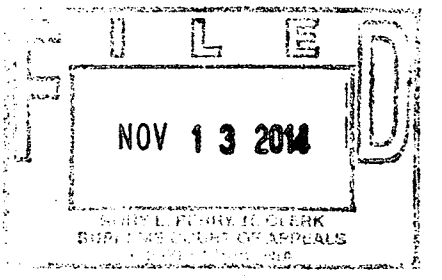
BRIEF FILED
WITH MOTION

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



LAWYER DISCIPLINARY BOARD,

Complainant,

v. **No. 13-0491**

KERRY A. NESSEL,

Respondent.

AMENDED BRIEF OF RESPONDENT KERRY A. NESSEL

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I. PRELIMINARY STATEMENT

Respondent, Kerry A. Nessel, concurs in and adopts herein the entirety of Complainant's Brief. Respondent includes in this brief: (1) a section supplementing Complainant's Brief, Section 1.C "FINDINGS OF FACT," to more fully discuss the allegations, facts and history of this matter; and (2) a Summary of Argument and Argument sections, to more specifically state Respondent's positions.

II. RESPONDENT'S STATEMENT OF FACTS SUPPLEMENTING COMPLAINANT'S BRIEF, SECTION 1.C, "FINDINGS OF FACT"

Kerry A. Nessel, the Respondent, is a sole practitioner in Huntington, West Virginia. Admitted to the Bar in 1999, he has a general practice, but has focused on criminal defense (much of it court appointed) and plaintiff's personal injury cases. In approximately 2002, Mr. Nessel began to represent prisoners in connection with claims of sexual assaults by correctional staff while detained and/or serving sentences in jails run by the Regional Jail Authority, and while serving sentences for felony convictions (Tr. 103-104)[1] in the West Virginia Divison of Corrections (DOC) women's facility, Lakin Correctional Center (LCC). Mr. Nessel has been one of a very small number of lawyers to undertake the representation of these women in connection with sexual assault and related claims.[2] Mr. Nessel has prosecuted a total of approximately 125 to 135 sexual assault cases against DOC and the Regional Jail Authority. Tr. 104 . He also has, of course, consulted with

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[1] Citations to the transcript of the May 13, 2014 hearing before the Lawyer Disciplinary Board Hearing Panel Subcommittee will be made as Tr. ____.

[2] Three other Huntington attorneys have done so, and Mr. Nessel has associated with those attorneys on cases in the past.

additional inmates, whose cases he declined to take; and he has met with numerous inmates who were, or whom he believed to be, witnesses. Tr. 92. The matter now before this Court came about within the broader context of this litigation; litigation that has been the subject of considerable press coverage; and that has presented considerable challenges to this State's penal authorities. The cases presented considerable challenges to Mr. Nessel due to the credibility and proof issues inherent in any inmate's claim based on activities that occurred inside a prison.

Lori Nohe was the LCC Warden at all times relevant to this matter. She made the first complaint to the Office of Disciplinary Counsel (ODC) on March 23, 2010, alleging Mr. Nessel offered money to inmates for client referrals. ODC Ex. 1.[3] ODC opened the complaint in its own name on March 29, 2010, based on claims by inmate S.F. that Mr. Nessel met with her, uninvited, and offered to put money into an account for her if she provided case referrals that resulted in settlements. Mr. Nessel submitted a written response, ODC Ex. 3, and a statement under oath to ODC, ODC Ex. 9, denying S.F.'s assertions.[4]

In his sworn statement Mr. Nessel testified that he gave money to inmate clients in amounts of $25 and $35, sent by money orders to be placed on the inmates' prison accounts at LCC. ODC 3; Tr. 84-90. The funds were Mr. Nessel's personal funds, which he sent, not as a finder's fee, but out of sympathy for those clients and consistent with his

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[3] ODC Exhbits from the transcript of the May 13, 2014 Lawyer Disciplinary Board Hearing Panel Subcommittee will be made as ODC Ex. _____.

[4] S.F.'s claims were contradicted by (1) her own letter to Mr. Nessel, through which she initiated contact by requesting Mr. Nessel represent her on a sexual harassment case arising at the a Regional Jail; and (2) Mr. Nessel's letter to her declining her case. ODC Ex. 3, 4 and 5.

Catholic faith. Tr. 101. He testified he knew his conduct was prohibited by the Rules of Professional Conduct. Mr. Nessel also testified that his sole employee, Michael Ferguson, sent some money orders at his direction. Mr. Nessel recalled three inmate clients to whom money was sent, and further advised there were a few other clients, whose names he could not specifically recall. Mr.Nessel admitted he failed to supervise his (only) staff person, in violation of Rule 5.3(b) and (c). In total, Mr. Nessel has acknowledged that three named clients and "several others" received money orders in amounts of $25 to $50. He did not attempt to hide these transactions. All the money orders disclosed him or Mr. Ferguson as the payor.[5]

Kelly C. Morgan is an associate with Bailey and Wyant, PLLC, the firm that has represented DOC personnel named as defendants in the sexual assault litigation. Ms. Morgan made the second complaint to ODC, on September 16, 2011, regarding, once again, the allegations of the finder's fee purportedly offered to S.F. Ms. Morgan's complaint included a new allegation: that Mr. Nessel pursued meritless cases for LCC inmates J.Q. and S.R. ODC merged Ms. Morgan's complaint into the prior complaint.

The J.Q. and S.R. civil actions were initiated along with numerous other LCC inmate cases, filed in Cabell County, alleging that inmates had been sexually assaulted by Dr. John Pellegrini. Dr. Pellegrini was an agent of Wexford Health Sources, which provided medical care at LCC to inmates per contract with DOC. Counsel for Wexford and Dr. Pellegrini filed a motion for sanctions against Mr. Nessel in the J.Q. and S.R. actions, on

[5] Neither WVDOC nor its counsel located or identified any other Nessel/Ferguson money orders, except those to BC, JQ and TS.

this same issue. That motion was heard by the circuit court and denied. RE 22.[6] The J.Q. and S.R. cases were dismissed, without prejudice, based on *W.Va. R. Civ. P.* 4(k) on service of process grounds. RE 23.[7]

More than two years after Warden Nohe's initial complaint, DOC and its counsel provided more information to ODC. On June 20, 2012 Lou Ann Cyrus, an attorney with Shuman, McCuskey & Slicer, counsel for DOC in the sexual assault litigation, provided recordings of telephone calls of J.M. and T.S., clients of Mr. Nessel, discussing Mr. Nessel with family or friends. J.M. appears to tell her parents that Mr. Nessel could not send money directly to her, but could send it to J.M.'s mother, because he had "gotten in trouble" previously for sending money to clients. T.S. advised a man that Mr. Nessel was subject to allegations that he offered inmates money for referrals and that he was accused of double billing.[8]

On July 6, 2012, the Warden provided records from the LCC accounts of inmates J.M. and A.M., including two checks drawn on Mr. Nessel's account. The J.M. check was part of the distribution of the settlement of J.M.'s civil action against DOC. Tr 50-51. The A.M. check was also a portion of J.M.'s distribution, which Mr. Nessel sent to A.M. at the direction of J.M. The record reflects that J.M. and A.M. had a close relationship as inmates and friends. TR 51. DOC policy prohibits inmate gifts to inmates, and so the A.M. check

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[6] Respondent's Exhbits from the transcript of the May 13, 2014 Lawyer Disciplinary Board Hearing Panel Subcommittee will be made as RE Ex. _____.

[7] Respondent was acting in good faith in the J.Q. and S.R. civil actions, as demonstrated by: Judge Pancake's denial of the sanctions motion; Mr. Nessel's testimony that DOC document production in litigation was not always reliable; and the W.Va. Board of Osteopathic Medicine's subsequent action against Dr. Pellegrini for sexual assault of patients while working for a different employer. RE 25 and 26.

[8] There is no indication in the record of any allegations regarding double billing.

was returned to Mr. Nessel. ODC Ex. 20. Mr. Nessel testified he did not know inmate A.M. Tr. 86-88.

On July 25, 2012 DOC also submited information to ODC from "inmates and staff" that Mr. Nessel offered finder's fees. ODC Brief, p. 7. The only "inmates and staff" identified in this latest material were M.C. and A.C. A.C. told DOC investigators that a written communication (a letter) she previously sent, and which discussed Mr. Nessel, was not truthful. As it turned out, M.C. had an intimate relationship with a DOC Lieutenant. The Lieutenant subsequently left DOC employment. M.C. sued DOC, and completely impeached herself in Warden Lohe's opinion. Tr. 42-44.

Also, on July 25, 2012, DOC once again provided information originating from S.F. This time an Assistant Warden provided a sworn statement concerning S.F. The Assistant Warden advised that he had interviewed S.F., who made the same finders' fee allegations against Mr. Nessel. And on July 25, 2012 LCC Supervisor Courtney Roush provided a sworn statement to ODC that Mr. Nessel met with fifteen or more inmates at LCC in a single day. ODC Ex. 29.

Mr. Nessel appeared for a second statement under oath at ODC, in September 2012. Once again, he admitted sending money orders to some clients, and that he authorized his office helper to do so on a few occasions. Once again, he denied offering payments for the referral of cases. ODC Ex. 36. Mr. Nessel testified that his inmate clients discussed their cases with other inmates, and encouraged them to contact him for representation.

Warden Nohe testified before the Hearing Panel. Mr. Nessel first came to her attention because he visited "numerous inmates" at one time, which she opined was "very

unusual."[9] Then, "through investigation," it was found that Respondent and Mr. Ferguson were "putting money on the inmates' books," Tr. 6-7 by sending money orders. The Warden "knew at that time" that Mr. Ferguson was an employee of Respondent. Tr. 7-8. Warden Nohe opined Mr. Nessel's visits were "unusual" because, in her experience, most attorneys "come in and see one inmate" or two. Tr. 9. She testified to the time and efforts of DOC staff to facilitate the inmate visits. Tr. 9-10. At some point, the Warden initiated a new procedure, limiting attorneys to visiting no more than five inmates per day. Tr. 10-11. Before the Warden changed the LCC visitation procedure, she had not informed Mr. Nessel that his inmate visits constituted a problem for her or LCC. Likewise, after the policy change, Mr. Nessel always complied with the new procedures. Tr. 22. The Warden testified that LCC's efforts to accommodate Mr. Nessel's inmate visits were not administratively burdensome and not disruptive to the facility. Tr. 20-21. She also testified that LCC security was not "compromise[d]." Tr. 11. It appears that Warden Lohe was troubled by the fact that Respondent visited inmates who were not "active cases." Tr. 21.

The Warden testified that LCC's "investigation" began in January, 2010 and lasted "four and a half years." Tr. 12. The investigation consisted of: (1) LCC staff review of inmate mail (a routine procedure) and (2) review of inmates' financial prison accounts; Tr. 12, 34, 37; (3) the identification, review and production of recordings of inmate telephone calls, a task carried out, at least in part, by DOC outside counsel, Tr. 27-34;[10] (4) review

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[9] On the whole, the record shows Respondent visited many inmates *on a single day*; not at one time. *See* ODC Ex. 29.

[10] All inmate calls are recorded, excepting attorney-client calls. Tr. 19. Inmates are allowed to make calls "several" times a day. Tr. 33-34. Therefore, an inmate may make, on average, 365 to over 1400 calls per year.

Recordings of telephone calls of LCC inmates suing DOC and DOC personnel are given to

of visitor logs, Tr. 37; (5) staff interviews of inmates; (6) outside counsel taking sworn statements from inmates, Tr. 39; (7) examination of inmate/plaintiffs and inmate witnesses by counsel for DOC and DOC personnel, about Mr. Nessel, during depositions in pending civil actions, Tr. 38.

Following the Statement of Charges and exchange of documents, Respondent, his counsel and ODC engaged in open and thorough discussions, which culminated in the stipulation, Joint Exhibit 1. Following the hearing, including consideration of the exhibits, and the testimony of Warden Nohe and Respondent, the Hearing Panel approved the stipulation and recommended discipline.[11]

III. SUMMARY OF ARGUMENT

The sanctions recommended by the Hearing Panel Subcommittee are more than sufficient to punish Respondent, deter further misconduct by Respondent and others, and educate the Bar and the public as to a lawyer's duties. The recommended sanctions will advance the Court's and the legal profession's interests in maintaining the integrity of the profession and will foster public confidence in the integrity of the legal profession.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This Court, by its Order of September 3, 2014, set oral argument on January 13, 2015.

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outside counsel for DOC and DOC personnel. Tr. 24-25. After an inmate files a lawsuit, DOC personnel cease listening to that inmate's calls but the recordings are still provided to outside counsel. Tr. 29-30.

[11] The parties had agreed to the terms and most, if not all, of the language of the stipulation by early October, 2013, in anticipation of the hearing before the Hearing Panel Subcommittee scheduled in October. Various circumstances, not related to the merits of this case, resulted in continuances until May 13, 2014.

V. ARGUMENT

When first questioned under oath by counsel for the ODC, Mr. Nessel readily acknowledged that he knowingly violated Rules 1.8(e) and 5.3(b) and (c). He admitted sending $25 and $35 money orders to a few clients and directing his employee to do so. Money was sent to several inmate clients whom he recalled, and "probably" a few others whose names he could not recall. Based on DOC records and Mr. Nessel's testimony, it can be estimated that at least three clients, plus a "few" more, totaling perhaps five or six clients, received money[12]; and it is likely the total amount given did not exceed $500. Respondent understands that neither the amount given, nor the number of recipients, excuses or justifies violating the rules. The prohibition in Rule 1.8(e) is clear and simple. And although one court has refused to create an "ad hoc" exception to the Rule, State of Oklahoma *ex rel* Oklahoma Bar Association v. Smolen, 17 P.3d 456 (2000), a more reasoned approach would permit this Court and the Lawyer Disciplinary Board to consider factors relevant to punishment and deterrence. In other words, violation of these rules should not result in a presumption that suspension is required. In this sense, the amount of financial assistance given (or loaned) to a client, the purpose of the payment, and the lawyer's intention, are relevant factors that allow disciplinary authorities and this Court to make an individualized sanction appropriate to the case.

Although the total amounts Mr. Nessel gave some clients has not been ascertained with precision, there is no dispute that the sums were not substantial; not even substantial to an inmate. These were modest sums given out of sympathy. The sums would allow an

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[12] Warden Nohe testified Respondent provided money to "five or six" inmates. Tr. 65.

inmate client to purchase extras: e.g., hair conditioner, makeup, a greeting card or candy bars from the LCC commissary.[13] The sums were not such as one might reasonably expect would cause a person, even a confined person, to take any action. The sums Mr. Nessel gave clients were less than the "living expenses" advanced or loaned to clients in other cases. *See* Lawyer Disciplinary Board v. Otis R. Mann, Jr., Supreme Court No. 23012, January 16, 1997 (unpublished) (admonishment for lawyer who advanced client $50 to $315 on nine occasions); In the Matter of Jack O. Morse, 293 Ga. 670, 748 S.E.2d 921 (2013) (reprimand to lawyer who loaned client $1,400 to avoid foreclosure).

The purpose for the gifts and the intention with which Mr. Nessel made the gifts is relevant. He acted out of sympathy for the clients. There is no credible or reliable evidence to contradict this point. One may be tempted to infer from the proximity of the finders' fee allegations that Mr. Nessel gave the sums for that purpose. The finders' fee allegations continue to be a palpable presence in this matter, and they pose a danger that one might conflate the unproven finders' fee allegations with the modest gifts. This should not be done.

Following the 4½ year investigation by LCC staff and two Charleston law firms, there remained exceedingly scant evidence, no persuasive evidence, that Mr. Nessel offered or paid fees for case referrals. The allegations were based on second and third-hand hearsay, from questionable sources, such as M.C. and S.F. None of the "evidence" proffered by DOC was admissible under the West Virginia Rules of Evidence. None of the evidence was shown to be reliable. The sources of the material did not testify and were

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[13] DOC provided inmates a bar of soap, a tube of toothpaste and deodorant on a monthly basis. Tr. 44-47. Other items had to be purchased.

not subject to cross-examination.

The recorded telephone calls are especially troubling, for lack of cross-examination of the speakers. The reliability and credibility of the speakers has not been tested. The speakers could have explained the factual basis, if any, of their comments about Respondent. The telephone recordings prove nothing, and do not remotely approach the clear and convincing evidence required by Rule 3.7 of the Rules of Professional Conduct.

The facts in this case have been established by the parties' stipulation and the Hearing Panel's findings of fact. The stipulation, approved by the Hearing Panel, is "binding and a judgment thereon will not be reversed." Syl. pt. 3, Lawyer Disciplinary Board v. Cavendish, 226 W.Va. 327, 700 S.E. 2d 779 (2010). This Court gives substantial deference to the Lawyer Disciplinary Board's findings of fact. Roark v. Lawyer Disciplinary Board, 207 W.Va. 181, 495 S.E. 2d 552 (1997). Respectful consideration is due the Lawyer Disciplinary Board's recommendation of appropriate sanctions, but this Court is the final arbiter of lawyer discipline. Committee on Lawyer Ethics v. MacCorkle, 192 W.Va. 286, 432 S.E. 2d 377 (1994).

So we end where we began: Mr. Nessel gave $25 to $50 sums to 5 or 6 clients. He admitted his conduct when first asked about it. He has not engaged in that conduct now for years. While he violated his duties to his clients, the actual harm to them is limited and abstract. Respondent did not act from selfish motives or self interest. The duties Respondent owes to the public and the legal profession will be adequately addressed by the recommended sanctions. The harms Mr. Nessel has caused are not of sufficient gravity to merit or require suspension.

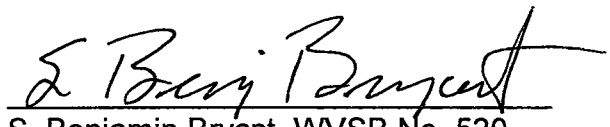
VI. CONCLUSION

Kerry A. Nessel is remorseful, has corrected his conduct, and stands ready for sanctions to be imposed. In light of the whole record, he respectfully prays this Court concur with the sanctions recommended by the Lawyer Disciplinary Board Hearing Panel Subcommittee.

Respectfully submitted,

KERRY A. NESSEL

By Counsel,



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CERTIFICATE OF SERVICE

I, S. Benjamin Bryant, do hereby certify that on the 13th day of November, 2014, I have served the foregoing **"Amended Brief of Respondent Kerry A. Nessell"** upon the parties to this action via United States Mail, postage pre-paid, and email addressed as follows:

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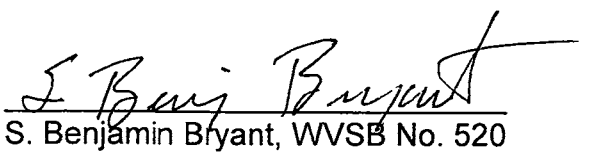

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