

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

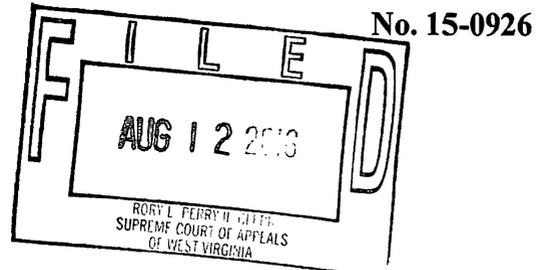
LAWYER DISCIPLINARY BOARD,

Petitioner,

v.

**EDWARD R. KOHOUT, a member of
The West Virginia State Bar,**

Respondent.



BRIEF OF THE LAWYER DISCIPLINARY BOARD

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I. STATEMENT OF THE CASE

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

This is a disciplinary proceeding against Respondent Edward R. Kohout (hereinafter “Respondent”), arising as the result of a Statement of Charges (hereinafter “SOC”) issued against him and filed with the Supreme Court of Appeals of West Virginia on or about September 25, 2015. Respondent was served with the SOC on September 30, 2015. Disciplinary Counsel filed mandatory discovery on or about October 20, 2015. Respondent filed his Answer to the SOC on or about October 19, 2015, and submitted mandatory discovery on November 23, 2015.

The matter proceeded to hearing in Morgantown, West Virginia, on Monday, January 25, 2016, and continued on Tuesday, January 26, 2016. Rachel L. Fetty, Esquire, appeared on behalf of Respondent, who also appeared. Andrea J. Hinerman, Senior Lawyer Disciplinary Counsel, and Rachael L. Fletcher Cipoletti, Chief Lawyer Disciplinary Counsel, appeared on behalf of the Office of Disciplinary Counsel (hereinafter “ODC”). The Hearing Panel Subcommittee, comprised of Timothy E. Haught, Esquire, Chairperson; Kelly D. Ambrose, Esquire; and Cynthia L. Pyles, laymember, presided over the proceedings.

The Hearing Panel Subcommittee (hereinafter “HPS”) heard testimony from Edythe Gaiser, Esquire, Vanessa Lawson, Kristen Taylor, Esquire, Bryan Selbe, Charles Galford, Sonja Richard, Teresa Johnson, Ronald G. Kramer, Magistrate Herschel R. Mullins, Christian Warner, Kimberly Hoskins, Kathy Brady and Respondent and the arguments of counsel. The HPS also admitted into evidence ODC’s Exhibits 1- 45, and Respondent’s Exhibit 1.¹ Pursuant to the HPS’s instructions during the hearing, Disciplinary Counsel submitted ODC Exhibit 45 on or

¹ While the hearing transcript indicates that “Respondent’s Exhibit 1” was admitted, Respondent presented a notebook containing 36 exhibits. At the hearing, Ms. Fetty stated that “And we – and so we’ll need to move for admission of our notebook, too before we forget.” Mr. Haught stated “[t]hen those shall be admitted unless there’s an objection.” Disciplinary Counsel did not object. [Tr. 557-8].

about February 1, 2016. On or about February 4, 2016, ODC received Respondent's Supplemental Exhibit.²

On or about June 3, 2016, the HPS issued its decision in this matter and filed with the Supreme Court of Appeals of West Virginia its "Report of the Hearing Panel Subcommittee" (hereinafter "Report"). The HPS properly found that the clear and convincing evidence established that Respondent violated Rules 1.1; 1.2(a); 1.3; 1.4(a) and (b); 1.5(a); 1.15(a) and (b); 3.1; 5.4(a); 8.1(a); 8.4(c) and (d).³ The HPS issued the following recommendation as the appropriate sanction: (1) That Respondent's law license be annulled; (2) That Respondent be required to make full restitution to Sonja Richard in the amount of \$2,059.66; and (3) That Respondent pay the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

Thereafter, on or about June 27, 2016, Senior Disciplinary Counsel filed her consent to the recommendation of the HPS. Respondent filed his objection on or about July 5, 2016.

B. FINDINGS OF FACT

Respondent is a lawyer practicing in Morgantown, Monongalia County, West Virginia. Respondent, having passed the bar exam, was admitted to The West Virginia State Bar on November 4, 1987. As such, he is subject to the disciplinary jurisdiction of the Supreme Court of Appeals of West Virginia and its properly constituted Lawyer Disciplinary Board.

Complaint of Office of Disciplinary Counsel

ODC opened a complaint against Respondent after receiving a letter dated January 8, 2014, from Rory L. Perry, II, Clerk of Court, and Edythe Nash Gaiser, Deputy Clerk of Court of

² While these were admitted at the hearing, the Chairperson noted and preserved Disciplinary Counsel's objection to the presentation of this exhibit at the hearing based on timeliness. The Chairperson of the HPS ruled that these supplemental exhibits would not be considered as substantive evidence "as to them in and of themselves as to whether or not [Respondent] did the work on the computer." [Tr. 421-428].

³ All references to the Rules of Professional Conduct herein are to those Rules in effect prior to January 1, 2015.

the Supreme Court of Appeals of West Virginia. [ODC Ex. 1, 2] By Order dated January 8, 2014, the Supreme Court of Appeals of West Virginia (hereinafter “Supreme Court”) directed the Clerk to “refer the actions of [Respondent] to the [ODC] for investigation into violations of the Rules of Professional Conduct,”⁴ [ODC Ex. 1, Bates No. 3; ODC Ex. 17, Bates No. 3705].

By way of background, on or about October 31, 2013, Respondent filed a Notice of Appeal with the Supreme Court, in a matter captioned, *Nancy Lorraine Galford and Charles Galford v. Nancy Friend, individually, and Big Bear Lake Property Owners Association, Inc.*, Supreme Court No. 13-1134. Along with his Notice of Appeal, Respondent submitted a \$200.00 filing fee check identified as Check No. 3149, dated October 29, 2013, and drawn on Respondent’s “ATTORNEY AT LAW” account with United Bank. [ODC Ex. 1, Bates 5, 11-29; ODC Ex. 17, Bates 3709-3735]. On November 12, 2013, the Supreme Court subsequently entered a Scheduling Order. [ODC Ex. 1, Bates 9-10; ODC Ex. 17, Bates 3703-3704].

By letter dated December 11, 2013, the Clerk’s Office advised Respondent that on December 4, 2013, his United Bank Check No. 3149 had been returned for insufficient funds.⁵ The Clerk directed that Respondent provide the Clerk a cashier’s check or money order for the filing fee within seven (7) days. [ODC Ex. 1, Bates 4]. Respondent did not respond to the Clerk’s December 11, 2013 letter and claimed he did not receive this letter. [ODC Ex. 5, Bates 41; Tr. 390]. However, Vanessa Lawson, a former employee of Respondent’s law firm, who worked in Respondent’s office from November 2010 until December 31, 2013, testified that she recalled

⁴ In the January 8, 2014 letter from the Clerk’s office, Mr. Perry and Ms. Gaiser also noted that “[i]t is not known whether Nancy Lorraine Galford and/or Charles Galford paid any funds to [Respondent] for the filing fee and the Court directs that the investigation include the same.” [ODC Ex. 1, Bates 2].

⁵ The Clerk’s December 11, 2013 letter was addressed to Respondent at “The Law Office of Edward R. Kohout, PLLC, 235 High Street, Suite 307, Morgantown, WV 26505.” This is Respondent’s current address listed with the West Virginia State Bar and is also Respondent’s address listed on Check No. 3149. Ms. Gaiser testified that the Clerk’s December 11, 2013 letter was not returned to the Clerk’s office. [Tr. 26-28, 46].

receiving the Supreme Court's December 11, 2013 letter in Respondent's office. [Tr. 64]. She also said that Respondent came into the office after the letter was received and that she saw him read the letter. [Id.]. Ms. Lawson testified that she opened Respondent's mail received at his law office as part of her duties, and that after she opened the mail, she would lay the mail on Respondent's desk. She testified that "... and I would, like I said, lay everything in an order on his desk, never filed anything until he had read it. And once he had read that or whatever needed done, then he would give it back to me and I would file it." [Tr. 63]. Kristen Taylor, Esquire, an attorney who worked in Respondent's law office from May 2012 until in or about April 2014, also recalled receipt of the Supreme Court's December 11, 2013 letter. [Tr. 149, 164-165].

On or about December 13, 2013, Respondent filed a Motion to Withdraw as Counsel in *Nancy Lorraine Galford and Charles Galford v. Nancy Friend, individually, and Big Bear Lake Property Owners Association, Inc.*, Supreme Court No. 13-1134, which did not comply with the requirement set forth in Rule 3(d) of the Rules of Appellate Procedure.⁶ Ms. Gaiser testified that Respondent did not certify he had complied with Trial Court Rule 4.03(b) and that at the time the Supreme Court considered his Motion to Withdraw in early January 2014, Respondent had an outstanding debt [the filing fee] which the Supreme Court was trying to collect. [ODC Ex. 1, Bates 7-8; Tr. 31-32]. By Order entered January 8, 2014, the Supreme Court denied Respondent's Motion to Withdraw. [ODC Ex. 1, Bates 3].

By letter dated January 10, 2014, Respondent provided his verified response to this complaint. Respondent stated that he received a telephone call from Ms. Gaiser on or about January 8, 2014, advising that the Supreme Court had denied his Motion to Withdraw due to the

⁶ Rule 3(d) of the Rules of Appellate Procedure provides that "[i]n order to withdraw as counsel in an action pending in this Court in which counsel has previously appeared, counsel must provide the Court with documentation that counsel has fully complied with the requirements of Trial Court Rule 4.03. Counsel is not relieved of the obligation to comply with all applicable deadlines and obligations in the case until such time as the Court enters an order permitting counsel to withdraw."

unpaid filing fee. Respondent stated that he did not recall receiving any “communications” from the Supreme Court regarding the returned check prior to this telephone call from Ms. Gaiser. Respondent stated that he immediately mailed another check for the filing fee. Respondent provided a copy of his January 8, 2014 letter to the Clerk stating “[y]our office called today and advised that the filing fee had not yet been paid for this appeal. I thought it had been paid. Therefore, enclosed is my check for \$200 for the filing fee. Thank you.” The letter contained a copy of Check No. 093 in the amount of \$200.00 from an account purportedly in Respondent’s name through BB&T. It is not identified as a cashier’s check. [ODC Ex. 5]. In his response, Respondent also indicated that his clients, Mr. and Mrs. Galford, had already retrieved their file. Respondent stated that Mr. and Mrs. Galford, as well as the other persons involved in the case, “failed and refused to continue to pay [Respondent] for [Respondent's] time in working on this case.” Respondent denied any “dishonesty, deceit or misrepresentation” in the handling of money. . . . [Respondent] was unaware that the original check had not been paid by [his] bank and [Respondent] paid it immediately when notified yesterday.” Respondent further stated that because he promptly paid the check, the matter was moot and no ethical violation could be proven. [ODC Ex. 5, Bates 41-42].

On or about January 17, 2014, Respondent provided ODC a copy of a letter he had directed to Ms. Gaiser. Respondent sent the Supreme Court another check in the amount of \$200.00 for the filing fee for the Galfords’ case. A copy of the check, identified as an “Official Check” No. 5006168607 was processed through BB&T.⁷ In this letter, Respondent acknowledged that his Motion to Withdraw had been denied and he stated “[a]nd yes, I’m aware that I was not permitted to withdraw from this appeal. And even though my clients came and

⁷ This check is a counter check with Respondent’s address information placed on the check by rubber stamp.

picked up their file[,] I will be filing a brief prior to February 10 and in all other respects attempt to comply with the Court's rules and orders." [ODC Ex. 6].

On or about October 9, 2013, the Circuit Court of Preston County entered an Order granting Summary Judgment to the defendants in the matter captioned, *Lorraine Galford and Charles Galford v. Nancy Friend, individually, and Big Bear Lake Property Owners Association, Inc.*, Civil Action No. 13-C-42.⁸ As indicated above, Respondent filed a Notice of Appeal on or about October 31, 2013, with the Supreme Court. [ODC Ex. 10, Bates 778-791; ODC Ex. 16, Bates 3626-3639].

On or about November 18, 2013, Respondent filed a Motion to Withdraw as Counsel for Plaintiffs in the Circuit Court of Preston County.⁹ In the Motion, Respondent stated he had received a total of \$4,850.00 from all of the Big Bear Lake property owners involved in the lawsuit and that the Galfords had paid \$400.00 of that \$4,850.00. Respondent stated that despite monthly letters, the Plaintiffs "stopped paying, apparently having lost interest in the case and have ignored [Respondent's] repeated requests for payment." [ODC Ex. 16, Bates 3659-3691; ODC Ex. 10, Bates 3670].

Respondent did not have a written retainer agreement signed by the Galfords pertaining to his representation of them in the underlying matter. [Tr. 207]. It appears that there was an arrangement in place wherein Big Bear Lake property owners who wanted to participate in the law suit, including the Galfords, would pay Respondent \$50.00 a month during the representation. [ODC Ex. 10, Bates 2135]. However, Respondent also indicated to the Galfords

⁸ Respondent had originally filed the civil complaint in Monongalia County, on or about December 11, 2012, and the law suit was assigned Civil Action No. 12-C-870. However, by Order entered on or about February 20, 2013, the Circuit Court of Monongalia transferred the case to the Circuit Court of Preston County.

⁹ Ms. Gaiser testified that there is "no concurrent jurisdiction. Once a final order is entered – like in this case, there was a final order entered, granting summary judgment. So then once an appeal is docketed from that final order, the Circuit Court no longer has jurisdiction. There's no concurrent jurisdiction between the Circuit Court and the Supreme Court. Once an appeal is docketed, the jurisdiction is then with the Supreme Court of Appeals." [Tr. 37]

and other Big Bear Lake Property owners that his attorney's fee would also include "the standard one-third of any recovery from the case." [ODC Exhibit 10, Bates 2121-2122].

Respondent did not enter into a new retainer agreement with the Galfords for the filing of the appeal. [Tr. 483-484]. At his March 27, 2014, Sworn Statement, Respondent also stated that "I didn't ask the Galfords – I did not have a – I don't have a specific recollection of a conversation with the Galfords about, 'Hey, I'm going to file the appeal and it's \$200.00.'" [ODC Ex. 9, Bates 124]. Mr. Galford testified at the hearing that he was not aware that Respondent had filed an appeal with the Supreme Court. [Tr. 208].

By subpoena issued May 7, 2014, ODC subpoenaed Respondent's bank records for his IOLTA account, styled on his checks as his "Client Trust" account, and his Operating Account, styled on his checks as his "Attorney at Law" account. Subpoenas were issued to both United Bank and Branch Banking & Trust (BB&T).¹⁰ Respondent's bank records were subpoenaed for the following dates: June 1, 2012, through on or about June 2014, for the United Bank accounts, and December 1, 2013, through on or about June of 2014, for the BB&T accounts. [ODC Ex. 13, 14].

Respondent's bank records for his United Bank "Attorney at Law" account and his United Bank "Client Trust" account for the time period reflected in the subpoena do not indicate that Respondent received a payment by the Galfords to file an appeal with the Supreme Court. Bryan Selbe, Investigator, testified at the hearing that on the date, October 29, 2013, when Respondent wrote the first \$200.00 check to the Supreme Court, Respondent's "attorney at law" account was in "overdraft." [Tr. 188; ODC Ex.14; Bates 2688-2692].

¹⁰ Respondent abandoned his IOLTA account and his "Attorney at Law" account at United Bank on or about December 14, 2013. At his March 27, 2014 Sworn Statement, Respondent stated that "I changed banks. Well, I was so overdrawn with United Bank, and I was so overdrawn that I couldn't get out of the ditch to get the account back to where I could use it. So I had to open the new account. And it's still overdrawn. . . ." He further stated that "[i]t's still open. It's overdrawn. And whenever I get some money, I need to pay that and get it functioning again because this has always been my primary office account."

Complaint of Vanessa D. Lawson

Ms. Lawson, a former employee of Respondent's law office, filed her complaint on or about May 19, 2014.¹¹ Ms. Lawson alleged that four (4) of her paychecks from Respondent were returned by the bank for insufficient funds and that Respondent "routinely avoids creditors and has bounced check[s] to the 1) WV Supreme Court; 2) Mon[ongalia] Co[unty] Circuit Court; and, 3) Malpractice Insurance Company (Wells Fargo)." [ODC Ex. 18].¹² Ms. Lawson also alleged that Respondent submitted a fraudulent "Attorney's Charging Lien" against a client.¹³ [ODC Ex. 18]. Ms. Lawson stated that Respondent called her a "cunt" and acted unprofessional by repeatedly calling and texting her in a harassing manner. [ODC Ex. 18, 45; Tr. 136-140]. Finally, Ms. Lawson alleged that Respondent borrowed money from her mother Judy Beal, and never repaid it. [ODC Ex. 18; Tr. 86, 122-123].

Respondent provided his verified response on or about May 27, 2014. Respondent stated that Ms. Lawson was his client in the Fall of 2010. During the course of conversation at one of their meetings, Respondent mentioned that he was looking for a secretary. In or about November 2010, Ms. Lawson began working for Respondent and continued working with him until approximately December 2013. Respondent said that Ms. Lawson received raises and bonuses and the two "enjoyed a very close relationship as she and [her boyfriend] and [Respondent] were friends." [ODC Ex. 20, Bates 3958-3959]. Respondent stated that he "provided counsel and advice to [Ms. Lawson] and legal services to her mother, Judy Beal, when she sold her home in

¹¹ Ms. Lawson acknowledged the complaint was not in her handwriting but she was present when the complaint was written by Ronald Kramer, Esquire, and she reviewed and adopted the complaint as hers, prior to signing her name to the complaint. [Tr. 67-68].

¹² See also, hearing testimony from Bryan Selbe, Investigator, who testified in the October 2013-November 2013 time period, among the checks that were returned for insufficient funds in Respondent's "attorney at law" account or operating account, were checks to the Monongalia County Magistrate Court for a filing fee, to the Circuit Court of Monongalia County, to the Secretary of State, three checks to the US Treasury, a paycheck to Kristen Taylor, Esquire, and to the City of Morgantown for B&O Taxes. [Tr. 189-190].

¹³ See, Complaint of Ronald G. Kramer, II, *infra*.

Preston County.” [ODC Ex. 20, Bates 3959]. Respondent stated that in or about Fall 2013, he began experiencing “a cash flow shortfall, which is typical in many small offices.” During this time, Respondent had additionally hired Kristen Taylor, Esquire, and had asked both employees to take a pay cut in order “to help stretch personal expenses.” Respondent stated that both agreed. [ODC Ex. 20, Id.].

Another one of his employees at the time, Robert Kramer, Esquire, had obtained his own law license and wanted to take over a case Respondent had been handling for him. They (Respondent and Mr. Kramer), had a disagreement regarding Respondent’s fee, so Respondent filed a charging lien, which would be reviewed for payment by the Court at the end of the case. Respondent stated that Ms. Lawson provided an affidavit indicating Respondent “had falsely stated in [his] invoice that [he] paid his filing fee.” Respondent stated that he has cancelled checks to prove he paid this filing fee, not Mr. Kramer. Respondent stated that Ms. Lawson had “backstabbed” him by providing this affidavit and denied that there was anything “fraudulent” about the charging lien. [ODC Ex. 20, Bates 3959-3960].

Respondent stated that Ms. Beal sued him in Magistrate Court in or about April, 2014, over the alleged loan, referenced above, in the amount of \$5,000.00. Respondent stated that this was not a loan, but was an unsolicited gift offered to help him pay for his cataract eye surgery. Respondent stated, “I told [Ms. Lawson] that my insurance didn’t cover it and she told [Ms. Beal] who offered to pay for it. [Ms. Beal] did it out of consideration for the fact that [Respondent] had been good to [Ms. Lawson]. It was never intended to be a loan.” [ODC Ex. 20, Bates 3960]. Respondent acknowledged that some of his checks had been returned for insufficient funds but stated that he paid each one that was returned. [ODC Ex. 20, Id.].

Respondent further denied repeatedly texting and calling Ms. Lawson. He said that the

text Ms. Lawson attached to her complaint was sent “after [Respondent] was served with [Ms. Beal’s] suit.” [ODC Ex. 20, Id.]. However, Ms. Lawson testified at the hearing that Respondent also sent her text messages on the following dates: January 6, 2014, January 8, 2014, January 10, 2014, and January 15, 2014. [Tr. 137-140; ODC Ex. 45].

On or about November 18, 2014, ODC received a fax from Monongalia County Magistrate Court regarding a civil summons for a case filed by Respondent against Ms. Lawson. Respondent accused Ms. Lawson of borrowing money totaling \$4,500.00 and defaming Respondent by accusing him of criminal and unethical conduct, referenced the ODC complaint, and attached copies of checks to his Magistrate Court complaint against Ms. Lawson. Respondent demanded judgment of \$5,000.00 plus court costs. [ODC Ex. 24; ODC Ex. 22].

Ms. Lawson testified that the checks used as exhibits in Respondent’s lawsuit against her were not loans but were actually bonus checks she was given after case settlements. Ms. Lawson noted, in corroboration of this, that the copies of the checks she received from Respondent’s IOLTA account in the exhibits are displayed next to checks written to the clients whose cases had settled. [For example, ODC Ex. 22, Bates 4211, 4212; Tr. 81-82, 118, 125, 128-129].

Complaint of Sonja Richard

Ms. Richard retained Respondent to represent her in a civil case. On or about October 30, 2013, Respondent provided Ms. Richard with a check in the amount of \$20,000.00, which Respondent told her was her portion from a \$35,000.00 settlement. Respondent also told her “not to worry about” a \$985.00 medical bill owed to Dynamic Physical Therapy (hereinafter “Dynamic”) because he would pay it. However, Respondent did not pay the Dynamic bill, even though Respondent had signed a May 15, 2013 letter of protection. [ODC Ex. 28, Bates 4324;

Tr. 231-232, 235]. Ms. Richard also believed the matter had been turned over to debt collections. [ODC Ex. 28; Tr. 239].

Despite numerous attempts to contact Respondent about the Dynamic bill, Ms. Richard was only able to speak to Respondent in or about March 2014. During this March 2014 conversation, Respondent requested information from Ms. Richard about the Dynamic bill and he again assured her that he would pay the bill. [ODC Ex. 28, Bates 4320-4324; Tr. 232]. Ms. Richard also provided a copy of the May 15, 2013 letter of protection signed by Respondent and addressed to Dynamic. Ms. Richard stated that their agreed upon fee for Respondent was “33%”. Her settlement was in the amount of \$35,000.00, yet she received \$20,000.00 and Respondent received \$15,000.00. As such, she believed Respondent had received more than the agreed upon fee for his services. [ODC Ex. 28, Bates 004321; ODC Ex. 30, Bates 4330-4331; Tr. 230].

On or about June 25, 2014, Respondent provided his verified response and stated that he represented Ms. Richard in a “fall down case” after she had tripped over concrete steps at her apartment and that his fee for the representation was one-third of the settlement plus expenses. Respondent stated that his “expenses included the filing fee and service of process [in the amount of] Two Hundred Seventy-five Dollars (\$275.00), the bill to Dynamic Physical Therapy [in the amount of] Nine Hundred Eighty-five Dollars (\$985.00), the cost of obtaining her hospital records from Fairmont General [in the amount of] Fourteen Dollars and Eighty-four cents (\$14.84), and [Respondent’s] office expense.” [ODC Ex. 30]. Respondent admitted he had guaranteed payment to Dynamic but stated that “[t]o date [he had] not been billed by them. [He] never refused to pay it and [he] is holding the money to pay [the bill] once they contact him.” Respondent also maintained that this bill has had no effect on Ms. Richard’s credit, as “she already had bad credit.” [ODC Ex. 30, Bates 4327]. Respondent also stated that Ms. Richard was

having an extra-marital affair with another one of his clients and that she had a criminal record and had spent four and half years in jail. Respondent stated that she “was just trying to extort money from [him] when she called, and with this complaint.” [ODC Ex. 30, Bates 4328].

Respondent denied violating any of the Rules of Professional Conduct, stating that he worked diligently to obtain a settlement and Ms. Richard voluntarily accepted her settlement and signed all paperwork. Respondent stated that he kept Ms. Richard advised of the developments of her case. Respondent also stated that his written fee agreement with Ms. Richard is the standard fee agreement, and the \$15,000.00 he received was “fair, reasonable and necessary based on the time in the case, the difficulty, [Respondent’s] experience, and all of the other Rule 1.5(a) factors.” Respondent denied holding any property for Ms. Richard and again stated that he would pay the bill to Dynamic once he received the same. Respondent further denied any act of deception, fraud or deceit, or any improper conduct. Respondent stated that she was experiencing “buyer’s remorse” and “needs to be satisfied with the outcome.” [ODC Ex. 30, Bates 4328].

Contrary to Respondent’s assertions that he had not received the Dynamic bill, the evidence reflected that Respondent received the bill from Dynamic on or about July 12, 2013 via facsimile. Additionally, Respondent received notice of the Dynamic bill from Teresa Johnson, an employee at the Morgantown Dynamic office who contacted him about the bill. Ms. Johnson testified she contacted Respondent’s office on March 17, 2014, April 10, 2014, May 19, 2014, and again on June 2, 2014, and left several messages to which Respondent did not respond. [ODC Ex. 30, Bates 4339; ODC Ex. 31, Bates 4369; Tr. 237-238, 254]. Ms. Richard testified that she did not contact Respondent’s office to request or “extort” more money, as Respondent suggested. On the contrary, she contacted Respondent to inquire why he had not paid the bill. She further requested “an itemized list of [Respondent’s] cost, expenses, etc” because she

believed Respondent had taken more money from the settlement than what he was entitled. Ms. Richard further stated that “[r]egardless of [her] credit history, this never should have made it to a collection agency.” [Tr. 232, 235-236, 242]. Ms. Richard also said she had been honest with Respondent regarding her past and now felt “very exposed and violated” because Respondent was using that private information against her in an attempt to “take the focus of [her] complaint away from [Respondent].” Ms. Richard denied any involvement in an extra-marital affair and questioned why her character needed defending, “when it is [Respondent’s] actions that are being questioned?!” [ODC Ex. 31, Bates 4368; Tr. 243].

Respondent’s written fee agreement with Ms. Richard provides, in part, that his “attorney’s fees for representing client shall be one-third (33.33%) of any funds recovered from the case, plus reimbursement of expenses associated with the same.” The fee agreement also provides, in part, that “[c]lient does hereby authorize attorney, at attorney’s sole option, to withhold and pay from any sums received by way of settlement or otherwise in the prosecution of the claim: (a) Attorney’s fee herein provided; (b) Any costs or expenses not yet reimbursed to attorney; (c) Any amounts owed by client for doctor or hospital bills; (d) Any other obligations owed by client arising out of the controversy for which attorney was employed.” [ODC Ex. 30, Bates 4330-4331].

On or about October 30, 2013, Respondent deposited Complainant Richard’s \$35,000.00 settlement check into his United Bank “Client Trust Account.” [ODC Ex. 14, Bates 2364, 2368]. On October 30, 2013, Respondent wrote a check from his “Client Trust Account” in the amount of \$20,000.00 as payment to Ms. Richard. There are no checks reflecting payment of “Attorney fees and expenses” from Respondent’s United Bank “Attorney at Law” account. Rather, on the same date, Respondent made two “Internet/Phone Trans” from his United “Client Trust

Account” to his United Bank “Attorney at Law” account in the amounts of \$3,000.00 and \$12,000.00, purportedly representing his “Attorney’s fees and expenses” of \$15,000.00 as indicated on his Settlement Disbursement. On the day prior to the “Internet/Phone” transfer, the balance in Respondent’s United Bank “Attorney at Law” account was negative \$2,665.44. [ODC Ex. 14, Bates 002364, 2367, 2691; See also, ODC Ex. 30, Bates 4366]. The November 12, 2013 bank statement for Respondent’s United Bank “Attorney at Law” account indicates that the beginning balance on or about October 12, 2013, was negative \$292.92. Respondent’s ending balance on or about November 12, 2013, was \$1,901.80. [ODC Ex. 14, Bates 2688-2691]. The December 12, 2013 bank statement for Respondent’s United Bank “Attorney at Law” account indicates the beginning balance on or about November 12, 2013, was \$1,901.80. Respondent’s ending balance on or about December 12, 2013, was negative \$1,741.11. The balance in Respondent’s United Bank “Attorney at Law” account had a negative balance only eighteen (18) days after the October 30, 2013 “Internet/Phone” transfer. [ODC Ex. 14, Bates 2703-2709].

Pursuant to Respondent’s written fee agreement in this matter charging an attorney’s fee of 33.33%, Respondent’s attorney fee from the \$35,000.00 settlement in the Richard matter is \$11,665.50. Respondent’s claimed expenses are \$257.00 for the filing fee and \$14.84 for copies of medical records. Respondent also withheld \$985.00 to pay Dynamic. [Respondent’s Ex. 22].

What was required of Respondent		What Respondent did-Oct. 2013	
\$35,000.00	Settlement	\$35,000.00	Settlement
<u>-\$11,665.50</u>	Attorney’s Fee	<u>-\$15,000.00</u>	Attorney’s Fee & Expenses
\$23,334.50		\$20,000.00	Paid to Complainant
<u>- \$275.00</u>	Expense -filing fee		
\$23,059.50			
<u>- \$14.84</u>	Expense -medical records		
\$23,044.66			
<u>- \$985.00</u>	Dynamic Physical Therapy bill (not paid until December 15, 2015)		
\$22,059.66	Due to Complainant		

Complaint of Ronald G. Kramer, II

Respondent represented Mr. Kramer¹⁴ in a civil action from approximately April through December 2013. Mr. Kramer stated that Respondent declined settlement offers and made counter-offers without communicating those offers to him. Mr. Kramer also alleged that after he discharged Respondent from representing him, Respondent submitted a fraudulent attorney lien to the Circuit Court documenting fraudulent hours and expenses. Finally, Mr. Kramer alleged that Respondent sent numerous vulgar and unprofessional emails and text messages to him and other attorneys both during, and after, the representation. For example, Mr. Kramer alleged that when Judge Gaujot ruled against Respondent regarding Respondent's fees, Respondent "emailed defense counsel stating 'I'm not going to get fucked.... And I'm supposed to take this up the ass...'" Also, "I don't give a damn about what Judge Gaujot says."

On or about July 23, 2014, Respondent provided his verified response and maintained that the complaint against him was "completely frivolous." While Mr. Kramer was employed by Respondent as a law clerk, Mr. Kramer asked Respondent to "sue Volkswagen and Cochran (dealership) in Pittsburgh over a new 2011 Volkswagen car he leased from Cochran in December of 2010. [Mr. Kramer] said that the door was coming off the hinge and they failed to repair in [sic] three times." Respondent stated that he informed Mr. Kramer that he would file the suit but he would have to charge for it and would keep track of his time and expenses. Respondent stated that Mr. Kramer agreed. [ODC Ex. 37, Bates 4499].

Respondent said he was offered \$18,000.00 to settle the case, "which was entirely ignored." Respondent stated that Mr. Kramer became increasingly impatient with the process. Respondent suggested making a settlement offer in the amount of \$30,000.00, but Mr. Kramer rejected the suggestion. [ODC Ex. 37, Id.] Respondent stated that Mr. Kramer traded in the

¹⁴ Mr. Kramer is an attorney licensed with the West Virginia State Bar, who was admitted on February 14, 2014.

vehicle in or about fall of 2013, and Mr. Kramer subsequently obtained his license to practice law and left his employment with Respondent. On or about January 3, 2014, Respondent and Mr. Kramer “had a nasty text exchange in which [Complainant Kramer] demanded to take over [Mr. Kramer’s] case and asked [Respondent] to withdraw.” Respondent filed a charging lien with the court claiming approximately \$14,000.00 in attorney’s fees. Mr. Kramer disputed the amount of the charging lien and a hearing was held before Judge Gaujot on or about January 15, 2014. However, Respondent stated that Mr. Kramer had “surreptitiously obtained from my former secretary, Vanessa Lawson, [an affidavit] in which she essentially claimed that [Respondent] had padded [Respondent’s] bill.” Mr. Kramer claimed he did a lot of the work himself and paid the filing fee himself, both of which Respondent stated were not true. [ODC Ex. 37, Bates 4500] Respondent stated that Mr. Kramer met for mediation in the case and reached a settlement in the amount of \$5,000.00. A few days later Mr. Kramer requested that Respondent withdraw the charging lien, but Respondent refused.

Mr. Kramer acknowledged that Respondent had the receipt for the filing fee in the case but still maintained that Respondent’s charging lien was fraudulent. Mr. Kramer further stated he drafted all pleadings in the case and provided discovery to the defense. [ODC Ex. 28, Bates 4500]. At the hearing, Mr. Kramer again maintained he drafted the pleadings in his case, including the complaint, discovery responses, and responses to dispositive motions. [Tr. 263-264]. Mr. Kramer also testified that he gave at least one of his pay checks back to Respondent to pay for the filing fee in his case. [Tr. 270-271; 283-285]

By Order entered on or about July 22, 2014, the Circuit Court of Monongalia County ordered Mr. Kramer to pay Respondent one-third of the settlement amount or \$1,666.66. The Court “concluded that this was a fair amount for [Respondent’s] attorney’s fees as one-third is a

standard contingency fee arrangement. Mr. Kramer was also ordered to pay any outstanding litigation costs incurred by Respondent and/or Mr. Kramer out of the settlement proceeds. The Court had noted that the agreement between Respondent and Mr. Kramer had been an oral contract but the parties had “alternate views” of the terms. [ODC Ex. 40, Bates 4867-4869].

C. CONCLUSIONS OF LAW

In regard to the Galford matter, the HPS found that Respondent failed to obtain the Galfords’ instructions concerning the objectives of the representation and failed to explain a matter to the extent reasonably necessary to permit the Galfords to make informed decisions regarding the representation, in violation of Rule 1.2(a)¹⁵ and Rule 1.4(b)¹⁶ of the Rules of Professional Conduct. The HPS also found that Respondent failed to hold the legal fees paid to him, in advance, by the Galfords, which was in his possession in connection to a representation separate from his own property in a “Client Trust Account,” in violation of Rule 1.15(a).¹⁷ Furthermore, the HPS found that Respondent violated Rules 1.1¹⁸, 8.4(c) and 8.4(d)¹⁹ of the

¹⁵ **Rule 1.2 Scope of representation**

- (a) A lawyer shall abide by a client’s decisions concerning the objectives of representation, subject to paragraphs (c), (d) and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client’s decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

¹⁶ **Rule 1.4 Communication**

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

¹⁷ **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 safeguarded. 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.

¹⁸ **Rule 1.1 Competence**

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

¹⁹ **Rule 8.4 Misconduct**

It is professional misconduct for a lawyer to:

Rules of Professional Conduct because he did not provide prior notice to or obtain authorization from the Galfords that he was filing an appeal with the Supreme Court of Appeals of West Virginia, did not have funds sufficient in his United Bank “Attorney at Law” bank account to cover the \$200.00 filing fee check he wrote on his United Bank “Attorney at Law” account and then attempted to improperly withdraw from the representation.

The HPS found that Respondent violated Rules 3.1²⁰, 8.4(c) and 8.4(d)²¹ of the Rules of Professional Conduct in regard to the Lawson complaint because he filed a non-meritorious lawsuit against Ms. Lawson which purpose was to harass her and that this conduct involved dishonesty, fraud, deceit or misrepresentation and was conduct prejudicial to the administration of justice because the lawsuit contained false allegations. The HPS also found that the evidence at the hearing demonstrated that Respondent shared attorney’s fees with a non-lawyer and thus, the HPS found that Respondent violated Rule 5.4(a).²²

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

²⁰ **Rule 3.1 Meritorious claims and contentions**

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

²¹ The provisions of Rule 8.4 are set forth in n.19 *supra*.

²² The SOC did not charge this rule violation. The Barber Court found, however, that there was not a due process violation when the HPS found a violation of uncharged conduct when “it was related to or was within the scope of the conduct and rule violations specifically charged.” Lawyer Disciplinary Board v. Barber, 211 W.Va. 358, 365, 566 S.E.2d 245, 252 (2002) *quoting* The Florida Bar v. Fredericks, 731 So.2d 1249 (Florida 1999). Rule 5.4 reads as follows: **Rule 5.4 Professional independence of a lawyer**

- (a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:
 - (1) An agreement by a lawyer with the lawyer’s firm, partner or associate may provide for the payment of money, over a reasonable period of time after the lawyer’s death, to the lawyer’s estate or to one or more specified persons;
 - (2) A lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer;
 - (3) A lawyer or law firm purchasing the practice of a deceased, disabled or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer an agreed-upon purchase price; and

The HPS found that Respondent failed to act with reasonable diligence in the Richard matter because he failed to disburse payment of the Dynamic bill in a timely manner and failed to keep Ms. Richard reasonably informed about the status of the Dynamic bill and failed to respond to her requests for information about the bill in violation of Rules 1.3²³ and 1.4(a) and (b).²⁴ The HPS also found that Respondent charged Ms. Richard an unreasonable fee in violation of Rule 1.5(a)²⁵ of the Rules of Professional Conduct. The HPS found that Respondent violated Rules 1.15(a) and 1.15(b) because he failed to promptly deliver funds to which both Ms. Richard and Dynamic were entitled to receive, that he failed to hold those funds in separately in a client trust account and failed to provide a “full accounting” of the money he withheld.²⁶ Furthermore, the HPS found that because he then wrongfully misappropriated and converted client funds and/or funds due to Dynamic to his own use, and asserted that Ms. Richard “was just trying to

(4) A lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

²³ **Rule 1.3 Diligence**

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

²⁴ **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) The provisions of Rule 1.4(b) are set forth in n.16 *supra*.

²⁵ **Rule 1.5 Fees**

- (a) A lawyer’s fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
 - (1) The time and labor required, the novelty and difficulty of the questions involved, and skill requisite to perform the legal service properly;
 - (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
 - (3) The fee customarily charged in the locality for similar legal services;
 - (4) The amount involved and results obtained;
 - (5) The time limitations imposed by the client or by the circumstances;
 - (6) The nature and length of the professional relationship with the client;
 - (7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and
 - (8) Whether the fee is fixed or contingent.

²⁶ **Rule 1.15 Safekeeping property**

- (a) The provisions of Rule 1.15(a) are set forth in n.17 *supra*.
- (b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

extort money from [Respondent] when she called [to inquire about his failure to pay the medical bill], and with this complaint,” Respondent violated Rules 8.4(c) and 8.4(d) of the Rules of Professional Conduct.²⁷ The HPS also found that Respondent knowingly made a false statement of material fact by stating in his verified response to Ms. Richards’ complaint that he was “holding” the money to pay the bill from Dynamic, he violated Rule 8.1(a) of the Rules of Professional Conduct.²⁸

Finally, in the Kramer matter the HPS found that Respondent violated Rules 8.4(c) and 8.4(d) when he submitted an “Invoice for Legal Services” containing false information with his Notice of Attorney’s Charging Lien in *Ronald G. Kramer, II, v. Volkswagen Group of America, Inc., et al*, Civil Action No. 13-C-286, Circuit Court of Monongalia County.²⁹

II. SUMMARY OF ARGUMENT

This Court has long recognized that attorney disciplinary proceedings are not designed solely to punish the attorney, but also to protect the public, to reassure the public as to the reliability and integrity of attorneys, and to safeguard its interests in the administration of justice. Lawyer Disciplinary Board v. Taylor, 192 W.Va. 139, 451 S.E.2d 440 (1994). The evidence in the record supports the HPS’s findings of fact and, as such, the factual findings are to be given substantial deference by this Honorable Court. The HPS properly found that the clear and convincing evidence established that Respondent committed violations of Rules 1.1; 1.2(a); 1.3;

²⁷ The provisions of Rule 8.4 are set forth in n.19 *supra*.

²⁸ The SOC did not charge this rule violation, rather it referenced Rule 8.1(b). The Barber Court found, however, that there was not a due process violation when the HPS found a violation of uncharged conduct when “it was related to or was within the scope of the conduct and rule violations specifically charged.” Lawyer Disciplinary Board v. Barber, 211 W.Va. 358, 365, 566 S.E.2d 245, 252 (2002) *quoting* The Florida Bar v. Fredericks, 731 So.2d 1249 (Florida 1999). Rule 8.1(a) provides as follows: **Rule 8.1 Bar admission and disciplinary matters**

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(a) Knowingly make a false statement of material fact; or ...

²⁹ The provisions of Rule 8.4 are set forth in n.19 *supra*.

1.4(a) and (b); 1.5(a); 1.15(a) and (b); 3.1; 5.4(a); 8.1(a); and 8.4(c) and (d). Moreover, in consideration of Respondent's prior disciplinary history, including a two year suspension for making materially false representations in conjunction with his bar application, for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, and a demonstrated pattern of misconduct involving intentional deception, the HPS issued the following recommendation as the appropriate sanction in this matter: (1) That Respondent's law license be annulled; (2) That Respondent be required to make full restitution to Sonja Richard in the amount of \$2,059.66; and (3) That Respondent pay the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 19 of the Rules of Appellate Procedure, this Honorable Court's July 11, 2016 Order set this matter for oral argument on Wednesday, October 12, 2016.

IV. ARGUMENT

A. STANDARD OF PROOF

In lawyer disciplinary matters, a *de novo* standard of review applies to questions of law, questions of application of the law to the facts, and questions of appropriate sanction to be imposed. Roark v. Lawyer Disciplinary Board, 207 W. Va. 181, 495 S.E.2d 552 (1997); Committee on Legal Ethics v. McCorkle, 192 W. Va. 286, 452 S.E.2d 377 (1994). This Court gives respectful consideration to the Lawyer Disciplinary Board's recommendations as to questions of law and the appropriate sanction, while ultimately exercising its own independent judgment. McCorkle, 192 W. Va. at 290, 452 S.E.2d at 381.

Substantial deference is to be given to the Lawyer Disciplinary Board's findings of fact unless the findings are not supported by reliable, probative, and substantial evidence on the

whole record. McCorkle, Id.; Lawyer Disciplinary Board v. Cunningham, 195 W. Va. 27, 464 S.E.2d 181 (1995). At this level, “[t]he burden is on the attorney at law to show that the factual findings are not supported by reliable, probative, and substantial evidence on the whole adjudicatory record made before the Board.” Cunningham, 195 W.Va. at 34-35, 464 S.E.2d at 188-189; McCorkle, 192 W. Va. at 290, 452 S.E.2d at 381. The charges against an attorney must be proven by clear and convincing evidence pursuant to Rule 3.7 of the Rules of Lawyer Disciplinary Procedure. Syl. Pt. 1, Lawyer Disciplinary Board v. McGraw, 194 W. Va. 788, 461 S.E.2d 850 (1995).

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

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

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

1. Respondent has violated duties owed to his client, the public, the legal system and the legal profession.

Respondent engaged in misconduct in violation of the Rules of Professional Conduct and violated duties owed to his clients, the public, the legal system and legal profession. In violation of Rules 1.2(a) and 1.4(b), Respondent neither communicated with the Galfords after their case was dismissed on Summary Judgment to the extent necessary to permit them to make informed decisions about their case nor obtained their instruction and approval regarding whether they wanted to appeal the dismissal to the Supreme Court. Respondent sent a letter regarding the dismissal of the case and included a discussion about filing an appeal, but he also requested a payment of \$3,000.00 “up front before starting work....” [ODC Ex. 10, Bates 1168-1169]. In addition, the letter was not specifically addressed to the Galfords, instead it was simply addressed to the “Big Bear Lake residents.” [Id.] Mr. Galford testified at the hearing that while he was aware the case had been dismissed by the Circuit Court, he was not aware that Respondent had filed an appeal with the Supreme Court. [Tr. 208]. Respondent also acknowledged that he did not have a conversation with the Galfords about the \$200.00 filing fee to file the appeal. [ODC Ex. 9, Bates 000124; Tr. 483-484]. Mr. Galford testified that “[w]hen he withdrew [sic] from it, we decided, everybody decided they wasn’t going to fight it no more, wasn’t no use, just paying money out for nothing.” [Tr. 212]. Furthermore, Respondent had Mr. Galford pick up his client files before Respondent received an Order from the Supreme Court relieving him of his duties to his clients. Mr. Galford testified that he picked up the client files when Respondent called him “when it was over with and told me to come to his office and get all my files, so I went and got all my files.” [Tr. 211-212]. Mr. Galford signed a release for the files on December 3, 2013. [ODC Ex. 5, Bates 45]. The evidence is clear that when Mr. Galford picked up his file on December 3, 2013, Respondent had not yet been relieved of his obligations

to represent his clients in the appeal. [ODC Ex. 1; Bates 3-4]. Respondent's actions demonstrate a misrepresentation of the status of the case to his client in violation of Rule 8.4(c) and incompetence in violation of Rule 1.1 through the improper filing of the Motion to Withdraw and in his misunderstanding of when his duty to his clients concluded. [Tr. 32].

Moreover, Respondent's testimony at the hearing and his statements in his response to this complaint that he did not receive or have notice of the Supreme Court's December 11, 2013 letter advising him that his filing fee check had been returned for insufficient funds was not credible. Respondent's secretary, Vanessa Lawson, and an associate in his office, Kristen Taylor, both testified that they recalled the letter coming into Respondent's office, and Ms. Lawson testified that she saw Respondent read the letter. [Tr. 63, 64]. Ms. Gaiser testified that the file at the Clerk's office did not contain a returned letter. [Tr. 26-28, 46]. In fact, the bank account from which Respondent wrote the check to the Supreme Court for the Galford appeal was also overdrawn at the time he wrote the check on October 29, 2013. [Tr. 188].

As officers of the court, lawyers are expected to abide by procedural rules and law. Respondent did not follow the applicable appellate rules when filing his Motion to Withdraw at the Supreme Court. [Tr. 32]. Respondent also violated his duties owed to the legal system and the legal profession when the filing fee check he paid to the Supreme Court in the Galfords' matter was returned for insufficient funds. Furthermore, these same duties were violated when he engaged in inappropriate conduct with the Clerk's Office of the Supreme Court when the Clerk's Office attempted to obtain payment of the filing fee. Ms. Gaiser testified that when she telephoned Respondent to advise him about the Court's decision to deny his Motion to Withdraw, Respondent cursed at her. [Tr. 36, 52]. Ms. Gaiser specifically recalled that Respondent used the word "fuck" when speaking to her during that telephone conversations. [Tr.

52]. Respondent, however, denied that he cursed at Ms. Gaiser and said he "... did not use anything offensive... I don't disrespect court clerks. That's one thing I learned in law school....I'm always nice to clerks...So I would never use the 'f' word. I would not use the 'f' word ..." [Tr. 394-395].

In the Richard matter, Respondent violated his duties owed to his client, the legal system, and the legal profession when he converted funds owed to Ms. Richard and Dynamic to his own use in violation of Rules 1.15(a) and (b) and Rules 8.4(c) and (d) of the Rules of Professional Conduct. On May 2, 2013, Ms. Richard signed a fee agreement with Respondent to represent her in a "fall down" case. [ODC Ex. 30, Bates 4330]. The fee agreement was a contingent fee agreement and Respondent's attorney's fee for the representation "shall be one-third (33.33%) of any funds recovered from the case, plus reimbursement of expenses associated with same." [Id.] The settlement in the Richard matter was \$35,000.00. On October 30, 2013, Respondent deposited the settlement check into his United Bank "Client Trust" account. Under his fee agreement with Ms. Richard, Respondent's attorney fee of 33.33% should have been \$11,665.50. Furthermore, his claimed itemized expenses totaled no more than \$289.84, notwithstanding the fact that Respondent never provided an itemized statement to Ms. Richard even though she made repeated requests for the same. [Tr. 235]. Respondent did, however, present Ms. Richard with a check for \$20,000.00 and then made two subsequent transfers of funds from his "Client Trust" account to his "Attorney at Law" account in the amount of \$12,000.00 representing his attorney's fees and \$3,000.00 representing his expenses. Respondent has also admitted that he failed to timely pay the \$985.00 bill which was owed to Dynamic, despite having signed a Letter of Protection. [Tr. 352; ODC Ex. 28, Bates 4324]. Respondent also failed to properly

communicate with Ms. Richard and Ms. Johnson from Dynamic when they attempted to contact him to discuss and conclude the matter. [Tr. 232, 237-238, 254].

In the Lawson complaint, the evidence supports a violation of Rule 3.1 of the Rules of Professional Conduct as Respondent's lawsuit against Ms. Lawson was not meritorious and was brought solely to harass her. Respondent also engaged in conduct involving dishonesty, fraud, deceit or misrepresentation and in conduct prejudicial to the administration of justice. Respondent filed the lawsuit against her claiming that her bonus checks were loans which she had to pay back. Respondent attached several pages from his bank statement to his complaint. [ODC Ex. 22, Bates 406-4216]. Furthermore, Respondent admitted as an exhibit, a September 7, 2011 letter purportedly signed by Ms. Lawson which indicated, among other things, that the bonuses were to be considered loans she would have to pay back if she quit her employment with him. [ODC Ex. 22, Bates 4100]. Ms. Lawson testified that from her first day of work, she was told that she would receive bonuses and that while the September 7, 2011 letter has her signature, she did not sign it, that the only time she saw the letter was when she was in Magistrate Court for the case filed against her by Respondent, and that it had never been "presented to [her] at any time that [she] worked for him." [Tr. 97-99]. Ms. Lawson also testified that while she had enjoyed working for Respondent, she thought his actions in filing the lawsuit against her regarding her bonus checks was a vendetta because her mother had sued him. [Tr. 92]. Respondent's conduct in the Lawson matter violated his duty owed to the legal system and the legal profession. Finally, Respondent's conduct in not first clarifying the nature of his fee agreement with Mr. Kramer and then filing the charging lien in the Kramer matter containing false information is a violation of his duties owed to his client, the legal system, and the legal profession.

2. Respondent acted intentionally in these matters.

The evidence demonstrates that Respondent's misconduct was intentional. "Intent" as defined by the American Bar Association is when the lawyer acts with the conscious objective or purpose to accomplish a particular result. *ABA Model Standards for Imposing Lawyer Sanctions*, (1992).

In regard to the "bounced" filing fee check sent to the Supreme Court written from his United Bank "Attorney at Law" account, Respondent admitted that he "blew up" his United Bank accounts associated with his law office (that he was no longer able to use this account because of the repeated lack of funds which put him far into the red). In order to pay the filing fee at the Supreme Court in the Galfords' appeal after receiving notice of the "bounced" check, he testified that he opened a new account at BB&T in January of 2014 "with a check for \$1,000 from a client David Birch, "...because I had to have a working bank account because I had blown up the – I'd blown up United. I couldn't use it anymore. It was in the negative." [Tr. 391-392]. Furthermore, Respondent admitted that in October of 2013, when he deposited the \$12,000.00 in attorney fees and \$3,000.00 in expenses from the Sonja Richard settlement, his United Bank "Attorney at Law" account was in the negative and that all of the "positive" balance in October 2013 in his "Attorney at Law" account came from the Richard settlement. [Tr. 461-462]. At the hearing, Respondent claimed he did not realize he had been holding the money to pay the Dynamic bill; however, this testimony is not credible. This lack of credibility is corroborated by the fact he has admitted that he did not pay the medical bill; he knew that his law office United Bank accounts had "blown up" in December of 2013; and, he had to open new law office bank accounts at another bank in January of 2014 because the United Bank accounts were so overdrawn that he could not bring them back to a positive balance. [Tr. 387-388]. Respondent's

lack of credibility is further supported by the fact that in his initial response to Ms. Richard's complaint, Respondent stated that he would have paid the bill if Dynamic had billed him. [ODC Ex. 30]. Nonetheless, Respondent included three notices of the Dynamic bill with his own response. [ODC Ex. 30, Bates 4327, 4333, 4337, 4339]. Furthermore, Bryan Selbe, Investigator, testified that the October 30, 2013, two deposits of \$12,000.00 and \$3,000.00 phone transfer deposits, made from the Richard settlement brought Respondent's "Attorney at Law" account into a positive balance where it remained so only until November 18, 2013, when the account went back into overdraft status. [Tr. 184]. Not one of Respondent's transactions between October 30, 2013, through November 18, 2013, were made on Ms. Richard's behalf. [ODC Ex. 14, Bates 2688-2702]. There is no question that Respondent converted unearned "attorney fee" and "expense" money which he had misappropriated from settlement money owed to Ms. Richard and/or Dynamic for use on his own personal and law office expenses, including the filing fee in the Galford appeal (which check later bounced). [Tr. 459-460; ODC Ex. 14, Bates 2688-2702]. In fact, Respondent admitted at the hearing that "the money that should've been paid to Dynamic went into my general account and Dynamic did not get paid, yes." [Tr. 352]. Respondent testified that he used the money he claimed for "expenses" in the Richard matter for "... secretarial time, copies, phone calls, things of that nature, supplies. I mean there's got to be some payment for that. I mean, you know, the office runs on money basically, so you've got to charge the client something." [Tr. 344-345].

In response to a question by one of the HPS members that it appeared as if Respondent took advantage of the situation at Ms. Richard's settlement to "bump up" his fee, Respondent stated:

"That's exactly right. Yeah. Well a couple of things, a couple of factors there for why that was done. One, I was in serious financial trouble. I mean the bank account was underwater before that

money was put in the bank account at the end of October. And, two, I thought that I deserved it because the case turned out a lot better than I would've expected it to. I never really expected they would go to \$35,000. I mean when we got over 20, I started to get excited. So, you know, I – and I discussed it with Sonja. She said – she turned to me and said 'Well, how much will I get?' I said 'Twenty'. She was happy with that. I thought we had a modification to our fee agreement. I mean could I have explained it to her better? Could I have done the math for her? Yes. I mean did I make mistakes in handling that? Absolutely." [Tr. 528-529].

Respondent then admitted that any modification to a contract must be done in writing and that he "mishandled it and I admit to that" [Tr. 529].

In regard to Respondent's conduct in the Lawson and Kramer complaints, it is clear that Respondent was also acting in an intentional manner when he sent Ms. Lawson multiple inappropriate texts, filed the non-meritorious lawsuit against Ms. Lawson, and filed the charging lien in the Kramer matter containing false information in an attempt to obtain more attorney's fees than what he was entitled to collect. Respondent appeared to be motivated by his belief that these individuals were not loyal to him and that such betrayal by his employees, deserved punishment which he initiated through the legal system. [Tr. 371-374].

3. Respondent's misconduct caused potential and actual harm.

The harm to the public, the legal system and the legal profession at the hands of Respondent is great in this matter. Because the legal profession is largely self-governing, it is vital that lawyers abide by the rules of substance and procedure which shape the legal system. Respondent's noncompliance with these rules as exhibited in this record is clearly detrimental to the legal system and profession, and his conduct undermines the integrity and public confidence in the administration of justice. Furthermore, Ms. Richard and Dynamic were financially harmed because Respondent wrongfully converted money that was owed to her and to Dynamic. In addition, because Respondent failed to timely pay the Dynamic bill, the bill was turned over to

collections on or about June 2, 2014. However, Ms. Johnson testified that she pulled the bill from collections since Respondent paid the bill in full on December 15, 2015. [Tr. 256].

When Ms. Richard contacted Respondent to discuss the nonpayment of her Dynamic bill and to question him regarding the distribution of her settlement, Respondent chose to ignore these initial communications. Respondent did nothing about paying the bill even after acknowledging to Complainant and Disciplinary Counsel in his response that it was his responsibility to pay. Respondent did not pay the bill until more than a year after Ms. Richard filed the complaint with ODC and by then, it was shortly before the disciplinary hearing. Moreover, Respondent accused Ms. Richard of committing the crime of extortion. In response, Ms. Richard testified that “...for [Respondent] to run [her] down into the dirt for trusting [him] with personal information about [her] life, that hurt. It really did.” [Tr. 249]. She also said “[b]ecause I mean it look [sic] really bad on attorneys.” [Id.] Mr. Galford also testified regarding the injury to his reputation and stated a few people still do not speak to him because of the lawsuit and that a lot of “Big Bear” people continue to be mad at him. [Tr. 214-215]. Mr. Galford said he “really thought [Respondent] was going to do something, you know, get the assessments down. It was my mistake.” [Tr. 215].

4. There are numerous aggravating factors in this matter.

Aggravating factors are considerations enumerated under Rule 3.16 of the Rules of Lawyer Disciplinary Procedure for this Court to examine when considering the imposition of sanctions. Elaborating on this rule, the Scott Court held “that aggravating factors in a lawyer disciplinary proceeding ‘are any considerations, or factors that may justify an increase in the degree of discipline to be imposed.’” Lawyer Disciplinary Board v. Scott, 213 W.Va. 209, 216, 579 S.E.2d 550, 557 (2003) quoting *ABA Model Standards for Imposing Lawyer Sanctions*, 9.21

(1992). The HPS found that the following aggravating factors exist in this case: (1) prior disciplinary offenses; (2) dishonest or selfish motive; (3) a pattern of misconduct; (4) multiple offenses; (5) refusal to acknowledge wrongful nature of conduct; (6) substantial experience in the practice of law; and (7) indifference to making restitution.

Prior discipline is aggravating on the issue of sanction because it calls into question a lawyer's fitness to practice a profession imbued with the public's trust. Syl. Pt. 5, Committee on Legal Ethics v. Tatterson (Tatterson II), 177 W. Va. 356, 352 S.E.2d 107 (1986); Lawyer Disciplinary Board v. Veneri, 206 W.Va. 384, 524 S.E.2d 900 (1999). Respondent was previously suspended from the practice of law for two (2) years for making materially false representations in conjunction with his application for admission to the bar, for engaging in conduct involving dishonesty, fraud, deceit and other misrepresentation, and for engaging in improper practice before the Bankruptcy Court for the Northern District of West Virginia which had resulted in a three (3) year suspension of his right to practice before that Court. Moreover, the Supreme Court found that Respondent had demonstrated a pattern of misconduct involving intentional deception. *Lawyer Disciplinary Board v. Edward R. Kohout*, Supreme Court No. 22629, April 14, 1995. [ODC Ex. 41, Bates 4883-4892]. After a reinstatement proceeding, Respondent was reinstated to the practice of law by Order entered March 24, 2005. [ODC Ex 41, Bates Nos. 4880-4882]. In addition, Respondent was admonished by the Investigative Panel of the LDB on May 6, 2013, for violating Rule 3.3(a)(1) of the Rules of Professional Conduct which provided, in pertinent part, that "[a] lawyer shall not knowingly: (1) make a false statement of material fact or law to a tribunal" when he failed to truthfully respond to the Family Court's questioning regarding the status of his receipt of settlement money on behalf of a client.

[ODC Ex. 41, Bates 4872-4879]. The evidence clearly demonstrates that in these current matters, Respondent still engages in intentional misrepresentation.

Rule 9.22(c) of the *ABA Model Standards for Imposing Lawyer Sanctions* indicates that a pattern of misconduct constitutes an aggravating factor. Respondent exhibited a pattern and practice of failing to communicate with his clients and misleading clients about the status of their matters. The Scott Court noted that the *ABA Model Standards for Imposing Lawyer Sanctions* has also recognized “multiple offenses” as an aggravating factor in a lawyer disciplinary proceeding. Scott, 213 W.Va. at 217, 579 S.E.2d at 558. In this case, the HPS also found that Respondent committed multiple offenses. The evidence also established that Respondent refused to acknowledge the wrongful nature of his misconduct and that he exhibited an indifference to making restitution. Finally, the HPS found that Respondent had substantial experience in the practice of law and that same was an aggravating factor.

5. The existence of any mitigating factors.

In addition aggravating factors, the Scott court also adopted mitigating factors in lawyer disciplinary proceedings and stated that mitigating factors “are any considerations or factors that may justify a reduction in the degree of discipline to be imposed.” Lawyer Disciplinary Board v. Scott, 213 W.Va. 209, 579 S.E.2d 550, 555 (2003) *quoting ABA Model Standards for Imposing Lawyer Sanctions*, 9.31 (1992).³⁰ Respondent asserted the following mitigation factors were present in this matter: that he paid the Dynamic bill, that the events occurred during a time

³⁰ The Scott Court held that mitigating factors which may be considered in determining the appropriate sanction to be imposed against a lawyer for violating the Rules of Professional Conduct include: (1) absence of a prior disciplinary record; (2) absence of a dishonest or selfish motive; (3) personal or emotional problems; (4) timely good faith effort to make restitution or to rectify consequences of misconduct; (5) full and free disclosure to disciplinary board or cooperative attitude toward proceedings; (6) inexperience in the practice of law; (7) character or reputation; (8) physical or mental disability or impairment; (9) delay in disciplinary proceedings; (10) interim rehabilitation; (11) imposition of other penalties or sanctions; (12) remorse; and (13) remoteness of prior offenses.

wherein he admittedly lost control over his financial situation and did not manage his business or finances appropriately, that he was dealing with his wife's and his own health issues, that he had relied on unqualified staff, that he "over hired and over paid" that same staff, and that he made a concerted effort to remedy his administrative and office management difficulties. However, the HPS found that any mitigation asserted by Respondent was clearly outweighed by the aggravating factors present in this case.

C. SANCTION

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.

The Rules of Professional Conduct state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. Syl. Pt. 3, *in part*, Committee on Legal Ethics v. Tatterson, 173 W.Va. 613, 319 S.E.2d 381 (1984), *cited in* Committee on Legal Ethics v. Morton, 186 W.Va. 43, 410 S.E.2d 279 (1991). In addition, discipline must serve as both instruction on the standards for ethical conduct and as a deterrent against similar misconduct to other attorneys. In Syllabus Point 3 of Committee on Legal Ethics v. Walker, 178 W.Va. 150, 358 S.E.2d 234 (1987), the Court stated:

In deciding on the appropriate disciplinary action for ethical violations, this Court must consider not only what steps would appropriately punish the respondent attorney, but also whether the discipline imposed is adequate to serve as an effective deterrent to other members of the Bar and at the same time restore public confidence in the ethical standards of the legal profession.

Moreover, a principle purpose of attorney disciplinary proceedings is to safeguard the public's interest in the administration of justice. Daily Gazette v. Committee on Legal Ethics, 174 W.Va.

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

Respondent’s violations in this case are extremely egregious and damage the public’s perception of the legal profession. The most serious among the many charges against Respondent are misappropriation and conversion of funds belonging to his client and to a medical provider. It further appears from the weight of the evidence that Respondent is not remorseful for these acts and instead has used continued deceit and manipulation to justify his repeated unethical actions. A lesser punishment would not prove effective under these conditions and would not protect the public from an ongoing pattern of unethical practice that has not been abated with prior punishment. Moreover, in this case, the aggravating factors clearly outweigh any potential mitigating factors which Respondent raised. The HPS, having heard and reviewed all the evidence and testimony before it, properly recommended annulment in this matter. Annulment is the only sanction that will effectively protect the public from a lawyer who has already been suspended for two years for misrepresentation. It is the only sanction that will adequately protect the public from a lawyer who charged a client an excessive attorney’s fee and expenses, failed to provide the client with a proper accounting, failed to timely pay the client’s medical bill from money which he had told his client he had “withheld”, then converted that same client’s money

to his own use because he needed the money, and then engaged in misrepresentation of these facts to the client.

In cases involving the failure to preserve client property, absent any aggravating or mitigating circumstances, the *ABA Model Standards for Imposing Lawyer Sanctions* provide that:

Standard 4.11. Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client.

In cases involving a failure to act with reasonable diligence and promptness in representing a client and absent any aggravating or mitigating circumstances, the *ABA Model Standards for Imposing Lawyer Sanctions* also provide that:

Standard 4.41. Disbarment is generally appropriate when . . . (b) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client; or (c) a lawyer engages in a pattern of neglect with respect to client matters and causes injury or potential injury to a client.

In cases involving failure to provide competent representation to a client and absent any aggravating or mitigating circumstances, the *ABA Model Standards for Imposing Lawyer Sanctions* provide that:

Standard 4.51. Disbarment is generally appropriate when a lawyer's course of conduct demonstrates that the lawyer does not understand the most fundamental legal doctrines or procedures, and the lawyer's own conduct causes injury or potential injury to a client.

The *ABA Model Standards for Imposing Lawyer Sanctions* also provide that absent any aggravating or mitigating circumstances, the following sanction is generally appropriate in cases where the lawyer engages in fraud, deceit, or misrepresentation directed toward a client:

Standard 4.61. Disbarment is generally appropriate when a lawyer knowingly deceives a client with the intent to benefit the lawyer or another, and causes injury or potential injury to the client.

“Disbarment of an attorney to practice law is not used solely to punish the attorney but is for the protection of the public and the profession.” Syl. Pt. 2, In Re: Daniel, 153 W.Va. 839, 173 S.E.2d 153 (1970); Syl. Pt. 6, Office of Disciplinary Counsel v. Jordan, 204 W.Va. 495, 513 S.E.2d 722 (1998). A sanction is to not only punish the attorney, but should also be designed to reassure the public confidence in the integrity of the legal profession and deter other lawyers from similar conduct. Syl. Pt. 2, Committee on Legal Ethics v. White, 189 W.Va. 135, 428 S.E.2d 556 (1993); Syl. Pt. 3, Committee on Legal Ethics v. Walker, 178 W.Va. 150, 358 S.E.2d 234 (1987); Syl. Pt. 5, Committee on Legal Ethics v. Roark, 181 W.Va. 260, 382 S.E.2d 313 (1989); Syl. Pt. 3, Lawyer Disciplinary Board v. Friend, 200 W.Va. 368, 489 S.E.2d 750 (1997); and Syl. Pt. 3, Lawyer Disciplinary Board v. Keenan, 208 W.Va. 645, 542 S.E.2d 466 (2000). For the public to have confidence in our disciplinary and legal systems, lawyers such as Respondent who engage in pervasive misrepresentation and convert client funds must be removed from the practice of law. A severe sanction is also necessary to deter other lawyers who may be considering or who are engaging in similar conduct.

Respondent’s most serious transgression in this matter is undoubtedly the misappropriation and conversion of funds due to Ms. Richard and Dynamic which were intentionally and admittedly converted to his own use because his bank accounts were depleted. The Supreme Court has repeatedly held that “[t]he general rule is that absent compelling extenuating circumstances, misappropriation or conversion by a lawyer of funds entrusted to his/her care warrants disbarment.” Office of Disciplinary Counsel v. Jordan, 204 W.Va. 495, 513 S.E.2d 722 (1998); Lawyer Disciplinary Board v. Kupec (Kupec I), 202 W.Va. 556, 561, 505 S.E.2d 619, 631 (1998) *remanded with directions*, See also, Lawyer Disciplinary Board v. Kupec (Kupec II), 204 W.Va. 643, 515 S.E.2d 600 (1999); Lawyer Disciplinary Board v. Wheaton, 216

W.Va. 673, 610 S.E.2d (8) (2004); Lawyer Disciplinary Board v. William H. Duty, 222 W.Va. 758, 671 S.E.2d 763 (2008). The Kupec I Court recognized as follows:

The term misappropriation can have various meaning. In fact, the misuse of another's funds is characterized as misappropriation or conversion. Black's defines misappropriation as "[t]he unauthorized, improper, or unlawful use of funds or other property for purposes other than that for which intended . . . including not only stealing but also unauthorized temporary use for [the] lawyer's own purpose, whether or not he derives any gain or benefit from therefrom. Black's Law Dictionary (6th ed.1990). See In re Wilson, 81 N.J. 451, 409 A.2d 1153, 1155 n.1 (1979) (defining misappropriation as 'any unauthorized use by the lawyer of client's funds entrusted to him including not only stealing, but also unauthorized temporary use for the lawyer's own purpose, whether or no he derives any personal gain or benefit therefrom'). Kupec I, 202 W.Va. at 202-3, 505 S.E.2d at 262-3.

The fact that Respondent finally paid the Dynamic bill on December 15, 2015, should not mitigate any proposed sanction. Respondent's payment of that bill shortly before the disciplinary hearing does not negate his admitted misconduct especially in light of the facts indicating that Respondent held the money inappropriately to keep his bank account in the black, then used that money to pay for his personal and office expenses, and did not pay a medical bill he clearly had knowledge of until after Ms. Richard was forced to file a complaint with ODC. Even after she filed this complaint, Respondent failed to pay the money until December 15, 2015. Such forced action should not be seen as mitigation. Syl. Pt. 8, Lawyer Disciplinary Board v. Geary M. Battistelli, 206 W.Va. 197, 523 S.E.2d 257 (1999); Syl. Pt. 4, Committee on Legal Ethics v. Hess, 186 W.Va. 514, 413 S.E.2d 169 (1991); and Lawyer Disciplinary Board v. Kupec (Kupec I), 202 W.Va. 556, 569-570, 505 S.E.2d 619, 632-633 (1998), *remanded with directions*, See Lawyer Disciplinary Board v. Kupec (Kupec II), 204 W.Va. 643, 515 S.E.2d 600 (1999). Battistelli and Hess note that mitigation of punishment because of restitution must be governed by the facts of the particular case. However, Kupec I provides that:

Where the restitution has been made after the commencement of disciplinary proceedings, or when made as a matter of expediency under the pressure of the threat of disciplinary proceedings, some courts have refused to consider it a mitigating factor. Kupec I, 515 S.E.2d at 570, citations omitted.

As this Court stated in Lawyer Disciplinary Board. v. Coleman, 219 W. Va. 790, 639 S.E.2d 882 (2006), “we do not take lightly those disciplinary cases in which a lawyer’s misconduct involves the misappropriation of money. In such instances, we have resolutely held that, unless the attorney facing discipline can demonstrate otherwise, disbarment is the only sanction befitting of such grievous misconduct.” Id., 219 W.Va. at 797, 639 S.E.2d at 889. In addition, “[m]isappropriation of funds by an attorney involves moral turpitude; it is an act infected with deceit and dishonesty and will result in disbarment in the absence of compelling extenuating circumstances justifying a lesser sanction.” Id. (*quoting* Lawyer Disciplinary Bd. v. Kupec, 202 W.Va. 556, 571, 505 S.E.2d 619, 634 (1998) (additional quotations and citation omitted)).

This Court has long recognized the seriousness of misappropriation and has disbarred lawyers due to misappropriation of client funds. In Lawyer Disciplinary Board v. Battistelli, 206 W.Va. 197, 523 S.E.2d 257 (1999), Mr. Battistelli was disbarred for, among other misconduct, neglect of client affairs, repeatedly lying to a client about the status of a case, and withholding too much money from a client’s settlement and never sending this money to either a provider or refunding it to the client. In Committee on Legal Ethics v. Lambert, 189 W. Va. 65, 428 S.E.2d 65 (1993) (*per curiam*), a lawyer was disbarred for conversion of a client’s money to his own personal use, causing a forged instrument to be uttered, failure to pay over money received on behalf of a client, and failure to inform the Disciplinary Committee of a debt to a client during a reinstatement proceeding. In Committee on Legal Ethics v. Pence, 161 W. Va. 240, 240 S.E.2d 668 (1977), a lawyer was disbarred for detaining money collected in a professional or fiduciary

capacity without *bona fide* claim coupled with acts of dishonesty, fraud, deceit or misrepresentation. In Committee on Legal Ethics v. White, 176 W. Va. 753, 349 S.E.2d 919 (1986) (*per curiam*), a lawyer was disbarred for conversion of client trust funds. In In re Hendricks, 155 W. Va. 516, 185 S.E.2d 336 (1971) (*per curiam*), yet another lawyer was disbarred for detaining client money without *bona fide* claim and acts of fraud and deceit. In Lawyer Disciplinary Board v. Raymond Brown, 223 W.Va. 554, 678 S.E.2d 60 (2009) (*per curiam*), a lawyer was disbarred after he misappropriated \$8,020.00 he had withheld from a client settlement to pay subrogation claims held by two insurers which had paid his client's outstanding medical bills.

In another West Virginia case, a lawyer was disbarred for embezzling money from his clients, an illegal act for which he plead guilty. Office of Lawyer Disciplinary Counsel v. Tantlinger, 200 W. Va. 542, 490 S.E.2d 361 (1997) (*per curiam*). The Court noted that Mr. Tantlinger "violated a trust which must be inherent in the attorney-client relationship." Tantlinger, 200 W.Va. at 548, 490 S.E.2d at 367. The Court also found that Mr. Tantlinger had acted knowingly by a contrived scheme to deceive his clients into believing that he had not defrauded them. The Court noted that "[ou]r profession is founded, in part, upon the integrity of the individual attorney in his dealings with the public in general and his clients in particular." Id. at 366-367. While Respondent may not have employed such an elaborate and contrived scheme as Mr. Tantlinger to obtain money from his clients, Respondent did, nonetheless, clearly mislead and take advantage of Ms. Richard and her settlement money by claiming that his oral response to her question about how much she would receive from her settlement was an oral modification of her written fee agreement with him. Moreover, he used this "modification" as an excuse to claim an excess and unearned attorney's fee and expenses in violation of his written retainer

agreement. It cannot be overlooked that Respondent pay Ms. Richard's medical bill until shortly before the disciplinary hearing and also converted the extra money he claimed from her case and the money he was holding to pay her medical bill to his own use.

Another significant consideration in this matter is Respondent's prior disciplinary history. The *ABA Model Standards for Imposing Lawyer Sanctions* provide that absent any aggravating or mitigating circumstances, the following sanction is generally appropriate in cases involving prior discipline:

Standard 8.1(b). Disbarment is generally appropriate when a lawyer: ... (b) has been suspended for the same or similar misconduct, and intentionally or knowingly engages in further similar acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.

This Court has looked to the overall history of the lawyer, including such things as prior wrongdoing and discipline, when determining what sanction to impose. Syl. Pt. 5, Committee on Legal Ethics v. Tatterson (Tatterson II), 177 W. Va. 356, 352 S.E.2d 107 (1986). In Tatterson I, the respondent was suspended for six months for commingling client funds, failure to deliver to client proper share of settlement proceed, failure to account properly for proceeds or make an accounting, misrepresentation of facts to client, and conversion of client funds to attorney's own use. Committee on Legal Ethics v. Tatterson (Tatterson I), 173 W.Va. 613, 319 S.E.2d 381 (1984). In the second matter, Mr. Tatterson's license was then annulled after he was found to have to obtained an excessive fee and did so by engaging in conduct involving dishonesty, fraud, deceit or misrepresentation³¹, this Court stated that "prior discipline is an aggravating factor in a pending disciplinary proceeding because it calls into question the fitness of the attorney to

³¹ Mr. Tatterson was found to have violated Disciplinary Rule 2-106(A) by "enter[ing] into an agreement for[,] charg[ing] [and] collect[ing] ... [a] clearly excessive fee." The Tatterson II Court also noted that "[i]n order to obtain the 'clearly excessive fee,' the respondent in this case misrepresented the difficulty in obtaining the life insurance proceeds. In so doing the respondent violated Disciplinary Rule 1-102(A)(4). . . [which] provides that a lawyer shall not '[e]ngage in conduct involving dishonesty, fraud, deceit or misrepresentation.'" Tatterson II, 177 W.Va. 356, 352 S.E.2d 114, (1986).

continue to practice a profession imbued with a public trust.” Tatterson II, 177 W.Va. at 364, 352 S.E.2d at 115-6.

Other jurisdictions have also considered a lawyer’s prior disciplinary history in issuing sanctions and have found that prior disciplinary history is an aggravating factor. In State of Nebraska ex. rel. Counsel for Discipline v. John P. Ellis, 808 N.W.2d 634 (Neb. 2012), the Supreme Court of Nebraska disbarred an attorney for conduct similar to the conduct found in his 2003 one year suspension. In both cases, the attorney was found to have neglected client matters, misled the clients about the status of their matters, and made false statements to cover up his negligence. In addition, in the 2012 disciplinary matter, the attorney was also found to have mishandled client funds. The Supreme Court of Nebraska stated that “[Ellis’] conduct in this case is similar. Cumulative acts of attorney misconduct are distinguishable from isolated incidents, therefore justifying more serious sanctions, [internal citations omitted], including disbarment.” Ellis, 808 N.W.2d at 642. See also, Iowa Supreme Court Board of Professional Ethics & Conduct v. Leon, 602 N.W.2d, 336, 339 (Iowa 1999) (stating revocation is necessary to protect the public where there is a ‘pattern of misconduct [that] leads us to conclude that future misconduct is likely”).

Based upon Respondent’s misconduct, including consideration of aggravating factors which outweigh any mitigating factors raised by Respondent, annulment is the appropriate sanction in this matter. Respondent’s course of conduct indicates that he did not gain any insight from his previous suspension for similar violations of the Rules of Professional Conduct. Despite serving a previous two year suspension from the practice of law, the record demonstrates that Respondent continued to engage in misconduct that is incompatible with his obligations under the Rules of Professional Conduct. Respondent’s actions in these cases, including

misappropriation and conversion of client funds, and clearly establish that Respondent has not been practicing to the standard required of him from his clients, the public in general and the Rules of Professional Conduct. The HPS properly concluded that Respondent cannot be entrusted with the continuing duties or privileges of a licensed member of the legal profession.

V. CONCLUSION

In reaching its recommendation as to sanctions, the HPS considered the evidence, including aggravating factors and any mitigating factors, and for the reasons set forth above, the HPS recommended the following sanctions: (1) That Respondent's law license be annulled; (2) That Respondent be required to make full restitution to Sonja Richard in the amount of \$2,059.66; and (3) That Respondent be ordered to pay the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure. Accordingly, ODC urges that this Honorable Court uphold the sanctions as recommended by the HPS.

Respectfully submitted,
The Lawyer Disciplinary Board
By Counsel



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CERTIFICATE OF SERVICE

This is to certify that I, Andrea J. Hinerman, Senior Lawyer Disciplinary Counsel for the Office of Disciplinary Counsel, have this day, the 12th day of August, 2016, served a true copy of the foregoing "**Brief of the Lawyer Disciplinary Board**" upon Rachel L. Fetty, Esquire, counsel for Respondent Edward R. Kohout, by mailing the same via United States Mail with sufficient postage, to the following address:

Rachel L. Fetty, Esquire
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Andrea J. Hinerman