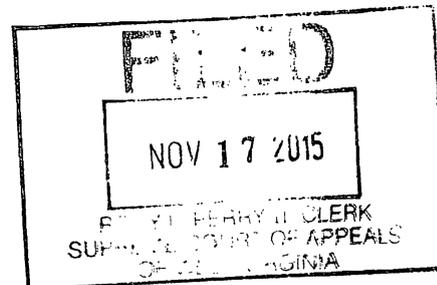


BEFORE THE LAWYER DISCIPLINARY BOARD
STATE OF WEST VIRGINIA



IN RE: HOWARD J. BLYLER, a member of
 The West Virginia State Bar

Bar No. 375
ID No. 12-05-614
Supreme Court No.: 14-0365

**RESPONDENT'S PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW AND RECOMMENDED SANCTIONS**

I. PROCEDURAL HISTORY

Formal charges were filed against the Respondent Howard J. Blyler with the Clerk of the Supreme Court of Appeals on or about April 18, 2014, and served upon the Respondent Howard J. Blyler on April 22, 2014. Respondent subsequently obtained counsel, Gregory A. Tucker, and filed his answer to the statement of charges on or about May 27, 2014. The matter was scheduled several times but had to be rescheduled due to the severe illness of Respondent's wife who subsequently passed way on December 29, 2014.

Thereafter, the matter proceeded to hearing at Stonewall Jackson Resort in Roanoke, West Virginia, on April 20, 2015. However, Respondent was unable to appear due to the death of his mother and the matter proceeded into hearing of the complainant Lloyd Allen Cogar and was thereafter continued and a second hearing was held on the 31st day of August, 2015, at Stonewall Jackson Resort.

The Hearing Panel Subcommittee was comprised of John W. Cooper, Esquire, Chairperson; Kelly D. Ambrose, Esquire; Cynthia L. Pyles, Layperson. Jessica H. Rhodes, Disciplinary Counsel Lawyer, appeared on behalf of the Office of Disciplinary Counsel and Gregory A. Tucker, Esquire, appeared on behalf of the Respondent, Howard J. Blyler, who appeared in person. In addition to the

prior testimony of Lloyd Allen Cogar, the Hearing Panel Subcommittee heard the testimony of Joyce Helmick Morton, Attorney at Law, practicing in Webster County, West Virginia; Dwayne Vandevender, Prosecuting Attorney of Webster County, West Virginia; Michelle Hill, prior client of the Respondent and the Respondent, Howard J. Blyler, on the 31st day of August, 2015.

The Office of Disciplinary Counsel tendered Exhibits 1-27 and Joint Exhibit 1 was tendered by the Office of Disciplinary Counsel and the Respondent which were admitted into evidence. Thereafter Respondents Exhibit 1 was admitted into evidence.

Based upon the evidence and the record, the Respondent by his counsel submits the following findings of facts, conclusions of law and recommended sanctions.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Howard J. Blyler (hereinafter "Respondent") is a lawyer practicing in Cowen, Webster County, West Virginia. (ODC Ex. 9, bates stamp 40) Respondent was admitted to The West Virginia State Bar by diploma privilege on May 18, 1976. (ODC Ex. 9, bates stamp 42) As such, Respondent is subject to the disciplinary jurisdiction of the Supreme Court of Appeals of West Virginia and its properly constituted Lawyer Disciplinary Board.

2. On or about May 19, 2005, Brenda Alderman, Executrix of the Estate of Lloyd Allen Cogar, Jr., Trustee of the Estate of Stacy Lynn Cogar, infant, filed an action in the Circuit Court of Braxton County, West Virginia, Case No. 05-C-29, to sell the real estate of Lloyd Allen Cogar, III and several other individuals. (ODC Ex. 15, bates stamp 556-561) The lawsuit was filed on behalf of plaintiff by William C. Martin, a now suspended member of the West Virginia Bar and Respondent was retained to represent Lloyd A. Cogar, III. (ODC Ex. 15, bates stamp 561)

3. On or about November 10, 2005, an Order was entered in the case wherein the parties agreed to sell all of the real estate owned by the late Lloyd Allen Cogar, Jr. at the time of his death. (ODC Ex. 15, bates stamp 564-565) The Order was stated that William C. Martin and Respondent were appointed as Special Commissioners to conduct the sale and post bond in the amount of \$50,000.00. Id. The proceeds from the sale were ordered to be used to pay the costs of the sale, then to pay an unpaid loan at the Bank of Gassaway which secured the real estate. Id. The remaining sums were ordered to be held by the Special Commissioner pending distribution under the will of Lloyd Allen Cogar, Jr. Id. Bernard R. Mauser, Esquire was also appointed Commissioner to determine the assets and liabilities of the estate to determine the priority of the same along with a report to be filed with the court. Id.

4. On or about April 27, 2006, the Court entered an "Order Approving Sale" which allowed the payment of certain costs and ordered the remaining balance of the proceeds from the sale to be deposited by William C. Martin into his trust account to be distributed upon further Order of the Court. (ODC Ex. 15, bates stamp 567-568)

5. On or about April 25, 2007, the Court entered another "Order Approving Sale" regarding another sale which allowed payment of certain costs and ordered the remaining balance of the proceeds from the sale to be deposited by Respondent into his trust account to be distributed upon further Oder of the Court. (ODC Ex. 15, bates stamp 574-575) The Order noted that William C. Martin was now a full time prosecuting attorney and could no longer act as a Special Commissioner in the case and therefore, he was relieved as Special Commissioner and his bond was released. Id. Pursuant to said Orders, all sums had been deposited into the account of William C. Martin and/or Respondent.

6. *West Virginia Code* §55-11-1, as amended, requires that the proceeds from the sale of real estate by a special commissioner be deposited in his name as special commissioner and such proceeds shall not be removed without an order of distribution of the court.

7. By March of 2009, the "Special Account" maintained by Respondent at City National Bank, Account Number 8004027879, reached the amount of Ninety-Six Thousand Eight Hundred Fifty-One Dollars and Eighty Cents (\$96,851.80). (ODC Ex. 23, bates stamp 788)

8. On or about March 19, 2009, City National Bank withdrew all of the sums from the "Special Account". (ODC Ex. 23, bates stamp 790) The State of West Virginia was paid the amount of Ninety-Six Thousand Seven Hundred Twenty-Six Dollars and Eighty Cents (\$96,726.80) with City National Bank keeping One Hundred Twenty-Five Dollars (\$125.00) as a legal processing fee. (ODC Ex. 23, bates stamp 789)

9. On or about March 16, 2009, a Notice of Levy from the State of West Virginia was served on City National Bank for personal income taxes due and owing by Respondent. (ODC Ex. 10, bates stamp 238-242)

10. On or about September 11, 2012, the Court entered an Order which stated that Respondent was to hold the funds in his trust account and the State of West Virginia had taken the money from the account for a tax levy. (ODC Ex. 15, bates stamp 638-640) The Order also stated that Respondent was attempting to retrieve the money from the State of West Virginia. *Id.* However, the Court noted that the State of West Virginia and City National Bank were not parties to the case, and the Court had no authority to order them to return the money. *Id.* The Court ordered Respondent to take action to restore the funds within thirty (30) days from the entry date of the Order and if

Respondent felt the money was improperly paid, then he would need to take appropriate legal action within thirty (30) days from the entry date of the Order. Id.

11. Complainant Lloyd A. Cogar, III, filed his complaint against Respondent on November 21, 2012. (ODC Ex. 1, bates stamp 1-9) Mr. Cogar alleged that Respondent did not alert the heirs of the estate about the State of West Virginia taking the money for a tax levy, nor did Respondent do anything to get the money back. (ODC Ex. 1, bates stamp 2) Mr. Cogar indicated that he discovered the money was missing on or about September 5, 2012, when the Braxton County Circuit Court held a hearing on the matter. Id.

12. By letter dated November 30, 2012, Disciplinary Counsel forwarded the complaint to Respondent asking for a response thereto. (ODC Ex. 2, bates stamp 11-12)

13. Respondent did not respond.

14. By letter dated January 14, 2013, sent via certified and regular mail, Disciplinary Counsel again wrote to Respondent asking for a response to the complaint by January 24, 2013. (ODC Ex. 3, bates stamp 13-15) The return receipt was signed and such was received by the Office of Disciplinary Counsel on or about January 18, 2013. (ODC Ex. 3, bates stamp 15)

15. On or about January 24, 2013, Respondent called and asked for an extension to file his response. An extension was granted to February 6, 2013, and Respondent was told to send a letter to confirm extension.

16. On or about February 19, 2013, the Office of Disciplinary Counsel received a response from Respondent dated February 5, 2013. (ODC Ex. 4, bates stamp 16-25) Respondent stated in his response that he was retained by Mr. Cogar to represent him in a partition action filed by his step-mother to sell the property of his father after his father's death. (ODC Ex. 4, bates stamp 16)

The Court then appointed Respondent and William C. Martin as Special Commissioners to hold the sales and that was done. Id. Bernard Mauser was appointed and ordered to determine the liabilities of the estate. Id. Respondent was holding the funds pending Mr. Mauser's report. Id. Respondent stated that he contacted Mr. Mauser on numerous occasions about getting the report. Id. At a time soon after, the State Tax Commissioner filed a suggestion with City National Bank and the bank then forwarded all of the money to the State Tax Commissioner. (ODC Ex. 4, bates stamp 17) Respondent said he immediately notified the bank and the State Tax Commissioner that the money was not his money as soon as he received notice of the lien. Id. The matter sat the same way until the court brought a hearing on the same. Id. Respondent stated that he had a complaint prepared to sue City National Bank and the State Tax Commissioner for the return of the money. Id. Mr. Cogar has now retained William McCourt, Esquire to represent him and Respondent sent Mr. McCourt a copy of the complaint for him to include Mr. Cogar as a party. Id. Respondent also stated that Clinton Bischoff, Esquire was appointed as Special Commissioner and he would also have an opportunity to modify the complaint to include Mr. Bischoff's client. Id.

17. Mr. Cogar filed additional correspondence dated August 17, 2013 wherein he stated that Respondent had not filed a suit to retrieve the money. (ODC Ex. 7. bates stamp 28)

18. On or about October 15, 2013, Respondent along with Mr. Cogar and other heirs filed a lawsuit against City National Bank and the West Virginia State Tax Commissioner in the Braxton County, West Virginia Circuit Court, Case Number 13-C-59. (ODC Ex. 20, bates stamp 736-741)

19. On or about November 19, 2013, Respondent appeared for a sworn statement at the Office of Disciplinary Counsel. (ODC Ex 9, bates stamp 37-96) Respondent stated that he "should have filed suit sooner" regarding the money being taken by the State Tax Commissioner. (ODC Ex.

9, bates stamp 76) Respondent provided a copy of his file concerning this case. (ODC Ex. 9, bates stamp 41) In that file, there was an unsigned March 23, 2009 letter City National Bank that stated the funds were client's funds and should not have been subjected to the tax levy. (ODC Ex. 10, bates stamp 251)

20. On or about November 24, 2013, the Court entered an Order that forfeited Respondent's bond as Special Commissioner and ordered that the insurance for the bond to pay Fifty Thousand Dollars (\$50,000.00) into an account set up for the monies concerning the estate with the Braxton County Commission and Braxton County Fiduciary Commissioner. (ODC Ex. 15, bates stamp 672-676)

20. Because Respondent failed to act with reasonable diligence by failing to retrieve the money taken by the State Tax Commissioner, which harmed his client Lloyd Allen Cogar, III, he has violated Rule 1.3 of the rules of Professional Conduct, which provides as follows:

Rule 1.3.Diligence.

A lawyer shall act with reasonable diligence and promptness in representing a client.

21. Because he failed to keep his client Lloyd Allen Cogar, III, reasonably informed about the State Tax Commissioner taking the funds, Respondent has violated Rule 1.4(a) and Rule 1.4(b) of the Rules of Professional Conduct, which provide as follows:

Rule 1.4.Communication.

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

22. Because Respondent failed to inform Mr. Cogar and others about the money being taken from the Special Account, he violated Rule 8.4(c) and 8.4(d) of the Rules of Professional Conduct, which provides as follows:

Rule 8.4. Misconduct.

It is professional misconduct for a lawyer to:

- (c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation.
- (d) Engage in conduct that is prejudicial to the administration of justice.

23. The testimony reveals and there is no dispute that Mr. Blyler's wife was diagnosed with Alzheimer's a few days prior to the tax levy in question and that she suffered from debilitating Alzheimer's from that time until her passing in December 2014.

24. The testimony reveals that Mr. Blyler was her primary caretaker and continued to practice law on only a limited basis. In fact, Respondent had to take his wife to his court appearances, depositions and other proceedings when he was unable to obtain other caretaking services.

25. The record also reflects that Mr. Blyler immediately notified the State Tax Department and the bank that the funds levied upon were not personal funds but client funds not subject to levy. However, Mr. Blyler clearly admitted that he failed to adequately follow up with that notice, that he failed to notify his client or the Court because he was embarrassed by the tax levy, and that he failed to take adequate steps to bring an action against the Tax Commissioner until the matter was set for hearing by the Circuit Court of Braxton County.

26. Although the condition of his wife and the care he provided to her are significant mitigating circumstances that does not excuse the conduct of Mr. Blyler nor has he attempted to excuse his conduct.

27. There is currently pending an action for the return of these funds against the State Tax Commissioner which is pending before the West Virginia State Supreme Court. Should the funds be ordered to be returned that would alleviate the financial circumstances of this complaint.

28. The complainant, Allen Cogar, III, testified before the panel on April 20, 2015, (transcript page 44) that he had no objection to Mr. Blyler being permitted to continue to practice law under appropriate supervision so that he would be in a position to make restitution in this matter should it become necessary after the Supreme Court decision.

29. The proceeds of the sale of the Cogar real estate were paid to the state tax department by City National Bank in violation of §55-12-1 of the *Code* as there was no order of distribution by the court.

30. The West Virginia State Tax Department improperly levied on a special commissioners account maintained at City National Bank under the authority of the Circuit Court of Braxton County, West Virginia.

31. The Respondent has no personal funds to repay the money improperly levied on by the State Tax Department as reflected by his testimony before the hearing panel.

32. From the evidence addressed before the hearing panel, the only way the money may be recovered to the complainant and his family is permitting the Respondent to maintain his license to practice law and recover same through the pending lawsuit or by requiring him to pay restitution which he cannot do unless he is allowed the continued privilege of practicing law.

III. DISCUSSION AND RECOMMENDED SANCTIONS

The Respondent does not dispute holdings in Lawyer Disciplinary Board v. Taylor, 192 W.Va. 139, 451 S.E.2d 440 (1994) relative to the state bar's duty to protect the public as to the reliability and integrity of attorney's and to safe guard its interest in the administration of justice. The Respondent likewise understands the factors to be considered in opposing appropriate sanctions found in Rule 3.16 in the Rules of Lawyer Disciplinary Procedure. It is important to note that the Respondent stipulated that he violated Rule 1.3, Rule 1.4 and Rule 8.4 of the Rules of Professional Conduct. The Respondent does not and has never denied that the special commissioners account was levied on by the state tax department, that the City National Bank paid the levy and that the monies were applied to his personal tax debt. Disciplinary counsel attempted to make the point several times at the hearing before the panel that the Respondent somehow personally benefitted by the application of the money to his tax debt. The evidence is to the contrary in that the burden of Mr. Blyler's obligation has shifted from the tax department to the Cogar family. In fact, the state of West Virginia has been unjustly enriched by its and the banks violation of the provisions of §55-12-1 of the *Code*, which mandate that those monies cannot be removed without order of the court.

As the panel is very well aware, there are exceptional mitigating circumstances in this case. In the first instance, the Respondent did not willfully pay the money from the special commissioner's account to the state tax department. Those monies were wrongly levied upon and paid by the tax department and the bank. The record reflects that the Respondent was not even aware of the levy until after the monies had been paid. To focus on the actions by the state tax department and bank of levying on the special commissioner's account misses the mark in this case.

As noted in Lawyer Disciplinary Board v. Robinson, 736 S.E. 2d, 18, 230 W.Va. 18 (2012), mitigating factors which may be considered in determining the appropriate sanctions 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 towards proceedings*; (6) Inexperience in the practice of law; (7) Character 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. (*Emphasis added*) In Lawyer Disciplinary Board v. Duty, 671 S.E.2d 763, 222 W.Va. 758 (2008), the court held that factors to be considered in imposing sanctions after a finding of lawyer misconduct, the disciplinary board 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.

Clearly, the misconduct in this case under the Rules of Professional Conduct occurred because of the delay by the Respondent in notifying his client and the court of the actions of the state tax department and City National Bank. The Respondent clearly admits this both at the time his statement was taken in this matter by disciplinary counsel and before the hearing panel. However, as the record reflects, a significant factor in this case is that the Respondent's wife was diagnosed with debilitating Alzheimer's Disease at substantially the same time as the levy was made by the

state tax department. No doubt this diagnosis was devastating to both Respondent and his family as Mrs. Blyler was a relatively young, vibrant and extremely popular local school teacher.

The Blyler family struggled with Mrs. Blyler's disease and related medical complications as they became progressively worse from early 2009 until her death in December 2014. As the record further reflects, Mr. Blyler was her primary caretaker noting in his testimony correctly that it was his responsibility to provide for her care. The record further reflects that Mr. Blyler would often have to balance her care with his obligations to his clients as he was responsible for her personal needs on a daily basis, her medical and emotional care, while at the same time attempting to practice law. He would often have to take her to court hearings, depositions and other proceedings because there was no one else available to assist him. Mr. Blyler even had to take his wife when he met with disciplinary counsel for a statement following the complaint in this case. Hopefully, none of us know or will never know the extreme pressure and sense of responsibility Mr. Blyler faced due to this wife's condition.

As the testimony of Mr. Blyler before the hearing panel reflects the he immediately after receiving notice of the levy contacted both the bank and the state tax department to advise each that the monies were client funds and should not have been subject to levy. The testimony of Mr. Blyler further shows that he contacted representatives in the tax department, legislature and the Governor's office in an effort to recover the monies. What Mr. Blyler has admitted to is that he failed to promptly notify his client and the court of the situation. All of the stipulated violations of Rule 1.3, Rule 1.4 and Rule 8.4 involve Mr. Blyler's failure to inform the court and his client of the levy and to promptly take steps to recover the monies. However, his conduct at least to a degree was

understandable given the grave circumstances he faced with his wife and none were the result of any intentionally deceitful or wrongful acts on his part.

In Lawyer Disciplinary Board v. Keenan, 42 S.E.2d 466, 2008 W.Va. 645 (2005), our Court held that because of the obvious economic consequences that an attorney would suffer from inability to practice law, his license would not be suspended and instead attorney would be publically censured for failing to act with reasonable diligence, failing to keep his client's reasonably informed, failing to properly render a full accounting to his client and failing to properly terminate his representation of a client. Mr. Blyler's conduct in this case falls squarely within the holdings of the *Keenan* case. The violation of the rules of professional conduct occurred in this case because of his lack of communication with the court and his client and his lack of diligence in pursuing the recovery of the money. There was not an intentional violation of the rules of professional conduct by the Respondent when the monies were paid from the special commissioner's account in violation of §55-12-1 of the *Code* because Mr. Blyler was not even aware of the levy until after the monies were paid. Frankly, Mr. Blyler could have done nothing more to safeguard the monies than the steps taken by him as they were protected by a Court order. We assert to the panel that the Circuit Court of Braxton County was in error when it stated that it has no authority to order the state tax department to return the money. It had and continues to have the authority under §55-12-1 to order the money returned.

The Respondent has filed suit in the Circuit Court of Kanawha County, West Virginia, and the matter is now pending before the Supreme Court. Mr. Blyler is now taking diligent efforts to recover the money. He has further testified that he has no personal funds to repay the funds. This is painfully true as had he had the money in the first instance, there wouldn't have been any

obligation to the tax department. Additionally, his wife's five (5) year battle with Alzheimer's has left him financially devastated. Therefore, given his financial situation, he should be permitted to retain his license to recover the money and make his client's whole either through the pending lawsuit or through an order of restitution by the Lawyer's Disciplinary Board. He can do neither without a law license.

It should be noted that Mr. Blyler's bonding company has paid Fifty Thousand and 00/100 Dollars (\$50,000.00) to the Circuit Court of Braxton County, West Virginia, to be paid to those originally entitled to those funds. It is a significant consideration in this case that the complainant has indicated his willingness to accept a sanction in this case allowing Mr. Blyler to continue to practice law with an order of restitution.

In conclusion, there are significant mitigating factors in this case. First, the situation involving Mr. Blyler's wife including her death occurred simultaneously with the events that lead to the complaint. Secondly, the absence of a dishonest or selfish motive, personal problems, full and free disclosure to disciplinary board and a cooperative attitude towards the proceedings, all in relation to the position taken by the complainant in this case and in consideration of the *Keenan* case cited above, justify a sanction less than suspension with supervision and an order of restitution.

Therefore, the board recommends that Mr. Blyer be reprimanded for his conduct. That in the event that the levied funds are not ordered to be restored by the state tax department that he be required to forthwith comply with any repayment schedule as determined by the Circuit Court of Braxton County, West Virginia, where the underlying action lies including any other funds that he may be required to pay by the court. That he be required to undergo supervised practice for a period of twelve (12) months and that he be required to pay the reasonable costs of these proceedings.

Respectfully submitted,

HOWARD J. BLYLER
By Counsel



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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of November, 2015, I served the foregoing RESPONDENT'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED SANCTIONS upon the following by mailing a true and accurate copy thereof to their respective addresses by United States mail, postage prepaid:

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