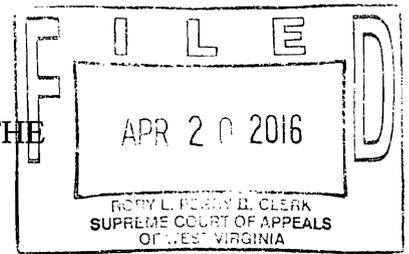


IN THE SUPREME COURT OF APPEALS OF THE
STATE OF WEST VIRGINIA



LAWYER DISCIPLINARY BOARD,

Complainant,

v.

No. 14-0365

HOWARD J. BLYLER,

Respondent.

RESPONSE BRIEF OF RESPONDENT HOWARD J. BLYLER

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I. STATEMENT OF THE CASE

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

Formal charges were filed against the Respondent Howard J. Blyler on or about April 18, 2014. The nature of the charges allege that an action was brought in the Circuit Court of Braxton County, West Virginia, to sell real estate of Lloyd Alan Cogar, Jr., deceased. The Respondent was retained to represent Lloyd A. Cogar, III. An Order was entered in the case on or about November 10, 2005 wherein the parties agreed to sell all the real estate owned by the late Lloyd Alan Cogar, Jr. The Circuit Court entered an Order appointing the Respondent and another attorney, William Martin, to act as special commissioners, to post bond in the amount of \$50,000.00 and conduct a sale of the decedent's real estate. The proceeds from the sale were ordered to pay the cost of the sale, then to pay an unpaid loan at the Bank of Gassaway which was secured by the real estate. The remaining balance of the sales proceeds was ordered to be held in a trust account by the special commissioners pending distribution of the will of Lloyd Alan Cogar, Jr. There was a delay in the final distribution of those funds as another commissioner was appointed by the Court to determine the assets and liabilities of the estate and to determine the priority of any estate claims.

On April 27, 2006 the Circuit Court entered an Order approving the sale of the real estate of the late Mr. Carr which allowed for the payment of certain costs and ordered the remaining balance of the proceeds from the sale to be deposited into the trust account of the co-special commissioners to be distributed upon further Order of the Court. Subsequently, on April 25, 2007 the Circuit Court entered another Order approving the sale of additional real estate which allowed the payment of certain costs and ordered the remaining balance of the proceeds from this sale to also be deposited

into the special commissioners' trust account to be distributed upon final order of the Court. All monies from the sale of the real estate was deposited in a special commissioners' account at City National Bank in Sutton, Braxton County, West Virginia, where the land is located and the action filed. The co-special commissioner William Martin had subsequently been elected to the position of Prosecuting Attorney of Braxton County, a full time position, and he could no longer act as co-special commissioner. Therefore, the account maintained by the co-commissioner at the City National Bank in Sutton, West Virginia, was then changed solely to the name of the Respondent under his social security number. No funds had been distributed at that time or subsequently distributed by the Respondent without prior authorization from the Circuit Court. At that time the account contained \$96,851.80.

On March 19, 2009 City National Bank withdrew the entire balance of the account pursuant to a levy against the Respondent by the West Virginia State Tax Department. Respondent had no prior knowledge of the levy nor did he authorize or consent to the transfer of the funds in the account at City National Bank to the State Tax Department pursuant to the tax levy. More importantly, there was no Order by the Circuit Court authorizing the withdrawal of the funds.

At about the same time as the tax levy, the Respondent and his wife received devastating news that Mrs. Blyler was suffering from Alzheimer's Disease. Although the Respondent notified the bank and state tax department that the funds were client funds and should not have been levied on, he did not notify the Court or his client that the balance of the special commissioner's account had been paid toward his tax deficiency with the State of West Virginia. The Respondent did make efforts to rectify the issue by contacting the state tax department and his legislative representatives in an effort to recover the funds. These efforts were unsuccessful.

At this point, the Respondent's life became consumed with caring for his ailing wife. While she was able to work, the Respondent assisted her by grading her student papers in the evenings and accompanied her to the many doctors appointments she required. In addition to Alzheimer's, she began suffering from additional health complications resulting from her catastrophic disease. Ultimately, although he tried to maintain his law practice, the Respondent became her primary caretaker caring for her 24 hours a day 7 days a week. Initially, her condition allowed him to take her to court hearings and other proceedings but eventually her health deteriorated to the point that was no longer possible. Ultimately, due to her condition she could not be left alone and she required constant care even to the point where the Respondent had to assist her using the bathroom. She began suffering from seizures and other complications including orthopedic issues which required weekly trips from Cowen, West Virginia, to Parkersburg, West Virginia, for orthopedic care. Her condition continued to decline and tragically she passed away on December 29, 2014. He was personally and financially devastated from the five year battle with the disease.

The Respondent finally disclosed the loss of the funds pursuant to the tax levy to the Court and parties on September 11, 2012. In its Order from that date, the Circuit Court found that the Respondent was attempting to retrieve the money from the State Tax Department. The Court further noted incorrectly that as the State of West Virginia and City National Bank were not parties to the case that the Court had no authority to Order them to return the money. The Respondent was ordered to take action to restore the funds within 30 days from the entry of the Order which he was unable to do. (We believe the ruling of the Court was incorrect as the Court never relinquished jurisdiction over the sales proceeds and can, in fact, order the return of the money by the State Tax Department.)

The complaint was filed in this matter by his client, Lloyd A. Cogar, III, on November 21, 2012 alleging the loss of the real estate sales proceeds, that the Respondent did not alert the heirs of the estate about the tax levy and the Respondent had not done anything to get the money back.

Subsequently, a hearing was held on the complaint before the hearing panel subcommittee (HPS) on April 20, 2015. However, the Respondent was unable to appear at that time due to the death of his mother but the matter proceeded wherein the testimony of the complainant, Lloyd A. Cogar, III was taken. In his testimony, the complainant outlined the basis for his complaint but ultimately stated to the hearing panel subcommittee that he would prefer a resolution of the complaint by allowing the Respondent to maintain his license under the supervision of a supervising attorney with an order of restitution.

Thereafter, on August 31, 2015 the hearing continued where further testimony was taken including the testimony of the Respondent. Based upon the testimony and evidence introduced at the hearing, the hearing panel subcommittee entered its findings of fact and recommended decision in this case. It should be noted that the Respondent stipulated not only the facts in the case but also his violation of Rules 1.3, 1.4 and 8.4 of the *Rules of Professional Conduct*. The hearing panel subcommittee further found the Respondent violated Rule 3.2.

In its discussion and recommended sanctions, the hearing panel subcommittee found by clear and convincing proof that Respondent violated his duties to his client. The hearing panel subcommittee found that the respondent did not act with reasonable diligence and promptness in protecting his client's interest after the state mistakenly seized funds from the special commissioner's account and when he failed to communicate to his client the fact that the funds had

been seized. The panel further found that there was a further violation of Rule 3.2 for respondent's failure to expedite litigation to protect his client's interest.

However, in its decision, the hearing panel subcommittee wrote:

"In evaluating the evidence in this matter, the HPS had to determine which of Respondent's actions or omissions were intentional as contrasted with those that were unintentional or negligent. The most culpable mental state is that of intent, when the lawyer acts with the conscious objective or purpose to accomplish a particular result. The next most culpable mental state is that of knowledge, when the lawyer acts with conscious awareness of the nature or attendant circumstances of his conduct both without the conscious objective or purpose to accomplish a particular result. The least culpable mental state is negligence which occurs when a lawyer fails to be aware of a substantial risk that circumstances exist or that a likely adverse result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation. Respondent clearly did not intentionally place the funds in the special account with any intent to gain financial benefit from them. Likewise, he did not knowingly allow the funds to be taken from the account to satisfy his personal tax lien. He had no involvement whatsoever in that process, and he had no knowledge of this withdrawal of funds until the funds were levied upon and removed from the account. *The facts of this case are somewhat unique and troublesome, many of which have little to do with Respondent [emphasis added].*"

Further, the hearing panel subcommittee wrote:

"The unfortunate events that occurred in this matter created a "perfect storm" of adverse consequences and events, many or most of which were beyond Respondent's control and certainly beyond his intent..."

The hearing panel further found that the Respondent was aware of his personal tax liability, but there is no evidence he did anything intentionally to utilize client funds to satisfy his tax obligation. He had no reason to anticipate nor is there any provision in the law that a tax lien would extend to a special commissioner's account created pursuant to a Court order to hold funds for a third party.

The hearing panel went on to say that:

“Clearly, Respondent’s lack of diligence and his failure to file a suit to protect his client’s interest resulted in harm to his client. It is the opinion of the HPS, the Respondent’s violations were not intentional but they were violations nonetheless which have caused substantial harm to Mr. Cogar and his family.”

The hearing panel subcommittee found that the Respondent’s dishonesty in failing to inform his client of the tax levy and with failing to immediately and diligently move forward with legal action to rectify his mistake and his experience as a lawyer were aggravating factors in this case. The hearing panel further noted substantial mitigating factors in this case including the absence of a prior disciplinary record, extraordinary personal problems and the chronic and progressive physical deterioration of his wife of whom he was the sole care giver, good character, absence of selfish motive and remorse. It went on to find:

“To the contrary, the problems giving rise to this disciplinary proceeding surfaced in March because of the unselfish conduct of Respondent as a devoted husband/care giver in trying to provide for the needs of his dying wife while continuing to manage a small rural law practice. His devotion to his wife included around the clock care, 365 days a year, for her remaining years. Before his wife’s forced retirement, he served not only as a lawyer in his community, but also as a surrogate teacher as he helped by grading student’s papers and preparing report cards on her behalf. After her diagnosis with Alzheimer’s, Respondent arranged his schedule to not only attempt to practice law, but also to be able to take his wife to Parkersburg for as many as three days a week for medical care and physical therapy.”

Mr. Blyler would often take his wife to court hearings, depositions and even while giving his statement to the Office of Disciplinary Counsel following the complaint in this matter.

The hearing panel subcommittee further found:

“In review of other cases in this jurisdiction where mitigation played a role in determining an appropriate recommendation as to sanctions against a practicing lawyer, the HPS could not find any with stronger compelling facts to warrant more lenient consideration of probation and a reprimand as opposed to a suspension.”

Importantly, the hearing panel twice made note in its decision that the complainant Mr. Cogar supported a resolution which would place Respondent in a position where he could practice law under supervision so that he could make restitution. After a complete analysis of the stipulated facts in this case, the aggravating factors and mitigating factors presented, the hearing panel subcommittee made the following recommendations as to disposition in this case:

1. That a strong reprimand be issued against Respondent;
2. That he be placed on probation for a period of at least eighteen months;
3. That he be permitted to practice law during the period of probation under the supervision of Joyce Morton or any other lawyer approved by this Court and ODC;
4. That Respondent make restitution of the amounts seized from the special commissioners' account within 36 months from the date of the Court's order if the same is not fully satisfied in the Cogar's pending negligence action against Respondent;
5. That Respondent pay the costs and expenses incurred by ODC in the prosecution of this proceeding and in overseeing the Respondent's probation and in the fulfillment of his obligations in making restitution.

B. FINDINGS OF FACT MADE BY THE HEARING PANEL SUBCOMMITTEE

The Respondent takes no issue with the findings of fact made by the Hearing Panel Subcommittee. In fact, most, if not all, of these facts were stipulated by the Respondent.

C. CONCLUSIONS OF LAW MADE BY THE HEARING PANEL SUBCOMMITTEE

The Hearing Panel Subcommittee concluded, again without dispute from the Respondent who stipulated violations of Rules 1.3, 1.4 and 8.4 that he violated the Rules of Professional Conduct as follows:

Rule 1.3. Diligence.

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

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.

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.

Although ODC urges that Respondent violated Rule 1.15(a) of the Rules of Professional Conduct, the HPS finds that such violation was not proven by clear and convincing evidence. Rule 1.15 states:

Rule 1.15 Safekeeping property

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account designated as a "client's trust account" in an institution whose accounts are federally insured and maintained in the state where the lawyer's office is situated, or in a separate account elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safe guarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

“The evidence in this case indicates that Respondent did comply with the statutory requirements of *West Virginia Code* §55-12-1, respecting special commissioner's accounts.

Ironically however, and, but for the "perfect storm" of adverse events and circumstances surrounding the special commissioner's account, including, the removal of Mr. Martin as a joint fiduciary; the change in the name or title on the special account; and, the mistaken payment of the funds from the account by City National Bank, the money would never have been taken from the account. Placing the money in an IOLTA account as urged by ODC and suggested by the Circuit Court may have provided better protection, but the specific language of §55 -12-1 does not require it. This statute applies whether the special commissioner is a lawyer or not.

Because Respondent failed to timely retrieve the money taken by the State Tax Commissioner and failed to make reasonable efforts to retrieve the money, he has violated Rule 3.2 of the Rules of Professional Conduct which provides as follows:

Rule 3.2. Expediting litigation.

A lawyer shall make reasonable efforts to expedite litigation consistent with the interest of the client.

The complainant, Allen Cogar, III, testified before the panel 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. (Hearing transcript 4-20-15, page 44) Mr. Cogar was understandably upset with the fact that the funds deposited in the special commissioners' account had been seized. Even after the forfeiture of the \$50,000.00 bond had replenished half of the funds seized from the account, there is still a shortfall of nearly \$47,000.00 some of which may be subject to distribution to Mr. Cogar and his family.”

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. From the evidence addressed

before the hearing panel, the only way the money may be recovered by the complainant and his family is if the Respondent is permitted to maintain his license to practice law.

D. OBJECTIONS OF THE OFFICE OF DISCIPLINARY COUNSEL

The Office of Disciplinary Counsel objects to the recommended sanctions imposed by the hearing panel subcommittee in this matter. Particularly, it objects to the subcommittee's failure to find a violation of Rule 1.15(a) and Rule 3.4(c). The panel found that there was no proof by clear and convincing evidence that the Respondent violated this Rule as the Respondent complied with *West Virginia Code* §55-12-1 which is controlling where special commissions are appointed by the Circuit Court to sell real estate. §55-12-1 of the *Code* provides in part:

“...with the further condition he will deposit in his name as such special commissioner or special receiver all moneys received by him as such special commissioner or special receiver in one or more banks in the county in which the suit or cause is properly instituted, and will not remove the same therefrom without the order or decree of distribution of the presiding judge.”

It should be noted that there are criminal penalties for a violation of this section which provide:

“...any special commissioner or special receiver violating the conditions of his bond or the provisions of this section by making a sale or receiving money before executing bond as aforesaid, *or failing to deposit the money in one or more banks in the county in which the suit or cause is properly instituted as aforesaid, or failing to keep the same therein subject to a decree of distribution, shall be guilty of a misdemeanor and shall be punished by a fine of not less than twenty-five nor more than one hundred dollars and may be imprisoned in the county jail for a term not to exceed ten days.*” (emphasis added)

Therefore, the Respondent was statutorily compelled to keep the money in a special commissioners' account in Braxton County, West Virginia, where the suit was instituted and the sale Ordered by the Circuit Court and not in his trust account in Webster County, West Virginia. He

could not have anticipated that the State Tax Department would levy on a special commissioner's account containing client funds. Therefore, as he fully complied with the controlling statutory provisions, he did not fail to safeguard client funds.

As a side note, based upon the provisions of §55-12-1 of the *Code*, it is the position of the Respondent that as those monies were held in the account pursuant to the Order of the Circuit Court, those monies were and remain under the jurisdiction of the Circuit Court of Braxton County, West Virginia, and they could not have been removed even by the State Tax Department pursuant to levy without an Order of such court. As these monies never left the jurisdiction of the Circuit Court and there has not been an Order authorizing any payment from the account, the Circuit Court has the authority to Order those funds returned by the State Tax Department.

The analysis of ODC related to an IOLTA account and a trust account is not relevant given that §55-12-1 of the *Code* is controlling in cases in which special commissioners are appointed by the court to sell real estate. The hearing panel subcommittee properly analyzed the facts of this case in light of the statutory mandates of §55-12-1 of the *Code* and found that Mr. Blyler was not in violation of Rules 1.15(a) and Rule 3.4(c). Further, the hearing panel subcommittee found that Mr. Blyler did not voluntarily turn over these funds, had no prior knowledge the funds were to be paid pursuant to the State Tax Department's levy and reasonably could not have anticipated same.

II. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Respondent is prepared to submit this matter to the Court on the briefs filed. There is a full and complete record made by the hearing panel subcommittee and all the facts and written arguments are before the Court.

III. STANDARD OF PROOF

The ODC correctly sets forth that the charges against an attorney must be proven by clear and convincing evidence pursuant to Rule 3.7 of the Rules of Disciplinary Procedure. Lawyer Disciplinary Board v. McGraw, 194 W.Va. 788, 461 S.E.2d 850 (1995) Further 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 record. Committee on Legal Ethics v. McCorkle, 192 W.Va. 286, 452 S.E.2d 377 (1999)

The Respondent argues that the findings and recommendations of the hearing panel subcommittee were sound and fully supported by substantial evidence set forth in the record, most of which facts were stipulated by the Respondent showing his willingness to cooperate in this matter. Consequently the recommended sanction in this case should be adopted by this Court which has a de novo standard of review. Committee on Legal Ethics v. McCorkle, 192 W.Va. 286, 452 S.E.2d 377 (1999)

IV. DISCUSSION AND RECOMMENDED SANCTIONS

Based upon the stipulated facts in this case and further facts developed by the parties and the hearing panel subcommittee, it is undisputed that the hearing panel subcommittee properly found violations of Rules 1.3, 1.4, 3.2 and 8.4. The Respondent takes to exception to the panel's findings thereof. The hearing panel further found that there were aggravating factors in this case of dishonesty on the part of the Respondent for failing to inform his client of the tax levy and for failing to immediately and diligently move forward with a civil action to rectify the mistake and the respondent's substantial experience in the practice of law. The hearing panel balanced the aggravating factors in this case with the significant mitigating factors which substantially impacted

Mr. Blyler's conduct in this case. It found as mitigating factors the absence of a prior disciplinary record, extraordinary personal problems caused by the chronic and progressive physical deterioration of his wife's health of whom he was the sole care giver, good character, absence of selfish motive and remorse. Although not specifically noted as a mitigating factor, the hearing panel likewise adopted the position of the complainant, Lloyd Cogar, III, who prefers a disposition of this case allowing Mr. Blyler to continue to practice law under the supervision of a supervising lawyer with the requirement that he make restitution. Mitigating factors are any consideration or factors that may justify reduction of the degree of discipline to be imposed. Lawyer Disciplinary Board v. Scott, 213 W.Va. 209, 214, 579 S.E.2d 550, 555 (2003) It is clear that the hearing panel subcommittee gave great weight to Mr. Cogar's position in light of the mitigating factors in this case and recommended a strong reprimand against the Respondent, that he be placed on probation for at least eighteen (18) months, that he be supervised by a lawyer approved by the Court and ODC and that he make restitution in the amount seized from the special commissioner's account within thirty-six (36) months from the date of the court's order.

The ODC disputes the recommended sanctions in this case. The ODC asserts that the sanctions imposed by the hearing panel subcommittee are inadequate and seek a one year suspension of Respondent's law license. However, ODC refuses to consider the recommended disposition by the complainant Mr. Cogar who stated that he had no objection to Mr. Blyler continuing to practice law under the supervision of a supervising attorney with a requirement that he pay restitution. And the further fact that the Respondent has no present funds to pay restitution.

The hearing panel subcommittee, in its footnote on page 16 found that Mr. Blyler's conduct was simply deceitful in that he failed to advise his client and the Court that the funds were seized

by the state tax department. It specifically noted that it did not find clear and convincing evidence existed proving that Respondent committed a higher level of misconduct. He acted deceitfully because he was ashamed and embarrassed. However, the Respondent readily admitted without hesitation during both his statements to Office of Disciplinary Counsel and before the Hearing Panel Subcommittee that he was negligent in failing to follow up the loss of the funds through the levy and to notify his client and the Court of this action. The Hearing Panel Subcommittee noted significant mitigating factors involved throughout this case and in at least once instance, referred to it as a “perfect storm”. The hearing panel subcommittee further noted in footnote 7 on page 17 of its findings that:

“What happened to the money in the special commissioners’ account was a mistake, and the levy did not occur as a result of an intentional act or omission on the part of Respondent. His primary failing occurred when he neglected to advise his client that the money had been taken and when he failed to take all actions necessary to retrieve the funds.”

ODC fails to consider that the levy on the special account was not an intentional act on the part of the Respondent. The ODC further argues that the Respondent benefitted by the money being taken from the special commissioners’ account and applied to his tax delinquency. ODC likewise fails to recognize that this is clearly no benefit to the Respondent. The debt he owed to the state tax department was transferred to his client in this case. Additionally, this so called benefit resulted not from any willful conduct on the part of the Respondent.

Pursuant to the Court’s holding in Lawyer Disciplinary Board v. Taylor, 192 W.Va. 139, 451 S.E.2d 440 (1994) without question the board has a duty to protect the public as to the reliability and integrity of attorneys and to safeguard its interest in the administration of justice. The Respondent likewise understands the factors to be considered in imposing appropriate sanctions found in Rule

3.16 in the Rules of Lawyer Disciplinary Procedure. Respondent readily 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. However, he disputes the position of Disciplinary Counsel that he has benefitted from this and further argues that his conduct complied with the controlling statutory provision of §55-12-1 of the *Code*.

As the hearing panel noted, 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 by the tax department and paid by the bank. The record reflects that the Respondent was not even aware of the levy until after the monies had been paid. No one could anticipate that the tax department would take and keep client funds to satisfy the Respondent's tax obligation. Disciplinary Counsel focusing on the actions of the state tax department and bank of levying on the special commissioner's account as a violation of the Rules by the Respondent misses the mark in this case.

As noted in Lawyer Disciplinary Board v. Scott, 213 W.Va. 209, 579 S.E.2d. 550, (2003), 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 Office of Disciplinary Counsel v. Jordan, 204 W.Va. 495, 513 S.E.2d 722 (1998) and in Lawyer Disciplinary Board v. Duty, 222 W.Va. 758, 671 S.E.2d 763 (2008), the Court held that 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.

The misconduct in this case by the Respondent occurred because of the delay by the Respondent in failing to timely notify his client and the Court of the actions of the state tax department and City National Bank and his delay in attempting to recover the money. The Respondent unequivocally admitted this both at the time his statement was taken by disciplinary counsel and before the hearing panel subcommittee. However, it was not a violation of the Rules when the state tax department wrongfully levied on the special commissioners' account.

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 that it was his responsibility and his alone to provide for her care. The record further reflects that Mr. Blyler would often have to balance her daily care with his obligations to his clients. He would often have to take her to court hearings, depositions and other proceedings because there was no one else available to assist him.

The Respondent practices law in a severely economically depressed area. In fact, not so many years ago, a national magazine named it the poorest area of the country. Not surprisingly, given the economic conditions in the county, there were only three lawyers to serve the needs of the Webster County citizens. The hearing panel subcommittee found that the Respondent is one of three lawyers in the county and suspension of his law license would cause hardship for those in need of legal services there. Following this election, there will only be two including the Respondent. Allowing the Respondent to maintain his license under the supervision of a supervising lawyer would assist in serving the legal needs of the community. It likewise would provide the only opportunity for those entitled to the sales proceeds to be made whole by allowing the Respondent to pay restitution.

Furthermore, the Prosecuting Attorney of Webster County, a former client of the Respondent and another member of the Webster County Bar testified as to the Respondent's good character. These are all considerations made by the hearing panel subcommittee in determining the appropriate sanctions it recommended.

In Lawyer Disciplinary Board v. Keenan, 208 W.Va. 645, 542 S.E.2d 466 (2000), the Court held that because of the obvious economic consequences that an attorney would suffer from his inability to practice law, his license would not be suspended and instead the 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

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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.

V. CONCLUSION

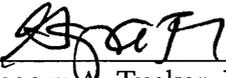
Mr. Blyler has been taking diligent efforts to recover the money. He has no personal funds to repay the money taken in the levy. Additionally, his wife's five year battle with Alzheimer's has left him financially devastated. Therefore, given his financial situation, he should be permitted to retain his license to recover the money and make his client's whole. He cannot do this without a law license.

It needs noted that Mr. Blyler's bonding company has paid \$50,000.00 to the Circuit Court of Braxton County, West Virginia, to be paid to those entitled to those funds. It is a significant consideration in this case that the complainant Mr. Cogar has indicated his willingness to accept a sanction allowing Mr. Blyler to continue to practice law with an order of restitution.

In conclusion, there is no dispute that the Respondent violated the Rules of Professional Conduct. However, there are significant mitigating factors to be considered 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, remorse and a cooperative attitude towards the proceedings. Thirdly, the position taken by the complainant Mr. Cogar in this case. Finally, the considerations set out by the Court in the *Keenan* case, justify a sanction less than suspension with supervision and an order of restitution.

Given the weight of the evidence in this case, the aggravating and mitigating circumstances surrounding the violations by the Respondent, the wishes of the complainant that the Respondent be allowed to continue practicing under supervision with an order of restitution, the Respondent's good character, remorse and the lack of counsel in the Webster County area to serve the legal needs of community, the hearing panel subcommittee's recommendation that the Respondent be strongly reprimanded, placed on probation for at least 18 months, only be permitted to practice law under supervision and make restitution within 36 months, is both reasonable, appropriate and is well reasoned. Based thereon, the Respondent prays that the Court adopt the recommended sanctions by the hearing panel subcommittee.

Respectfully submitted,
HOWARD J. BLYLER
By counsel



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CERTIFICATE OF SERVICE

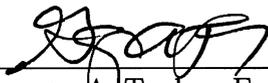
I hereby certify that on the 19th day of April, 2016, I served the foregoing RESPONSE BRIEF OF RESPONDENT HOWARD J. BLYLER upon the following by mailing a true and accurate copy thereof to their respective addresses by United States mail, postage prepaid:

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