

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

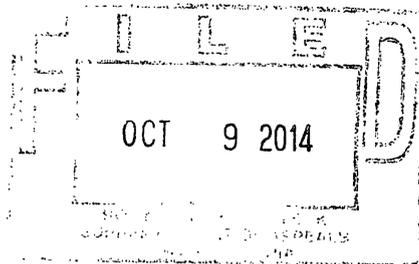
LAWYER DISCIPLINARY BOARD,

Complainant,

v.

KERRY A. NESSEL

Respondent.



No. 13-0491

BRIEF OF THE LAWYER DISCIPLINARY BOARD

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I. STATEMENT OF THE CASE

A. NATURE OF PROCEEDINGS AND RECOMMENDATION OF THE HEARING PANEL SUBCOMMITTEE

This is a disciplinary proceeding against Respondent Kerry A. Nessel, (hereinafter “Respondent”), arising as the result of a Statement of Charges issued against him and filed with the Supreme Court of Appeals of West Virginia on or about May 13, 2013. Respondent was served with the Statement of Charges on May 17, 2013, and filed a timely response thereto.

The matter then proceeded to hearing in Charleston, West Virginia, on May 13, 2014. Attorney S. Benjamin Bryant, Esquire, appeared on behalf of Respondent Kerry A. Nessel, who also appeared. Andrea J. Hinerman, Senior Lawyer Disciplinary Counsel, appeared on behalf of the Office of Disciplinary Counsel. The Hearing Panel Subcommittee, comprised of J. Miles Morgan, Esquire, Chairperson; Steven K. Nord, Esquire; and Priscilla M. Haden, laymember, presided over the proceedings.

The Hearing Panel Subcommittee heard testimony from Lori Nohe, Warden of Lakin Correctional Center, and Respondent and the arguments of counsel. The Hearing Panel Subcommittee also admitted into evidence the Office of Disciplinary Counsel’s Exhibits 1-10, 12, 15, 16, 18-20, 22, 23, 26, 29-36, 41, 45-48, and 51; Respondent’s exhibits 13, 22, 23, 25, and 26; and Joint Exhibit 1.

On or about June 19, 2014, the Hearing Panel Subcommittee filed its Report adopting the “Stipulations and Recommended Discipline” (hereinafter “Report”) with the Supreme Court of Appeals of West Virginia. The Hearing Panel Subcommittee properly found the “Stipulations and Recommended Discipline”, submitted as Joint Exhibit 1, to be appropriate in this matter.

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

1. That Respondent shall be reprimanded;
2. That Respondent shall attend an additional 9 (nine) hours of CLE in the area of ethics and law office management over and above his otherwise required CLE hours to be completed during the next reporting period;
3. That Respondent's practice shall be supervised for a period of one (1) year by an attorney agreed upon between the Office of Disciplinary Counsel and Respondent. The goal of the supervised practice will be to improve the quality and effectiveness of Respondent's law practice to the extent that Respondent's sanctioned conduct is not likely to recur; and
4. Respondent shall pay the costs incurred in this disciplinary proceeding.

B. FINDINGS OF FACT

Kerry A. Nessel (hereinafter "Respondent") is a lawyer practicing in Huntington, which is located in Cabell County, West Virginia. Respondent was admitted on April 13, 1999, to The West Virginia State Bar after successful passage of the February 23 and 24, 1999 bar exam, and, as such, he is subject to the disciplinary jurisdiction of the Supreme Court of Appeals of West Virginia and its properly constituted Lawyer Disciplinary Board.

Lori A. Nohe, Warden of Lakin Correctional Center, advised the Office of Disciplinary Counsel by letter dated March 23, 2010, that she believed Respondent was allegedly seeking business from inmates and offering money for referrals. [ODC Exhibit 1]. Warden Nohe provided

a statement from Lakin Correctional Center (hereinafter “Lakin”) Inmate S.F.¹ which was taken by John Sallaz, an Investigator at the time for the West Virginia Division of Corrections (hereinafter “WVDOC”). S.F. described an incident during which she alleged that Respondent had met with her seeking information regarding sexual assault by guards at Western Regional Jail. S.F. stated that Respondent was given her name by T.S., another Lakin inmate. Respondent allegedly requested names of other inmates who would be willing to discuss a possible case with him and offered to put any settlement money received into an account for S.F. to access upon her release from prison. [ODC Exhibit 1].

On or about March 29, 2010, a complaint was opened in the name of the Office of Disciplinary Counsel against Respondent for these allegations. [ODC Exhibit 2].

On or about April 16, 2010, Respondent submitted his response to the disciplinary complaint and denied the allegations. Respondent stated that S.F. initially contacted him in a letter dated August 29, 2009, requesting representation. A copy of this letter was provided upon request of the Office of Disciplinary Counsel. [ODC Exhibits 3, 4, and 5].

In his response, Respondent denied soliciting S.F.. However, Respondent stated that in or about 2009 or 2010, he met with S.F., and investigated her claims that she had been sexually assaulted while an inmate at Western Regional Jail. Respondent believed that S.F. was upset because he did not agree to represent her. However, Respondent stated he may have offered to write a letter to the Parole Board on her behalf. [Exhibit 3].

¹Inmates are identified by their initials pursuant to Rule 40(e)(1) of the Rules of Appellate Procedure.

Respondent appeared for a sworn statement at the Office of Disciplinary Counsel on April 4, 2011.² Respondent, again, denied all allegations that he solicited information or business from S.F. or offered any money for a “finder’s fee.” Respondent stated that S.F. signed a standard contract, but ultimately Respondent ended his representation of S.F. because he “found out she was lying.” [ODC Exhibit 9].

However, Respondent admitted that he had sent small amounts of his own money to clients, i.e. twenty-five dollars (\$25.00) to thirty-five dollars (\$35.00), but not as a payment for referrals. Respondent indicated that the money was sent simply “out of the kindness of my heart,” because he felt sorry for his clients. Respondent stated that he knew that it was a violation of the Rules of Professional Conduct and that he would take corrective measures to ensure it did not happen again. [ODC Exhibit 9].

On or about September 16, 2011, the Office of Disciplinary Counsel received a complaint from Kelly C. Morgan, Esquire, an associate with Bailey and Wyant, PLLC, which included a copy of a transcribed interview by John Sallaz, investigator for the WVDOC, and a Memorandum from Mr. Sallaz to Warden Nohe regarding S.F.’s allegations against Respondent. Since this new complaint involved substantially similar facts and issues, it was merged with the complaint involving S.F. opened on or about March 29, 2010. Respondent was advised of this new complaint by letter dated November 3, 2011, and he was asked to file a verified response to these new allegations. [ODC Exhibits 16, 18].

Ms. Morgan’s complaint also detailed two other separate and distinct incidents involving Respondent. The first incident involved a case with Wexford Health Sources (hereinafter

²This sworn statement also included testimony regarding Complaint I.D. No. 09-01-512, which has since been closed.

“Wexford”), which provides in-house contractual medical services at WVDOC facilities. Ms. Morgan stated that Respondent had requested medical records on numerous Lakin inmates, who had alleged they were sexually abused while receiving medical treatment from Dr. John Pellegrini while at Lakin. Wexford copied the requested files and billed Respondent for the cost, but he refused to pay the bill. Ms. Morgan stated that Respondent then requested that Wexford search through the records it had copied and send him just a few pages. Wexford insisted that Respondent pay the full copying charges, but he again refused. Because Respondent refused to pay, Wexford did not forward the records to him, and he was unable to verify the accuracy of the inmates’ allegations. One of the inmates, J.Q., was released prior to Dr. Pellegrini’s employment at Lakin. Accordingly, Ms. Morgan said she informed Respondent that J.Q. could not have been treated by Dr. Pellegrini. Nonetheless, Respondent filed suit against Dr. Pellegrini and included J.Q. as a plaintiff in the case. Despite being apprised of the information that J.Q.’s claim was not viable, Respondent repeatedly refused to voluntarily dismiss J.Q. from the complaint. The second incident involved Inmate S.R., who was also named as a plaintiff in the above-mentioned case against Dr. Pellegrini.³ Ms. Morgan stated that Inmate Ratliff had no claims against Dr. Pellegrini or Wexford, never consulted with Respondent, and never consented to filing the suit. Ms. Morgan informed Respondent of this discrepancy, but Respondent again repeatedly refused to voluntarily dismiss S.R. from the claim. Ms. Morgan also alleged that Respondent repeatedly failed to respond to her correspondence regarding the case. [ODC Exhibit 16].⁴

³It is noted that S.R.’s name is misspelled in the lawsuit Respondent had filed on her behalf.

⁴At a hearing held on November 30, 2011, before the Honorable David M. Pancake, Judge, the Defendants’ Motion for Sanctions was heard by the Court. At the hearing, the Court denied the Motion for Sanctions. [Respondent’s Exhibit 22]. By Order entered December 1, 2011, the Court dismissed, without prejudice, this civil action from the Court’s active docket on a limited ruling pursuant to Rule 4(k) of Civil

On or about November 23, 2011, Respondent filed his response to Ms. Morgan's complaint. Respondent stated that he filed the case against the WVDOC because he believed his clients were telling the truth. Respondent claimed that "the WVDOC and its contracted agencies have a history of making documents disappear." Respondent believed the WVDOC is on a "witch hunt to disparage my good name and character." Respondent claimed that multiple clients have reported to him that their parole was revoked, they were subjected to made-up violations, or kept at Lakin for months after making parole so they would provide favorable testimony regarding the WVDOC and its staff in pending lawsuits. Respondent claimed that he believed there was a conspiracy in the WVDOC involving a "plethora of rapes and sexual assaults that occur on WVDOC grounds," which he was attempting to expose. He believed that this is the reason for the ethical complaints against him. [ODC Exhibit 19].

On or about June 20, 2012, Lou Ann S. Cyrus, Esquire, of Shuman McCuskey & Slicer, provided transcripts of several recorded telephone calls of Inmate J.M. and Inmate T.S., who were represented by Respondent while they were incarcerated at Lakin.⁵ In these calls, J.M. informs her mother, Lisa Ohlinger, that Respondent had allegedly agreed to attempt to send money to J.M. through Ms. Ohlinger. However, J.M. said that as Respondent had previously gotten into trouble for sending money to inmate, he could no longer send it directly to her. Instead he would send it to Ms. Ohlinger, who could then forward it to J.M..⁶ During another call, J.M. informed her father,

Procedure relating to the time limit for service, not based upon frivolousness. [Respondent's Exhibit 23].

⁵These transcripts were provided in accordance with an Agreed Order in the matter of *Jillia Mayes v. Francis, WVDOC*, Kanawha County Civil Case No.: 10-C-831.

⁶Ms. Ohlinger agreed to submit to a sworn statement to take place on April 11, 2013. However, Ms. Ohlinger did not appear for her sworn statement. [ODC Exhibits 44, 49].

Eddie Mayes, of the same. Inmate T.S.'s calls included conversations with Estill Sloan, during which they discuss allegations that Respondent is committing ethical violations, such as sending money to inmates for referring other inmates for potential lawsuits and double billing. [ODC Exhibit 25, Under Seal].

In a letter dated June 11, 2012, Respondent stated that J.M. did contact him requesting an "advance" on her settlement, but he denied sending any money to her. [ODC Exhibit 24].

On or about July 6, 2012, Warden Nohe notified Complainant that two checks were received and processed through Lakin for Inmates J.M. and A.M. J.M.' check (check #2342) was processed and placed on her spending account.⁷ However, Inmate A.M.'s check (check #2343) could not be processed because it was referenced as a gift from J.M.. Warden Nohe stated that Respondent was notified of this disallowance. [ODC Exhibit 26].

On or about July 25, 2012, Courtney Roush, a supervisor at Lakin, offered information in a sworn statement regarding Respondent's visits to the facility during which he would meet with numerous inmates. Ms. Roush handled the scheduling and paperwork for the meetings and assisted the officers with monitoring the visits. Ms. Roush stated that Respondent would often meet with fifteen (15) or more inmates in one day. [ODC Exhibit 29].

On or about July 25, 2012, Robin Ramey, an Investigator at Lakin, provided a sworn statement. Investigator Ramey offered information she had obtained from inmates and staff regarding allegations that Respondent had offered money for referrals for pending lawsuits. Investigator Ramey received information from Inmate M.C. and Inmate A.C. Investigator Ramey's memorandum dated August 25, 2011, to Warden Nohe regarding interviews with Inmate A.C. and

⁷Upon information and belief, this money represented the proceeds from a settlement of J.M.' claims against WVDOC obtained on her behalf by Respondent.

Inmate M.C. was provided to Complainant. This interview was conducted based on written correspondence from A.M. referencing several situations at the prison. However during the interview, A.M. admitted that her correspondence was not truthful. Because her allegations involved another inmate and an correctional officer, it was then necessary to notify Warden Nohe and conduct an interview with the other inmate, Inmate M.C.. During that interview, Inmate M.C. stated that Respondent told her she could tell her story and get paid for it, or she would be deposed in another case at which time she would have to tell it anyway or be charged with perjury. Inmate M.C. stated that Respondent came to meet with her several times and made the same offer. [ODC Exhibit 32].

On or about July 25, 2012, John Sallaz, now the Deputy Warden at Lakin, provided a sworn statement. Deputy Warden Sallaz previously held a position as an Investigator, during which time he was asked to investigate allegations that had been made against Respondent. Deputy Warden Sallaz stated that he spoke with S.F. upon her request regarding Respondent. S.F. stated that Respondent offered her a percentage of any settlement if she would give him names for a potential lawsuit. [ODC Exhibit 31].

Respondent appeared for a second sworn statement on September 18, 2012. Respondent again admitted to previously sending small amounts of money to his inmate clients, but denied he had sent any money since his first sworn statement at the Office of Disciplinary Counsel and further denied that any money was sent as a payment for referrals. Respondent stated that he has instructed his assistant, Michael Ferguson, not to send money either.⁸ Respondent stated that inmates would

⁸Money had previously been deposited into an inmate's account in the form of a money order signed by "M. Ferguson." For example, "M. Ferguson" sent three money orders for Fifty Dollars (\$50.00) each made out to B.C. on or about the following dates: November 17, 2010; December 31, 2010; and February 14, 2011. Respondent acknowledged depositing money into the following clients' inmate accounts: T.S.,

confide their situations to other inmates who would then encourage them to contact him. Respondent believes whenever an inmate files a lawsuit against WVDOC, there is a conspiracy to cover up the reasons for the lawsuits, and WVDOC is retaliating against the inmates by giving them more time for frivolous rule violations, and/or denying parole. [ODC Exhibit 36].

C. CONCLUSIONS OF LAW

Respondent admitted by stipulation and the Hearing Panel Subcommittee found that by depositing his personal funds into some of his clients' prison accounts, for purposes not related to litigation, he violated Rule 1.8(e) of the Rules of Professional Conduct, which provides as follows:

Rule 1.8. Conflict of Interest: Prohibited Transactions.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

Respondent admitted by stipulation and the Hearing Panel Subcommittee found that he directed, caused or ratified the deposit by Mr. Ferguson, an employee/agent of his law firm, of Respondent's personal funds into some of his clients' inmate accounts at Lakin Correctional Center and that these actions violated 5.3(b) and (c) of the Rules of Professional Conduct, which provides as follows:

Rule 5.3. Responsibilities regarding nonlawyer assistants.

With respect to a nonlawyer employed or retained by or associated with a lawyer:

B. C., and J.G. Respondent also acknowledged there were probably several others but he was unable to provide any additional names. [ODC Exhibit 15, Bates Nos. 380, 381; see also ODC Exhibit 46, Bates No. 828].

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer.

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable action.

Respondent admitted by stipulation and the Hearing Panel Subcommittee found that by depositing his personal funds into clients' prison accounts, and/or knowingly assisted or induced another to do so, as well, in violation of Rules 1.8(e) and 5.3 of the Rules of Professional Conduct, that Respondent has violated Rule 8.4(a) and Rule 8.4(d) of the Rules of Professional Conduct, which provide as follows:

Rule 8.4. Misconduct.

It is professional misconduct for a lawyer to:

(a) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

* * *

(d) Engage in conduct that is prejudicial to the administration of justice.

The Office of Disciplinary Counsel and Respondent jointly recommended the dismissal of the Rule 3.1 violation alleged in ¶ 20 of the Statement of Charges and Rule 7.3 violation alleged in ¶ 22 of the Statement of Charges.

II. SUMMARY OF ARGUMENT

The Supreme Court has long recognized that attorney disciplinary proceedings are not designed solely to punish the attorney, but also to protect the public, to reassure the public as to the

reliability and integrity of attorneys, and to safeguard its interests in the administration of justice. Lawyer Disciplinary Board v. Taylor, 192 W.Va. 139, 451 S.E.2d 440 (1994). The evidence in the record supports the Hearing Panel Subcommittee's findings of fact and, as such, the factual findings are to be given substantial deference by this Honorable Court. The Hearing Panel Subcommittee appropriately concluded that Respondent violated Rules 1.8(e), 5.3(b), 5.3(c), 8.4(a) and 8.4(d) of the Rules of Professional Conduct.

Therefore, in order to effectuate the goals of the disciplinary process, the Hearing Panel Subcommittee of the Lawyer Disciplinary Board recommended that Respondent be reprimanded; that he attend an additional 9 (nine) hours of CLE in the area of ethics and law office management over and above his otherwise required CLE hours to be completed during the next reporting period; shall petition for reinstatement after serving his suspension; that his practice shall be supervised for a period of one (1) year by an attorney agreed upon between the Office of Disciplinary Counsel and Respondent with the goal of improvement in the quality and effectiveness of Respondent's law practice to the extent that Respondent's sanctioned conduct is not likely to recur; and that he pay the costs incurred in this disciplinary proceeding.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 19 of the Revised Rules of Appellate Procedure, this Honorable Court's September 3, 2014 Order set this matter for oral argument on January 13, 2015.

IV. ARGUMENT

A. STANDARD OF PROOF

In lawyer disciplinary matters, a *de novo* standard of review applies to questions of law, questions of application of the law to the facts, and questions of appropriate sanction to be imposed.

Roark v. Lawyer Disciplinary Board, 207 W. Va. 181, 495 S.E.2d 552 (1997); Committee on Legal Ethics v. McCorkle, 192 W. Va. 286, 452 S.E.2d 377 (1994). The Supreme Court of Appeals gives respectful consideration to the Lawyer Disciplinary Board's recommendations as to questions of law and the appropriate sanction, while ultimately exercising its own independent judgment. McCorkle, 192 W. Va. at 290, 452 S.E.2d at 381.

Substantial deference is to be given to the Lawyer Disciplinary Board's findings of fact unless the findings are not supported by reliable, probative, and substantial evidence on the whole record. McCorkle, Id.; Lawyer Disciplinary Board v. Cunningham, 195 W. Va. 27, 464 S.E.2d 181 (1995). At the Supreme Court level, "[t]he burden is on the attorney at law to show that the factual findings are not supported by reliable, probative, and substantial evidence on the whole adjudicatory record made before the Board." Cunningham, 464 S.E.2d at 189; McCorkle, 192 W. Va. at 290, 452 S.E.2d at 381.

The charges against an attorney must be proven by clear and convincing evidence pursuant to Rule 3.7 of the Rules of Lawyer Disciplinary Procedure. *See*, Syl. Pt. 1, Lawyer Disciplinary Board v. McGraw, 194 W. Va. 788, 461 S.E.2d 850 (1995). The Supreme Court has also held that "[s]tipulations or agreements made in open court by the parties in the trial of a case and acted upon are binding and a judgment founded thereon will not be reversed." Syl. Pt. 3, Lawyer Disciplinary Board v. Cavendish, 226 W.Va. 327, 700 S.E.2d 779 (2010).

The Supreme Court of Appeals is the final arbiter of formal legal ethic charges and must make the ultimate decisions about public reprimands, suspensions or annulments of attorneys' licenses to practice law. Syl. Pt. 3, Committee on Legal Ethics v. Blair, 174 W.Va. 494, 327 S.E.2d 671 (1984); Syl. Pt. 7, Committee on Legal Ethics v. Karl, 192 W.Va. 23, 449 S.E.2d 277 (1994).

B. ANALYSIS OF SANCTION UNDER RULE 3.16 OF THE RULES OF LAWYER DISCIPLINARY PROCEDURE

Syl. Point 4 of Office of Disciplinary Counsel v. Jordan, 204 W.Va. 495, 513 S.E.2d. 722 (1998) holds: Rule 3.16 of the Rules of Lawyer Disciplinary Procedure provides that when imposing a sanction after a finding of lawyer misconduct, the Court shall consider: (1) whether the lawyer has violated a duty owed to a client, to the public, to the legal system, or to the profession; (2) whether the lawyer acted intentionally, knowingly, or negligently; (3) the amount of the actual or potential injury caused by the lawyer's misconduct; and (4) the existence of any aggravating or mitigating factors. A review of the extensive record in this matter indicates that Respondent has transgressed all four factors set forth in Jordan.

1. Whether Respondent has violated a duty owed to a client, to the public, to the legal system or to the legal profession.

The evidence establishes by clear and convincing proof that Respondent violated his duty owed to his clients by failing to adhere to his obligations under Rule 1.8(e) which prohibits him from providing financial assistance, in any amount, to a client in connection with pending or contemplated litigation except for the advancement of court costs and expenses of litigation, repayment of which may be contingent on the outcome of the matter or the payment of court costs and expenses of litigation on behalf on an indigent client. In addition, Respondent violated his duty to the legal system when he deposited and/or caused to be deposited by a person in his employ, his personal funds into his clients' prison accounts.

Respondent admitted that he deposited money into the following clients' inmate accounts: T.S., B.C., and J.G. Respondent also acknowledged there were probably several others but he was unable to provide any additional names. Respondent admitted to depositing money in the amounts

of \$25.00 to \$35.00. [ODC Ex 9, Bates Nos. 97, 143; ODC Ex. 15]. In addition, records received from Lakin clearly established that money had also been deposited into certain client inmate accounts in the form of a money order signed by "M. Ferguson." The person identified as M. Ferguson is, by admission, Michael Ferguson, who at the time of the deposits was Respondent's employee. For example, "M. Ferguson" sent three money orders for Fifty Dollars (\$50.00) each made out to B.C. on or about the following dates: November 17, 2010; December 31, 2010; and February 14, 2011. [ODC Exhibit 15, Bates Nos. 380, 381; see also ODC Exhibit 46, Bates No. 828]. Warden Nohe, who filed the complaint against Respondent, testified at the hearing that Respondent came to her attention because of deposits into some prison inmate accounts by a "M. Ferguson" who she knew at the time to be Respondent's employee. [Hrg. Trans. at pp. 6-8]. At his sworn statement, Michael Ferguson stated that he was aware that Respondent had sent money to inmate clients. [Ex. 47, Bates Nos. 847-848]. Mr. Ferguson also admitted that he had sent money to inmate client which Respondent had taken from the office's petty cash drawer. [Ex. 47, Bates No. 849].

Warden Nohe also testified at the hearing about Respondent's practice of requesting to see so many inmates at one time that it disrupted the normal day to day procedure at the prison because his requests tied up employees who had to stay with the inmates waiting in the hallway. She also testified that Lakin subsequently changed its procedures for lawyers' requests to meet with prison inmates due to Respondent's practice in making requests to see so many inmates at one time. [Hrg. Trans. at pp. 8-12].

2. Respondent acted intentionally, knowingly or negligently.

Respondent testified at the hearing in this matter that at the time he was depositing money in to client prison accounts, he knew that the same was a violation of the Rules of Professional

Conduct. [Hrg. Trans. at p. 82]. Therefore, Respondent acted in a knowing manner in this matter. “Knowledge” is defined by the American Bar Association in the *Standards for Imposing Lawyer Sanctions* as the “conscious awareness of the nature or attendant circumstances of his or her conduct without conscious objective or purpose to accomplish a particular result.”

3. The amount of actual or potential harm caused by the lawyer’s misconduct.

It is acknowledged that his clients suffered no injury as a result of Respondent’s misconduct in depositing or causing to be deposited his personal funds into his clients’ prison accounts. However, because Respondent knowingly committed violations of the Rules of Professional Conduct, he injured both the legal system and the legal profession. Furthermore, Warden Nohe testified as to expenditure of Lakin employee time on its investigation into Respondent’s activities at the prison and the fact that Respondent’s visits to the prison to see multiple clients at the same time, prior to changes in prison procedures, interrupted normal prison activity. [Hrg. Trans. at pp. 11-15]. However, Warden Nohe acknowledged that after 2011, when the investigation began, there had been no further evidence that either Respondent or Mr. Ferguson had deposited any further money into inmate accounts. [Hrg. Trans. at p. 15].

4. The existence of any aggravating factors.

Aggravating factors are considerations enumerated under Rule 3.16 of the Rules of Lawyer Disciplinary Procedure for the Court to examine when considering the imposition of sanctions. Elaborating on this rule, the *Scott* court held “that aggravating factors in a lawyer disciplinary proceeding ‘are any considerations, or factors that may justify an increase in the degree of discipline to be imposed.’” Lawyer Disciplinary Board v. Scott, 213 W.Va. 209, 216, 579 S.E. 2d 550,

557(2003) quoting *ABA Model Standards for Imposing Lawyer Sanctions*, 9.21 (1992). There are several aggravating factors present in this case.

Rule 9.22(c) of the *ABA Model Standards for Imposing Lawyer Sanctions* indicates that a pattern of misconduct constitutes an aggravating factor. The Scott Court noted that the *ABA Model Standards for Imposing Lawyer Sanctions* has also recognized "multiple offenses" as an aggravating factor in a lawyer disciplinary proceeding. Scott, 213 W.Va. at 217, 579 S.E.2d at 558.

Rule 9.22(c) of the *ABA Model Standards for Imposing Lawyer Sanctions* indicates that a pattern of misconduct constitutes an aggravating factor. Respondent has exhibited a pattern and practice of misconduct of (1) depositing or causing to be deposited his personal funds into his clients' prison accounts; (2) multiple offenses of depositing or causing to be deposited his personal funds into his clients' prison accounts; and (3) substantial experience in the practice of law.

5. The existence of any mitigating factors.

In addition to adopting aggravating factors in Scott, the Scott court also adopted mitigating factors in a lawyer disciplinary proceedings and stated that mitigating factors "are any considerations or factors that may justify a reduction in the degree of discipline to be imposed." Lawyer Disciplinary Board v. Scott, 213 W.Va. 209, 579 S.E.2d 550, 555 (2003) quoting *ABA Model Standards for Imposing Lawyer Sanctions*, 9.31 (1992)⁹. It should be clear that mitigating factors were not envisioned to insulate a violating lawyer from discipline.

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

In this case, the Hearing Panel Subcommittee found the following to be mitigating factors: (1) absence of a prior disciplinary record; (2) cooperative attitude toward proceedings; (3) timely good faith to rectify consequences of misconduct; (4) remorse; and (5) Respondent is the sole parent of a minor son, now age 13, who has been very active in school activities and sports.

C. SANCTION

The principle purpose of attorney disciplinary proceedings is to safeguard the public's interest in the administration of justice. Syl. pt. 3, Daily Gazette v. Committee on Legal Ethics, 174 W.Va. 359, 326 S.E.2d 705 (1984); and Syl. pt. 2, Lawyer Disciplinary Board v. Hardison, 205 W.Va. 344, 518 S.E.2d 101 (1999). Moreover, “[a] sanction is to not only punish the attorney, but should also be designed to reassure the public confidence in the integrity of the legal profession and deter other lawyers from similar conduct.” Syl. pt 2, Committee on Legal Ethics v. White, 189 W.Va. 135, 428 S.E.2d 556 (1993); Syl. pt 3, Committee on Legal Ethics v. Walker, 178 W.Va. 150, 358 S.E.2d 234 (1987); Syl. pt. 5, Committee on Legal Ethics v. Roark, 181 W.Va. 260, 382 S.E.2d 313 (1989); Syl pt. 3, Lawyer Disciplinary Board v. Friend, 200 W.Va. 368, 489 S.E.2d 750 (1997); and Syl pt. 3, Lawyer Disciplinary Board v. Keenan, 208 W.Va. 645, 542 S.E.2d 466 (2000).

In general, Standard 7.3 of the *ABA Standards for Imposing Lawyer Sanctions* states that a reprimand is appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed a professional and causes injury or potential injury to a client, the public, or to the legal system. Even when little or no harm occurred, a public sanction helps educate the respondent lawyer and deter future violations. While in this case Respondent has admitted to acting knowingly and there was certainly a potential for harm, a reprimand seems more appropriate as the ABA Standards define a reprimand is “a form of public discipline which declares the conduct of the lawyer improper, but

not does not limit the lawyer's right to practice." See, ABA Standards for Imposing Lawyer Sanctions, Section 2.5.

In deciding an appropriate sanction, this Court must consider not only what sanctions would appropriately punish Respondent, but also whether the sanctions are adequate to serve as an effective deterrent to other members of the Bar and restore public confidence in the ethical standards of the legal profession. Committee on Legal Ethics v. Walker, 178 W.Va. 150, 358 S.E.2d 234 (1987). The Stipulated Discipline adopted by the Hearing Panel Subcommittee appropriately addresses these concerns. A review of the record indicates that the Hearing Panel Subcommittee properly considered the evidence and made an appropriate recommendation to this Court.

The Rules of Professional Conduct state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. Syl.pt. 3, in part, Committee on Legal Ethics v. Tatterson, 173 W.Va. 613, 319 S.E.2d 381 (1984), cited in Committee on Legal Ethics v. Morton, 186 W.Va. 43, 45, 410 S.E.2d 279, 281 (1991). Respondent, a lawyer with considerable experience, has demonstrated conduct which has fallen below the minimum standard for attorneys, and discipline must be imposed. In the past this Court has looked to the overall history of the lawyer, including such things as prior wrongdoing and discipline, when determining what sanction to impose. Syl. pt. 5, Committee on Legal Ethics v. Tatterson (Tatterson II), 177 W. Va. 356, 352 S.E.2d 107 (1986) (*prior discipline aggravating because it calls into question a lawyer's fitness to practice a profession imbued with the public's trust*).

In regard to a violation of Rule 1.8(e) of the Rules of Professional Conduct, this Court has issued an unpublished decision which admonished the lawyer. In Lawyer Disciplinary Board v. Otis R. Mann, Jr., Supreme Court No. 23012, January 16, 1997 (Unpublished), this Court issued an

admonishment “for technically violating Rule 1.8(e) of the Rules of Professional Conduct. In Mann, the lawyer advanced to his client amounts of money ranging from \$50.00 to \$315.00 on nine (9) occasions. It appeared that the money was advanced for living expenses, however, and the client reimbursed the attorney after receipt of Workers’ Compensation checks. The attorney also apparently loaned the same client \$2,500.00 towards the purchase of a mobile home the client made in anticipation of her receipt of other settlement money which arrived the next day.

Recently, the Supreme Court of Georgia, In the Matter of Jack O. Morse, 293 Ga. 670, 748 S.E.2d 921 (2013), issued a panel reprimand to an attorney who admitted to loaning a client \$1,400.00 so that the client could avoid foreclosure in violation of Rule 1.8(e) of the Rules of Professional Conduct. In Morse, the client also repaid the loan which the lawyer had given to him. Id.

However, the Supreme Court of Oklahoma issued a 60 day suspension to an attorney who had made a loan to a client for living expenses. State of Oklahoma ex rel. Oklahoma Bar Association v. Donald E. Smolen, 17 P.3rd 456 (2000). The Oklahoma Court specifically noted that while it was not unsympathetic to the plight of litigants, it would not create an “ad hoc exception...” permitting lawyers to advance funds beyond what was already permitted under the rules which is funds only for costs associated with pending or contemplated litigation. Oklahoma Bar Association v. Smolen, 17 P.3rd 456, 462. The Oklahoma Court also cited with approval, after noting that most courts impose discipline on lawyers for this conduct, the Mississippi Supreme Court’s “concern that allowing a lawyer to advance funds to a client for living expenses would ‘generate unseemly bidding wars for cases and inevitably lead to further denigration of our civil justice system.’” Id., 17 P.3d at 461-2, *citing* Mississippi Bar v. Attorney HH, 671 So.2d 1293 (Miss. 1995). It should be noted that the

attorney in Smolen had been disciplined on two prior occasions by the Oklahoma Supreme Court including once for a prior violation of Rule 1.8(e) of the Rules of Professional Conduct. Id., 17 P.3rd at 463.

In regard to a violation of Rule 5.3 of the Rules of Professional Conduct, this Court has issued an unpublished decision which admonished the lawyer. In Lawyer Disciplinary Board v. Lawrence E. Sherman, Jr., Supreme Court No. 33294, September 13, 2007 (Unpublished), this Court issued a reprimand to an attorney who was found guilty, among other violations, of violating Rule 5.3 due to his failure to supervise staff members to whom he delegated his responsibilities within his office.

This matter also involved a violation of Rule 8.4(d) of the Rules of Professional Conduct. Unlike in other recent cases before this Court, it does not appear that Respondent in this matter was using his status as an attorney who to see clients at Lakin in a wholly inappropriate manner. *See for example*, Lawyer Disciplinary Board v. Stanton, 225 W.Va. 671, 695 S.E.2d 901 (2010) and Lawyer Disciplinary Board v. Stanton, __ W.Va. ___, 760 S.E.2d 453 (2014), WL 2564409. Nonetheless, Respondent's activities in meeting with multiple clients and in depositing the \$50.00 money orders into some inmate accounts did cause some disruption in the orderly running of the prison. Moreover, as this Court noted in Stanton Court, "prison officials should not have to over-analyze the motivations of an attorney who seeks to meet with an incarcerated individual whom he states or implies is his client." Lawyer Disciplinary Board v. Stanton, 225 W.Va. 671, 695 S.E.2d 901 (2010).

V. CONCLUSION

In reaching its recommendation as to sanctions, the Hearing Panel Subcommittee considered the evidence, the facts and recommended sanction, the aggravating factors and mitigating factors.

For the reasons set forth above, the Hearing Panel Subcommittee recommended the following sanctions:

1. That Respondent shall be reprimanded;
2. That Respondent shall attend an additional 9 (nine) hours of CLE in the area of ethics and law office management over and above his otherwise required CLE hours to be completed during the next reporting period;
3. That Respondent's practice shall be supervised for a period of one (1) year by an attorney agreed upon between the Office of Disciplinary Counsel and Respondent. The goal of the supervised practice will be to improve the quality and effectiveness of Respondent's law practice to the extent that Respondent's sanctioned conduct is not likely to recur; and
4. Respondent shall pay the costs incurred in this disciplinary proceeding.

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

Respectfully submitted,
The Lawyer Disciplinary Board
By Counsel

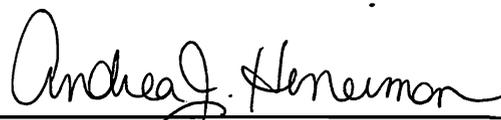


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CERTIFICATE OF SERVICE

This is to certify that I, Andrea J. Hinerman, Senior Lawyer Disciplinary Counsel for the Office of Disciplinary Counsel, have this day, the 9th day of October, 2014, served a true copy of the foregoing "**Brief of the Lawyer Disciplinary Board**" upon S. Benjamin Bryant, Esquire, counsel for Respondent Kerry A. Nessel, by mailing the same via United States Mail with sufficient postage, to the following address:

S. Benjamin Bryant
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Charleston, West Virginia 25323



Andrea J. Hinerman