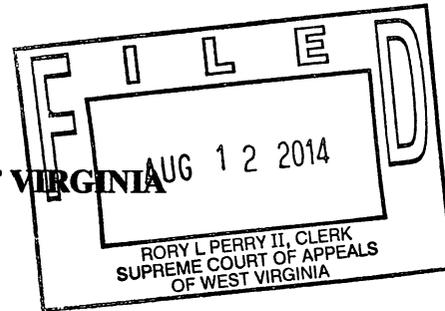


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**



**LAWYER DISCIPLINARY BOARD,**

**Complainant,**

**v.**

**Case No. 12-1172**

**BENJAMIN F. WHITE, a member of  
The West Virginia State Bar,**

**Respondent.**

**BRIEF OF THE RESPONDENT, BENJAMIN F. WHITE**

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## ASSIGNMENT OF ERROR

The Respondent has taken the somewhat unusual step of stating the Office of Disciplinary Counsel's objections as he understands them even though Rule 35(a)(4) of the Rules of Appellate Procedure states that lawyer disciplinary briefs need not designate assignments of error. In this case, it is the Office of Disciplinary Counsel that objects to the Hearing Panel Subcommittee's recommended dismissal of three of the charges and to the recommended sanction of a public reprimand. The Office agrees with and asks the Court to adopt the Hearing Panel Subcommittee's conclusions of law that the Respondent violated Rules 1.15(b) and (c) of the Rules of Professional Conduct, but also asks the Court to find violations of Rules 1.15(a), 8.4(c) and 8.4(d) and annul Mr. White's law license.

The Respondent is the one who did not object to any part of the Subcommittee's Report and Recommendation and who must address in this responsive Brief all of the Office of Disciplinary Counsel's objections which are, in effect, assignments of errors. Otherwise he risks having the Court assume that he agrees with the Office's view of an issue he did not address, pursuant to Rule 10(d) of the Rules of Appellate Procedure.

The Respondent had difficulty discerning all of the Office of Disciplinary Counsel's specific objections and arguments due to their being placed in the Statement of Case section of the Brief rather than in the Argument section. For example, in the Statement of the Case section, the Office of Disciplinary Counsel opened its subsection entitled "Findings of Fact of the Hearing Panel" with this declaration:

Although Office of Disciplinary Counsel disputes some of the factual findings made by the Hearing Panel Subcommittee, Office of Disciplinary Counsel asserts that regardless of the factual findings, its primary basis for its objection to the

recommended decision is that the conclusions of law and the recommended sanction do not comport with the findings made by the Hearing Panel Subcommittee or the relevant law in West Virginia.

[Brief at 3]. Notwithstanding this disclaimer, the Office of Disciplinary Counsel indirectly articulated its disputes with the Subcommittee's factual findings in footnotes 1, 2, 3, 6, 7, 8 and 11, still within the Statement of the Case section of the Brief.

In a similar vein, the Office of Disciplinary Counsel *formally* objected to the dismissal of the charges brought under Rule 1.15(a), 8.4(c) and 8.4(d). But it ~~added~~ that the Hearing Panel's dismissal of a separate charge under Rule 3.4(c) (mistakenly referred to as 3.4(a)) was also the result of a "faulty application of the law to the facts" with a footnote to ~~explain~~ **explain** why. [Brief at 26 n. 11]. Its arguments as to why the dismissal of these three charges was erroneous are also found in the Statement of the Case portion. The Argument section was devoted primarily to the issue of sanctions.

The Respondent accordingly lists the Office of Disciplinary Counsel's objections as he understands them:

1. The Hearing Panel Subcommittee erred in its application **of the** law to the facts when it dismissed the charge that the Respondent violated Rule 1.15(a) of the Rules Professional Conduct. There was clear and convincing evidence that **the** Respondent violated Rule 1.15(a).
2. The Hearing Panel Subcommittee erred in its application of the law to the facts when it dismissed the charges that the Respondent violated Rules of Professional Conduct 8.4(c) and 8.4(d). There was clear and convincing evidence of such violations.

3. Because the Office of Disciplinary Counsel met its burden of proving violations of Rules 1.15(a), 8.4(c) and 8.4(d) of the Rules of Professional Conduct, in addition to the violations of Rule 1.15(b) and 1.15(c) found by the Hearing Panel Subcommittee, the Court should impose a sanction of disbarment rather than the public reprimand recommended by the Hearing Panel Subcommittee under the sanction guidelines of Rule 3.16 of the Rules of Lawyer Disciplinary Procedure

### **STATEMENT OF CASE**

The Respondent takes issue with much of the content found in the Office of Disciplinary Counsel's Brief under its Statement of Case section, as explained above. The Respondent considers it more appropriate to address the Office of Disciplinary Counsel "disputes" with the Subcommittee's factual findings and its objections to the Subcommittee's application of those findings to the law in the Argument section of this Brief. He will also provide the Court in the Argument section with additional facts from the record that support and give context to the Hearing Panel Subcommittee's findings and conclusions to rebut the Office of Disciplinary Counsel's objections.

In this section of the Brief, the Respondent deems it essential to set forth carefully the basic allegations of fact from the Statement of Charges, what conduct of Respondent was alleged to have constituted violations of the Rules of Professional Conduct, what portions of the Rules of Professional Conduct were cited as being violated and what portions of the Rules the Hearing Panel Subcommittee concluded the Respondent had violated.

The Statement of Charges alleged the following basic facts:

(1) Hendrickson & Long, PLLC entered into an oral employment agreement with Mr. White in April 2008 that the firm would pay him a base salary of \$80,000 and extend him an \$80,000 line of credit to be used at his discretion. [¶ 2]. In turn, Mr. White agreed to turn over all attorney fees he received from representing Social Security disability clients to the firm; agreed that any legal fees earned on matters unrelated to his Social Security disability claims practice would be paid directly to the firm; and further agreed that he would have no personal financial interest in any portion of these fees;

(2) Mr. White advised Hendrickson & Long that the fee checks issued by the Social Security Administration had to be issued in his name, not the firm's name, and he assured the firm that he would promptly remit any fee checks to the firm; [¶ 7]

(3) In April 2009, the firm terminated Mr. White effective May 15, 2009, because Eckert Seamans, with whom the firm had merged as of January 1, 2009, did not want to have a Social Security claimant's practice. In May, the office manager of Hendrickson & Long noticed that Social Security fee award checks had not been endorsed over to the firm for some months and arranged a meeting with Mr. White to discuss the matter. At the meeting, Mr. White claimed that as of December 31, 2008, he was no longer an employee. [¶¶13-15].

(4) The firm asked Mr. White to sign a Social Security Administration form "that would have authorized the Social Security Administration to provide the firm with a listing of each of Mr. White's clients and the amounts of any fees paid to

him.” Mr. White refused to sign the form. Despite repeated demands by the firm that Mr. White provide a written accounting of all legal fees received during his employment and sign the Social Security Administration form, he would not do so. [¶¶ 16, 17, 19, 20].

(5) Following a mediated settlement of the civil action and counterclaim between that the firm and Mr. White, Mr. White failed to follow through on turning over one fee award check. The firm filed a Motion for Entry of Judgment for the Breach of Settlement Agreement in April 2012, alleging that Mr. White failed to keep the firm informed of the status of the check “despite repeated requests to do so.” Mr. White did not respond to the motion and the firm received a judgment from the Circuit Court which it levied Mr. White’s bank account to collect. [¶¶ 27-39].

The Statement of Charges alleged the following conduct by Mr. White constituted violations of Rule 1.15(a); Rule 1.15(b); 1.15(c); 8.4(c) and 8.4(d) of the Rules of Professional Conduct:

- ▶ He knowingly failed to promptly advise his Firm of the receipt of funds from the SSA;
- ▶ He failed to turn over funds in an unknown amount [fn 1] that rightfully belonged to his Firm;
- ▶ “And/or” he failed to properly keep the same until the dispute between Respondent and the Firm had been resolved;
- ▶ Instead, he converted the same to his own personal use.

Footnote 1 read: “Because the Firm was not the attorney of record listed with SSA, it is unknown to the Firm (and to ODC) the amount of client checks that were issued to Respondent above and beyond the checks that the Firm confronted Respondent with at the May 2009 meeting.” [¶ 40].

The Statement of Charges further alleged that Mr. White violated Rule 3.4(c) of the Rules of Professional Conduct by failing “to honor the agreed upon terms of the settlement agreement, which was confirmed by the Court, despite his representations to the Court.” [¶ 41].

The Statement of Charges quoted the portion of each Rule it found applicable to the conduct set forth in ¶ 40 [the ellipses are in the original]:

Rule 1.15(a): “A lawyer shall hold property of . . . third persons that is in a lawyer’s possession in connection with a representation separate from the lawyer’s own property. . . .”

Rule 1.15(b): “Upon receiving funds or other property in which a . . . third person has an interest, a lawyer shall promptly notify the . . . third party. . . .”

Rule 1.5(c): “When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claims interest, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.”

Rule 8.4(c) and (d): “It is professional misconduct for a lawyer to:  
(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;  
(d) engage in conduct that is prejudicial to the administration of justice.”

*Ibid.*

The Statement of Charges did not specifically charge Mr. White with two other provisions in Rule 1.15(b): The prompt delivery to the third person of any funds that the third person is entitled to receive; and the prompt rendering of a full accounting regarding such property. However, the Statement of Charges listed as unethical conduct Mr. White’s failure to turn over funds rightfully

belonging to the firm without specifying which of the five rule violations applied. Similarly, by alleging that Mr. White failed to turn over funds in an “unknown amount” with the accompanying footnote quoted *supra*, the Statement of Charges implied that he refused to sign the Social Security Administration form and never provided a full accounting for purposes of concealment. Thus, whether he provided a full accounting was thoroughly litigated.

### SUMMARY OF ARGUMENT

The Hearing Panel Subcommittee made reasonable findings of fact that there was a *bona fide* business dispute between Hendrickson & Long and Mr. White as to **who had** an interest in the Social Security fee award checks and that Mr. White’s belief that the fee award checks were to be credited in whole or in part towards repayment of an \$80,000 loan was reasonable and understandable. These findings were supported by reliable, probative and substantial evidence as a whole demonstrating that there never was an explicit agreement or implicit understanding that Mr. White would have no personal financial interest in the Social Security fees and would promptly remit any fee checks to the firm, as alleged in the Statement of Charges. Further, the ambiguous and unusual terms on the face of the employment contract and the later promissory note coupled with **parole** evidence about the two documents negated the presumption made by the Office of Disciplinary Counsel that the firm had clear entitlement to the checks simply by hiring Mr. White as an Associate Attorney.

The Hearing Panel Subcommittee then reviewed the Rules of Professional Conduct to determine which of those charged were applicable to this business dispute and whether those charges had been proved by clear and convincing evidence, *i.e.*, it applied the facts to the law. Its correctly concluded that Mr. White should have given the firm notice when he received fee award checks but did not turn them over beginning in February 2009, because he knew the firm “ha[d] an interest” in

the funds, within the language of Rule 1.15(b). It also correctly concluded that he should have kept the fee award checks separate because both he and the firm “claim[ed] interest” in them until the dispute over their respective interests was resolved, within the language of Rule 1.15(c). Instead of keeping them separate, concluded the Subcommittee, he violated Rule 1.15(c) by negotiating some of the checks he had kept beginning in late April, 2009 once he knew that he would have to quickly establish his own law firm because Eckert Seamans would not continue the working arrangement.

The Hearing Panel Subcommittee aptly recognized that the plain language of Rule 1.15(a) did not apply to the facts. The Rule directs a lawyer to “hold property of . . . third persons” in the lawyer’s possession separate from his or her own property. The fee award checks were not property of the firm to which Mr. White was entrusted to hold and safeguard in a trust account, like escrowed funds in a business transaction.

Consistent with the Subcommittee’s finding that the fee award checks were the subject of a legitimate business dispute, it also did not find a violation of the second portion of Rule 1.15(b) that requires a lawyer to promptly deliver to the third person any funds the third person “is entitled to receive.” As found by the Subcommittee, the firm claimed an interest in the checks, but there was no clear entitlement mandating that Mr. White promptly deliver them to the firm.

The Subcommittee found no clear and convincing evidence that Mr. White engaged in dishonest or fraudulent conduct --Rule 8.4(c)-- or conduct prejudicial to the administration of justice--Rule 8.4(d). Again, this finding is consistent with the evidence that Mr. White did not engage in surreptitious behavior to conceal his receipt of the fee award checks and did not misappropriate, divert or convert funds that the firm was clearly “entitled to receive.” The firm and Mr. White

availed themselves of the civil judicial system and ultimately entered into a settlement that resolved all issues between them.

The Subcommittee concluded that Mr. White did not “knowingly disobey an obligation of a tribunal” under Rule 3.4(c) of the Rules of Professional Conduct because he took all action that was required of him to cooperate in obtaining reissued checks from the Social Security Administration. Although not referenced by the Subcommittee, its conclusion is buttressed by the actions of J. Miles Morgan, who is of counsel to Hendrickson & Long, and who represented the firm in the civil litigation against Mr. White. Mr. Morgan made a false statement to the Circuit Court in his Motion for Judgment that Mr. White had not responded to the former’s e-mail inquiries, and he deliberately omitted Mr. White’s e-mail response when he attached his own e-mails up to the point of Mr. White’s response.

The Subcommittee’s recommended sanctions of a public reprimand and additional continuing legal education hours in legal ethics and/or/law office management serve all of the purposes of attorney discipline under the unique facts established and are appropriate for the ethical violations found.

#### **STATEMENT ON ORAL ARGUMENT**

The Court has already scheduled this matter for oral argument on September 10, 2014 pursuant to Rule 19 of the Rules of Appellate Procedure. The Respondent respectfully requests that his argument time be extended beyond ten minutes if necessary. The Office of Disciplinary Counsel, on behalf of the Petitioner, the Lawyer Disciplinary Board, is entitled to open and close the argument under Rule 19(e); the Respondent, who typically is objecting to the Hearing Panel Subcommittee’s Report or Recommendation, is only permitted one opportunity to state his or her objections.

In this case, the Office of Disciplinary Counsel is asking the Court to adopt two of the Subcommittee's conclusions (that Respondent failed to give notice under Rule 1.15(b) and failed to keep the fee checks separate until his dispute with the firm was resolved under Rule 1.15(c)). But it is also objecting to three of the Subcommittee's conclusions that there was no clear and convincing evidence that the Respondent failed to hold property of a third person separate from his own property under Rule 1.15(a), that the Respondent engaged in dishonest conduct under Rule 8.4(c) and that the Respondent's conduct was prejudicial to the administration of justice under Rule 8.4(d). It also objects to the recommended sanction of a public reprimand and asks the Court to impose the most severe sanction, disbarment. The Respondent therefore requests that he be permitted additional time during his presentation because he is, in effect, undertaking the role of representing the Petitioner, the Lawyer Disciplinary Board.

#### ARGUMENT

- A. The Hearing Panel Subcommittee's findings of fact that there was a *bona fide* business dispute between Mr. White and Hendrickson & Long and that Mr. White had a reasonable belief that he had a legitimate claim to the Social Security fees are supported by reliable evidence as a whole and should be given substantial deference by the Court upon review.**

The Office of Disciplinary Counsel posits that accepting the findings of fact made by the Hearing Panel Subcommittee, the Subcommittee made a faulty application of the facts to the law when it recommended dismissing the charges brought under Rules 1.15(a), 8.4(c) and 8.4(d) of the Rules of Professional Conduct. This argument glosses over the fact that the Office of Disciplinary Counsel is in fundamental disagreement with the Subcommittee's findings of fact, which are really the foundation of its Report. As the Court observed in another lawyer disciplinary case:

Although [the Respondent] asserts that the determination of an attorney-client relationship is a question of law, such a determination can only be made in the context of the antecedent facts. See *State ex rel. DeFrances v. Bedell*, 191 W. Va. 513, 517, 446 S.E.2d 906, 910 (1994) ("The determination of the existence of an attorney-client relationship depends on each case's specific facts and circumstances.").

*Lawyer Disciplinary Bd. v. Haught*, \_\_\_ W. Va. \_\_\_, 757 S.E.2d 609, 621 (2014).

The determination of what ethical obligations Mr. White had with respect to the fee award checks under Rules 1.15, 8.4(c) or 8.4(d) of the Rules of Professional Conduct depends upon the totality of circumstances. The Court gives substantial deference to the Hearing Panel Subcommittee's findings of fact, unless such findings are not supported by reliable, probative and substantial evidence on the whole record. Syl. Pt. 3, *Committee on Legal Ethics v. McCorkle*, 192 W. Va. 286, 452 S.E.2d 377 (1994).

The Office of Disciplinary Counsel's objections and arguments are premised on a critical assumption of fact: It is "axiomatic" or self-evident that the Social Security fee checks paid to Mr. White while he was employed by Hendrickson & Long belonged to the law firm. See Brief at 7 n. 3, 36 n. 13. From this unproved assumption of fact, the Office of Disciplinary Counsel concludes that Mr. White's failure to turn over the fee award checks and his eventual negotiation of them was a wrongful action that constituted misappropriation, diversion and conversion, all terms the Office of Disciplinary Counsel has used throughout this proceeding.

In fact, the record demonstrates that the Office of Disciplinary Counsel uncritically incorporated into the Statement of Charges all allegations made by the Complainant's firm in disregard of any evidence and testimony presented by the Respondent during the investigation of the ethics complaint and was willing to overlook the firm's own ethical violations committed during this business dispute with respect to holding Social Security fee checks without notifying Mr. White and

falsely asserting to the Circuit Court that Mr. White had not responded to its counsel's inquiries about the status of the mediating settlement.

Fortunately for the Respondent, the Hearing Panel Subcommittee considered the evidence as a whole. In determining that the dispute between Mr. White and the law firm was a legitimate one and in determining that Mr. White's claim that the Social Security fees were to be credited, at least in part, towards repayment of the \$80,000 loan was reasonable and credible, the Subcommittee considered the nature of a Social Security practice, the circumstances surrounding Mr. White leaving his prior place of employment, the terms of the March 25, 2008 letter agreement and the September 30, 2008 promissory note and the credibility of the witnesses' testimony.

As set forth in great detail in the Hearing Panel Subcommittee's Report, these facts formed the basis of the Subcommittee findings of fact that this was a business dispute:

(1) Mr. White grossed \$ 172,820.48 in 2007, and his base salary was \$160,000 representing Social Security claimants at his first place of employment.

(2) Mr. White was not interested in working for another law firm; he wanted to develop his own practice, but lacked the financial wherewithal to do so. He was recruited by Hendrickson & Long, to whom he had once referred a personal injury case.

(3) He came to an agreement in principle with David Hendrickson to come to Hendrickson & Long to start his own Social Security claimants' practice. His understanding was that he would be paid \$160,000 annually while developing the practice, but that \$80,000 would be designated as a loan because other associates were not paid that much.

(4) Mr. Hendrickson requested his office manager, Richard Fisher, to reduce the terms to writing, although Mr. Fisher had not been present at the meeting.

(5) The letter agreement of March 25, 2008 was incomplete, vague and ambiguous. It did not address how Social Security Fees would be handled. The unusual combination of the \$80,000 salary with the \$80,000 loan annually to be paid in increments of \$3,333 twice a month supported Mr. White's testimony and understanding that he would receive \$160,000 annually, which he needed to meet his current living expenses. The provision that the loan would be repaid out of bonuses was not realistic given the realities of how merit bonuses could be earned. The letter agreement made no reference to Social Security fees.

(6) Mr. White would not have left a law position where he was earning, at a minimum, \$160,000 with regular bonuses to work as an associate at a law firm making \$80,000 and incurring a loan for another \$80,000 with no realistic way to pay it back.

(7) The existence of the loan, the business plan that Mr. White submitted based upon his experience at his first job, the fact that the firm paid for advertising exclusively featuring Mr. White and his payment of some of the advertising himself as well as for an additional assistant reinforced the Subcommittee's finding that this was not a traditional law firm/associate attorney arrangement; rather the goal of the arrangement would be to assist Mr. White in developing a Social Security practice to the point where he could be self-sustaining and the firm would maintain a relationship to benefit from personal injury referrals.

(8) The promissory note executed on September 1, 2008 had materially different terms in it from the letter agreement. The annual loan of \$80,000 became a line of credit for \$80,000 to be used only until December 2009. Mr. White's testimony that he signed the note only because Mr. Fisher would not pay his semi-monthly loan payment until he did.

(9) The merger of Hendrickson & Long with Eckert Seamans that was completed as of January 1, 2009 made implementation of this arrangement impossible, because Eckert Seamans did not want a Social Security claimants' practice as part of its services and did not want to continue the loan.

(10) The testimony of David Hendrickson and Mr. Fisher was not credible. It was inconsistent, malicious and at times self-serving. Both asserted that Mr. White orally agreed that the Social Security fee award checks would be the property of the firm; both continued to assert that Mr. White never provided an accounting as evidenced by his refusal to sign a Social Security authorization form, even though Mr. Fisher acknowledged at the hearing (but not on direct examination) that he spoken with a Social Security Deputy well before the Statement of Charges was issued. This Deputy confirmed and corroborated Mr. White's explanation that the form would not provide the information the firm sought.

(11) Mr. White's testimony was consistent from his answer to the ethics complaint and his sworn statement through the disciplinary hearing.

**B. The Hearing Panel Subcommittee applied the facts to the provisions of Rule 1.15 of the Rules of Professional Conduct and correctly concluded that the Social Security fee checks were funds in which Mr. White and Hendrickson & Long both claimed an interest so that the notification provision of Rule 1.15(b) applied as did Rule 1.15(c), because there was a dispute between the two parties concerning those claims.**

Rule 1.15 of the Rules of Professional Conduct sets forth an attorney's obligations with respect to money and other property that relates to legal representation. The obligations differ depending upon when and how the money came into the lawyer's hands and whose money it is.

Rule 1.15(a) governs the situation when a lawyer is holding “property of clients or third persons”. The lawyer is directed to keep the property separate from the his/her own property and place funds in a client’s trust account. Such a situation occurred in *Lawyer Disciplinary Bd. v. Haught*, \_\_\_ W. Va. \_\_\_, 757 S.E.2d 609 (2014). The client gave the lawyer a check made payable in her name and the lawyer’s name in the amount of \$11,402.50 to hold during the pendency of litigation. The focus of the disciplinary hearing, in part, was whether the lawyer violated Rule 1.15(a) by failing to keep the \$11,402.50 in his trust account after he initially deposited the check there..

Rule 1.15(b) concerns a lawyer’s responsibilities “upon receiving funds or other property in which a client or third person has an interest,” such as a personal injury settlement. Subsection (b) directs a lawyer to do three things promptly: (1) notify the client or third person who has “an interest” of the lawyer’s receipt of the funds; (2) deliver to the client or third person “any funds or other property that the client or third person is entitled to receive” and (3) provide a full accounting upon request. These types of funds differ from funds belonging to a client or third person that the lawyer holds. There would be no need to give prompt notice to the client when it was the client who gave the lawyer the funds to hold in the first place. Neither would there be a need for prompt disbursement.

The fact that a client or third person has “an interest” in funds the lawyer has received does not necessarily mean that the individual has a legal right or entitlement to its prompt delivery. So a duty to notify under Rule 1.15(b) does not automatically create a duty to promptly deliver the funds.

If both the lawyer and the client or third person claim an interest in the funds and there is a dispute over their respective interests, Rule 1.15(c) directs the lawyer to keep funds separate until the dispute is resolved.

1. **The Hearing Panel Subcommittee's finding that Mr. White violated Rule 1.15(b) of the Rules of Professional Conduct by failing to give Hendrickson & Long notice he was retaining the checks is correct.**

The Hearing Panel Subcommittee applied its findings of fact to the law and determined that the Social Security checks were property or funds that came into Mr. White's possession and in which Mr. White and the firm of Hendrickson & Long both asserted interests, within the meaning of Rule 1.15(b). Accordingly, Mr. White had a duty to notify the law firm that he had received the checks, and he did not do so.

Mr. White acknowledged that he did not carry out this duty at the disciplinary hearing [Respondent's Proposed Findings, p. 34]. As set forth in his Answer to the Statement of Charges, he thought Mr. Fisher always opened the Social Security checks that came to the firm and made a copy before forwarding them to Mr. White and therefore there was no need for notification. The fact that at the May 20, 2009 meeting, Mr. Fisher had copies of all of the checks Mr. White kept confirmed this belief. [Answer ¶¶ 58, 59]. Mr. White intended to give notice by speaking to Mr. Hendrickson about the issue but was unable to get Mr. Hendrickson's attention.

Only after hearing Mr. Fisher's testimony that he made copies of the fee award checks from Mr. White's computer on the morning of May 19, 2009 did Respondent realize that he should have given notice for everyone's protection. It would have forced the issue to be resolved. The Office

of Disciplinary Counsel's assertion that Mr. White still fails to appreciate the wrongfulness of his conduct in its Brief is therefore incorrect.

**2. The Hearing Panel Subcommittee correctly found that Mr. White did not violate Rule 1.15(b) with respect to the prompt delivery and accounting requirements even though these violations were not clearly charged.**

The Respondent wishes to point out that the Statement of Charges only alleged a failure to notify the firm under Rule 1.15(b); it did not recite the portion of Rule 1.15(b) pertaining to prompt delivery of property to which a third person was entitled. Nor did the Statement of Charges quote the portion of Rule 1.15(b) relating to a prompt accounting upon request. However, the Statement of Charges listed as unethical conduct, without attributing it to a specific Rule the following: "He failed to turn over funds in an unknown amount that rightfully belonged to his Firm *and/or* failed to properly keep the same until the dispute between Respondent and the Firm had been resolved." [¶ 40] Moreover, footnote 1 implied that Mr. White had not provided an accounting of the fee award checks he retained.

Out of an abundance of caution, the Respondent fully addressed the two other requirements of Rule 1.15(b) in his Corrected Proposed Findings, p.34, anticipating the Syllabus point of *Lawyer Disciplinary Board v. Stanton, Slip op.* No. 13-0138 (W. Va. June 5, 2014) that "a lawyer may be disciplined for an uncharged rule violation if the uncharged violation is within the scope of the misconduct alleged in the formal charge, and if the lawyer is given (1) clear and specific notice of the alleged misconduct supporting the uncharged rule violation and (2) an opportunity to respond."

Likewise, the Subcommittee either explicitly or implicitly held that there was insufficient evidence that Mr. White violated the delivery requirement and the accounting requirement. The Subcommittee's discussion concerning the viability of Hendrickson & Long's claim to the Social

Security fees as its property except as repayment for the loan, in light of the merger with Eckert Seamans as of January 1, 2009 on p. 31 not only supported the finding that Mr. White had a reasonable concern that the fee checks were not being applied to repay the loan but also served to negate application of Rule 1.15(b)'s prompt delivery of property requirement because the law firm lacked clear entitlement to the checks. The Subcommittee also devoted many paragraphs to support its finding that it was satisfied with Mr. White's accounting that he did not turn over to Hendrickson & Long 18 fee award checks totaling \$46,326.69. [¶¶ 49-65]. This finding negated any inference that Mr. White failed to provide an accounting.

**3. The Hearing Panel Subcommittee's finding of a violation of Rule 1.15(c) is supported by evidence.**

Based upon its findings concerning the respective interests of the parties in the Social Security fee award checks, the Subcommittee concluded that both parties claimed an interest in the fee award checks within the meaning of Rule 1.15(c) and that Mr. White violated Rule 1.15(c) by not keeping the 18 fee award checks separate until the dispute was resolved. After Eckert Seamans decided on April 15, 2009 that Mr. White would not be permitted to join the merged firm and would be terminated, he began negotiating the checks to fund his practice.

The Respondent notes at this point that he is the one who produced the evidence of when he negotiated the 18 checks at issue after the first day of the disciplinary hearing by obtaining copies of the front and backs of the checks from the Social Security Administration in between disciplinary hearings. [See summary chart in R Ex. 14].<sup>1</sup> Obtaining these records was difficult and time-

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<sup>1</sup> The chart lists 21 clients. There are three names on the list who were not on the accounting that Mr. White provided Hendrickson & Long and the Office of Disciplinary Counsel in August 2009: Harper, Gibson and Simpson. The fee check in Harper was issued August 25, 2009, long after Mr. White was evicted from the law firm offices on May 20, 2009. Gibson's check came to the firm after May 20, 2009

consuming for Mr. White although he learned through this process how to avoid most of the bureaucratic obstacles at the Social Security Administration.

Until he reviewed them in 2013, he did not remember that he had negotiated eight checks prior to the end of his relationship with Hendrickson & Long on May 20, 2009. He had made representations in good faith to the Office of Disciplinary Counsel in his sworn statement and in his Answer to the Statement of Charges, ¶ 35, that he did not negotiate the checks until after May 20, 2009. Nevertheless, he did not withhold this evidence because he was committed to providing the Hearing Panel the full facts of this case.

By contrast, Hendrickson & Long filed a motion to quash a subpoena the Respondent requested for the deposit slips of the firm's operating account to prove that the firm negotiated two fee checks in the Fall of 2008 that Mr. Fisher testified at the disciplinary hearing Mr. White had withheld. [Report at 2].

**4. The Hearing Panel Subcommittee's finding of no clear and convincing evidence of a violation of Rule 1.15(a) is accurate and consistent with its evaluation of the Respondent's duties under Rule 1.15(b) and (c) of the Rules of Professional Conduct**

*The Office of Disciplinary Counsel asserts that if the Subcommittee concluded that Hendrickson & Long claimed an interest in the fees award checks sufficient to trigger a duty of Mr. White to notify the firm upon receipt of the checks under Rule 1.15(b) and to keep the funds separate until the dispute was resolved under Rule 1.15(c), it must also find that Mr. White had a duty to deposit the fee award checks in an IOLTA account as property of the firm under Rule 1.15(a).*

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and the firm allowed it to go stale. Although Simpson received a favorable decision on February 5, 2009, Mr. White discovered that he had never received a check from the Social Security Administration.

The Respondent disagrees. The property discussed in Rule 1.15(a) is property “of a client or third person” that the lawyer is holding. In other words, these are funds that unquestionably belong to the client or third person that the lawyer has been asked to hold for a particular purpose. It may be a deposit for legal fees or anticipated expenses or earnest money for a business transaction.

The Hearing Panel applied its findings of fact concerning Mr. White’s reasonable understanding of how the Social Security fees would be treated and the effect of the firm’s merger with Eckert Seamans on Mr. White’s employment status and his ability to repay the promissory note to reasonably conclude that the checks did not unquestionably belong to Hendrickson & Long. [Report at 33]. This made Rule 1.15(a)’s requirement that the funds be kept in a client trust or an IOLTA account inapplicable to the specific circumstances of this case. Instead, the Panel found the requirements of Rule 1.15(b) and (c) to be more relevant to this situation.

Even if Hendrickson & Long’s claimed interest in the fees rendered the checks property of a third person within the meaning of Rule 1.15(a), added the Subcommittee, Mr. White’s failure to deposit the checks in an IOLTA account or other client trust account was understandable. Mr. White did not have a client trust account. He kept the checks in his desk drawer while attempting to discuss the matter with Mr. Hendrickson. It was his intent to keep the checks separate under these circumstances instead of comingling the money by depositing them in his personal bank account.

- C. The Hearing Panel’s correctly concluded that there was no clear and convincing evidence that Mr. White engaged in dishonest conduct or conduct prejudicial to the administration of justice in violation of Rule 8.4(c) and 8.4(d) of the Rules of Professional Conduct.**

The Hearing Panel Subcommittee found there was no clear and convincing evidence that Mr. White engaged in conduct involving dishonesty, fraud, deceit or misrepresentation prohibited by Rule

8.4(c) of the Rules of Professional Conduct or conduct prejudicial to the administration of justice under Rule 8.4(d). The Subcommittee based these conclusions on the finding that Mr. White did not lie or make a representation that was false by virtue of omission. He stopped turning the fee checks over to the firm to deposit in its operating account. He took no action to conceal his withholding of the checks. [Report ¶ 6].

These conclusions are supported by the evidence. Mr. Fisher testified at the disciplinary hearing that Kevin Busby, the employee who sorts and distributes the mail, reported to Mr. Fisher that Mr. White had instructed him not to open mail with Social Security checks and instead deliver them directly to Mr. White, contrary to the firm's standard practice. Mr. Fisher had already opened envelopes with three checks in them. He put them back in their envelopes and gave them to Mr. Busby. [Tr. Vol. 1 pp. 221-222]. The Hearing Panel Subcommittee gave no weight to this evidence, because it was hearsay and noted that Mr. White denied it. [Report at 34 n. 4].

There was, moreover, additional evidence that Mr. White introduced to support his denial. Rita Kenyon testified at the hearing. She was a former assistant who worked at Hendrickson & Long from 2001 to August 13, 2008. She began working with Mr. White in April 2008. She testified that she had given Kevin Busby instructions on opening the mail. The instructions were not to throw away the envelope. In fact, she instructed Mr. Busby on this point even before Mr. White came because when she was assisting an attorney with collections, debtors often put their address on the envelope, not in the letter. She had to repeat herself after she began working with Mr. White. She got to the point that she went to the mailroom and helped Mr. Busby sort the mail, so she could take the mail with her. Mr. White never asked her to direct Mr. Busby to deliver the mail to his office directly without opening it, and she never gave Kevin those instructions. [Vol. III, 50-52].

Mr. White testified that it was important in Social Security cases to save the envelope to establish when the Social Security Administration mailed out decisions or notices. There often was a gap between the date of mailing and the date posted on decisions or notices, and these documents may give the claimant a short time period in which to file a protest or other response.

There was additional evidence to negate any inference of surreptitious or dishonest behavior. As set forth on page 16 *infra*, Mr. White believed that Mr. Fisher continued his practice of opening all envelopes with checks inside after the former stopped endorsing and turning over the checks. The fee award checks from the Social Security Administration came in envelopes with Mr. White's name and address on the check showing in the window and were thus easily identified. Even Steven Hastings testified that Mr. Fisher could smell a check. When Mr. Fisher showed Mr. White copies of the fee award checks retained since February 2009 at the May 20, 2009 meeting, this confirmed his belief that Mr. Fisher continued to make copies of the checks before the mail was distributed. Mr. White testified to his belief at his sworn statement. It was not until the disciplinary hearing that he learned Mr. Fisher had gone into his office at 6:00 a.m. May 19, 2009 and made copies of the checks from Mr. White's computer.<sup>2</sup>

The Office of Disciplinary Counsel asserted that the very act of not turning over the checks was dishonest and tantamount to conversion because Mr. White owed a fiduciary duty to the firm with respect to the fees. The Hearing Panel Subcommittee rejected this argument. The Office of Disciplinary Counsel had defined conversion as the "unauthorized exercise of ownership of property belonging to another" in its proposed findings it submitted, and the Subcommittee found that Mr.

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<sup>2</sup> Mr. White knew that Mr. Fisher had made a copy of his hard drive before turning his electronic files over to him, but thought that occurred after May 20, 2009.

White reasonably believed he had a legitimate interest and claim to the social security fees. [Report at 34 ¶ 6].

Before this Court, the Office of Disciplinary Counsel argues that a lawyer's belief that he has a legitimate interest in funds should not be a defense to conversion; it would protect someone whose beliefs are simply rationalizations or wishful thinking. This argument ignores the fact that the Subcommittee made a finding of fact that Mr. White's beliefs were reasonable based upon reliable evidence, as discussed in Section A of this Brief.

The Office of Disciplinary Counsel also argues that the Subcommittee's conclusion that Mr. White's negotiated the checks before the dispute was resolved in violation of Rule 1.15(c) necessarily is tantamount to a finding of conversion or misappropriation because Hendrickson & Long claimed some portion of the fees over which Mr. White exercised ownership and that he used the funds for his "personal use."

It was reasonable and not inconsistent for the Hearing Panel Subcommittee to conclude from the large amount of documents and testimony produced at the hearing that Mr. White violated Rule 1.15(c) when he began negotiating the fee award checks he had kept separate but did not engage in conversion under Rule 8.4(b) and 8.4(c) because his intent in withholding the checks was to resolve the business dispute over how they should be treated. He negotiated them not for personal use but to establish a law office quickly to continue representing his clients, a crisis that arose through no fault of his own.

The record shows the circumstances under which Mr. White withheld and then negotiated those checks, and they do not support a conclusion that Mr. White misappropriated funds or violated Rule 8.4(c) and 8.4(d). Mr. White had signed the promissory note in September 2008 which required

him to pay back the loan by May 1, 2011 or within one year of ceasing to be an employee of Hendrickson & Long, PLLC, whichever came first. But the note contained one other provision of significance. It read:

**Should Hendrickson & Long, PLLC cease to operate as an active business (i.e. case operations as an active and practicing law firm) through merger, sale or otherwise, Borrower shall pay such outstanding principal as then due and owing, with no interest, to Hendrickson & Long at 214 Capitol Street, Charleston, West Virginia 25301 or to such other entity or per persons, as the owner, holder or assign hereof may designate in writing, and such principal shall be paid in full on or before May 1, 2011.**

[ODC Ex. 17, Bates No. 474]. The quoted portion is ambiguous. It could mean that if the firm merges into another firm, Mr. White must pay such outstanding principal as then due and owing to the firm immediately or to an assignee on or before May 1, 2011. Alternatively, it could mean that upon a merger that occurs within his first year of employment, the loan increments or draw will cease and Mr. White must pay the outstanding amount of the loan back by May 1, 2011. Either way, the firm's merger with Eckert Seamans had the potential to negatively impact Mr. White's ability to pay the loan.

Mr. White began receiving Social Security fees in September 2008. He had not anticipated that he would begin receiving fees for 18 months after joining the firm, because he did not plan on bringing ongoing claims with him. However, Steve Hasting had directed him to write a letter soliciting his former clients. As a result, a majority of his first clients at the firm had claims already pending. Mr. White thought he would put these fees towards paying his loan. After Mr. White had a conversation with Mr. Fisher and learned that Mr. Fisher had not been crediting the fees towards repayment of the loan, he still continued to turn over the checks anticipating that he would work this out with Mr. Hendrickson.

By February 2009, however, the situation had changed. Hendrickson & Long had merged into Eckert Seamans January 1, 2009. Although Eckert Seamans held Mr. White out as an employee, it was expressing doubts about the arrangement to the extent that it had Hendrickson & Long pay his salary, for which Eckert Seamans would reimburse the firm. Mr. White was the only employee being paid from a Hendrickson & Long account.

After the merger, Hendrickson & Long was no longer paying for Mr. White's advertising, a critical expenditure for a Social Security claimants practice. Mr. White was also having difficulty getting the administrative support he needed. As he testified at the hearing, he began paying for the television advertising, the telephone yellow pages and an assistant himself out of his salary (base + loan increment), even though his income was already fully obligated for living expenses. He did not use any fee checks for this purpose or to pay the personal living debts, such as the mortgage, on which he was falling behind. [R. Ex. 11; Vol. II, 81-85].

Mr. White first stopped turning over the fee award checks when he received the Price and Moore checks that were dated February 9, 2009. He placed them in his drawer with no intent on negotiating them, but he was sufficiently concerned about his employment status and the issue of how these fees were being treated by Hendrickson & Long that he no longer trusted that he would receive credit for the checks he had already turned in.

Mr. White first negotiated one of the fee award checks he had been holding on April 28, 2009, more than two and a half months after he stopped turning the checks over. He had been told of Eckert Seamans's final decision that his Social Security practice was not a good fit for the firm and that he would be terminated in May. He knew that he had to establish his own practice in a very short period of time and be able to continue representing almost 300 clients in a seamless fashion. (No one else

practiced Social Security work at the firm.) It was only then that he began cashing some of the fee checks for a lease deposit, to purchase bricks for the build-out of his office and to buy a license for his Prevail software. [Tr. Vol. 11, pp. 116-117]. The Respondent does dispute the Office of Disciplinary Counsel's footnote that it is undisputed Hendrickson & Long wanted to help him succeed. The PREVAIL software they provided to him, which was of no use to the firm and contained electronic client files, still required him to purchase a license.

The chart Mr. White prepared [Exhibit 14] shows that the earliest Mr. White negotiated one of these fees checks is April 28, 2009. He negotiated other checks on April 30, 2009 (1), May 1, 2009 (1), May 4, 2009 (1), May 11, 2009 (1), May 13, 2009 (2), May 20, 2009 (1), May 21, 2009 (1), May 21, 2009 (1), May 27 (1), and June 22, 2009 (5). The three oldest checks, issued February 9 and 11, 2009, were not negotiated until June 22, 2009.

Hendrickson & Long initiated a civil action and Mr. White filed a counterclaim that joined the issue of who was entitled to the Social Security fee checks and the meaning of the employment contract. The firm later amended its complaint to add a claim for repayment of the promissory note, since a year had passed. As a result of mediation, the parties settled all claims and released each other, although the specific terms of the release were not reduced to writing. [ODC Ex. 17 Bates No. 716]. There has never been a judicial determination on who owned the Social Security fees. From Mr. White's perspective, the moneys that he paid the firm in the settlement plus the fee award checks he gave to the firm before February 2009 came close to repaying the promissory note of \$80,000.

The Hearing Panel Subcommittee's finding that a lawyer may violate Rule 1.15 without committing conversion is supported by the recent decision of *Lawyer Disciplinary Bd. v. Haught*, \_\_\_ W. Va. \_\_\_, 757 S.E.2d 609, 621 (2014) the Court held the record did not support a finding that the

lawyer who failed to keep client funds he was holding in his IOLTA account in clear violation of Rule 1.15(a) also committed a criminal act (Rule 8.4(b) or converted the money for his personal use (Rule 8.4(c) and (d)). The bank records showed that the lawyer had deposited the check for \$11,402.50 in his IOLTA account and within 30 days had written two checks on the account, one to himself and one to a family trust, leaving a balance in the account of \$1,778.60. The Court found that those checks were for work he was doing as counsel for a family trust and others, not for personal use.

**C. The Office of Disciplinary Counsel's criticism of the Respondent's conduct in the civil litigation, regarding the Hearing Panel Subcommittee's recommended dismissal of the Rule 3.4(c) violation demonstrates its continuing refusal to acknowledge any evidence favorable to him.**

The Hearing Panel Subcommittee recommended dismissal of the charge that Mr. White refused to carry out the settlement terms in the civil litigation, in violation of Rule 3.4(c), knowingly disobeying an obligation of a tribunal. The facts found by the Subcommittee were that Mr. White did respond to an e-mail inquiry of Hendrickson & Long's counsel, Mr. Morgan, about the status of one fee award check remaining to be reissued by the Social Security Administration. Mr. White did carry out the terms of the settlement agreement to cooperate in getting the Social Security Administration to reissue the check. It was Mr. Morgan who filed a Motion for Entry of Judgment representing to the Circuit Court that he had repeatedly requested a report on the status of the payment from Mr. White "to no avail," and he attached to his Motion copies of his e-mails to Mr. White *up to the point where Mr. White responded*. He omitted Mr. White's e-mail response, received only two days before he filed the Motion and omitted his reply to Mr. White that asked the latter to stay in touch.

The Hearing Panel found that Mr. White contributed to the impression that he ignored the Circuit Court's desire to issue a final order and refused to cooperate in carrying out the settlement

terms by not checking his e-mail, which had routed the Motion to Enforce to his junk folder, and not keeping the Court Clerk apprised of his current office address, which caused copies of the Order Granting Judgment to be returned. This conduct was at best negligent.

The Office of Disciplinary Counsel, in its Brief on page 26 n. 11 stated:

Although it does not believe Respondent's negligence excuses his conduct in the civil suit, as it is not able to establish that the conduct was **knowingly** Office of Disciplinary Counsel does not assert it met its clear and convincing burden on a violation of Rule 3.4 of the Rules of Professional Conduct.

There was nothing wrong about Mr. White's conduct in the civil suit. The negligence pointed out by the Hearing Panel Subcommittee hardly constitutes a violation of an obligation of the tribunal. Yet, the Office of Disciplinary Counsel turned a blind eye to the fact that Hendrickson & Long's counsel, who happens to be a member of the Lawyer Disciplinary Board, deliberately made a misrepresentation to a Court and submitted an incomplete record of his e-mail communications to support that misrepresentation.

The Respondent is compelled to address this footnote because it demonstrates a disturbing pattern. Underlying the Office of Disciplinary Counsel's objections to the Hearing Panel Subcommittee's Report and Recommendations is the wholesale, uncritical acceptance of its witnesses, all of whom belong to the Hendrickson & Long firm, despite evidence to the contrary. This attitude continues to this day.

- D. The sanction of a public reprimand, additional CLE hours on law office management and legal ethics are appropriate under the Rules of Lawyer Disciplinary Procedure guidelines and serve the purpose of punishment and deterrence.**

The Office of Disciplinary Counsel argues that disbarment is the appropriate sanction in this case. Her argument is premised on the contention that Mr. White converted moneys that were the unquestioned property of Hendrickson & Long, a conclusion that the Subcommittee rejected. None of the cases cited in its Brief have comparable facts and all are premised on a finding of misappropriation of firm funds. They therefore provide no guidance as set forth in greater detail *infra*.

The Hearing Panel Subcommittee considered the factors set forth in Rule 3.16 of the Rules of Lawyer Disciplinary Procedure using its findings of facts and conclusions of law. It determined that the sanction of a public reprimand and six additional continuing legal education credits in legal ethics or law office management to be the appropriate sanction.

The Subcommittee concluded that Mr. White violated duties to the legal system and profession in his handling of the contract dispute with the firm. The Subcommittee reiterated that there was no clear showing that the Social Security fee checks were the exclusive property of the firm and no showing of how Mr. White was supposed to pay the promissory note following the merger. To the contrary, the Respondent proved he had a good faith and reasonable belief that these fees would be applied to the promissory note. These findings of fact demonstrated that no duties to clients or the public were violated.

The Subcommittee next found that Mr. White acted negligently when he failed to give notice and intentionally when he negotiated the checks. It also found that there was no actual or potential injury. No client funds were at risk and whether any firm monies were lost was the subject of a genuine dispute which was resolved in the civil litigation.

Finally, the Hearing Panel Subcommittee found no aggravating factors and these mitigating factors. (1) This was essentially a bona fide contract dispute. (2) Mr. White acted without dishonest

or selfish motives. In making this finding, the Subcommittee meant that he didn't act with malice or act out of greed to obtain more income than he had agreed to or to support a certain lifestyle. (3) Mr. White was an inexperienced lawyer. He entered into an arrangement with a more experienced lawyer that was not well formed or thought through by either side. He could not anticipate the firm's merger with Eckert Seamans would render the arrangement unworkable. (4) He cooperated throughout the investigation and disciplinary hearing, going to great lengths to obtain documentation. He testified consistently throughout. When he was discovered during the disciplinary hearing that the firm's Motion for Entry of Judgment, which Mr. Morgan testified had been e-mailed to him, had gone into his junk folder, he informed the Subcommittee. (5) Finally, Mr. White had no prior disciplinary record. More explicitly, he had never received an ethics complaint from a client, even though his practice is one of high volume and in an area of law that typically generates client complaints.

There is an additional mitigating factor that the Hearing Panel Subcommittee did not explicitly find but may have implicitly considered to support its recommendation of a public reprimand: the malice of the complainant. In *Committee on Legal Ethics of State Bar v. Smith*, 156 W. Va. 471, 478, 194 S.E.2d 665, 669 (1973), the Court observed that "Some consideration must be given to the fact that Doster, the Alabama attorney, made threats to the defendant to use a petition to the Committee on Legal Ethics as a collection device." The Court cautioned that although the evil motives of the complainant were no defense to the charges, "apparent spite or money collection motivation on the part of the referring attorney, under the peculiar circumstances of this case, should be regarded as a mitigating factor in favor of the defendant" citing *Committee on Legal Ethics v. Pietranton*, 143 W. Va. 11, 16, 99 S.E.2d 15, 18 (1957)

The record is replete with the malice displayed by the Complainant and his firm, from changed testimony and baseless allegations to misrepresentations to a Circuit Court as described in the Hearing Panel Subcommittee's findings of fact. [Report ¶¶ 60-88].

The cases cited by the Office of Disciplinary Counsel to support disbarment are not applicable to the facts in this case. They concern admitted misappropriation of legal fees. The summary orders and consents to disbarment attached to its Brief do not disclose the underlying facts. They are no more helpful to the Court than the Investigative Panel Closing in LD. No. 96-04-329, which is attached to this Brief.<sup>3</sup> The lengthy complaint, which is not attached, alleged that the complainant had hired the respondent attorney full time and during the course of employment he converted legal fees owed to the law firm. The Investigative Panel determined that both parties presented evidence to support their positions, this was a legal dispute and the disciplinary system was not the proper forum. Without a record to review in these summary decisions, the Court cannot determine their persuasiveness.

One summary case provided by the Office of Disciplinary Counsel did recite specific facts about the respondent's employment arrangement, and those facts are inapposite to the facts in Mr. White's case. *In the Matter of Kyle Cornelia Leftwich*. Ms. Leftwich was convicted of embezzlement following her consent to disbarment. *Leftwich v. Commonwealth*, 737 S.E.2d 42, 43 (Ct. App. Va. 2013). The Court recited what it described as uncontroverted facts: The lawyer was employed by a firm to practice social security disability law. Three times during her employment:

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<sup>3</sup> Because the complainant was Chairman of the Lawyer Disciplinary Board at the time, the Office of Disciplinary Counsel did not conduct the investigation. It was undertaken by Counsel to the Judicial Investigation Commission. The undersigned counsel did not participate.

appellant signed employment agreements with M & H. The agreements stated that all legal fees or similar forms of compensation earned by appellant in the capacity of her employment were the exclusive property of M & H and that appellant would “render full-time professional legal services on behalf of employer....” Appellant relied on the firm's resources for marketing, claim investigation, and recordkeeping....

Although the Statement of Charges alleged that Mr. White had orally agreed that the legal fees would be the exclusive property of Hendrickson & Long, the Subcommittee specifically rejected the testimony of Mr. Hendrickson and Mr. Fisher as to any oral agreement.

The West Virginia published cases cited by the Office of Disciplinary Counsel are also distinguishable. In *Committee on Legal Ethics v. Hess*, 186 W. Va. 514, 413 S.E.2d 169 (1991), a law partner siphoned legal fees from real estate transactions from a separate bank account into his personal account. When the firm decided to conduct an audit on all of its trust accounts, Mr. Hess initially tried to prevent his real estate account from being subject to the audit. Mr. Hess argued that this was an internal business disagreement. He believed he had been unfairly treated by his partners in the allocation of the firm's profits. Said the Court, “This is not a situation where there is a bona fide dispute as to whether, under the firm's past practice, the funds converted were authorized.” *Id.* at 517.

The instant disciplinary case differs from *Hess*. The large volume of evidence demonstrates that the employment arrangement was not a traditional one and its terms were incomplete and ambiguous. Mr. White's employment status was never settled; it was the subject of discussion and debate beginning with the merger discussions between Hendrickson & Long and Eckert Seamans.

The Respondent submits that a more helpful disciplinary case is *Office of Lawyer Regulation v. Gende*, 344 Wis.2d 1, 821 N.W.2d 393 (2012). The Respondent in that case signed an agreement when he left the firm to start his own practice that assigned 80% of fees generated from cases the

lawyer was taking with him and 20% was allotted to him. The lawyer almost immediately tried to repudiate the agreement and the parties became involved in bitter litigation. During this time, the lawyer set aside disputed portions of many fees, but kept the entire fee in two cases, thereby violating Wisconsin's version of Rule 1.15(c). The referee who heard the disciplinary case recommended that the lawyer receive a public reprimand, writing:

Trust fund violations are serious. Lawyers must be scrupulous in handling other people's money and Mr. Gende, at the end of the day, was not. . . . This case is not like the typical dishonest and deceptive trust account case . . . . Mr. Gende did not . . . attempt to "steal fees" through deception. He tried to "steal" them by convincing a court that he was entitled to them. This was, at the end of the day, largely a business dispute—albeit one that Mr. Gende would have been better off to avoid.

The Court agreed:

We conclude that a public reprimand is sufficient to achieve the objectives of attorney discipline. As the referee noted in his prefatory remarks to his lengthy report and recommendation, this is an unusual disciplinary case which is, for the most part, a business dispute between Attorney Gende and his former employer. No client reported being dissatisfied with Attorney Gende's representation, and no clients were deprived of funds to which they were entitled. The referee commented,

On one level, what followed was nothing more than a dispute between Attorney Gende and [Cannon & Dunphy] as to . . . fees. Mr. Gende and [Cannon & Dunphy] litigated the latter's entitlement to fees in a number of fora. "The referee referred to the lengthy dispute between Attorney Gende and Cannon & Dunphy as a "war." Although Attorney Gende was unable to persuade any court that Cannon & Dunphy was not entitled to the fees it claimed, the referee found it significant that no court found Attorney Gende's arguments to be frivolous. While we agree with the referee that Attorney Gende's conduct and his repeated stalling tactics in an effort to avoid paying fees owed to Cannon & Dunphy were inappropriate, and that his conduct was contrary to Wisconsin's Rules of Professional Conduct for Attorneys, we agree with the referee that under the unique facts of this case a public reprimand is sufficient to impress upon Attorney Gende the seriousness of his actions and to deter other attorneys from engaging in similar conduct.

344 Wis.2d at 11, 821 N.W.2d at 399. The *Gende* Court found a violation of what is essentially the equivalent to West Virginia's Rule 1.15(c); it did not treat the violation as a case of conversion because of the referee's finding that this was a business dispute. The Court deemed that a public reprimand to be an appropriate sanction that conveyed the seriousness of the attorney's violation.

Unlike Mr. Gende in the above-cited case, Mr. White did not have a clear agreement with the law firm about the distribution of attorney fees. He never repudiated his employment agreement; his was confusing, incomplete and ambiguous. He did his best to honor the agreement as he reasonably understood it.

The Hearing Panel Subcommittee's Report and Recommendations conveys the message that when a lawyer has a bona fide dispute with his or her employing law firm, he/she must still abide by the Rules of Professional Conduct. Its adaption by the Court will not encourage lawyers to engage in self-help as predicted by the Office of Disciplinary Counsel. A public reprimand will serve as a deterrent to other lawyers who may find themselves in a dispute with another lawyer or firm. A disbarment or any suspension of Mr. White's law firm would be completely out of proportion to his conduct. Even a suspension would have a devastating effect on his solo practice which he had been forced to develop under difficult circumstances.

The public's confidence in the Bar and the lawyer disciplinary system does not need restoring. It was never shaken by this business dispute among lawyers.

### CONCLUSION

The Hearing Panel Subcommittee heard three days of testimony and reviewed at least three notebooks of evidence in this disciplinary matter, which was vigorously litigated. The Subcommittee issued a thorough and thoughtful opinion that the Respondent submits to this Court respectfully it

should adopt. He requests that the Court reject the cookie cutter approach urged by the Office of Disciplinary Counsel that ignores the record.

Benjamin F. White

By Counsel



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**CERTIFICATE OF SERVICE**

I, Sherri Goodman Reveal, do hereby certify that the within document, "Corrected Proposed Findings of Fact and Conclusions of Law" has been served upon Rachael L. Fletcher Cipoletti, Chief Lawyer Disciplinary Counsel for the Office of Disciplinary Counsel this 11th day of August, 2014 by U.S. mail addressed to:

Rachael L. Fletcher Cipoletti  
Chief Lawyer Disciplinary Counsel  
Office of Disciplinary Counsel  
4700 MacCorkle Ave. SE Ste 1200-C  
Charleston, West Virginia 25304

  
Sherri Goodman Reveal

BEFORE THE LAWYER DISCIPLINARY BOARD  
STATE OF WEST VIRGINIA

I.D. No.: 96-04-329

Date Filed: October 8, 1996

**Complainant:** David J. Romano, Esquire  
363 Washington Avenue  
Clarksburg, West Virginia 26301

**Respondent:** Basil R. Legg, Esquire  
168 West Main Street  
Suite 703  
Clarksburg, West Virginia 26301

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INVESTIGATIVE PANEL CLOSING

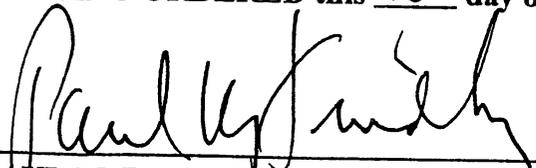
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**THIS INVESTIGATION OF THIS MATTER** having been completed and a report having been made to the Investigative Panel of the Lawyer Disciplinary Board, the Panel concludes that the complaint should be closed for the following reasons:

That the Complainant and the Respondent have provided the Panel with evidence to support each of their claims. Based upon the evidence presented, the Board's investigation and review, the Panel finds no evidence of a violation of the Rules of Professional Conduct. Further, the Panel finds that this is not the proper forum for Complainant's claim. The filing of an ethics complaint is not a substitute for any legal remedy the Complainant may have.

As this matter does not concern a matter involving a breach of professional ethics, this complaint should be closed.

CLOSING ORDERED this 18<sup>th</sup> day of June 1998.

  
\_\_\_\_\_  
PAUL M. FRIEDBERG, CHAIRMAN  
Investigative Panel of the  
Lawyer Disciplinary Board