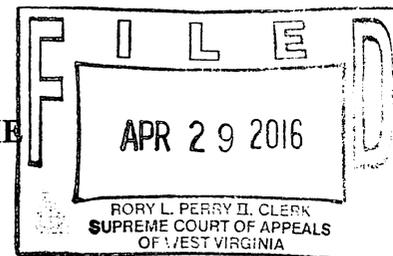


IN THE SUPREME COURT OF APPEALS OF THE
STATE OF WEST VIRGINIA



LAWYER DISCIPLINARY BOARD,

Complainant,

v.

No. 14-0365

HOWARD J. BLYLER,

Respondent.

REPLY BRIEF OF THE LAWYER DISCIPLINARY BOARD

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
I. REPLY TO RESPONDENT'S BRIEF	1
A. Failure to Safekeep Client Funds	2
B. Appropriate Weight and Use of Mitigating Factors	4
II. CONCLUSION	7

TABLE OF AUTHORITIES

Cases:

Blyler v. Matkovich
 No. 14-0760, No. 14-1335 (W.Va. Sup. Ct. November 23, 2015) 2

Committee on Legal Ethics v. Keenan
 189 W.Va. 37, 427 S.E.2d 471 (1993) 1

Committee on Legal Ethics v. McCorkle
 192 W.Va. 286, 452 S.E.2d 377 (1994) 1

Committee on Legal Ethics v. Tatterson
 173 W.Va. 613, 319 S.E.2d 381 (1984) 1

Lawyer Disciplinary Board v. Clifton
 236 W.Va. 362, 780 S.E.2d 628 (2015) 6

Lawyer Disciplinary Board v. Cunningham
 195 W.Va. 27, 464 S.E.2d 181 (1995) 1

Lawyer Disciplinary Board v. Keenan
 208 W.Va. 645, 542 S.E.2d 466 (2000) 5, 6

Lawyer Disciplinary Board v. Scott
 213 W.Va. 209, 579 S.E. 2d 550 (2003) 5

Lawyer Disciplinary Board v. Sturm
 2016 WL 1602277, ___ S.E.2d ___ (2016) 5

West Virginia Statutes and Rules:

R. Law Disc. Proc. Rule 3.15 7

R. Law Disc. Proc. Rule 3.32 7

R. Professional Conduct Rule 1.3 1

R. Professional Conduct Rule 1.4(a) 1

R. Professional Conduct	Rule 1.4(b)	1
R. Professional Conduct	Rule 1.15(a)	1, 3
R. Professional Conduct	Rule 3.2	1
R. Professional Conduct	Rule 3.4(c)	1
R. Professional Conduct	Rule 8.4(c)	1
R. Professional Conduct	Rule 8.4(d)	1
W.Va. Code	§ 55-12-1	3

I. REPLY TO RESPONDENT'S BRIEF

This matter is before the Court pursuant to the "Report of the Hearing Panel Subcommittee" issued on June 26, 2015. The Hearing Panel Subcommittee properly found that the evidence established that Respondent committed violations of Rules 1.3, 1.4(a), 1.4(b), 3.2, 8.4(c), and 8.4(d) of the Rules of Professional Conduct. 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). Respondent has not shown that the factual findings in this case are incorrect regarding the above named rules. However, the Hearing Panel Subcommittee did not find violations of Rules 1.15(a) and 3.4(c). The Office of Disciplinary Counsel disagreed with and asked this Honorable Court to find a violation of those rules as well. The Office of Disciplinary Counsel also disagreed with the recommendation by the Hearing Panel Subcommittee that a reprimand be issued and asked this Court to suspend Respondent's law license for at least one (1) year for his misconduct.

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). It cannot be said that Respondent's conduct in this case conforms to the expectations for the profession as set forth in the Rules of Professional Conduct. The evidence clearly establishes that Respondent acted in a manner which was negligent at first, then became intentional, and that such conduct deviated from the

standard of behavior that a reasonable lawyer would exercise in that situation. Respondent's misconduct is egregious in relation to the position he held not only as an attorney, but also the position of an attorney who was holding a large amount of funds for a client.

A. Failure to Safekeep Client Funds

In Respondent's brief, he indicates that the Circuit Court of Braxton County, West Virginia "has the authority to Order those funds returned by the State Tax Department." However, Respondent provided no evidence or proof that he has requested the Braxton County Circuit Court to return those funds. Further, a review of the Order from the Braxton County Circuit Court indicates that the Circuit Court makes clear that it does not have jurisdiction over City National Bank and the State of West Virginia because they were not parties to the action. ODC Ex. 15, Bates stamp 628-640. While Respondent may not have intentionally allowed the funds to be removed from his account, the fact remains that the funds were removed from his account and Respondent did nothing until the Braxton County Circuit Court ordered him to file suit to recover those funds. Id. Respondent intentionally did not advise his client about the removal of the funds, and never said a word about the removal of the funds until he was ordered to appear in a court hearing on September 5, 2012. It was at that hearing that Respondent finally admitted that the funds had been taken. It is not beyond consideration that Respondent may never have revealed that the funds had been taken if not for the intervention of the Circuit Court. Respondent is now implying that the Circuit Court has authority to order the return of the funds. If Respondent had not waited for years to reveal the information, perhaps a civil suit would have been successful. However, we will never know because the statute of limitations has been applied to the civil lawsuit and the money cannot be returned. See Blyler v. Matkovich, No. 14-0760, No. 14-1335 (W.Va. Supreme Court, November 23, 2015)

(memorandum decision). Respondent states that he has no funds to repay the account, but again, that is the fault of Respondent and the burden should not be borne by his client and others entitled to those funds.

Respondent has a duty under the Rules of Professional Conduct Rule 1.15(a) to safeguard client funds. Respondent failed in that duty to his client. Respondent appears to rely on the fact that he followed West Virginia Code § 55-12-1 in not placing the funds in a trust account. However, Respondent does not seem to understand that not only does he have obligations under that statute as a special commissioner, but he also has an obligation under the Rules of Professional Conduct. While Respondent may not have been required under West Virginia Code § 55-12-1 to place the funds in a trust account, Respondent certainly was required under the Rules of Professional to keep the funds in a trust account. Respondent's failure to properly place the funds in a trust account and failure to properly name the account led to the seizure of the funds. Clearly, Respondent's failure to safekeep these funds as required by the Rules of Professional Conduct led to the loss of the funds.

Respondent "disputes the position of Disciplinary Counsel that he has benefitted from this" in his brief. Respondent appears to argue that he because he did not intentionally remove the funds, the argument that he has benefitted from the funds cannot be true. However, the evidence produced demonstrated that Respondent knew the funds were taken soon after they were seized in March of 2009. 8/31/15 Hrg. Trans. p. 16-18. Respondent did nothing beyond a telephone call and sending a single letter to try to retrieve over Ninety-Six Thousand Dollars (\$96,000.00) in funds that he knew his client had an interest in. Again, Respondent did not advise his client or the Braxton County Circuit Court about the taking of the funds until many years later in September of 2012, and, then long after the statute of limitations had run, filed a civil lawsuit to try to recover the funds.

Respondent received a benefit of having over Ninety-Six Thousand Dollars (\$96,000.00) of his back taxes paid in March of 2009 with his client's money and he did nothing to recover those funds until ordered to do so. There is no way to claim that Respondent did not receive a benefit. Lloyd Allen Cogar, Respondent's client, testified that Respondent received a benefit by having his taxes paid along with the penalties and fees associated with the failure to pay taxes. 4/20/15 Hrg. Trans. p. 28-29. Further, Mr. Cogar also said that "[t]here has been no personal sacrifice on [Respondent]" after all of these years. 4/20/15 Hrg. Trans. p. 29. The lawsuit filed by Respondent, in an attempt to recover those funds, was unsuccessful but Respondent still carries the benefit of those funds forever. While Respondent may not have acted intentional when the funds were removed, he certainly acted intentionally in not timely alerting his client or being diligent in recovering the funds. Even if Respondent is ordered to repay those funds in order to make his client whole, as requested by Disciplinary Counsel, he will still have the benefit of having those back taxes paid.

B. Appropriate Weight and Use of Mitigating Factors

It is apparent that Respondent suffered as his wife struggled with the devastating disease of Alzheimer's and her subsequent death. It was, and is, a heavy burden for Respondent to bear. However, Respondent did not cease to practice law to care for his wife but, instead, he continued to practice law during this time frame. While it is understandable that Respondent's duties to his wife were important during this time frame, Respondent's duties to his client, the public, and the legal system were also important as Respondent continued to practice law. Respondent admitted that he never told his client about the funds being taken and gave no reason as to why he did not do so. 8/31/15 Hrg. Trans. p. 20. Further, it was not that he did not tell his client for a few days, Respondent did not tell his client from March of 2009 until September of 2012. This Honorable Court has stated

recently that “[w]hile we understand that sometimes a lawyer’s personal problems require the lawyer’s utmost attention, this focus of a lawyer’s attention cannot come at the client’s expense.” Lawyer Disciplinary Board v. Sturm, 2016 WL 1602277, ___ S.E.2d ___ (2016). In that case, the attorney was dealing with “significant personal events outside her control.” Id. Respondent was dealing with significant personal events outside his control in this case but again, it should not come at the expense of his client, the public, or the legal system.

Respondent attempts to assert that the suspension of his license to practice law would cause him economic consequences and that his local legal community would suffer without him. These two assertions are not one of the thirteen (13) mitigating factors listed by this Court in Lawyer Disciplinary Board v. Scott, 213 W.Va. 209, 579 S.E.2d 550 (2003). Such assertions should not be considered as mitigating. Respondent also argues that this Honorable Court should follow the decision in Lawyer Disciplinary Board v. Keenan, 208 W.Va. 645, 542 S.E.2d 466 (2000), wherein the attorney was publicly censured as opposed to being suspended. In that case, the majority of the Court did not support a suspension of the attorney “[b]ecause of the obvious economic consequences that the respondent would suffer with an inability to practice law, we will not suspend his license to practice.” Id. at 653, 474. However, the dissenting opinion in that case by Justice Davis noted that she was

“mindful that mitigating circumstances should be considered when this Court has to determine whether to suspend an attorney’s license. . . The majority opinion points out, in a conclusory fashion, that ‘[b]ecause of the obvious economic consequences that the respondent would suffer with an inability to practice law, we would not suspend his license to practice.’ Negative economic consequences brought about as a result of the suspension of an attorney’s license, in and of itself, are not a mitigating factor for sanctioning purposes. In fact, negative economic consequences frequently accompany the suspension of a license to practice law. To accept the reasoning of the majority decision of this case, though, would mean that this Court could never

suspend an attorney's license because to do so would result in the negative economic consequences for the attorney.”

Lawyer Disciplinary Board v. Keenan, 208 W.Va. 645, 654, 542 S.E.2d 466, 475 (2000).

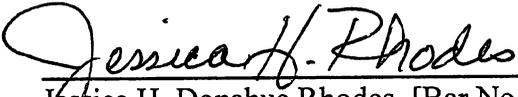
Disciplinary Counsel believes that this Honorable Court would no longer support the majority opinion in the Keenan case to consider Respondent's own economic consequences as a mitigating factor to avoid suspending Respondent from the practice of law. Respondent's misconduct in this case is serious because it resulted in the loss of over Ninety-Six Thousand Dollars (\$96,000.00) in funds, for which he still receives a benefit. Respondent seems to ignore the economic consequence that faced by his client and others who were entitled to those funds. In this case, Mr. Cogar had to expend additional monies to hire a new attorney, and his sister to moved to West Virginia thinking that she was going to receive some of the funds. 4/20/15 Hrg. Trans. p. 24, 26. The idea that Respondent would suffer economic consequences, much like his client and others did due to his misconduct, because he would be suspended from the practice of law should not lessen his sanction.

Further, the attorney in Lawyer Disciplinary Board v. Clifton, 236 W.Va. 362, 780 S.E.2d 628 (2015), put forth an argument in his brief before this Honorable Court that his local legal community would suffer if he was removed from the practice of law. Brief of Respondent Jarrell L. Clifton, Lawyer Disciplinary Board v. Clifton, 236 W.Va. 362, 780 S.E.2d 628 (2015), W.Va. Supreme Court (Case No. 13-1128), 2015 WL 5566892. In Clifton, this Court made no mention of such as a mitigating factor in its opinion after reviewing the brief from the attorney. Id. at 645. It is clear that the effect to the legal community, as a result of a suspension of an attorney's license to practice law, is not a proper mitigating factor to be considered by this Honorable Court and they have declined to consider such in the past.

II. CONCLUSION

Accordingly, for the reasons set forth above, the ODC requests that this Honorable Court adopt the following sanctions: (1) that Respondent's law license be suspended for at least one year; (2) that Respondent be required to petition for reinstatement pursuant to Rule 3.32 of the Rules of Lawyer Disciplinary Procedure; (3) that upon reinstatement, Respondent's practice be supervised for one (1) year; (4) that Respondent be ordered to pay Ninety-Six Thousand Eight Hundred Fifty-One Dollars and Eighty Cents (\$96,851.80) into the Estate of Lloyd Allen Cogar, Jr.; and (5) that Respondent pay the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

The Lawyer Disciplinary Board
By Counsel



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CERTIFICATE OF SERVICE

This is to certify that I, Jessica H. Donahue Rhodes, Lawyer Disciplinary Counsel for the Office of Disciplinary Counsel, have this day, the 29th day of April, 2016, served a true copy of the foregoing "**REPLY BRIEF OF THE LAWYER DISCIPLINARY BOARD**" upon Gregory A. Tucker, counsel for Respondent Howard J. Blyler, by mailing the same via United States Mail with sufficient postage, to the following address:

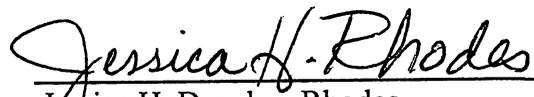
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And upon the Hearing Panel Subcommittee at the following addresses:

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Jessica H. Donahue Rhodes