent sent a letter to Mr. Cutright stating his acknowledgment "your receipt of the two (2) original Purchase Agreements to acquire Mr. Snow's Public Service

Commission Certificate executed by Mr. Snow.” ODC Ex. 34, p. 1826-1827. On or about March 5, 2008, Mr. Cutright sent an original version of the Purchase Agreement to the Public Service Commission. ODC Ex. 34, p. 1869. On or about June 12, 2008, Mr. Snow sold his Sanitation Service for Two Hundred and Seventy-Five Thousand Dollars (\$275,000.00). ODC Ex. 34, 1902. Mr. Roger Cutright, an attorney who practices in Morgantown, WV, testified that he handled the sale of Mr. Snow’s property to the purchaser. He indicated that he did the majority of the work in reference to the closing. Mr. Scotchel just reviewed his documentation. He also testified that the sale price went from Three Hundred Thousand (\$300,000.00) down to Two Hundred Seventy-five Thousand Dollars (\$275,000.00) during the course of the negotiations because of actions taken either by Mr. Snow or Mr. Scotchel. He also testified that he charged Two Thousand Three Hundred Ninety-eight Dollars and Twenty-five Cents (\$2,398.25) for the work he performed on behalf of the purchaser of Snow Sanitation. The money was deposited into Respondent’s IOLTA checking account 8284 at Citizens Bank of Morgantown in Morgantown, West Virginia. ODC Ex. 9, p. 39-40. The reduction in the purchase price was due to the charges filed against Mr. Snow and the delay in the sale of the company.

The Hearing Panel asserted above paragraphs were necessary to show that Respondent did not do substantive work, contrary to his assertion he did substantive work on the misdemeanor charges and the Public Service Division Administrative Claims. The Hearing Panel also found that each of those charges and administrative hearings were necessary to sell the garbage business.

On or about February 12, 2008, Mr. Snow sent Respondent a written document regarding payments to be made from the sale of the business. ODC Ex. 9, p. 51. Mr. Snow stated “[f]rom the money I receive from the sale of Snow Sanitation Certificate that’s in my name, please pay the following. 1.) Charity L. Snow - \$50,000.00 2.) All Centra Bank loans 3.) To John Scotchel for all attorney fees, costs, and expenses from year 2002 to the present which includes the closing of the sale of my business. In the amount of \$25,000.00 Lewis Snow.” Id. It appears Respondent added additional writing stating “Does not include fees over \$100,000” and additional writing regarding the \$25,000 towards the business that stated “appeal to bus only.” Id. Further writing on the bottom of the document “S/Client 2/26”. Id. Respondent did not provide the original document and said it was lost in the discovery process in the civil suit filed against him by Mr. Snow.

Also, on or about June 12, 2008, Respondent had Mr. Snow sign an agreement that stated “I authorize addition [sic] payment of \$145,000.00 to John C. Scotchel, Jr. For atty’s fees. From 2002 to Present.” ODC Ex. 9, p. 52. The document appears to be signed by Mr. Snow and a Deborah Robinson. Id. The original document is no longer in existence because Respondent lost it during the discovery process in a civil case. Mr. Snow was not competent to testify regarding his signature and Debbie Robinson denied she signed such an agreement. Over the next few months, after June of 2008, Respondent paid money to Mr. Snow’s estranged wife, daughters, bank loans, finance company loans, and advances to Mr. Snow. ODC Ex. 9, p. 29-38, 41-50, 53-70.

On or about March 21, 2009, Mr. Snow met with Respondent. ODC Ex. 1, p. 2. Mr. Snow requested the rest of his money from the sale of his business and a receipt for Respondent's fees in the matter. Id. Respondent informed Mr. Snow that there was no money left. Respondent never provided an accounting to Mr. Snow and never provided any additional monies.

On or about April 6, 2009, Mr. Snow filed a complaint against Respondent, which was forwarded to Respondent on or about April 9, 2009. ODC Ex. 1. In the complaint, Mr. Snow said he wanted a receipt from Respondent regarding Respondent's attorney fees and wanted to know where his money was being kept. Id. The signature of Lewis Snow Sr appears on the second page of the complaint. Id. at 0002. The signature of notary Jeanne R. Russell appears below the Lewis Snow Sr signature and shows the date of April 3, 2009. Id. This notary signature is also in blue ink and includes the notarial seal. Id.

On or about May 8, 2009, Allan N. Karlin, Esquire, sent a letter to Disciplinary Counsel indicating that he represented Complainant and that he "understand[s] [Complainant] has a complaint filed with the Lawyer Disciplinary Board against John Scotchel." ODC's Ex 5, 0017. Mr. Karlin stated that his role was "to obtain monies owed to [Complainant] from [Respondent]." Id. Mr. Karlin further said Deborah Robinson "prepared" the complaint for Complainant.¹ Id.

¹ There is no requirement in the Rules of Lawyer Disciplinary Procedure for the Complainant to prepare and fill out the complaint.

On or about May 29, 2009, in his verified response to the complaint filed against him by Lewis Snow, Respondent indicated the following break down for his attorney fees:

- A. October of 2002 until January of 2003, Respondent “began work on sales package-Flat fee \$25,000-No charge.”
- B. January 2003 until December 1, 2003, Respondent “began work on 3 criminal cases filed against Mr. Snow and his related sanitation business. Case numbers 03M-225,226,318.” Respondent stated “Flat fee charged \$40,000 reduced to \$25,000”
- C. November of 2004 until October 26, 2005, Respondent worked on Mr. Snow’s case before the West Virginia Public Service Commission, PSC Case 04-2003-MC-19A. Respondent stated Mr. Snow’s attempt to increase rates lead to violations filed by the PSC in Case No. 04-2003-MC-19A. Respondent stated “Final Ordered [sic] entered October 26, 2005-no fines or jail time- no loss of license-\$50,000 reduced to \$35,000.”
- D. October 2005-October 2006, Respondent stated he began “preparation of comprehensive package to sell business.” Respondent stated “Flat Fee \$25,000 no sale after preparation.” Respondent then stated he investigated “potential multiple violations regarding IRS and WV State Tax Dept.” Respondent went on to say “Flat Fee \$25,000.”
- E. June of 2006 until October of 2006, Respondent stated “Walls violations of Mr. Snow’s territory-Flat fee \$2,500 reduced to \$1,500.” Respondent referenced Public Service Commission case 04-2003-MC-19A.
- F. October 2, 2006 until May 8, 2007, Respondent stated he worked on “06M-3447-4 criminal charges.” Respondent stated “Flat Fee \$40,000 reduced to \$25,000.”

- G. July 11, 2007 until August 21, 2007, Respondent stated he worked on “WV Ins Commission - Workers Comp issues-felony issues” which resulted in no jail time. Respondent stated “Flat Fee \$10,000 This required immediate resolution in order for Mr. Snow to stay in business and out of jail.”
- H. In his verified response to the ethics complaint, Respondent provided a breakdown of his fees as follows:

“Summary of above Flat Fee to Reduced Fee

1. \$25,000-\$0.00
 2. \$40,000-\$25,000
 3. \$50,000-\$35,000
 4. \$50,000-\$50,000 - sale and transfer of business-Plus potential civil and criminal tax liability issues
 5. \$2,500- \$1,500
 6. \$40,000-\$25,000
 7. \$10,000-\$10,000 no reduced
- Total \$217,500 reduced to \$146,500

This above was rounded down to \$145,000 as agreed to by Mr. Snow as reflected on June 12, 2008 agreement.”

- I. November of 2007 until June 12, 2008, Respondent worked on the “sale and transfer of Mr. Snow’s sanitation business \$25,000 as agreed to by Mr. Snow on February 21, 2008.”
- J. June 12 of 2008 until June 19, 2008, Respondent prepared an “amended separation agreement-\$5,000 flat fee not paid.”
- K. June 20, 2008 until August 8, 2008, Respondent prepared agreements to disburse money to Mr. Snow’s four (4) children. Respondent stated “\$5,000 -not paid.”
- L. June 18, 2008 until December of 2008, Respondent stated that he worked on “issue with son not signing agreement dragged on.”

ODC Ex. 9, p. 22-24. Respondent testified that, pursuant to earlier agreements and order of divorce, he paid Twenty-five Thousand Dollars (\$25,000.00) to Mr. Snow's ex-wife and Ten Thousand Dollars (\$10,000.00) each to Mr. Snow's daughters. Mr. Snow took his son's Ten Thousand Dollars (\$10,000.00) to disburse to him after he had refused the payment from Mr. Scotchel. Respondent charged a total of One Hundred and Seventy Thousand Dollars (\$170,000.00) to Mr. Snow for attorneys fees. Respondent stated that he "questioned the authenticity of the complaint as it is obviously written in third person and the signature is questionable. [ODC Ex. 9, p. 21]. Since [Complainant] has retained separate counsel and has waived attorney client privilege and has further acknowledged that the complaint filed was filed with [Complainant's] consent, there is no longer a need to question the authenticity of the complaint." Id.

On or about July 28, 2009, Mr. Snow's counsel, Allan N. Karlin, Esquire, filed a letter indicating "Mr. Snow expressly denies that he ever agreed to or approved of a fee of \$145,000.00." ODC Ex. 12, p. 77-78. On or about September 30, 2009, Mr. Karlin provided a copy of the "Answer of the Complaint and Counter-Claim in the case that [he] filed on behalf of [Complainant]." ODC's Ex 19, 0090-0104. On or about October 13, 2009, Disciplinary Counsel received a letter dated August 9, 2009, from Respondent as a reply to Mr. Karlin's July 28, 2009 letter. ODC's Ex 20, 0108-0129. Respondent provided a copy of the complaint filed by Mr. Karlin on behalf of Complainant against Respondent that was filed in the Circuit Court of Monongalia County, West Virginia, on or about July 23, 2009. Id. at 0112-0113. The two page complaint reflected the same allegations made in the ethics

complaint filed with the Office of Disciplinary Counsel. Id. The civil case was settled for Two Hundred and Twenty-Five Thousand Dollars (\$225,000.00) in favor of the Complainant. Complainant was required to pay Respondent Ten Thousand Dollars (\$10,000.00) to cover his counterclaims against Complainant. 2/27/13 Hrg. Trans. p. 82. Mr. Karlin also testified that half of the remaining money after paying some loans was split between Complainant and Complainant's wife. 2/27/13 Hrg. Trans. p. 82-83.

On or about January 7, 2010, Respondent appeared at a sworn statement. During that statement, Respondent said he kept time records on the work that he performed for Mr. Snow, but shredded the documents around December of 2008. ODC Ex. 25, p. 164. Respondent stated he did not have written fee agreements on these matters, except the February 21, 2008 written agreement and the June 12, 2008 written agreement regarding attorney fees. ODC Ex. 25, p. 166-167. During the sworn statement, Respondent was asked by Disciplinary Counsel for itemization of the work he performed for Mr. Snow since 2002. ODC Ex. 25, p. 268-169, 315. Respondent also agreed during his sworn statement that he that Complainant had acknowledged making the complaint in this matter. Id., p. 0193-0194.

On or about January 13, 2010, Disciplinary Counsel sent a letter to Respondent requesting "time receipts/bills/invoices of your work in the Snow matter from October 2002 until March 2009." ODC Ex. 27, p. 356. Respondent never provided "time receipts/bills/invoices" of his work in the Snow matter beyond some hand written documents which only show the case, the total amount of hours, and the amount of fee charged for the

matter. ODC Ex. 34, p. 2368-2369. There were never any documents produced to show the individualized time that Respondent worked on Complainant's matters.

C. CONCLUSIONS OF LAW

The Hearing Panel Subcommittee made several conclusions of law as to violations of the Rules of Professional Conduct. The conclusions of law were based upon the record presented and are supported by the clear and convincing standard.

The Hearing Panel found that Respondent charged an unreasonable fee to Mr. Snow in the various matters, failed to communicate to Mr. Snow the basis or rate of Respondent's fee in the various matters, and failed to have the Twenty-Five Thousand Dollars (\$25,000.00) for the sale of Mr. Snow's business in writing in violation of Rules 1.5(a), 1.5(b), 1.5(c), 8.4(c) and 8.4(d) of the West Virginia Rules of Professional Conduct. Respondent's fee of One Hundred and Seventy Thousand Dollars (\$170,000.00) was unreasonable based upon the proof of work provided by Respondent. Respondent has the burden to prove that he earned the fee. The burden of proof is always upon the attorney to show the reasonableness of the fees charged. Syl. Pt. 2, Committee on Legal Ethics of West Virginia State Bar v. Tatterson, 177 W.Va. 356, 352 S.E.2d 107 (1986). The same burden to prove reasonableness remains with the attorney under any fee structure. "Attorneys who fail to effectively document their efforts on behalf of a client run the risk of being unable to convince a reviewing court, based on their word alone, of the reasonableness of the fee charged or, in cases where it applies, the full and proper value of fees to be awarded on a *quantum merit* basis." Bass v. Cotelli Rose, 216 W.Va. 587, 592, 609 S.E.2d 848, 853 (2004). Respondent

was not able to provide proof of earning that fee nor was the evidence contained in Respondent's file or the public files proof of the fee. Respondent also was unable to provide any proof that he informed Complainant about the basis or rate of his fee. Respondent was unable to clearly explain his fee to Disciplinary Counsel or the Hearing Panel. Respondent's fee of Twenty Five Thousand Dollars (\$25,000.00) if the sanitation business was sold was obviously contingent upon the sale of the business. This was a contingency fee that was not placed into writing until on or about February 12, 2008. Respondent was dishonest, deceitful and misrepresented his work in the matters he handled for Complainant. Further, the amount of money Respondent took as a fee was prejudicial to Complainant.

Respondent failed to provide Mr. Snow the funds from the sale of his business and failed to provide a full accounting of the money from the sale of Mr. Snow's business in violation of 1.15(b) of the Rules of Professional Conduct. Respondent provided some funds from the sale of the business to Complainant and to pay for some loans, but Respondent ended up for One Hundred and Seventy Thousand Dollars (\$170,000.00) from the sale amount of Two Hundred Seventy Five Thousand Dollars (\$275,000.00). Further, Complainant requested a receipt, or accounting, of Respondent's fees on or about March 21, 2009. Respondent never provided such an accounting to Complainant.

Disciplinary Counsel requested that Respondent provide "time receipts/bills/invoices" of his work in Complainant's case at the sworn statement on or about January 7, 2010. Disciplinary Counsel followed up that request with a letter dated January 13, 2010. Respondent provided a two page, hand written document which only showed the case and

what Respondent's fee was. Respondent was instructed to recreate time at the sworn statement but Respondent failed to provide any detailed accounting of his work and fees. The Hearing Panel found this to be in violation of Rule 8.1(b) of the Rules of Professional Conduct.

II. SUMMARY OF ARGUMENT

The Supreme Court 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). In order to effectuate the goals of the disciplinary process, the Hearing Panel Subcommittee of the Lawyer Disciplinary Board recommended that Respondent be annulled; Respondent shall undergo supervised practice for two (2) years after reinstatement; Respondent shall complete additional twelve (12) hours of CLE hours before reinstatement; and that Respondent pay the costs of the disciplinary proceeding.

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

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 evidence presented in this case clearly exceeds the standard of clear and convincing.

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 gives respectful consideration to the Lawyer Disciplinary Board's recommendations as to questions of law and the appropriate sanction, while ultimately exercising its own independent judgment. McCorkle, 192 W. Va. at 290, 452 S.E.2d at 381. Substantial deference is to be given to the Lawyer Disciplinary Board's findings of fact unless the findings are not supported by reliable, probative, and substantial evidence on the whole record. McCorkle, Id.; Lawyer Disciplinary Board v. Cunningham, 195 W. Va. 27, 464 S.E.2d 181 (1995).

At the Supreme Court level, "[t]he burden is on the attorney at law to show that the factual findings are not supported by reliable, probative, and substantial evidence on the whole adjudicatory record made before the Board." Cunningham, 464 S.E.2d at 189; McCorkle, 192 W. Va. at 290, 452 S.E.2d at 381. The Supreme Court 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).

The evidence in this case met and exceeded the clear and convincing standard as required by the Rules of Lawyer Disciplinary Procedure. The findings of fact are well documented in the record and the conclusions of law are supported by the evidence that was presented at the disciplinary hearing in this matter.

B. COMPLAINT SIGNATURE ISSUE

On or about November 14, 2011, Ms. Robinson testified during a deposition that she had written out the complaint for Complainant and had signed the document for Complainant in front of the notary. R's Ex 22, p. 14. Complainant's deposition was also taken on or about November 14, 2011 and Complainant had clear trouble with his memory regarding details of his current life along with details about filing the complaint. R's Ex. 21. Complainant's counsel, Allan Karlin, Esquire, also appeared at the deposition and made the statement on the record that there has been "a significant deterioration in [Complainant's] ability to focus on and answer questions." R's Ex. 21, p. 10.

Because of Ms. Robinson's statement during that November 14, 2011 deposition, Respondent's counsel took the deposition of the notary public who signed the notary acknowledgment of the Complainant's signature on the complaint. On April 4, 2012, Jeanne R. Russell, testified that Complainant did sign the complaint in front of her based upon her

review of the records that she keeps about her notary signatures. R's Ex. 24. On May 25, 2012, Ms. Robinson appeared for another deposition and gave additional testimony that she did not sign the complaint as she had previously testified. R's Ex. 23. Ms. Robinson was quite clear that she had previously testified incorrectly and was wanting to correct that misstatement. Id.

Respondent had a forensic document examiner testify that the signature on the complaint was "probably not" Complainant's signature. 2/27/13 Hrg. Trans. p. 176. However, the examiner previously indicated that she asked on several occasions for an original signature of Complainant and Respondent did not provide such to the examiner even though Respondent was aware that the original complaint was on file with the Office of Disciplinary Counsel. The forensic document examiner indicated that the "original is the best evidence." 2/27/14 Hrg. Trans. p. 181. Further, the forensic document examiner was not able to give a categorical opinion that it was not Complainant's signature because she did not have the original. 2/27/13 Hrg. Trans. p. 182. Respondent failed to show the forensic document examiner the original complaint when it would have been readily available for her to review.

This issue with the signature on the complaint do not rise to a level of a due process violation. Further, there is no issue as to whether Complainant signed the complaint filed with the Office of Disciplinary Counsel. The notary testified that she witnessed Complainant sign the complaint and Ms. Robinson testified that she was previously incorrect about her signing the complaint. The issues regarding Ms. Robinson's incorrect statements would impact her credibility which were obviously observed by the Hearing Panel as she testified

at the hearing in this matter. The Hearing Panel choose to give testimony the weight it deserved. The forensic document examiner could have examined the original complaint but Respondent did not provide her with that document and the Hearing Panel Subcommittee gave her testimony the credibility it deserved. There were no originals of the documents for the forensic document examiner and that was the fault of Respondent. The evidence presented in this matter showed that Respondent failed to earn the money he took as a fee from Complainant.

C. 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.

Factors to be considered in imposing appropriate sanctions are found in Rule 3.16 of the Rules of Lawyer Disciplinary Procedure. These factors consist of: (1) whether the lawyer has violated a duty owed to a client, to the public, to the legal system, or to the profession; (2) whether the lawyer acted intentionally, knowingly, or negligently; (3) the amount of the

actual or potential injury caused by the lawyer's misconduct; and (4) the existence of any aggravating or mitigating factors. *See also*, Syl. Pt. 4, Office of Disciplinary Counsel v. Jordan, 204 W.Va. 495, 513 S.E.2d 722 (1998).

Respondent contended disciplinary proceedings were initiated as a result of the fabricated story told by Mr. Snow to his longtime girlfriend, Deborah L. Robinson ("Robinson"), sometime after Mr. Snow returned from his unsuccessful trip to Georgia to reunite with his estranged wife and family in July 2008. Respondent also contended that Mr. Snow and Respondent had a meeting at McDonalds in Monongalia County because Mr. Snow wanted Fifteen Thousand Dollars (\$15,000.00) from his sale of the business. At this meeting, Respondent alleges that he told Mr. Snow his settlement money was all disbursed and that Respondent had no money that belongs to Mr. Snow in escrow.

1. Respondent violated duties owed 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, the legal system and to the profession. The Office of Disciplinary Counsel has proven by clear and convincing evidence the violations of the Rules of Professional Conduct alleged against Respondent in the Statement of Charges. The evidence establishes by clear and convincing proof that Respondent violated duties owed to his clients by charging an unreasonable fee, failing to communicate the basis of the fee, failing to have a contingency fee in writing, failing to provide Complainant with his money, failing to provide a full accounting as

requested by Complainant, and failing to comply with Disciplinary Counsel's request for itemized billings or accountings.

Respondent deposited the \$275,000.00 from the sale of Snow Sanitation into his IOLTA account. ODC Ex. 9, p. 39-40, ODC Ex. 33, p. 495, 513. While Respondent did pay several outstanding loans that Complainant owed and provided money to Complainant's family, Respondent kept the majority of the funds for himself in the amount of \$160,269.54. ODC Ex. 9, p. 26. The oral agreement between Respondent and Complainant was contingent upon the sale of Complainant's sanitation business, and Respondent was to be paid \$25,000.00 if the sanitation business was sold. ODC Ex. 9, p. 22. This obvious contingent fee was never put in writing until February of 2008. ODC Ex. 9, p. 51. It is clear from that agreement that Complainant agreed to pay Respondent \$25,000.00 and Respondent was attempting to obtain additional monies from his handwriting on the February 2008 agreement regarding additional fees. Id. There is no proof that Complainant agreed to Respondent taking the majority of the funds from the sale of the business. Respondent clearly kept more than \$25,000.00. Further, the original of the June 12, 2008 agreement has been lost and there is no way to determine whether the writing on the document was done contemporaneously with the signatures on the page or the agreement was altered by Respondent. ODC Ex. 9, p. 52. Nevertheless, it is Respondent's burden to prove that he earned his fees in the matters he handled for Complainant and Respondent is unable to do that with any of the evidence produced in this case. Respondent was asked by Disciplinary Counsel to recreate his billing for the various matters he asserted that he was involved in for Complainant, but Respondent

failed to provide any itemization or accounting of the work he performed in the matters. Respondent provided no proof beyond a handwritten document showing the amount of fee for each case without any reference to specific work done in the matters. ODC Ex. 34, p. 2368-2369.

There is no proof that Respondent provided thousands of dollars of work in any of the other matters. The magistrate cases, case numbers 03-M-225, 226, and 318, that Respondent asserted he was involved in were handled mostly by another attorney. In fact, one case, 03-M-318, was dismissed prior to Respondent's appearance in the other cases and the case disposition sheet clearly showed that another attorney handled the matter. ODC Ex. 32, p. 457. The other attorney who handled the matter did not remember ever speaking with Respondent about the cases. 2/26/13 Hrg. Tran. p. 271-272. Further, the magistrate case that Respondent was involved in from the beginning, 06-M-3447, involved only one misdemeanor charge and not four charges as asserted by Respondent. ODC Ex. 32, p. 473-474. Further, the Assistant Prosecutors who were handling the misdemeanor charges testified that they were not aiming for jail time in these cases and neither had spent much time on these cases. 2/26/13 Hrg. Tran. p. 203-204, 223. Respondent charged Complainant \$50,000.00 to handle the misdemeanor cases and cannot prove he earned such an outrageous amount. ODC Ex. 9, p. 22, 23.

The 2004 case with the Public Service Commission showed that Respondent only got involved toward the end of the matter. Further, Respondent provided a "Conditional Notice of Appearance" indicating that he did not want to be involved in the matter if the hearing was

not continued. ODC Ex. 34, p. 814-815, 817-822. The “Conditional Notice of Appearance” was not filed until June of 2005, some six to seven months after Complainant filed to increase his rates and charges. The Public Service Commission was even recommending a rate increase for Complainant in the matter. ODC Ex. 34, p. 882; 2/26/13 Hrg. Tran. p. 297, 300. However, Respondent had Complainant withdraw the petition to increase rates when Complainant was operating the business at a deficit. 2/26/13 Hrg. Tran. p. 338-340. Respondent’s assertion that Complainant was facing jail time was also false. 2/26/13 Hrg. Trans. p. 312-313. While Respondent was involved in the cases, he cannot prove that he earned the outrageous fees that he charged in the matters. The 2006 Public Service Commission case shows no involvement of Respondent in the matter. While that case may have been linked to the 2006 misdemeanor charge and Respondent certainly was involved in that case, it was not a case where the State was looking to put Complainant in jail. 2/26/13 Hrg. Tran. p. 223. Respondent charged Complainant \$35,000.00, reduced from \$50,000.00, to Complainant for his work in the 2004 case. ODC Ex. 9, p. 22-23.

The Department of Labor issue that came up for Complainant in 2007 shows limited involvement from Respondent. ODC Ex. 57, p. 2885-2886. Respondent’s only involvement was a single phone call and a fax. *Id.* Respondent again asserted that Complainant was facing jail time and the possibility of the loss of his business because of the issue of not having workers’ compensation for certain employees. ODC Ex. 9, p. 23. Insurance Commission employee, Gregory Hughes, made it clear that it was a rare thing for such a case to end in jail time or loss of a business. ODC Ex. 56, p. 2841-2842. Mr. Hughes also stated that such

issues were not something he would handle. Id. Further, the matter was ultimately resolved by Deborah Robinson and not Respondent. ODC Ex. 57, p. 2886. Respondent charged Complainant \$10,000.00 for his involvement in this case. ODC Ex. 9, p. 23.

Respondent also tries to assert that Complainant was to pay half of the total amount he received from the sale of the sanitation business to Complainant's wife and that Complainant only paid his wife \$25,000.00 from the sale of business. It should be noted that Respondent prepared the agreement to pay Complainant's wife \$25,000.00 and she did not have other counsel to review the same. ODC Ex. 9, p. 53-56. Further, Complainant's civil counsel indicated that half of the settlement from the lawsuit against Respondent regarding this matter was paid to Complainant's wife as required by the separation agreement. 2/27/13 Hrg. Tran. p. 82-83. Further, Respondent attempted to indicate that Complainant made misrepresentations in his 2008 tax return regarding the sale of the business. When Respondent took the deposition of Teresa Brewer, who prepared the 2008 tax forms, she indicated that she was never told the amount of attorney fees even after she contacted Respondent to obtain the same. R's Ex. 26, p. 11, 21. Because it was close to the time to file the tax forms, Ms. Brewer decided to proceed without including the amount of attorney fees because, in the end, it did not matter on the federal income tax return. R's Ex. 26, p. 19-20. However, she noted that the amount of the attorney fees could have made a difference on the West Virginia tax return. R's Ex. 26, p. 20. In fact, Complainant paid more in West Virginia taxes because Respondent refused to tell Complainant the amount of attorney fees paid out of the sale of his business. R's Ex. 26, p. 25-26.

2. Respondent acted intentionally and knowingly.

In representing Complainant in this matter, Respondent acted intentionally and knowingly and his actions were clearly not the result of simple negligence or mistake. The evidence also supports that Respondent intentionally misappropriated Complainant's funds without earning those funds. Respondent did not communicate the basis of his fees to Complainant, and he certainly did not have a written contingency fee agreement. Complainant and Disciplinary Counsel requested Respondent to provide an itemization accounting of his hours and fees in the cases on numerous occasions, but Respondent has failed to provide the same. These acts are in violation of the duties Respondent owed to his clients, the public, and the legal profession.

3. The amount of real injury is great.

As a direct result of Respondent's misconduct, his client suffered real and actual injury. While it is acknowledged that Complainant sued Respondent and received a settlement, Respondent's client still suffered injury because of Respondent's misconduct. Further, Complainant continued to run his sanitation business with a deficit for an additional three years after Respondent had him withdraw his petition to raise his rates for his sanitation business, and this was even after the Public Service Commission had recommended that Complainant could raise his rates. Further, Complainant's tax liability to the State of West Virginia could have been reduced based upon the attorney fee that Respondent was paid, but Respondent would not tell the tax preparer in the early months of 2009 what his fee was in the matters. In this case, Respondent took Complainant's money and then attempted to

fabricate his involvement in Complainant's other matters to support his misappropriation of Complainant's money for his own use.

4. There are several aggravating factors present.

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). There are several aggravating factors present in this case, including (1) dishonest or selfish motive, (2) refusal to acknowledge wrongful nature of conduct, and (3) substantial experience in the practice of law. Respondent clearly converted client funds entrusted to him. Respondent not only refuses to see his misconduct, Respondent attempted to fabricate his involvement in other matters in an attempt to show that he earned the additional fee. Respondent has been a licensed attorney for almost thirty (30) years. The Supreme Court has held that "lawyers who engage in the practice of law in West Virginia have a duty to know the Rules of Professional Conduct and to act in conformity therewith." Lawyer Disciplinary Board v. Ball, 219 W.Va. 296, 633 S.E.2d 241 (2006).

5. The existence of any mitigating factors.

In addition to adopting aggravating factors in Scott, the Scott court also adopted mitigating factors in a lawyer disciplinary proceedings and stated that mitigating factors "are

any considerations or factors that may justify a reduction in the degree of discipline to be imposed.” Lawyer Disciplinary Board v. Scott, 213 W.Va. 209, 579 S.E.2d 550, 555 (2003) quoting *ABA Model Standards for Imposing Lawyer Sanctions*, 9.31 (1992)². Mitigating factors present in this case are (1) absence of a prior disciplinary record.

D. 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.

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

Moreover, 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).

Rule 3.15 of the Rules of Lawyer Disciplinary Procedure sets forth the following sanctions that may be imposed in a disciplinary hearing: (1) probation; (2) restitution; (3) limitation on the nature and extent of future practice; (4) supervised practice; (5) community service; (6) admonishment; (7) reprimand; (8) suspension; or (9) annulment.

The *ABA Model Standards for Imposing Lawyer Sanctions* also provide that absent any aggravating or mitigating circumstances, the following sanction is generally appropriate in cases where the lawyer engages in misappropriation of client funds:

Standard 4.11. Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client.

Respondent's violations in this case are extremely egregious and touch the very essence of the public's perception of the legal profession. It cannot be stressed enough that while these are Respondent's first offenses of the Rules of Professional Conduct giving rise to discipline, Disciplinary Counsel has grave concerns about what transpired in this case. These are not cases of simple negligence or neglect. Serious among the charges against Respondent are failure to preserve client funds and misappropriation of client funds. The Hearing Panel Subcommittee had the opportunity to observe Respondent's testimony and

found much of his testimony did not to not be credible. The Hearing Panel was also able to hear and observe the testimony of several witnesses which the Hearing Panel found to be credible sources.

West Virginia holds that absent compelling circumstances, misappropriation or conversion by a lawyer of funds entrusted to his/her care warrants disbarment. Office of Disciplinary Counsel v. Jordan, 204 W.Va. 495, 513 S.E.2d. 722 (1998); and Lawyer Disciplinary Board v. Kupec (Kupec I), 202 W.Va. 556, 561, 505 S.E.2d 619, 631 (1998), *remanded with directions*, see Lawyer Disciplinary Board v. Kupec (Kupec II), 204 W.Va. 643, 515 S.E.2d 600 (1999). The Kupec I Court recognized as follows:

The term misappropriation can have various meaning. In fact, the misuse of another's funds is characterized as misappropriation or conversion. Black's defines misappropriation as '[t]he unauthorized, improper, or unlawful use of funds or other property for purposes other than that for which intended . . . including not only stealing but also unauthorized temporary use for [the] lawyer's own purpose, whether or not he derives any gain or benefit from therefrom. Black's Law Dictionary (6th ed.1990). See In re Wilson, 81 N.J. 451, 409 A.2d 1153, 1155 n.1 (1979) (defining misappropriation as 'any unauthorized use by the lawyer of client's funds entrusted to him including not only stealing, but also unauthorized temporary use for the lawyer's own purpose, whether or no he derives any personal gain or benefit therefrom').

Kupec I, 202 W.Va. at 202-3, 505 S.E.2d at 262-3. Serious among these charges is the conversion of client money to his personal use. Intentional misappropriation by itself would warrant disbarment. Respondent was unable to present any compelling evidence to show that he earned the money that he took from the Complainant. Respondent's misconduct of taking

Complainant's money and then fabricating false work in cases is very serious and show the intentional nature of his misconduct.

The Supreme Court of Appeals of West Virginia has disbarred several lawyers due to misappropriation of client funds. In Lawyer Disciplinary Board v. Battistelli, 206 W.Va. 197, 523 S.E.2d 257 (1999). Mr. Battistelli was disbarred for, among other misconduct, neglect of client affairs, repeatedly lying to a client about the status of a case, and withholding too much money from a client's settlement and never sending this money to either a provider or refunding it to the client.

In Committee on Legal Ethics v. Lambert, 189 W. Va. 65, 428 S.E.2d 65 (1993) (*per curiam*), a lawyer was disbarred for conversion of a clients' money to his own personal use, causing a forged instrument to be uttered, failure to pay over money received on behalf of a client, and failure to inform the Disciplinary Committee of a debt to a client during a reinstatement proceeding. In Committee on Legal Ethics v. Pence, 161 W. Va. 240, 240 S.E.2d 668 (1977), a lawyer was disbarred for detaining money collected in a professional or fiduciary capacity without *bona fide* claim coupled with acts of dishonesty, fraud, deceit or misrepresentation. In Committee on Legal Ethics v. White, 176 W. Va. 753, 349 S.E.2d 919 (1986) (*per curiam*), a lawyer was disbarred for conversion of client trust funds. In In re Hendricks, 155 W. Va. 516, 185 S.E.2d 336 (1971) (*per curiam*), yet another lawyer was disbarred for detaining client money without *bona fide* claim and acts of fraud and deceit.

In yet another West Virginia case, a lawyer was disbarred for embezzling money from his clients, an illegal act for which he plead guilty. Office of Lawyer Disciplinary Counsel v. Tantlinger, 200 W. Va. 542, 490 S.E.2d 361 (1997) (*per curiam*). The Court noted that Mr.

Tantlinger “violated a trust which must be inherent in the attorney-client relationship.” Tantlinger, 490 S.E.2d at 366. The Court found that Mr. Tantlinger had acted knowingly by a contrived scheme to deceive his clients into believing that he had not defrauded them. The Court noted that “[ou]r profession is founded, in part, upon the integrity of the individual attorney in his dealings with the public in general and his clients in particular.” Id. at 366-367. While there may be no contrived scheme like in Tantlinger employed by Respondent to embezzle or obtain the money from his clients, Respondent, nonetheless, clearly took client money and attempted to make it look like the money had been legitimately earned.

In Lawyer Disciplinary Board. v. Coleman, 219 W. Va. 790, 639 S.E.2d 882 (2006), the Supreme Court of Appeals of West Virginia stated that “we do not take lightly those disciplinary cases in which a lawyer's misconduct involves the misappropriation of money. In such instances, we have resolutely held that, unless the attorney facing discipline can demonstrate otherwise, disbarment is the only sanction befitting of such grievous misconduct.” Id., 219 W.Va. at 797, 639 S.E.2d at 889. In addition, “[m]isappropriation of funds by an attorney involves moral turpitude; it is an act infected with deceit and dishonesty and will result in disbarment in the absence of compelling extenuating circumstances justifying a lesser sanction.” Id. (quoting Lawyer Disciplinary Bd. v. Kupec, 202 W.Va. 556, 571, 505 S.E.2d 619, 634 (1998) (additional quotations and citation omitted)).

Respondent may argue that he performed other work for Complainant in order to attempt to show that he did not take any money from Complainant, but this is not a valid argument. Respondent was unable and cannot provide any itemization or billing of his work in any of the matters he handled for Complainant. Respondent’s attempt to fabricate his

involvement in the matters cannot be sustained when the actual court records are reviewed. The court records show that Respondent was not counsel of record or even another attorney was working on the matter or Respondent provided little assistance.

“It may be that lawyers who do work under a contingency fee contract do not keep time records. It should be obvious from this case that keeping good time records would be the more prudent course. The burden of proof is always upon the attorney to show the reasonableness of the fees charged. The same burden to prove reasonableness remains with the attorney under any fee structure. Attorneys who fail to effectively document their efforts on behalf of a client run the risk of being unable to convince a reviewing court, based on their word alone, of the reasonableness of the fee charged or, in cases where it applies, the full and proper value of fees to be awarded on a *quantum merit* basis.”

Bass v. Cotelli Rose, 216 W.Va. 587, 592, 609 S.E.2d 848, 853 (2004) (*citing* Syl. Pt. 2, Committee on Legal Ethics of West Virginia State Bar v. Tatterson, 177 W.Va. 356, 352 S.E.2d 107 (1986)). It is clear that Respondent failed to “effectively document” his work to show a reasonable fee. All of the documentary evidence actually refutes Respondent’s assertion of the amount of work he put into Complainant’s other cases. The forensic document examiner testified that it was Complainant’s signatures on the February 12, 2008 and June 12, 2008 documents. The loss of the original documents of the February 12, 2008 and June 12, 2008 were not the fault of anybody except Respondent. Respondent attempted to blame Mr. Knight who handled the copying of the documents but Mr. Knight testimony was clear that Respondent provided a disheveled pile of papers. The forensic document examiner testified that originals are the best evidence. The problem with having copies of the

documents from February 12, 2008 and June 12, 2008 is that there is no ability to determine if the writing on the documents were contemporaneous or if additional writing was added to the documents after there was a signature placed on the document. Even if Complainant signed the June 12, 2008 document, that does not mean that Respondent is free to charge an unreasonable fee. Respondent still has the burden to prove that he earned the fee. It is clear that Respondent charged an unreasonable fee that is not supported by any evidence that was produced in the matter. Therefore, Respondent committed misconduct by converting Complainant's money to himself and concocting a story without any substantive proof to justify his actions.

V. RECOMMENDED SANCTIONS

Rule 3.15 of the Rules of Lawyer Disciplinary Procedure provides that the following sanctions may be imposed in a disciplinary proceeding: (1) probation; (2) restitution; (3) limitation on the nature or extent of future practice; (4) supervised practice; (5) community service; (6) admonishment; (7) reprimand; (8) suspension; or (9) annulment. It is the position of Disciplinary Counsel that for his conduct of effectively abandoning his client's interests and his law practice and his complete failure to participate in these proceedings that Respondent's license should be annulled.

“Disbarment of an attorney to practice law is not used solely to punish the attorney but is for the protection of the public and the profession.” Syl. pt. 2, In re Daniel, 153 W.Va. 839, 173 S.E.2d 153 (1970); and Syl. pt. 6, Office of Disciplinary Counsel v. Jordan, 204 W.Va. 495, 513 S.E.2d 722 (1998). Sanctions are not imposed only to punish the attorney, but also are designed to reassure the public's confidence in the integrity of the legal

profession and to deter other lawyers from similar conduct. Committee on Legal Ethics v. White, 189 W.Va. 135, 428 S.E.2d 556 (1993); Committee on Legal Ethics v. Walker, 178 W.Va. 150, 358 S.E.2d 234 (1987); Committee on Legal Ethics v. Roark, 181 W.Va. 260, 382 S.E.2d 313 (1989); Lawyer Disciplinary Board v. Friend, 200 W.Va. 368, 489 S.E.2d 750 (1997); Lawyer Disciplinary Board v. Keenan, 208 W.Va. 645, 542 S.E.2d 466 (2000). For the public to have confidence in our disciplinary and legal systems, lawyers who engage in the type of conduct exhibited by Respondent must be removed from the practice of law for some period of time. A license to practice law is a revokable privilege and when such privilege is abused, the privilege should be revoked. Such sanction is also necessary to deter other lawyers from engaging in similar conduct and to restore the faith of the victims in this case and of the general public in the integrity of the legal profession.

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). This type of conduct has a dramatic impact on the public's confidence in the integrity of the Bar and annulment is the appropriate sanction. *See* Lawyer Disciplinary Board v. Wade, 217 W.Va. 58, 614 S.E. 2d 705 (2005); Lawyer Disciplinary Board v. Daniel, Supreme Court Nos. 32569 and 32755; and Lawyer Disciplinary Board v. Askintowicz, Supreme Court No. 33070.

VI. 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 annulled;
- B. That upon reinstatement, Respondent's practice shall be supervised for a period of two (2) years by an attorney agreed upon between the Office of Disciplinary Counsel and Respondent;
- C. That Respondent shall complete twelve (12) hours of CLE in ethics in addition to such ethics hours he is otherwise required to complete to maintain his active license to practice, said additional twelve (12) hours to be completed before he is reinstated; and
- D. That 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

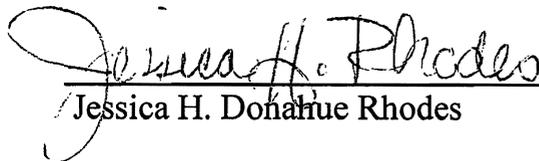


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CERTIFICATE OF SERVICE

This is to certify that I, Jessica H. Donahue Rhodes, Lawyer Disciplinary Counsel for the Office of Disciplinary Counsel, have this day, the 9th day of June, 2014, served a true copy of the foregoing "**Brief of the Lawyer Disciplinary Board**" upon J. Michael Benninger, Esquire, counsel for Respondent John C. Scotchel, Jr., by mailing the same via United States Mail, both certified and regular, with sufficient postage, to the following address:

J. Michael Benninger, Esquire
Post Office Box 623
Morgantown, West Virginia 26507



Jessica H. Donahue Rhodes