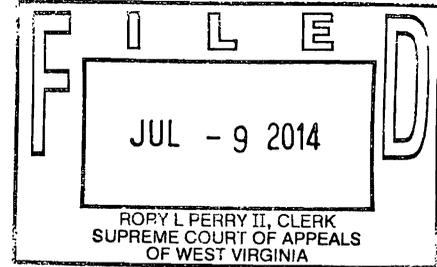


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 11-0728



LAWYER DISCIPLINARY BOARD,

Complainant,

vs.

JOHN C. SCOTCHEL, JR.,

Respondent.

RESPONDENT JOHN C. SCOTCHEL, JR.'S BRIEF

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RESPONDENT JOHN C. SCOTCHEL, JR.'S BRIEF

Now comes Respondent John C. Scotchel, Jr. (“Scotchel”), by counsel, pursuant to this Court’s Order dated May 6, 2014, and Rules 35 and 38, *West Virginia Rules of Appellate Procedure*, and files his brief in this lawyer disciplinary proceeding in response to the Statement of Charges filed against him, the undated Report and Recommendation of the Hearing Panel Subcommittee (“HPS”) submitted to the Court by the Office of Disciplinary Council (“ODC”) on April 16, 2014, and the Brief of the Lawyer Disciplinary Board (“LDB”) filed June 9, 2014.

STATEMENT OF THE CASE

The Proceedings

The complaint in this proceeding was filed on April 6, 2009, approximately two weeks following the sentinel event in this case—the March 21, 2009 McDonald’s meeting among Scotchel, Lewis Snow, Sr. (“Snow”), and his girlfriend Deborah L. Robinson (“Robinson”). Following receipt of the complaint, Scotchel alerted ODC, in his first written response dated May 1, 2009, raising the issue of “whether Mr. Snow drafted the complaint and signed the complaint.” ODC Ex. 3, pp. 6-15. Scotchel provided three of Snow’s notarized authentic signatures from February 2008 to June 2008, which documents provided the primary basis for his defense in this proceeding.

By correspondence dated May 8, 2009, Allan N. Karlin, Esquire, advised ODC of his representation of Snow and requested a copy of the complaint, which “was prepared by [Snow’s] long-time friend Deborah Robinson,” as she “has helped him greatly in his business transactions in recent years.” ODC Ex. 5, p. 17. ODC would not release the complaint to Mr. Karlin and advised him of same by correspondence dated May 12, 2009, stating, “this office can only release a copy of the complaint to Mr. Snow.” ODC Ex. 6, p. 18. Snow apparently

telephoned ODC on May 15, 2009, and requested a copy of the complaint. ODC Ex. 7, p. 19. It was transmitted same date to him. ODC Ex. 7 and 8, pp. 19-20. On May 29, 2009, Scotchel provided his verified response with attached exhibits to ODC for review, and a copy was provided to Mr. Snow and his retained counsel. ODC Ex. 9, pp. 21-70.

On July 27, 2009, Snow and Mr. Karlin filed Civil Action No. 09-C-519 against Scotchel in the Circuit Court of Monongalia County, West Virginia. The next day on July 28, 2009, Mr. Karlin wrote to ODC and stated, "Mr. Snow expressly denies that he ever agreed to or approved a fee of \$145,000.00." Mr. Karlin's correspondence acknowledged that Mr. Snow and his girlfriend, "have reviewed the document dated June 12, 2008, that Mr. Scotchel submitted purporting to authorize an additional fee of \$145,000.00 and deny that Mr. Snow ever agreed to such a fee." These bold, objectionable, hearsay declarations attributable to Snow, made by Mr. Karlin and Robinson, constitute the basis of ODC's case, since Snow was not available as a competent, credible witness. Mr. Karlin offered to have the June 12, 2008 written fee agreement between Snow and Scotchel examined by a document expert if there was a concern by ODC and offered to make Snow and Robinson "available to you for an interview." ODC Ex. 12, pp. 77-78. During his sworn statement taken by ODC on January 7, 2010, Scotchel again raised the concern that Snow had not drafted the complaint. ODC Ex. 25, p. 32. The record reveals that neither Snow nor Robinson was interviewed by ODC prior to their depositions taken by the undersigned on November 14, 2011. Respondent Ex. 21, p. 44 and Ex. 23, p. 5.

Snow was never deposed in the civil case; however, he did attend the first session of Scotchel's deposition held on September 28, 2010. According to Scotchel's insurance defense counsel, Daniel C. Cooper ("Cooper"), Snow "didn't seem to be, you know, oblivious to what was going on." H.T. Vol. II, pp. 29-30. On February 16, 2011, Snow's counsel filed his

amended disclosure of witnesses and included a statement that Snow's physician "may be called as a witness to testify regarding Mr. Snow's competency as a witness and to explain any issues that may arise with his ability to respond to questions at trial." Snow's discovery response served in November 2010 in the underlying civil action revealed that Robinson was the person who "provided information used to respond to the Interrogatories, Requests for Admission, and Requests for Production of Documents," served by Cooper. Respondent Ex. 27, p. 11. Snow's signature on his verification of his written discovery responses dramatically reveals his state of health at that time. Again, the response, like the complaint filed in this proceeding, was based upon information provided by Robinson, not Snow.¹ Thus, the LDB issued the Statement of Charges ("SOC") prior to ODC's interviewing Snow or Robinson concerning the allegations made in the complaint against Scotchel by Robinson and after knowing Snow had not signed the complaint and was incompetent to testify.

The SOC in this case was filed on April 27, 2011, 751 calendar days after Robinson filed the complaint against Scotchel. On July 26, 2011, Scotchel filed his Answer and Affirmative Defenses in which he affirmatively raised the fundamental due process issue which directly bears upon the procedural integrity of this proceeding. The issue results from Snow's failure to sign the Complaint, as mandated by Rule 2.3, and the cascade effect it had on the defense of this proceeding due to ODC's failure to interview Snow before he became disabled

¹ The discovery response, obviously designed to trigger professional liability insurance coverage, asserted that Scotchel was negligent in his representation of Snow, stating:

The defendant is negligent for a number of reasons including, but not limited to, his failure to disclose his fees prior to representing the plaintiff, his failure to provide billing statements or keep time records, his statement to the plaintiff that his attorney's fee was \$25,000, his failure to promptly turn over all funds owed to the plaintiff, and his payment of the funds from the sale to himself.

Respondent Exhibit 27, pp. 11-12.

and was unable to confirm or deny the allegations made by Robinson and Mr. Karlin against Scotchel. This is particularly troublesome in light of Snow's admissions during his deposition on November 14, 2011, that he "never could read," and he denied signing the complaint and the February 21, 2008 and June 12, 2008 fee agreements. Respondent's Ex. 21, pp. 7, 14 & 15.

Accordingly, on February 20, 2012, Scotchel filed his Motion to Dismiss on the grounds that the complaint filed against him upon which the SOC was based failed to contain Snow's verified signature, as required by Rule 2.3 and the published standard operating practice and procedures of the LDB and ODC.² The evidentiary hearings in this proceeding were held on February 26 and 27 and July 15, 2013. The procedural issue was also raised by Scotchel in his Rule 3.10 Post-Hearing Brief, served on November 13, 2013. In spite of HPS's finding that, "[w]hen Mr. Snow appeared at the hearing, he was unable to read or write or understand most of the proceedings that were taking place. After viewing the witness, the panel did not believe that Mr. Snow was aware of his surroundings and the import of the same," it rejected Scotchel's motion and did not further address the issue. Scotchel timely filed an objection under Rule 3.11 to the Report and Recommendation of the Hearing Panel, and this Court entered its time frame Order on May 6, 2014.

The Respondent

Scotchel was admitted to the West Virginia State Bar on May 15, 1984. He has engaged in the private practice of law in the Morgantown area since that time. Except for a short period at the outset of his career, Scotchel has been a solo practitioner. His practice involves general-to-complex civil litigation, usually serving as Plaintiff's counsel. From time to time, his practice has also included criminal defense, family law, real estate and some business

² The docket of the proceedings before HPS reveals the numerous filings made by the parties concerning the Motion to Dismiss and that oral argument was held thereon on May 7, 2012, all of which must be reviewed by the Court for a complete understanding of the due process violation in this proceeding. Respondent Ex. 1.

transactional work. H.T. Vol. I, pp. 142-144. Scotchel has no prior disciplinary record and did not abandon his client, his practice, or engage in any unethical conduct toward Snow.

Summary of Statement of Charges and HPS's Findings and Conclusions

The factual allegations contained in the SOC span a period from October 2002, the date Scotchel became Snow's attorney, to April 6, 2009, the date the complaint was filed by Snow's girlfriend against Scotchel. Although Snow did not complain to Scotchel, did not sign the complaint, and was not interviewed by ODC prior to issuance of the SOC, Scotchel stands accused by ODC, based upon the unsworn allegations of Robinson and Mr. Karlin of having charged "an unreasonable fee" to Snow for the legal work he provided in the various legal cases and matters he handled for Snow; having "failed to communicate" to Snow the basis or rate of his fee for the work performed in those various legal cases and matters; and having "failed to have the conditions of the Twenty-Five Thousand Dollars (\$25,000.00) for the sale" of Snow's business in writing. By reason thereof, it is asserted that Scotchel violated Rules 1.5(a), (b), (c), 1.15(b) and 8.4(c) and (d) of the *West Virginia Rules of Professional Conduct*. SOC ¶ 71, pp. 15, 16. Even though Snow did not request that Scotchel do so, Scotchel is also accused of failing to provide Snow with "a full accounting" and "the funds" from the sale of Snow's garbage and refuse collection business, in violation of Rule 1.15(b). SOC ¶ 72, p. 17. ODC also asserts Scotchel failed to comply with ODC's "lawful request for information" in this proceeding, in violation of Rule 8.1(b). SOC ¶ 73, p. 17.

In spite of substantial credible evidence presented by Scotchel establishing his long-time commitment to Snow throughout numerous legal matters in which he was involved, the basis of Scotchel's fee for his legal services, the written agreement to same signed by Snow, the proper disbursement of the proceeds of Snow's business in July 2008 and the reason more

documentation was not available, HPS did not concern itself with Snow's inability to meaningfully participate in the proceeding. Instead, HPS relied upon hearsay testimony of Robinson and Mr. Karlin, even though they were not present during the attorney-client contacts between Scotchel and Snow, and found Scotchel violated 1.5(a), 1.5(b), 1.5(c), 8.4(c), 8.4(d), 1.15(b) and 8.1(b).

The Case and its Factual Record

1. The March 21, 2009 McDonald's Meeting and ODC Credibility Problems

Scotchel and his counsel submit and contend in good faith that a fair and complete review of the entire record developed in this case reveals that this proceeding was initiated as a result of the fabricated story told by Snow to Robinson sometime after Snow returned from his unsuccessful trip to Georgia to reunite with his estranged wife and family in July 2008 and before the March 21, 2009 meeting at McDonald's. The following testimony reveals what took place at this fateful meeting:

Q. [BENNINGER] Okay. Now, I'm going back to the McDonald's meeting march [sic] 2009.

A. [SCOTCHEL] Okay.

Q. You were present, Mr. Snow and his girlfriend, live-in or his companion worker, whatever she is, all of the above, met down at McDonald's?

A. Right.

Q. How did that come about?

A. They wanted to meet. They called and they wanted to know how they could get \$15,000 and I went down to talk to them about it. And I went down there with knowledge that he had real estate, owned real estate in West Virginia and Pennsylvania, and I was going to try to arrange a loan for him.

- Q. Okay. Now, prior to receiving that call that they needed \$15,000, had he ever complained to you in August or at any other time that you'd seen Lewis Snow that you hadn't disbursed money, you'd overcharged him or made an unreasonable fee request on him, he wasn't knowledgeable about it, hadn't consented to it, anything like that?
- A. No. Like I said, the only little discrepancy was that \$10,000 not to his son.
- Q. And did you clear that up?
- A. Yes.
- Q. Now, when you met with him, what did he tell you? You met with him in March. I understand you were sitting at a table.
- A. March 21st, it was a Saturday, March 21st at McDonald's. And, actually, they wanted me to do something else, now that I'm thinking about it. They wanted me to sign a statement to give to their accountant that said that I charged \$25,000 to sell his business – no, I'm sorry, \$35,000 to sell his business.
- Q. Yeah. You previously mentioned that.
- A. And I refused to do that.
- Q. Why?
- A. Because it was 4[sic][25,000.
- Q. Okay. Now, what else did he ask you to do during this meeting?
- A. Tried to get money – as I said, they were trying to figure out how to buy some house together.
- Q. Did there come a time – did there come a time during this meeting at McDonald's that Deborah Robinson got up and left you both sitting there?
- A. Yes.

- Q. Can you describe what happened when she excused herself?
- A. Well, Mr. Snow and I were talking about how I could possibly maybe try and contact some banks and try to get him the \$15,000, Debbie Robinson said “Where’s the \$15,000 that you’re holding for him?” I said, “What are you talking about?” And I said all that has been disbursed, according to Mr. Snow signing off on all of it. I said, “I don’t know what you’re talking about.”

She got upset and went to the bathroom. I said, “Lou, what’s going on here?” And that’s when he started telling me that he was living in her house. She was taking care of him and he didn’t have any place to go, no family wanted him, he needed some help because he had some physical problems and she was taking care of him. So he told her that I was holding money for him. I said, “Lou, why would you tell her that?” Well, that was the end of that conversation because then she came back. I could figure that out on my own, what he did. He just lied to her because he had no place – he was desperate. He had no place to go, and used me.

Then when the time came for her to say, hey, Lou, where’s the money? He put the blame on me, and then they concocted this complaint that doesn’t even make sense.

H.T. Vol. III, pp. 129-132. Scotchel clearly raised this issue with ODC in his sworn statement on January 7, 2010. ODC Ex. 25, p. 0178. Robinson’s actions and statements on March 21, 2009, and her reliance on Snow’s story that Scotchel was holding \$15,000 of his funds from the sale of his business may, at first blush, seem objective and reasonable until they are considered against the fact that she rarely, if ever, was involved in any of the numerous attorney-client meetings between Scotchel and Snow or their communications. Since 2002, Robinson estimated her involvement in the meetings to be only four to five times. Respondent Ex. 22, p. 23.

Furthermore, an evaluation of the inconsistencies in Robinson’s statements and testimony throughout the course of this proceeding seriously calls into question HPS’s and

ODC's reliance on her as a credible witness. One of the times Robinson testified she was present with Snow and Scotchel was on February 21, 2008. H.T. Vol. I, pp. 76-78, p. 95, p. 117; Respondent Ex. 22, p. 24. This statement is patently false as Scotchel was in Las Vegas on that date. H.T. Vol. II, pp. 4-5. Another time Robinson said she was present was June 12, 2008, the date of the closing. The record reveals she was not present with Snow and Scotchel prior to or during the closing meeting held at Mr. Cutright's office. H.T. Vol. I, p. 167. These are critical dates when Snow and Scotchel discussed and concluded their fee arrangements.

It has been established that after the closing meeting at Mr. Cutright's office, Robinson was only involved with Snow and Scotchel when she was called in from the "outer office" at Scotchel's office to witness, in writing, Snow's signature on the agreement authorizing the attorney fees for the additional work performed by Scotchel on Snow's behalf. H.T. Vol. III, pp. 117-118; ODC Ex. 25, p. 00176. Robinson identified her signature on the June 12, 2008 attorney fee agreement, stating, "[i]t looks to be my signature." Respondent Ex. 22, p. 12. After being given an opportunity to read the entire June 12, 2008 attorney fee agreement, when asked a second time whether it contained her signature, Robinson confirmed, "[i]t seems to be." Respondent Ex. 22, p. 13. Robinson agreed for a third time that both she and Snow signed the June 12, 2008 attorney fee agreement:

Q. [Benninger] Then your signature and Mr. Snow's signature on the June 12, 2008 agreement, the signatures only, are they authentic? If need be, we can – I just want to know.

A. [Robinson] They look to be.

Respondent Ex. 22, p. 18.

Robinson denied at the hearing that she and Snow signed the June 12, 2008 memorandum. H.T. Vol. I, p. 47; Respondent Ex. 22, p. 36-37. Robinson's denial as to her

involvement with the June 12, 2008 written fee agreement, signed by Snow and witnessed by her, is contrary to her first sworn testimony given on November 14, 2011, as noted above, and the conclusions reached by Scotchel's handwriting expert. H.T. Vol. II, p. 167-176. These matters were ignored by ODC and HPS.

The remaining few times when Robinson had any contact while Snow and Scotchel were engaging as attorney and client was after the June 12, 2008 closing, when the disbursement of funds was being made according to Snow's wishes and directives. Respondent Ex. 22, p. 24. Robinson testified in deposition that Snow would have her call Scotchel and "have a check drawn up and Mr. Snow would pick it up." Respondent Ex. 22, p. 24. On each occasion this occurred, Snow endorsed the check, went to the bank and got cash. Respondent Ex. 22, p. 24. Robinson confirmed at the hearing:

Q. [BENNINGER] Lewis Snow was running the show because he was competent at the time, right?³

A. [ROBINSON] Right.

Q. And you were basically a recipient of whatever information Lewis provided you at home and you rarely were with the two of them, the attorney and client, as you've described, less than four or five times over all these years?

A. True.

H.T. Vol. I, p. 96-97. Importantly, this exchange not only demonstrated Robinson's lack of first-hand knowledge concerning the subject matter at issue in this proceeding but also her admission as to Snow's competency at the relevant time, which establishes a serious evidentiary hearsay problem and a constitutional due process violation because ODC relies on Robinson and Mr. Karlin's testimony to meet its heavy burden of proof as to the violations asserted in this case.

³ Robinson also testified at the hearing that Snow was competent at the McDonald's meeting. H.T. Vol. 1, p. 59.

2. Robinson's Preparation and Signing of Complaint

The inconsistencies in Robinson's testimony continue in relationship to the complaint filed with the ODC. Robinson admitted preparing and signing the complaint dated April 3, 2009, thereafter filed on April 6, 2009, against Scotchel. Remarkably, on November 14, 2011, during her deposition, under questioning by the undersigned and Lawyer Disciplinary Counsel, Robinson explained without any reservation or hesitation, in the presence of her counsel Mr. Karlin, the details of how, why and when she completed and signed the complaint. The following testimony is revealing as to her lack of equivocation on this fundamental jurisdictional issue:

Q. [BENNINGER] . . . Does Exhibit 1 contain his signature?

A. [ROBINSON] I signed this for him.

Q. So it does not contain his signature?

A. No, but it's his thoughts. That's what he told me to write.

Q. So you completed the complaint and he did not sign it, but you signed his name?

A. Yes, I did.

Q. And it was in front of a notary that notarized his signature, you notarizing his signature?

A. Yes.

Q. Was he present when this was done?

A. Yes.

Q. Jean Russell was the notary. Do you know Jean?

A. In Mount Morris, Pennsylvania.

Q. Have you used her before for notary services?

- A. Off and on.
- Q. Is she a friend of yours?
- A. No.
- Q. Just so we have it completely, explain to me the signing of Mr. Snow's name and how that went down in front of the notary.
- A. Well, because he couldn't see, he didn't have his glasses, I just did it for him.
- Q. Did he read it before?
- A. He told me what to write.
- Q. I understand, but the question is: He didn't read it before you signed it, I guess?
- A. I read it back to him.

Respondent's Ex. 22, p. 14-15. On that date, she admitted signing Snow's signature to the April 3, 2009 complaint on no less than three separate occasions. Respondent's Ex. 22, p. 14, p. 28 and p. 57.

During her second deposition held on May 25, 2012, Robinson recanted her November 14, 2011 deposition testimony by stating that it was Snow who signed the complaint, and not her. Respondent's Ex. 23, p. 3. This caused Scotchel and his counsel to inquire more closely, to take additional depositions, and to retain a highly qualified handwriting expert with impeccable credentials to examine the authenticity of Snow's signature. Respondent's Ex. 23, pp. 2-3. Thus, additional time passed and significant costs were incurred as a result of this change in her testimony. Respondent's Ex. 2.

Vickie L. Willard, Scotchel's handwriting expert, issued written reports dated January 24, 2012, and August 30, 2012, and concluded that, "[b]ased on the examination

conducted and on a reasonable degree of professional certainty, it is my opinion that the Lewis Snow, Sr., signature written on Exhibit 1 was probably not written by Mr. Snow.” Respondent’s Ex. 4. Ms. Willard testified before the HPS and concluded, “In my opinion, the signature on the complaint to the Disciplinary Board, 0001-0002 is probably not the signature of Lewis Snow.” H.T. Vol. II, p. 176. Willard’s testimony and expert opinion is consistent with Snow testifying that he did not remember ever seeing the complaint, filling it out, or signing it. Respondent’s Ex. 21, p. 9. At the hearing held in this proceeding, Snow confirmed the complaint did not contain his signature, stating without hesitation, “No, that ain’t it. It ain’t that.” H.T. Vol. 1, pp. 24-25.

Robinson’s lack of candor and credibility on this initial jurisdictional issue has at least two significant ramifications in this proceeding. First, Scotchel’s Motion to Dismiss is based upon the fact that his due process rights were violated because Robinson signed the complaint and the case proceeded solely on that basis. Second, the Court must determine whether Robinson’s and Mr. Karlin’s hearsay testimony, concerning crucial matters of evidence concerning Snow’s knowledge, interactions, communications and agreements with Scotchel upon which ODC’s case and the satisfaction of its heavy burden of proof rests, is admissible and worthy of belief when compared to the testimony of other witnesses and exhibits presented in this case. This is especially significant because of Snow’s lack of competency at the time of his deposition and hearing testimony.

3. Snow and his 1994 Court-Ordered Obligation to Pay His Estranged Wife One-Half of the Net Sale Proceeds and Relevant Contact with Snow between February 21, 2008, and June 12, 2008

Prior to Scotchel’s return to his office on February 25, 2008, and his review of the February 21, 2008 memorandum prepared by Robinson, signed by Snow and left for him at his office, Scotchel did not know that Snow was obligated by court order to pay his estranged wife

50% of the net proceeds from the sale of Snow Sanitation. ODC Ex. 25, p. 0248. This lack of knowledge was the reason Scotchel placed a “?” on the memorandum and sent it back to Snow. ODC Ex. 9, p. 0051; ODC Ex. 25, p. 0249; H.T. Vol. III, p. 49. Scotchel made additional notes as discussed below, initialed the memorandum and dated it, prior to sending it to Snow on February 26, 2008. ODC Ex. 25, p. 0251. From February 26, 2008, through May 11, 2008, Snow and Scotchel had many telephone and face-to-face private meetings, out of Robinson’s presence, concerning the relevant and necessary matters relating to the conclusion of the sale of his business. These matters included the determination of the net sale proceeds, after paying all of Snow’s known business loans and obligations and attorney fees. H.T. Vol. III, p. 118.

In spite of the destruction of the majority of Scotchel’s files and the shredding of his legal pads containing the time and work notes in December 2008, he located his summary of his personal telephone calls he had with Snow and Sprint bills where he initiated calls to Snow from February 26, 2008, through May 11, 2008. ODC Ex. 34, p. 2368; Respondent Ex. 6. Scotchel testified at length during the hearing about his summary exhibit which had been prepared from the information tabulated on his legal pads, long before any destruction of documents. The summary explained each time he had telephone contact with Snow and identified the time and work involved in each of the legal cases and matters he handled and the attorney fees tabulation for same. This summary was intentionally retained by Scotchel. H.T. Vol. III, pp. 32-33; H.T. Vol. III, pp. 118-120; ODC Ex. 34, p. 2368. During this time period, Scotchel and Snow discussed the significance of Snow’s obligation to pay his estranged wife 50% of the net proceeds from the sale of Snow Sanitation. H.T. Vol. III, p. 120.

The Amendment of Legal Separation Agreement with its attachment was prepared by Scotchel and incorporated the Findings of Fact and Conclusions of Law from Snow’s divorce

proceeding. ODC Ex. 9, pp. 0053-0059. Scotchel described Snow's obligation from the separation as critical to his work in completing the sales transaction for Snow's business. H.T. Vol. III, pp. 120-121. Specifically, the following question and answer demonstrates the importance of Snow's obligations and the related documents to the defense of the violations charged in this proceeding:

- Q. [RHODES] Explain why this is important in the defense of these charges against you.
- A. [SCOTCHEL] Because if you look at Exhibit A, it's on page – it's on 57, 57 and 58, it talks about Mrs. Snow being entitled to one-half of the net proceeds. And if you run the numbers, if you take out all the fees and attorney's fees and bank loan fees, this will come out to what Mr. Snow agreed to a week before.

H.T. Vol. III, pp. 120-121. Snow agreed in writing on June 12, 2008, to this disbursement. ODC Ex. 9, p. 0052.

Between May 11, 2008, and the closing held on June 12, 2008, Scotchel continued to work to obtain the necessary PSC waivers so that the sale of the business and the transfer of the certificate could be accomplished as soon as possible because Snow was seemingly unable to continue operating his business. H.T. Vol. 111, p. 119. On June 12, 2008, Scotchel and Snow attended the closing at Mr. Cutright's office and thereafter returned to Scotchel's office where they completed their discussion as to the court-ordered payment to his estranged wife, the disbursement and payment of the bank loans and the payment of attorney fees. Snow executed the attorney fee agreement on that date, and his signature was witnessed by Robinson. H.T. Vol. III, p. 118; ODC Ex. 9, p. 0052. On that date, Snow obtained his first \$5,000.00 disbursement from the sale proceeds which had been deposited that day by Mr. Cutright's secretary into Scotchel's IOLTA account. H.T. Vol. III, p. 60.

4. Actions Taken by Scotchel after Closing on June 12, 2008, in Accordance with Snow's Obligations and Instructions

Following the closing, Scotchel continued to have contact and discussions with Snow, and he first prepared the Amendment of Legal Separation Agreement which incorporated the Findings of Fact and Conclusions of Law from Snow's 1992 divorce action provided to Scotchel by CPA Walker *via facsimile* on or about June 17, 2008. ODC Ex. 9, pp. 53-59. Snow executed the Amendment of Legal Separation Agreement on June 19, 2008, and his signature was notarized. ODC Ex. 9, p. 0056. Thereafter, Scotchel, in accordance with Snow's wishes, prepared the conditional gift documents evidencing Snow's gifts to his three children, Anita L. Snow, Saraletta Snow and Carla L. Snow-Bradley. Snow's son refused to accept the gift from his estranged father. H.T. Vol. III, pp. 74-75, 114, 127, 130; ODC Ex. 9, pp. 0061-0070. Scotchel admitted to making an error with regard to the gift Snow intended for his son in the amount of \$10,000.00 but resolved it by paying Snow the \$10,000.00. H.T. Vol. III, pp. 127, 130; ODC Ex. 9, p. 0024.

During the time period following the June 12, 2008 closing and the disbursements made by Scotchel, Snow made no complaints or requests for any summaries, documents or accounts arising from the sale of his business. H.T. Vol. III, p. 114. A careful review conducted by Lawyer Disciplinary Counsel during the hearing revealed that the financial documents and checks provided in this case establish beyond doubt that all distributions from Scotchel's IOLTA account were proper and in accordance with Snow's written directions. H.T. Vol. III, pp. 59-78; ODC Ex. 33. Of great importance is the fact that Snow's estranged wife Charity L. Snow, also represented by Mr. Karlin, never objected to or questioned the financial distribution made under the written agreement she executed with Snow on June 19, 2008.

Scotchel completed all disbursements relating to the Snow transaction in December 2008. At that time, and in accordance with the consent granted to him by his client, he destroyed his files (then thought to be all of his files, but later additional documents were found) and shredded his legal pads containing his specific detailed notes of the time, work and attorney fee charges for each matter. The only documents intentionally not destroyed were the summaries identified during the hearing as the telephone contact summary (created in Spring 2008) for the period from February 21, 2008, through May 11, 2008, and the summary of fees (created in December 2008). ODC Ex. 34, p. 2368; ODC Ex. 35, p. 2369; H.T. Vol. III, pp. 110, 116. By this time, some six months after the closing, all disbursements of the sale funds had been made by Scotchel in accordance with the understanding, agreement and written directives of Snow. Snow had returned to Morgantown and was living with Robinson in her home, and she was caring for him on a day-to-day basis. Snow was fully aware and advised of all actions taken by Scotchel in completing all legal cases and matters. Also, with Snow's consent, Scotchel was to destroy or had destroyed the files, which included potentially damaging evidence of Snow's troublesome conduct. H.T. Vol. III, p. 127. Then, three months later, on Saturday, March 21, 2009, Scotchel received a telephone call from Robinson, requesting that he meet them at McDonald's. Scotchel's testimony concerning the meeting has been set forth fully above.

5. Other Relevant Events Leading to the March 21, 2009 McDonalds Meeting

Snow specifically advised Scotchel after the closing that he intended to travel to Georgia because "I want my family back." H.T. Vol. III, p. 112; ODC Ex. 25, pp. 0258, 0294. In August 2008 and thereafter, when Scotchel visited Snow in Osage for the purpose of confirming that he had Snow's consent to dispose of Snow's files from all earlier cases, Snow revealed that he came back to Morgantown after his trip to Georgia because his attempt to rekindle the

relationship with his ex-wife “didn’t work out.” H.T. Vol. III, pp. 112-114. At that time, Snow was destroying all of his files relating to Snow Sanitation. H.T. Vol. III, p. 115. Robinson admitted taking Snow’s records to the dump. H.T. Vol. I, p. 113. The following testimony reveals that Snow readily directed Scotchel to dispose of all of the client files:

Q. [BENNINGER] Did he agree or did he consent that you do that?

A. [SCOTCHEL] He absolutely said to get rid of them. In fact, he said it took him two days to get rid of everything from his office, anything related to Snow Sanitation, clients, anything.

H.T. Vol. III, p. 115. Thereafter, in December 2008, Scotchel disposed of a large portion of his files and the legal pads upon which he kept his time and work records and other important notes. Before doing so, he prepared the summary of fees from the legal pads. H.T. Vol. III, pp. 110-116. Everything that remained was turned over to ODC in this proceeding.

SUMMARY OF ARGUMENT

Scotchel contends that ODC has failed to meet its heavy burden of proof by clear and convincing evidence on each of the charges it made against him in this case. *Lawyer Disciplinary Board v. McGraw*, 194 W.Va. 788, 461 S.E.2d 850 (1995). Scotchel further contends that the findings of fact made by the HPS with reference to each of the charges made against him in this case are not supported by reliable, probative and substantial evidence when considering the case on the whole adjudicatory record. *Lawyer Disciplinary Board v. Cunningham*, 195 W.Va. 27, 464 S.E.2d 181 (1995). Scotchel also contends that HPS’s conclusions of law that he violated the rules set forth in the SOC, that he acted with an intentional and knowing state of mind, and that his law license should be annulled are not supported by the adjudicatory record, have not been established by clear and convincing

evidence, are arbitrary in nature, and should not be given any respectful consideration or deference. *Committee on Legal Ethics v. MacCorkle*, 192 W.Va. 268, 452 S.E.2d 377 (1994). Scotchel further argues that his procedural due process rights have been violated because the complaint upon which ODC based its investigation and LDB issued the SOC against him was invalid *ab initio* because of Snow's failure to sign same in compliance with Rule 2.3 and the other published standard operating procedures and practices issued by the Lawyer Disciplinary Board, as contained on ODC's website, and ODC's failure to interview Snow and Robinson before the SOC was issued. Due to the passage of time, Scotchel's ability to defend himself and to confront the putative complaining party has been prejudiced as the result of Snow's declining health and inability to testify as to relevant facts necessary for a full and complete presentation of the defense and ODC's and HPS's reliance on inadmissible hearsay as a substitute for Snow's verified information and testimony, all in violation of Scotchel's procedural due process rights. Lastly, Scotchel argues that mitigating factors are present and, upon their consideration, that a less severe sanction than has been recommended should be imposed, with retroactive application.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Scotchel asserts that oral argument is necessary pursuant to the criteria contained in Rule 18(a), West Virginia Rules of Appellate Procedure.

ARGUMENT

I. SCOTCHEL'S PROCEDURAL DUE PROCESS RIGHTS HAVE BEEN VIOLATED BECAUSE THE COMPLAINT FILED AGAINST HIM WAS NOT SIGNED AND VERIFIED BY SNOW AND HE HAS BEEN DENIED THE RIGHT TO MEANINGFULLY CROSS-EXAMINE SNOW ON RELEVANT MATTERS DUE TO HIS INCOMPETENCY.

This Court held that a license to practice law in this State "is a valuable right, such that its withdrawal must be accompanied by appropriate due process procedures."

Committee on Legal Ethics v. Boettner, 183 W.Va. 136, 140, 394 S.E.2d 735, 739 (1990). In *Committee on Legal Ethics v. Pence*, 161 W.Va. 240, 250, 240 S.E.2d 668, 673 (1978), this Court said “[i]t is well-settled that disbarment proceedings in this State are neither civil actions nor criminal prosecutions but are special proceedings peculiar in their nature.”

The due process procedures found in the Rules of Lawyer Disciplinary Procedure, promulgated by this Court, were violated by ODC, LDB and HPS in Scotchel’s case. Specifically, when ODC, LDB and HPS permitted this proceeding to continue upon Snow’s purported complaint, not read nor signed by him in violation of Rule 2.3 and the written complaint procedures established by LDB as published on ODC’s website, a clear, procedural due process violation occurred. Likewise, ODC’s failure to discharge its mandatory duty under Rule 2.4 to timely investigate Snow’s purported complaint against Scotchel led to delay, during which time Snow became incompetent and unavailable as a witness and caused the issuance of the SOC by LDB without first verifying and determining that Snow read and signed the complaint in this case. Lastly, HPS’s denials of Scotchel’s repeated objections to Robinson’s and Mr. Karlin’s hearsay testimony presented by ODC at the hearing constitute a clear violation of Rule 3.6 and Rules 802, 803, 804 and 403, West Virginia Rules of Evidence. H.T. Vol. II, pp. 55-70. The consideration of and reliance on this hearsay testimony, as repeatedly noted in the Brief of the Lawyer Disciplinary Board and the Report of the Hearing Panel Subcommittee, demonstrate the significance of this due process violation in the outcome of this proceeding. Scotchel was not able to meaningfully cross examine Snow at any time after the SOC was filed against him. Attempts were made to do so but they were of no constitutional evidentiary value. This fact, based upon Snow’s condition, was noted by HPS in footnote 1 of its Report and it is readily apparent from a careful reading of Snow’s deposition transcript. Without having the

ability to cross examine Snow, the person who was Scotchel's client and the purported complaining party, about the intimate details of the allegations of ethical misconduct, Scotchel was denied due process of law. The prejudice to him in this proceeding is pervasive. To deny Scotchel the right to confront his accuser constitutes a flagrant violation of the principles of the fair administration of justice. HPS did not make any rulings required by Rules 804 and 403, even though it readily admitted that Snow was unavailable as a witness because he was oblivious to his surroundings and the proceeding at hand. These combined prejudicial violations of this Court's procedural rules – due process procedures – undermine the very foundation of the rules of lawyer disciplinary procedure boldly articulated in Rule 1. Therefore, this proceeding should be dismissed as constitutionally and procedurally infirm.⁴

II. ODC HAS FAILED TO PROVE BY CLEAR AND CONVINCING EVIDENCE THAT SCOTCHEL VIOLATED ANY OF THE RULES OF PROFESSIONAL CONDUCT SET FORTH IN THE STATEMENT OF CHARGES, AS DISCUSSED IN TURN BELOW.

Rule 8.1(b)

Shortly after receiving the complaint, Scotchel, *pro se*, provided his initial written response to ODC on May 1, 2009. In that regard, Scotchel provided the first set of documents submitted in the defense of the SOC. ODC Ex. 3, pp. 0006-0015. Thereafter, by letter dated May 29, 2009, Scotchel submitted his verified response to the complaint. It included a complete breakdown and summary of the work performed on behalf of Snow from October 2002 through December 2008, together with a chart setting forth the accounting for and distribution of the sale proceeds from the sale of Snow Sanitation and a breakdown of the attorney fees he charged for his work over the six-year period of time he served as counsel for Snow. Attached to the verified response were a number of documents, including checks and banking records; documents signed

⁴ In violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article III, Section 10 of the West Virginia Constitution.

by Snow and Robinson; and legal documents executed by Snow, his estranged wife, Charity L. Snow, and his daughters, Sarahletha Snow, and Carla L. Snow-Bradley. ODC Ex. 9, pp. 21-70. Scotchel also submitted correspondence to ODC dated October 9, 2009 (with attachments) addressing the issues raised in the complaint. ODC Ex. 20, pp. 108-129.

Scotchel appeared before ODC on January 7, 2010, pursuant to a subpoena issued November 13, 2009, for his first sworn statement. He had with him approximately 1,500 pages of documents he had collected from the files available to him at that time. Throughout the sworn statement, reference was made to documents which were then available and, by agreement, would be copied later by Scotchel and provided at a later date. ODC Ex. 25, pp. 0017, 0159, 0202-0203, 0214, 0259, 0260, 0261, 0317. Scotchel again communicated with ODC by correspondence dated January 12, 2010, and provided additional information in response to the complaint. In this letter, Scotchel outlined what information he expected to obtain from Snow to defend himself. ODC Ex. 26, pp. 0348-0352. Of particular importance was the fact that Scotchel had located his written notes of telephone conferences he had with Snow following Scotchel's return to his office on February 26, 2008, from a business trip in Las Vegas. While Scotchel was in Las Vegas, there is no question that Snow signed the fee agreement regarding the sale of his business and transfer of his PSC license on February 21, 2008. ODC Ex. 26, p. 0352. This document was discussed during Scotchel's sworn statement conducted on January 7, 2010. ODC Ex. 25, p. 0205.

By correspondence from ODC dated January 13, 2010, Scotchel was provided an additional thirty (30) days within which to provide a copy of his complete file in the Snow matter and any notes regarding the fees he charged Snow, together with any time receipts, bills, and invoices of work he performed on his client's behalf on any legal case or matter from October

2002 until March 2009. ODC Ex. 27, p. 0356. By correspondence dated February 19, 2010, from Cooper Law Offices, ODC was provided “a copy of the file for your review in response to your letter to Mr. Scotchel dated January 13, 2010.” ODC Ex. 34, p. 0813. Attached to counsel’s correspondence were 1,557 pages of documentation believed to be related to the Snow complaint. ODC Ex. 34, pp. 0814-2369. Cooper, counsel for Scotchel in the civil action filed by Karlin, testified concerning the collection and handling of the documents relating to the Snow matter and how they were copied and then transmitted by his office to ODC. H.T. Vol. II, pp. 13, 14, 15, 16-19. Scotchel’s testimony confirmed how the documents were collected, handled, copied and ultimately transmitted by Cooper Law Offices to ODC. ODC Ex. 52, pp. 2600-2601. Scotchel appeared before ODC again on February 9, 2011, for a second recorded statement. ODC Ex. 52, pp. 2597-2750. At that time, Scotchel presented to ODC a CD-ROM diskette containing additional numerous documents relating to the Snow complaint. ODC Ex. 52, pp. 2600-2601. ODC repeatedly requested that Scotchel produce documents concerning the time he expended and the work he performed on behalf of Snow and the written fee agreement he had with Snow for same. Scotchel’s response has been consistent throughout this proceeding and reveals that the only records available to him which were responsive and created in real time were the telephone notes reflecting billable time and summary of the legal matters with fees from the four or five legal pads which had been destroyed in December of 2008. H.T. Vol. III, pp. 49, 109-110.

Scotchel advised ODC during his first sworn statement, on January 7, 2010, that his legal pads containing the requested information had been destroyed. ODC Ex. 25, pp. 162, 163, 164, 167, 224, 225, 227, 235, 319, 327, 328. Scotchel’s testimony during the July 15, 2013 hearing summarized documents available to him, ODC and HPS in this case:

Q. [BENNINGER] Okay. So we now know we have before us in this set of records, ODC exhibits and our exhibits, the collective of what is available to you today, what's available from the court and any source to document your work as his lawyer from the fall of 2002 through the completion of the sale that occurred in June of 2008, right?

A. [SCOTCHEL] Yeah, as much as we could find.

Q. Now, just in summary fashion, were there additional documents that could have established in more detail the work you performed on each of these identified matters from the fall of 2002 through June of 2008, but they are not now available to you, ODC or this panel?

A. Absolutely.

H.T. Vol. III, pp. 93-94. Scotchel's action in destroying his legal pads containing the information sought by ODC concerning the time he expended, the work he performed and the basis of his fee agreement with Snow on each of the legal cases and matters handled was in compliance with Snow's directives and the explanation Scotchel provided to ODC during his first sworn statement on January 7, 2010. ODC Ex. 25, pp. 0164-0165.

Robert H. Davis, Jr., Esquire, Scotchel's retained ethics expert, testified that, in his opinion, there was no violation of Rule 8.1(b) in this case. He articulated that he believed that Scotchel "has complied or attempted to comply in good faith or has substantial compliance on disclosing what he had to the ODC." H.T. Vol. II, p. 245. In addition, Mr. Davis testified that he:

[C]onsidered the two response letters from Mr. Scotchel to be pretty darn good for a person who's representing themselves. The attachment, the checks and the documentation to the more – the broader of the responses I thought was properly responsive at that stage in the proceeding.

H.T. Vol. II, p. 246. Mr. Davis concluded that Scotchel could not provide any time itemization or record of work he performed or any particular notes regarding the fee agreement agreed to by Snow because:

Well, and that's the other thing, you can't provide what you don't have. What he does have, according – you know, he is given a piece of paper that he has as to the time, which is the reconstruction. It's in one of the boxes, tab 34, whatever it is, 2369, the summary of hours. He's – that's what he had, that's what he produced. To the extent – you know, and, again, if it's still an issue, a credibility issue, if he didn't have the now famous yellow sheets, he didn't have a responsibility to produce those anyway. An accounting is not all the documents. An accounting can be a summary. He provided a summary.

H.T. Vol. II, pp. 247-248.

The record in this proceeding establishes that Scotchel provided timely responses to each request for information made by ODC. He also timely provided copies of all available documentation regarding the Snow matter in response to ODC's request and the subpoena issued by the Court for same. Accordingly, the evidence presented by ODC does not establish a violation of Rule 8.1(b) by clear and convincing evidence. This conclusion is consistent with the facts, circumstances and holdings in the cases of *Committee on Legal Ethics v. Martin*, 187 W.Va. 340, 419 S.E.2d 4 (1992); *Committee on Legal Ethics v. Cometti*, 189 W.Va. 262, 430 S.E.2d 320 (1993); and, *Lawyer Disciplinary Board v. Beveridge*, 194 W.Va. 154, 459 S.E.2d 542 (1995).

Rule 1.5(c)

Scotchel and Snow began their attorney-client relationship in October 2002 and, initially, the legal matter at issue was Snow's request that Scotchel assist him in the preparation of a package of information and documentation so that he could successfully market his personal business, Snow Sanitation. In his verified response dated May 29, 2009, Scotchel set forth his

verbal flat fee agreement with Snow for the scope of work contemplated initially in 2002.

Scotchel wrote:

As I stated in my request for an extension, when Mr. Snow requested my services, I was asked to assist him with selling his business which included the transfer of his license with the PSC. This began in the fall of 2002. Mr. Snow stated that he could not afford to pay me by the hour at a rate of \$500.00 per hour or at any hourly rate, and could only pay me from the proceeds of the sale of his business which included the transfer of his license. Further, the legal work was to be based upon a flat fee basis. Just so there is no misunderstanding, this arrangement was not a contingent fee agreement similar to personal injury matters. If any legal work performed for Mr. Snow was done, regardless of the outcome, there was no obligation to pay me unless his business was sold and license transferred. At this time, Mr. Snow believed his business was worth \$500,000 and we agreed to a fee of \$25,000. Accordingly, I agreed to work on a comprehensive package to present to prospective buyers with the understanding that I would not invoice him or require him to pay me unless he received money from the sale of his sanitation business. Further, I also agreed not to pursue any claim for fees or expenses against any of Mr. Snow's other assets, which included real estate in West Virginia and Pennsylvania among other personal items. At this time I cannot find a document memorializing this fee agreement from 2002 but as stated above I will reaffirm this arrangement or fee agreement. [Emphasis added.]

ODC Ex. 9, pp. 0021-0022. Scotchel also clearly stated in his verified response that:

Shortly after beginning work on a presentable sales package justifying the value of \$500,000.00, many other issues surfaced that required legal work to keep Mr. Snow from serving jail time and preserving his sanitation license. [Emphasis added.]

ODC Ex. 9, p. 0022. In essence, Scotchel's representation of Snow from 2002 until the conclusion of all matters can be easily viewed and understood as containing two discreet parts:

- a. The sale of Snow Sanitation on a flat fee basis, regardless of the time spent or work performed over an extended period of time; and

- b. All other legal cases and matters cumulated on a time and effort basis, reduced to an agreeable flat fee, payable only after Snow obtained resources to do so.

In November 2007, discussion ensued in earnest concerning the sale of Snow Sanitation to Hezakigh, LLC. The buyer, Hezakigh, LLC, was represented by Roger L. Cutright, and Snow was represented by Scotchel. Throughout the weeks and months prior to February 21, 2008, Scotchel and Cutright worked together on numerous drafts of the purchase agreement to acquire a Public Service Commission certificate for Snow Sanitation and other Public Service Commission documents required to effectuate the transfer of the certificate to the buyer. H.T. Vol. I, p. 157; H.T. Vol. III, p. 42. By correspondence dated February 19, 2008, Cutright provided Scotchel with two (2) duplicate original purchase agreements and requested that Snow execute same. ODC Ex. 34, p. 1825.

Although Scotchel was out-of-town in Las Vegas, Nevada, he coordinated the signing of the original documents with his office and Snow. Snow was contacted by Scotchel's staff to come to the office to sign the original documents, and he did so on February 21, 2008. The documents were signed, notarized and returned that day to Cutright's office for further handling. Snow agreed to pay Scotchel \$25,000.00 for the work he performed directly on the sale of the sanitation business. There was no dispute that this fee arrangement did not change over the years since 2002, in spite of the fact that Snow became embroiled in a number of additional, separate criminal, civil and administrative cases involving issues with his behavior and the performance of his sanitation business. Snow acknowledged the fee arrangement in writing in February 21, 2008, when he and Robinson appeared at Scotchel's office and prepared and left the memorandum for Scotchel to review, as Scotchel was out of the office in Las Vegas. ODC Ex. 9, p. 0051.

Upon returning to his office, Scotchel first learned of the memorandum, reviewed it, made notes on it and directed that his secretary send it back to Snow for review. The notes Scotchel wrote on the memorandum, included the “?” as to why he was directing the \$50,000.00 payment to his ex-wife as that matter had never been discussed with Scotchel, and “Does not include fees over \$100,000.00” and “App. to Bus. only.” ODC Tab 9, p. 0051. Scotchel testified that it was never his intent or agreement to charge Snow on a contingency fee basis on either the sale of his business or on any other case or matter he handled for him. H.T. Vol. III, pp. 50, 89, 90, 116.

Mr. Davis testified specifically with regard to his opinion that Scotchel did not violate Rule 1.5(c) and stated:

. . . I have an opinion, and the opinion is that there was never a contingent fee in the traditional sense of the rule, which requires a writing. A contingent fee is contingent upon the labor and efforts of the lawyer producing a specific result from which the fee will be paid, a specific result. That is not the same as a situation in which the lawyer works in hopes that sometime they will be paid.

And to that – you know, taking the more expanded view, which is apparently charged here, would mean that every one of us who does work and expects to be paid later, they don’t know exactly what the source will be or maybe they do is involved in a contingent fee. Payment is always contingent. The question is, the contingency is not the payment. Contingency is the linkage of the payment with the particular labor.

H.T. Vol. II, pp. 253-254.

Rule 1.5(b)

Scotchel testified on a number of occasions that he clearly communicated the basis of his fee to Snow with regard to the sale of the business and for each of the legal cases and other matters he handled. There is no testimony or evidence verified by Snow in this record

contrary to Scotchel's testimony, except hearsay testimony of Robinson and Karlin. In addition, Scotchel, in real time, prepared notes of his work and time expended and his communications with Snow, and the fee for each of the cases he handled. These notes were contained on the legal pads shredded in December 2008, after all cases were concluded and Snow consented to the destruction of all of his files. What does remain, however, are the two (2) separate summaries prepared from Scotchel's review of the legal pads when:

- a. Snow and Robinson prepared and signed and left their memorandum concerning the sale of the business and the fee to be charged dated February 21, 2008, for Scotchel to review; and
- b. Snow signed the June 12, 2008, attorney fee memorandum covering the fees for the other cases and matters he handled.

Importantly, Mr. Davis testified that Scotchel's actions met and satisfied his obligations under Rule 1.5(b). Davis commented:

Well, and heard today. And in my experience having actually been in a room and saw these rules written, particularly this one, the rule says "preferably". I think that's unfortunate, frankly, but preferably means preferably. It's not a shall, and I'm sure this hearing panel knows very well the difference between a shall and a should and a preferably. There is no absolute requirement of writing.

Again, this is another aspect of this case to which I referred earlier. This is a perfect illustration of a situation where the most humble scribbling on a napkin would meet the very minimal provisions of the rules. All you're required to do is to state the basis and rate of a fee. That's it. Much more is preferable, much more – the comment even added to the rule fleshes this out, much more is preferable.

Any time you talk about what a fee letter for a lawyer ought to have, you don't just say – you set the basis and the rate of the fee and say thank you very much, you know, Lawyer Davis. There's much more that should be done, but in fact, it is not required that fees exist. It's common sense. It's the best defense for lawyers, but that's not the ethics rule. They only have to make

known the basis and the rate of the fee at the time when – you know, that they can.

I might also state there's no requirement in the rule that a lawyer force a client into an agreement. What do you do? Hold the client down, threaten them, whatever. There are some clients who are, you know, difficult in that way. It is enough to tell them to the best of your ability what you think you're going to charge them with an hourly fee or otherwise and that is the – I guess the rate part of the basis. The basis could be a contingency or a flat fee. There's a number of ways to quote fees. There's dozens of different ways to put together the elements of an appropriate fee charge.

H.T. Vol. II, pp. 255-256. Clearly, Scotchel communicated repeatedly and effectively with Snow about the work he was performing and the attorney fees he was charging for same. Had Snow not been satisfied with the information he was receiving, he certainly would have sought and retained other counsel at any time during the six-year period when Scotchel served as his counsel. All inferences should be in favor of the undisputed testimony of Scotchel that he communicated ethically and clearly with Snow. Snow's silence for such a long duration through many legal cases and matters handled by Scotchel leads to the conclusion that all was well in the attorney-client relationship as to the scope of work, the attorney fees being charged and the reasonableness of same. This changed only after Snow returned from Georgia, unsuccessful in reuniting with his estranged family, and after Robinson began asking Snow for money.

Rule 1.5(a)

The legal cases and matters Scotchel agreed to handle at Snow's request accumulated over the six years since their relationship began. What appeared to be a single matter concerning the sale of a business turned into a series of criminal, civil and administrative challenges to Snow's continued operation of his business and his livelihood. A careful review of Scotchel's verified response dated May 29, 2009, specifically outlines each of the important

legal cases and matters he handled on behalf of his client. ODC Ex. 9, pp. 0021-70. Therefore, it is unnecessary to restate them specifically here. However, the Court should review the record which shows the voluminous nature of the documents which were initially recovered by Scotchel and then by ODC from the actual court files, the PSC and the Insurance Commissioner's office during the investigation of this case. Also, the extensive testimony from the various witnesses establishes the number of cases involved, the issues presented, the work performed by Scotchel and the risks involved in each to Snow in the continued operation of his business. In other words, when considering the voluminous record in this lawyer disciplinary proceeding, even compiled without Scotchel's original client files, the testimony from the various witnesses establishes a reasonable fee when considering the factors set forth in Rule 1.5(a)(1)-(8) and the guidance here provided by the Court in *Koppelman v. Collins*, 196 W.Va. 489, 473 S.E.2d 910 (1996); and *Aetna Casualty & Surety Co. v. Pitrolo*, 176 W.Va. 190, 342 S.E.2d 156 (1986). The testimony of Mr. Smith supports this conclusion. H.T. Vol. II, pp. 129-134.

It must be recognized that if Scotchel had his files available to him, there would be substantial documentation showing attorney notes, correspondence, legal research and other necessary components of an attorney's client file one would expect to see in a significant, unique area of the law not readily encountered by general private practice lawyers. Scotchel admitted that these matters were new to him and it took significant additional time and effort to acquaint himself on the subject matter, the controlling law and the nuances of each of the cases as they directly applied to Snow and his business and potentially exposed him to catastrophic loss. The loss of Snow as a witness in this proceeding and the fact that he and Robinson destroyed all of the Snow Sanitation records, which necessarily would have included documents, correspondence and records provided by Scotchel to him, is tantamount to an extremely prejudicial due process

violation in this proceeding because of the impending burden placed upon Scotchel under the holding of *Committee on Legal Ethics v. Tatterson*, 177 W.Va. 356, 352 S.E.2d 107 (1986). All evidence should be viewed by the Court from the perspective of an attorney and client responding in real time to the challenges then facing them and not from a limited, after-the-fact closed file evaluation. Scotchel's commitment to his client throughout the entire course was sincere and demonstrated loyalty and trust. Otherwise, Snow would have had simply stopped seeking Scotchel's advice and assistance and turned elsewhere for legal services. This is an important matter when evaluating the credibility of the accusations now being made against this lawyer who has practiced for more than thirty (30) years without any adverse disciplinary sanction.

When considering Scotchel's position with regard to the reasonableness of his fee, the Court should be mindful, when it makes the basic calculation for each of the cases and matters he handled for Snow, that it only takes 40 hours at \$250.00 an hour to reach a \$10,000.00 fee. When reviewing Scotchel's testimony throughout the entire proceeding, including his two sworn statements before ODC and his hearing testimony, and comparing it to his verified response dated May 29, 2009, one can easily understand that, for the time period each of these legal matters was open as active case(s) in his office, he could easily have spent 100 hours on each of the matters. Therefore, in the absence of any direct evidence presented by ODC by way of expert testimony or other witness to rebut Scotchel's verified response, his sworn testimony and the summaries prepared contemporaneously with work being performed for Snow submitted as proof of the reasonableness of his fees, a finding of no disciplinable conduct under Rule 1.5(a) should be made.

Rule 1.15(b)

The record in this case clearly establishes that, prior to the McDonald's meeting on March 21, 2009, which included Snow, Robinson and Scotchel, Snow never requested a written accounting or invoice from Scotchel concerning the work performed on any of these numerous and various legal cases or matters, and ODC does not contend he did so. As noted above, the only source of information was written information from which a more detailed summary or accounting could be provided by Scotchel as the issues raised in this proceeding were contained on the legal pads which were destroyed in December 2008. Scotchel has been consistent throughout this proceeding in advising ODC that, from time-to-time, he and Snow discussed the status of the work performed on his behalf, the amount of time involved, and the expected fee to be charged at the rate of \$250.00 per hour. H.T. Vol. III, p. 42. Scotchel has always admitted that he intended to charge Snow less than \$250.00 per hour or the fee which had been assigned to each particular matter, and that such fee would be reduced if and when the sale of his business occurred.

The check for the sale proceeds was deposited into Scotchel's IOLTA account on June 12, 2008, by Mr. Cutright's secretary. On that day, Snow signed the June 12, 2008 fee agreement for the work performed by Scotchel on the other legal cases and matters since 2002. Thereafter, as noted above, Scotchel disbursed all of the funds in the manner directed by Snow in the written documents he signed on February 21, 2008, June 12, 2008, and June 19, 2008, together with the conditional gift records he executed. The balance of all remaining sale proceeds were checks issued on Snow's behalf to pay business loans and taxes, checks to Snow individually and checks for payment for attorney fees, as agreed by Snow. There are no other funds which are missing or unaccounted for in this case. ODC carefully went through each of

the checks and account statements during the hearing, and they matched the tabulation provided by Scotchel in his verified response on May 29, 2009.

Scotchel's testimony cited above clearly reveals precisely what Snow and Robinson asked for during the Saturday, March 21, 2009 meeting. They asked for \$15,000.00 to buy a house and a statement that the attorney fees related to the sale of the business was \$35,000.00. Scotchel flatly refused to sign such a statement since it was inaccurate due to the fact that he charged a fee of \$25,000.00 for the work he performed relating to the sale of the business. He indicated that he would provide what additional assistance he could as to seeking to obtain funds utilizing Snow's real estate for loans. Snow either received original checks or copies of checks for payments he authorized Scotchel to make to others and for business debts as events unfolded between June and December 2008. The balance of the funds was clearly for attorney fees agreed to in writing by Snow on June 12, 2008, and June 19, 2008. There could have been no real, legitimate question or need for any other form of accounting or itemization as to these funds. Therefore, ODC has failed to meet its heavy burden of proof that Scotchel violated Rule 1.15(b) by clear and convincing evidence.

Rule 8.4(c) and (d)

There was no direct or circumstantial evidence presented in this proceeding which establishes that Scotchel engaged in any conduct which involved dishonesty, fraud, deceit or misrepresentation, evidence which is required to prove a violation of Rule 8.4(c). All important events and occurrences in this case have been confirmed by a combination of witness testimony and exhibits, and they include:

-the beginning and ending dates for the attorney-client relationship between Scotchel and Snow;

-the initial scope of work relating to the sale of the business and the subsequent expansion of Scotchel's involvement into numerous legal cases and matters (criminal, civil and administrative) which evolved over the following six-year period, from 2002;

-the basis of the fee for each matter Scotchel handled was established by, communicated to and agreed to by Snow;

-the work performed by Scotchel was significant and valuable as the cases were extremely important and unique to Snow as they posed direct, substantial risk to his continued operation of his business;

-the records from which Scotchel would have been able to better establish the work he performed and the time expended as proof of the basis of a reasonable fee and Snow's agreement to same were destroyed at the direction of Snow (Robinson admitted that the records concerning Snow Sanitation were also destroyed by them);

-the records available to Scotchel were produced to ODC as requested and his inability to reproduce time and billing records after the fact should not be considered as a violation of any ethical rule;

-Scotchel kept Snow informed and the documents involved in the various cases safe until he was instructed, with good reason, to destroy same. When asked for an accounting or itemization by the client (if believed such occurred at the March 21, 2009 meeting) or later by ODC, Scotchel provided what he could find, which included the February 21, 2008 attorney fee memorandum, the June 12, 2008 written attorney fee agreement, the amended legal separation agreement dated June 19, 2008, the conditional gift documents for monetary gifts made by Snow to his children, account statements and IOLTA checks, together with two written summaries showing extensive telephone contact between Scotchel and Snow at an important time in the case and a short summary of the list of cases and fees for each.

ODC Ex. 34, p. 2368; ODC Ex. 35, p. 2369. Simply stated, there is no basis in law or fact presented and controlling in this proceeding that requires or even suggests that HPS should discount Scotchel's testimony and evidence in favor of that presented by ODC.

As to credibility, it has been clearly shown throughout the entire proceeding that Scotchel has been faced with accusations by Robinson which have been shown to lack basis in fact and which are fraught with inconsistencies, recantations and untruthful sworn statements. Accordingly, Scotchel contends that ODC has failed to establish a violation of Rule 8.4(c) in this proceeding by clear and convincing evidence. Moreover, this dispute should be distilled to its essence, a fee dispute which arose months after the conclusion of all the cases and after all work was completed by the attorney on behalf of his client and reasonable attorney fees were paid. The reason and basis for the complaint and the subsequent investigation in this case is premised upon assertions made by a person, not the client, who, in spite of being Snow's long-time companion, was not a recipient of any of the sale proceeds. She was a person who had negligible contact and firsthand knowledge about the attorney-client relationship but upon whom the responsibility fell to care for Snow after he was rebuked by his family. There was no evidence presented that Scotchel failed to act every time Snow requested disbursement of funds from the IOLTA account. There is no evidence that Scotchel converted any of Snow's agreed-upon funds to his personal use. There is no evidence that Scotchel failed to make himself available and communicate with Snow as requested and needed. The scope of work was completed on all accounts. Snow was successful in achieving his goal initially established in 2002 — to sell his business and retire. The dispute in this case arose after Snow told a fabricated story to Robinson, who was then burdened with caring for him as his physical and mental condition declined. The fabricated story occurred only after his attempt to rejoin his family "didn't work out." Accordingly, a fair review of the sum total of the evidence presented in this case leads to the conclusion that ODC has failed to meet its burden of proof that Scotchel violated Rule 8.4(d) in this case by clear and convincing evidence.

III. THE RECORD DOES NOT ESTABLISH SCOTCHEL ACTED INTENTIONALLY OR KNOWINGLY IN VIOLATION OF ANY RULE OF PROFESSIONAL CONDUCT SET FORTH IN THE STATEMENT OF CHARGES.

If the Court finds sufficient evidence that Scotchel violated any of the rules set forth in the SOC, then it should carefully evaluate Scotchel's state of mind concerning his representation of Snow. The reason Scotchel did not abandon him, even though Snow was unable to pay him the hourly rate they frequently discussed for the various legal matters over the period of six years, was set forth succinctly in his letter dated January 12, 2010, to Lawyer Disciplinary Counsel. In that correspondence, Scotchel stated:

Last example involves a phrase you brought up on January 7 regarding the State Bar and Supreme Court's concern about the public perception of lawyers. On many occasions you asked why I continued to work for Mr. Snow without being paid up front. As I tried to explain, when I first met Mr. Snow, he said he could not afford to pay me any money at any rate per hour. This was when we were discussing the sale of his business in 2002. After our first meeting, Mr. Snow was gathering some basic information I needed to review in connection with the sale. Although I was provided limited information, sometime in late December 2002, Mr. Snow asked me to help him with a matter that he thought his attorney was not handling properly. Knowing that he could not pay me any money until or unless he sold his business, I agreed to represent him. Again, after each matter was concluded, I advised Mr. Snow of the time I would charge him and the rate of \$250 per hour, but each time, Mr. Snow would not agree to pay the fees at each particular time or sign any agreement even though both of us understood that he would only be responsible to pay the fees if he sold his business.

When you asked questions about why I continued to represent Mr. Snow without being paid up front or for past work, as I tried to explain, I agreed to represent Mr. Snow in December 2002 not knowing what I was getting into but, and this is where I do not understand your concern about the public's perception of lawyers. Knowing that Mr. Snow could not pay for my fees or any fee, that he could not qualify for legal aid or a court appointed attorney because of his income and business, if I were to discontinue representing Mr. Snow, after giving him my word that I would not, I do believe that I would be facing a disciplinary action

and the public's perception of lawyers would be negatively tarnished. If I withdrew during any matter, Mr. Snow would have had to defend himself with charges that could have imposed fines into thousands of dollars, the loss of his business license that was needed to sale [sic] his business and jail time, which would have also cost him the loss of his business.

ODC Ex. 26, pp. 0350B, 0351.

In addition, Scotchel testified that the critical issue and document, which arose after he received and reviewed the February 21, 2008 memorandum, was Snow's obligation to pay 50% of the net proceeds of the sale to his estranged wife. Scotchel's awareness of the need to account for and distribute funds in a proper and lawful way was enhanced because of his duty to Snow and to his estranged wife under the 1994 separation agreement, in accordance with Rule 1.15.

Scotchel's testimony in this regard stands unrebutted and unchallenged and should be given great weight by this Court. All lawyers, including Scotchel, would have known that at some point in time, a client, like Snow or his estranged wife, could and possibly would ask for an accounting within a reasonable time after the closing. However, after the passage of six months and with the consent of his client, Scotchel began destroying Snow's files and records generated throughout the years of representing him, due to potentially incriminating information related to Snow contained therein. During that intervening time, there were no questions, complaints or requests for additional documentation or explanation as to any matter associated with any of the legal cases and the sale of Snow Sanitation from Snow and his wife or anyone acting on their behalf. In summary, during his January 7, 2010 sworn statement provided to ODC, Scotchel emphasized the reason he stuck with Snow for such a long period of time. Scotchel said he gave Snow his word to "keep him out of trouble" and he did not want to go back on his word. ODC Ex. 25, pp. 0324-0326.

IV. **HPS FAILED TO CONSIDER AND FIND RELEVANT MITIGATING FACTORS EXIST IN THIS CASE.**

If the Court finds sufficient evidence that Scotchel violated any of the rules set forth in the SOC, then it should consider the following mitigating factors established in this case in the imposition of any sanction, under Rule 3.16 and the holding in *Lawyer Disciplinary Board v. Scott*, 213 W.Va. 290, 579 S.E.2d 550 (2003): 1) Scotchel's cooperative attitude toward ODC and this lawyer disciplinary proceeding; 2) Scotchel's lack of prior disciplinary record; 3) Scotchel's full, complete and good faith disclosure of all documents available to him relating to his long term representation of Snow, given that it is undisputed that Snow authorized the destruction of said records several months prior to any issue being raised by Snow (Robinson) concerning Scotchel's handling and distribution of the proceeds of the sale of the business, the accounting of same and the attorney fees charged; 4) the fact that Snow has been fully compensated through the civil action initiated by Mr. Karlin concerning the fee dispute at issue; 5) Scotchel's lack of any dishonest or selfish motive toward Snow during the entire six-year period he represented him; 6) Scotchel's good reputation as an attorney as established by Attorney Smith's testimony; and, 7) the availability of professional liability insurance and its payment to Snow for damages resulting from Scotchel's alleged negligent acts.

CONCLUSION

Scotchel respectfully requests that this Court reject HPS's report and recommended decision in this case and dismiss this proceeding upon the grounds asserted in his previously filed Motion to Dismiss based upon the clear violation of Rule 2.3, ODC's failure to interview Snow as part of its duty to investigate under Rule 2.4 prior to his incompetency and unavailability as a witness as the complaining party, and HPS's reliance on Robinson's and Mr. Karlin's hearsay testimony concerning Snow's statements, in violation of Rule 3.6 and Rules

802, 803, 804, and 403, West Virginia Rules of Evidence, as this proceeding was conducted in violation of his constitutionally protected procedural due process rights as established by the West Virginia Rules of Disciplinary Procedure. Scotchel asserts that, due to the long passage of time between the filing of the complaint and ODC's undue delay and failure to properly investigate serious accusations against him, resulting in Snow's inability to testify as to the relevant facts needed, Scotchel was unable to appropriately defend himself from the significant charges made against him in this case. Scotchel further requests that this matter be dismissed because ODC has failed to prove he violated any of the rules set forth in the Statement of Charges by clear and convincing evidence. All participants in this proceeding, including Snow, Robinson, Mr. Karlin, ODC, and Scotchel are required to abide by the due process procedures imposed by this Court under the Rules of Disciplinary Procedure. Clearly, these procedures and due process safeguards were not followed in this case, and to impose any sanction upon Scotchel under these circumstances would be a denial of his constitutional rights. In the event the Court concludes otherwise, Scotchel requests that the Court consider his violations to be inadvertent mistakes, negligence, and not disciplinable conduct.

Respectfully submitted,



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