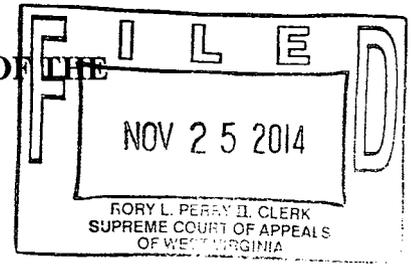


BEFORE THE SUPREME COURT OF APPEALS OF THE
STATE OF WEST VIRGINIA



LAWYER DISCIPLINARY BOARD,

Complainant,

v.

No. 13-0491

KERRY A. NESSEL

Respondent.

REPLY BRIEF OF THE LAWYER DISCIPLINARY BOARD

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I. REPLY TO RESPONDENT'S BRIEF

This matter is before the Court pursuant to the "Report of the Hearing Panel Subcommittee" issued on June 19, 2014, wherein the Hearing Panel Subcommittee found that the evidence established that Respondent committed violations of Rules 1.8(e)¹, 5.3(b) & (c)², 8.4(a) and (d)³ of the Rules of Professional Conduct. The HPS has recommended to this Honorable Court that Respondent be reprimanded for his conduct in this matter; that Respondent be ordered to complete an additional nine (9) hours of Continuing Legal Education and law office management over and above his otherwise required CLE hours to be completed during the next reporting period; that Respondent's practice shall be supervised for a period of one (1) year by an attorney agreed upon

¹ **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.

² **Rule 5.3. Responsibilities regarding nonlawyer assistants.**

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

- (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.

³ **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.

between the Office of Disciplinary Counsel and Respondent with the goal of the supervised practice being 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 that Respondent pay the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.⁴

In his brief, Respondent agrees with the recommendations of the Hearing Panel Subcommittee and "concur[s] and adopts . . . the entirety of [ODC's] brief." [Respondent's Amended Reply Brief at p. 1].⁵ Respondent admits that he knowingly violated the Rules of Professional Conduct by sending money to his inmate clients through money orders which were deposited into their prison accounts at Lakin Correctional Center (hereinafter "Lakin"). He also admits that he failed to supervise his non-lawyer employee as required by the Rules of Professional Conduct, who also mailed money orders to Respondent's inmate clients. While Respondent disputes that his conduct and activities at Lakin caused such disruption as to compromise safety, the evidence demonstrates that procedures at Lakin were indeed modified due to Respondent's misconduct. At this stage in the proceedings, this Court has held that "[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." Lawyer Disciplinary Board v. Cunningham, 195 W.Va. 27, 34, 464 S.E.2d 181, 189 (1995); Committee on Legal Ethics v. McCorkle, 192 W. Va. 286, 290, 452 S.E.2d 377, 381 (1994).

⁴ Respondent and the Office of Disciplinary Counsel entered into Stipulations regarding these matters and the same was admitted into evidence as Joint Exhibit 1, and adopted by the Hearing Panel Subcommittee in its Report of the Hearing Panel Subcommittee.

⁵ Respondent filed a reply Brief on or about November 10, 2014, and then on or about November 13, 2014, Respondent filed a Motion to File an Amended Brief and an Amended Brief. ODC's references to Respondent's Brief are made to Respondent's Amended Brief.

The Rules of Professional Conduct state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. Committee on Legal Ethics v. Keenan, 189 W.Va. 37, 40, 427 S.E.2d 471, 473 (1993) (*per curiam*); quoting Syl. Pt. 3, in part, Committee on Legal Ethics v. Tatterson, 173 W.Va. 613, 319 S.E.2d 381 (1984). Respondent's conduct in this matter did not conform to the expectations of the profession as declared by the Rules of Professional Conduct and to which he is expected to maintain. The evidence clearly establishes that Respondent acted in a manner which was intentional and knowing and deviated from the standard of care that a reasonable lawyer would exercise in that situation.

II. ARGUMENT

Respondent correctly points out that he admitted to depositing money into several of his clients' inmate accounts and into other unknown inmate accounts. However, Respondent maintains that at most, the total sum of deposits into his clients' inmate accounts total does not exceed \$500.00 and submits that the same was done out of sympathy for his inmate clients, rather than any scheme to pay a "finder's fee" as initially alleged in the first complaint filed against Respondent by Warden Nohe and in the second complaint, as well.⁶ [ODC Exhibit 15, Bates Nos. 380, 381; see also ODC Exhibit 46, Bates No. 828]. Respondent also admits that his non-lawyer employee, "M. Ferguson," used money orders to deposit Respondent's personal funds into his clients' inmate accounts at Lakin and that the evidence submitted from Lakin clearly establishes that money had been deposited into certain client inmate accounts. While Respondent discounts the significance of his actions on Lakin

⁶ In regard to his discussion of the alleged "finder's fee" in his Amended Brief on pages 9 and 10, Respondent references some evidence that was not admitted at the May 13, 2014 hearing. [Hrg. Trans. at pp. 130-133]. Furthermore, ODC and Respondent entered into stipulations jointly agreeing to recommend the dismissal of the rule violations relating to the allegations of the finder's fee and the frivolous lawsuit, identified as 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. [Joint Exhibit 1].

procedures, Warden Nohe, who filed the initial 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” whom she knew at the time to be Respondent’s employee. [Hrg. Trans. at pp. 6-8]. Warden Nohe also testified that changes were made in Lakin’s procedures to deal with the situations created by Respondent’s conduct. [Hrg. Trans. at pp. 8-12]. While Respondent asserts that the sum total of his actions in providing “gifts” to his inmate clients is inconsequential, he does admit that he knew the payments were in violation of Rule 1.8(e) of the Rules of Professional Conduct. However, it is acknowledged that his inmate clients suffered no real injury as a result of Respondent’s misconduct in depositing or causing to be deposited his personal funds into their prison accounts and that once the complaints were filed against him, he did cease this activity.

There can, however, be no question that the legal system and the legal profession were impacted due to Respondent’s violations of the Rules of Professional Conduct and were subjected to negative scrutiny. In dealing with this type of violation of the Rules of Professional Conduct, courts have recognized that there are strong policy considerations in enforcing the prohibitions stated in Rule 1.8(e) even though courts are not unsympathetic to the situation wherein lawyers yield to their clients’ requests for money prior to the conclusion of their cases. In 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. After noting that most courts impose discipline on lawyers for this misconduct, the Oklahoma Court cited with approval, 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).

III. CONCLUSION

Rule 3.15 of the Rules of Lawyer Disciplinary Procedure provides that the following sanctions may be imposed in a disciplinary proceeding: (1) probation; (2) restitution; (3) limitation on the nature or extent of future practice; (4) supervised practice; (5) community service; (6) admonishment; (7) reprimand; (8) suspension; or (9) annulment. Disciplinary Counsel and Respondent stipulated that a reprimand was an appropriate sanction in this matter and the Hearing Panel Subcommittee, after a hearing and the submission of evidence in this matter, has recommended a reprimand, as well.

Sanctions are not imposed only to punish the attorney, but also are designed to reassure the public's confidence in the integrity of the legal profession and to deter other lawyers from similar conduct. Committee on Legal Ethics v. White, 189 W.Va. 135, 428 S.E.2d 556 (1993); Committee on Legal Ethics v. Walker, 178 W.Va. 150, 358 S.E.2d 234 (1987); Committee on Legal Ethics v. Roark, 181 W.Va. 260, 382 S.E.2d 313 (1989); Lawyer Disciplinary Board v. Friend, 200 W.Va. 368, 489 S.E.2d 750 (1997); Lawyer Disciplinary Board v. Keenan, 208 W.Va. 645, 542 S.E.2d 466 (2000) W.Va. 645, 542 S.E.2d 466 (2000). In reviewing the evidence in this matter, which as Respondent points out involved an investigation lasting more than four years, it cannot be denied that Respondent's activities at Lakin in depositing and/or causing to be deposited the money orders into some inmate accounts caused disruption in the orderly running of the prison. In addition, the

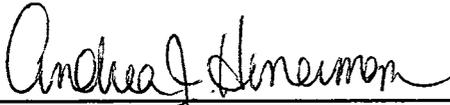
manner in which Respondent initially sought to meet with ~~both~~ clients, potential clients and witnesses, as he indicated in his Amended Brief at pp. 1-2, clearly caused Warden Nohe to believe she had to take some action against Respondent and revise prison procedures due to his activities in Lakin. 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).

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

Respectfully submitted,
The Office of Disciplinary Counsel
By counsel

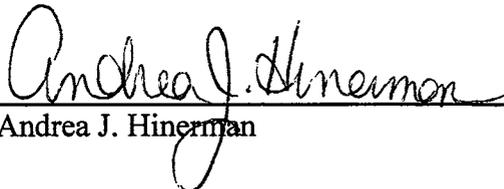


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CERTIFICATE OF SERVICE

This is to certify that I, Andrea J. Hinerman, Senior Lawyer Disciplinary Counsel for the Office of Disciplinary Counsel, have this day, the 25th day of November, 2014, served a true copy of the foregoing "**Reply 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, Esquire
Carey, Scott, Douglas & Kessler, PLLC
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Andrea J. Hinerman