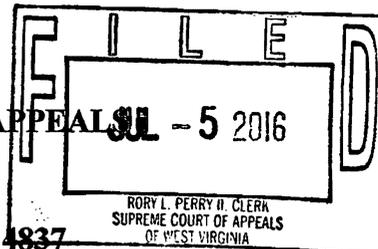


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RE: EDWARD R. KOHOUT, a member of
THE WEST VIRGINIA STATE BAR

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS



Bar No. 4837

Supreme Court No. 15-0926
ID Nos. 14-01-015, 14-01-274,
14-01-301, 14-01-382

**RESPONDENT'S OBJECTIONS TO THE RECOMMENDATIONS OF
THE HEARING PANEL SUBCOMMITTEE**

COMES NOW, Edward Kohout, Esq., by counsel, Rachel L. Fetty, and respectfully objects to the recommendations of the Hearing Panel Subcommittee for the annulment of Mr. Kohout's license and to some of the findings of fact and conclusions of law therein.

INTRODUCTION

Mr. Kohout respectfully objects to the recommendations of the Hearing Panel Subcommittee for the following reasons:

- I. *The conclusions of law made by the Hearing Panel in regards to the Galford matter, I.D. No. 14-01-015, are not supported by clear and convincing evidence, and where they are so supported, they do not warrant the recommended discipline.*
- II. *The recommended conclusions of law affirmed by the Hearing Panel regarding Mr. Kohout's interactions with his former employees are not supported by clear and convincing evidence where the former employees colluded to submit a false affidavit in the underlying matter for the purpose of charging Mr. Kohout with fraud and where Mr. Kohout had meritorious reasons for filing claims against the employees.*
- III. *The Hearing Panel made an error of law in finding that Mr. Kohout violated Rule 5.4 where he loaned funds to his employee where Rule 5.4 (a)(3) specifically permits compensation of non-lawyer employees and his actions did not compromise the purposes of the Rule.*
- IV. *The recommended discipline of the Hearing Panel does not reflect consideration of the mitigating factors in this matter.*

Regarding each of these objections in turn,

- I. *The conclusions of law made by the Hearing Panel in regards to the Galford matter, I.D. No. 14-01-015, are not supported by clear and convincing evidence, and where they are so supported, they do not warrant the recommended discipline.*

A. Rule 1.2 Scope of Representation

“Because Respondent failed to discuss with and obtain the Galfords’ instructions concerning the objective of representation in this matter Respondent violated Rule 1.2(a) (R HPC ¶19¹)

The Hearing Panel’s finding is based on underlying facts indicating that Mr. Kohout did not create a separate representation agreement with the Galfords prior to filing a notice of appeal in their case at the end of October in 2013. (R HPC¶15) Mr. Kohout acknowledges that he should have done this; however, there is no clear and convincing evidence supporting a claim that Mr. Kohout did not make efforts to notify and speak to the Galfords prior to filing the Notice of Appeal. To the contrary, he made contact with them several times. (ODC EX 10, Bates Nos. 1601-1614) (Respondent’s Testimony²) (Hrg. Trans. 483-484).

There is no evidence that Mr. Kohout filed the Notice of Appeal for selfish or inappropriate motives or that he had any improper intent. (Respondent’s Testimony) To the contrary, Mr. Kohout filed the Notice of Appeal to preserve the Galford’s rights to appeal. There was no evidence that the Galfords or anyone was harmed by Mr. Kohout’s filing of the Notice of Appeal where he was doing *more* than what he was asked solely to protect the rights of his clients. Furthermore, as mentioned earlier, Mr. Kohout was ordered to continue with the Appeal and he continued to do so without compensation.

B. Rule 1.4 (b), Communications,

“Because he failed to explain a matter to the extent reasonably necessary to permit the Galfords to make informed decisions regarding the representation, Respondent has violated Rule 1.4 (b)... “

¹ Recommendations of the Hearing Panel Committee.

² (Hereinafter, “RT”) Mr. Kohout testified that he met with the Galfords and attended every hearing with them; however, he did not sit them down and discuss the specifics of the filing fee or appeal.

The record indicates that Mr. Kohout communicated with the Galfords and the other “Big Bear” clients by correspondence on a regular basis and that he communicated with them after the underlying case was dismissed to advise them that an appeal would be necessary. (ODC Ex. 10, Bates Nos. 1601-1614) While the correspondence may have been addressed to the “Big Bear Campers” and was not always addressed to the Galfords specifically, there is no evidence that the Galfords did not understand the correspondence was for them or written to address their case.

Regarding other communications, Mr. Galford testified that he does use the telephone due to hearing difficulties and that it was his wife, Lorraine Galford, who had the majority of contacts with Mr. Kohout on the phone. (Hrng. Trans. Mr. Galford) Regarding other contacts, the Galfords attended every hearing with Mr. Kohout, including the hearing in which the opposing party was granted summary judgment, so they had that opportunity to meet with him and discuss what needed to occur. (Respondent’s Testimony)

Unfortunately, Mr. Galford did not recall significant interactions with Mr. Kohout; however, this does not constitute clear and convincing evidence that there was insufficient communication under the circumstances or that Mr. Kohout failed to make reasonable efforts. The events to which Mr. Galford was testifying had occurred two years prior to Mr. Galford’s testimony. Equally unfortunate is the Galfords’ deteriorating health. Mr. Galford has hearing difficulties and Mr. Kohout was advised at the time of this hearing that Mrs. Galford, although present, could not testify because her memory had deteriorated. (Mr. Galford’s Testimony)

The evidence indicates that Mr. Kohout corresponded with the Galfords, spoke to Mrs. Galford on the phone, attended all hearings with them and met with them. (ODC Ex. 10 Bates Nos. 1601-1614) (Respondent’s Testimony) (Mr. Galford’s testimony) He advised them that an appeal would have to be filed, and when he did not receive the confirmation that would have

been preferable, he filed a Notice of Appeal to protect the Galfords' rights. Under these circumstances the evidence simply does not indicate that Mr. Kohout was willfully uncommunicative or unwilling to explain the situation to allow them to make informed decisions.

Where Mr. Kohout communicated with his clients and attempted to get them to make a decision and they seemed unable to communicate sufficiently with him, Mr. Kohout's filing of a Notice of Appeal was not clear and convincing evidence of a violation of the Rules of Professional Conduct. Furthermore, there is no indication of any harm to the Galfords or any other person.

C. Rule 1.15(a) Safekeeping Property.

"Because he failed to hold the legal fees paid to him in advance by the Galfords, and or, other clients or third persons which were in his possession in connection to a representation separate from his own property in a "Client Trust Account" Respondent has violated Rule 1.15 (a)

The record reflects that interested parties in the Big Bear case paid as the case progressed and that no one involved in the matter provided a retainer or paid in advance. (ODC Ex. 10 1132-1136) Although the entire amount of the fees charged prior to the appeal was \$4,850.00 this is not clear and convincing evidence that Mr. Kohout acted improperly or out of a motive of self-interest unless the Rule requires that all Client Payments, whether earned before the payment is made or not, must be placed in a Client Trust Account. If this is the Rule, Mr. Kohout misapplied and misunderstood the Rule; however, he did so without any intent to act improperly.

D. Rule 1.1. Competence, Rule 8.4 (c) Professional Misconduct involving dishonesty, fraud, deceit or misrepresentation, Rule 8.4(d) conduct prejudicial to the administration of justice

Because he did not provide prior notice to, or obtain authorization from the Galfords that he was filing an appeal with the Supreme Court, did not have funds in his United Bank "Attorney at Law" bank account to cover his \$200.00 filing fee check he wrote on his United bank "Attorney at Law" account and then attempted to improperly withdrawal (sic) from the representation..." (R HPC ¶22)

Mr. Kohout is aware that the evidence of his financial difficulty is overwhelming. He is also aware that any error impugns an attorney's competence and that the record is clear that during this period of time, he made numerous errors. However, in the light of all of the facts, the preponderance of the evidence simply does not support the Hearing Panel's findings that Mr. Kohout engaged in any professional misconduct regarding any of the events cited in ¶22.

1. Authorization from the Galfords;

As noted above, the evidence indicates that Mr. Kohout communicated with the Galfords in person, by telephone and by correspondence. He did not obtain formal authorization to proceed with the Notice of Appeal; however, this was not due to a lack of effort and he acted to preserve his clients' rights rather than allow the deadline to pass. If this is a violation of the Rules, it simply does not constitute Professional Misconduct where there is no indication that it was done for any purpose other than to preserve his clients' rights and give them more time to make a decision regarding how to proceed. Particularly where his clients were elderly and having health problems, it was an understandable effort to accommodate them and did not harm them or anyone else.

2. "did not have funds in his United Bank "Attorney at Law" bank account to cover his \$200.00 filing fee check he wrote on his United bank "Attorney at Law" account"

Pursuant to the Supreme Court's previous decisions regarding this issue, "[t]he writing of a bad check by an attorney ordinarily does not constitute an act or crime involving moral turpitude." Committee on Legal Ethics v. Taylor, 187 WV 39, 415 S.E. R.2d. 280, Syl. Pt.2 (1992) The inquiry to be conducted concerns whether the check is written under circumstances demonstrate dishonesty...specifically, whether the attorney was aware that the check was worthless when written and whether the attorney fails to make it good in a reasonable amount of time. Syl. Pt. 3. In Mr. Taylor's case, after an indictment for writing several bad checks, he pled

pled guilty to a single misdemeanor charge. After his plea, he did not make any payment on the worthless checks for over two years. Finding that this failure to pay for two years was not reasonable and constituted misconduct, the Supreme Court issued a reprimand where it did not rise to the level of moral turpitude. *Id.* at 283.

In Mr. Kohout's case, he believed the check was good when he wrote it in October. (Respondent's Testimony) Although he does not recall seeing the letter sent by Clerk Perry advising him that the check was dishonored in December, he made good on the check within days of speaking to Ms. Gaiser on January 8, 2014. (Hrng. Trans. 390) (ODC Ex. 5, Bates No. 41) (ODC Ex 9, Bates Nos. 180-181) When he realized that a certified check was required, he sent an "Official Check", the equivalent of a cashier's check. (ODC Bates Nos. 46-48) Where Mr. Kohout believed the check was good when written and did not delay when he became aware of the situation, this cannot be clear and convincing evidence of a violation under this Rule.

While the Hearing Panel is not convinced by Mr. Kohout's testimony that he did not see the letter from the Supreme Court sent in December, Mr. Kohout's immediate response to the news from Ms. Gaiser was consistent with Mr. Kohout's testimony. He did not delay or prevaricate, he simply tried to make sure the check was covered as soon as possible. As will be discussed in Section III, the Hearing Panel relies on Ms. Lawson's testimony to counter Mr. Kohout and this is unreasonable under the circumstances. This claim simply does not rise to the level of incompetency under Rule 1.1, or Professional Misconduct under Rule 8.4.

3. *"and then attempted to improperly withdraw () from the representation"*

Regarding the Motion to Withdraw, under the facts identified by the Hearing Panel, Mr. Kohout erred by filing a Motion to Withdraw in Preston County after a Summary Judgment was issued and failed to attach the required Certificate with his Motion to Withdraw before the

Supreme Court of Appeals. These are procedural errors that he admits. However, there is no evidence that these procedural deficiencies constituted professional misconduct or moral turpitude. Furthermore, this inference is inconsistent with Mr. Kohout's actions where he followed the Supreme Court's orders and completed full briefing of the Galford case as required by the Supreme Court even though he was not compensated. Mr. Kohout filed a Motion to Withdraw because he could not get a conclusive response from his clients. However, he did not miss a deadline, leave his clients in the lurch or fail to provide competent services. Whatever errors are implicated in the Hearing Panel's findings in the matters raised by ¶22, they simply do not rise to the level of professional misconduct and do not warrant the recommended sanction.

II. The recommended conclusions of law affirmed by the Hearing Panel regarding Mr. Kohout's interactions with his former employees are not supported by clear and convincing evidence where the former employees colluded to submit a false affidavit in the underlying matter for the purpose of charging Mr. Kohout with fraud and where Mr. Kohout had meritorious reasons for filing claims against the employees.

Two of the complaints heard by the hearing panel involve Mr. Kohout's former employees, Mr. Ronald G. Kramer, II, Esq. and Ms. Vanessa Lawson, Mr. Kohout's former assistant. The conclusions of the Hearing Panel regarding the complaints brought by these employees are not supported by "reliable, probative and substantive evidence on the whole record" as required by Lawyer Disciplinary Board, v. Clifton, III, LDP 12-5-448 (Nov. 2015) (Syl. Pt. 3) (*citing* Syl. Pt. 3 Comm. on Legal Ethics v. McCorkle, 192 W. Va. 286, 452 S.E.2d 377 (1994) To the contrary, the evidence and testimony of Mr. Kohout's former employees regarding their own claims and others in this matter is riddled with fraud and calumny and should have been weighted accordingly.

A. Rule 8.4 (c&d) Rule 8.4 (d) Count IV, I.D. No. 14-01-382, Complaint of Ronald G. Kramer,

“Because Respondent engaged in conduct involving dishonesty, fraud, deceit or misrepresentation and in conduct prejudicial to the administration of justice by submitting a fraudulent “Invoice for Legal Services” 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...he violated Rules 8.4 (c) and 8.4 (d) of the Rules of Professional Conduct. (R. HPC ¶69)

This claim is unsupported by clear and convincing evidence where:

a. This matter was reviewed by Judge Gaugot in the Circuit Court of Monongalia County and there was no finding of fraud on Mr. Kohout’s part.

b. The accusation rests on the claims of Mr. Ronald G. Kramer, II, Esq., Mr. Kohout’s former employee; and

c. Mr. Kramer prepared a false affidavit for Mr. Kohout’s former secretary to sign on January 9, 2014, for the purpose of supporting his own self-interested claim of fraud in an attorney’s lien against Mr. Kohout; (ODC Ex. 21 Bates Nos. 4023) (Testimony: Kristen Taylor, Ronald G. Kramer, III and Vanessa Lawson)

d. Mr. Kramer ghostwrote Vanessa Lawson’s complaint to the ODC, piggybacking his claims of fraud onto her ODC complaint, in violation of L.E.O. 2010-10 which was then in force. (Ms. Lawson’s Complaint No. 14-01-274, May 16, 2014) (R. Kramer Testimony)

e. Mr. Kramer followed Ms. Lawson’s complaint with his own in which he referenced the fraudulent affidavit signed by Ms. Lawson stating among other things, “The court file has an affidavit from his (Mr. Kohout’s) former secretary notarized, stating that the lien he submitted was fraudulent.” (R. Kramer, Complaint No. 14-01-382) (R. Kramer Testimony)

Mr. Kohout filed a charging lien against Mr. Kramer, Esq. his former employee, after working on a “lemon law” case with him for over a year. (ODC Ex. 37 Bates Nos. 4518-4532)

Mr. Kohout supported the charging lien with an affidavit regarding time spent on Mr. Kramer's case including attendance at depositions, discovery, conferences, calls and correspondence. In response, Mr. Kramer charged Mr. Kohout with a filing a fraudulent charging lien. (R. Kramer Testimony) To support his own allegations of fraud against Mr. Kohout, Mr. Kramer prepared an affidavit asserting facts tending to show that in one instance, he had paid the filing fee in his case by returning two pay checks to Mr. Kohout. (ODC Ex. 21 Bates No. 4023)

The facts alleged in Mr. Kramer's affidavit were false where Mr. Kramer alleged that he turned over two paychecks totaling \$230.00 (the amount of the filing fee Mr. Kohout paid to file his Complaint ODC Ex. 37 Bates Nos. 4530) when in fact he was paid in \$50.00 and \$100.00 increments and the checks voided by Ms. Lawson in Mr. Kramer's file totaled \$150.00. (ODC Ex. 21 Bates Nos. 4023, Respondent's Exhibit 35) (R. Kramer Testimony, V. Lawson Testimony)

Furthermore, even if the facts presented in the affidavit had been true, they did not support Mr. Kramer's contention that Mr. Kohout committed "fraud" or had submitted a fraudulent attorney's lien. (ODC Ex. 37 Bates No. 4529-4530) The testimony at hearing indicated that the acceptance of voided checks from Mr. Kramer was an arrangement carried out by Ms. Lawson without Mr. Kohout's approval or knowledge prior to Mr. Kohout's filing of the charging lien and Ms. Lawson resigned without notice on December 31, 2013. (R. Kramer Testimony, V. Lawson Testimony)

When confronted with the factual misrepresentations in his affidavit, Mr. Kramer stated that he had relied upon Ms. Lawson. When confronted with the factual misrepresentations to which she had sworn, Ms. Lawson indicated that she had relied on Mr. Kramer. (R. Kramer Testimony, V. Lawson Testimony)

In addition to testifying to conspiring to commit calumny by false affidavit, Mr. Kramer and Ms. Lawson's complaints to the ODC reflected a similar conspiracy to malign Mr. Kohout's character. In 2014 Mr. Kramer ghost wrote Ms. Lawson's complaint to the ODC and *alleged his own self-serving and ongoing claims regarding his dispute with Mr. Kohout* in her complaint. (ODC Complaint, V. Lawson) (L.E.O. 2010-01) (Respondent's Proposed Findings of Fact and Conclusions of Law ¶¶24-27) Furthermore, in his complaint, Mr. Kramer used the false affidavit to bolster his own claims of professional violations against Mr. Kohout. "The court file has an affidavit from his (Mr. Kohout's) former secretary notarized, stating that the lien he submitted was fraudulent." (R. Kramer, Complaint No. 14-01-382) (R. Kramer Testimony)

Despite the fact that ghostwriting Ms. Lawson's complaint to the ODC was a violation of the Professional Rules and the fact that the underlying evidence in Mr. Kramer's and Ms. Lawson's case ODC complaint was a fraudulent affidavit, it does not appear that the Hearing Panel took these evidentiary concerns into consideration.

The evidence at hearing indicated that Virginia Lawson and Ronald G. Kramer, III, Esq. conspired to lie or mislead the court below regarding essential facts underlying Mr. Kramer's charges of fraud against Mr. Kohout. Despite this effort, Judge Gaugot did not find that Mr. Kohout had committed fraud in his attorney's lien or any other wrongdoing and awarded Mr. Kohout attorneys' fees (although limited) and his costs.

When this was not successful, Mr. Kramer and Ms. Lawson engaged in further calumny before the ODC by continuing to use the false affidavit to support their assertions before the Office of Disciplinary Counsel. Under these circumstances, where Mr. Kramer and Ms. Lawson demonstrated an intent and willingness to lie for the purpose of accusing Mr. Kohout of fraud; and Mr. Kramer violated the Rules of Professional Conduct in his efforts to so malign Mr.

Kohout, the testimony of these former employees should have been deemed incredible and disregarded by the Hearing Panel. This is significant, not only because of the charges brought by the former employees themselves, but also because in Mr. Kohout's case regarding the Supreme Court, the only person who claims that Mr. Kohout saw the letter from the Supreme Court in December of 2013, was Ms. Lawson who only days after reviewing the letter herself, quit without notice (December 31, 2013) and signed the false affidavit (January 9, 2014). (ODC Ex. 20 Bates Nos. 3962)

Despite the evidence showing that Mr. Kramer and Ms. Lawson's testimony and supporting affidavit were themselves fraudulent and in the absence of any finding by Judge Gaugot below that Mr. Kohout had engaged in any fraudulent behavior whatsoever, the Hearing Panel has recommended that Mr. Kohout be found guilty of professional misconduct and moral turpitude in his attorney's lien. This recommendation is simply not reasonable or supported by the evidence.

*B. Rule 3.1 Meritorious Claims and Contentions
(Count II, I.D. No. 14-01-274, Complaint of Vanessa Lawson) (R HPC ¶36)*

"Because Respondent filed a non-meritorious lawsuit against Complainant Lawson which purpose was to harass her, Respondent violated Rule 3.1 of the Rules of Professional Conduct..."

This finding centers on the question of whether Mr. Kohout filed a non-meritorious claim against Ms. Lawson when he sued her for the return of funds he had given to her under the terms of an Agreement he entered into with her during her employment. (ODC Ex. 27 Bates No. 4190) Under the terms of that Agreement, which Ms. Lawson did not recall signing, but admitted that the signature appeared to be her own, Mr. Kohout would loan money to Ms. Lawson and she would repay it unless she provided five years of loyal service in Mr. Kohout's employment at which time the funds would become a gift.

There is no dispute that Ms. Lawson left her employment without notice after approximately two years of employment. (ODC Ex. 20 Bates No. 3962) There is no dispute that Mr. Kohout did not have the funds to give bonuses to his employees or that he needed Ms. Lawson to return the funds he had loaned to her. There is no dispute that he loaned her approximately \$4,500.00. (ODC Ex. 27 Bates Nos. 4191-4192) Nevertheless, the Hearing Panel relied on Ms. Lawson's testimony to find that Mr. Kohout had no right to seek the return of the funds he had loaned her even though, as required by the Statute of Frauds, the parties had a written agreement that she would do so.

Where Mr. Kohout had a written agreement with an employee that she would repay loans made to her if she left before serving five years in his employ, and she left his employ without notice after two years, Mr. Kohout's claim for the return of the funds was meritorious and not filed solely for the purpose of harassing the employee, even if his claim was denied in court.

Ms. Lawson's testimony that Mr. Kohout gave her the money because she did not recall signing the Agreement that bore her signature is incredible. Days after her abrupt departure on December 31, 2013, Mr. Kohout responded by advising her that he would need her to return the money. (January 2, 2014 ODC Ex. 22 Bates Nos. 4193) Where one week later, on January 9, 2014, Ms. Lawson signed the affidavit swearing to facts that she should have known were untrue, Ms. Lawson's testimony is even more incredible and should have been disregarded completely.

C. Rule 8.4 (c & d) (Count II, I.D. No. 14-01-274, Complaint of Vanessa Lawson)

"Because Respondent engaged in conduct involving dishonesty, fraud, deceit or misrepresentation and engaged in conduct that is prejudicial to the administration of justice by filing, on his own behalf, a frivolous lawsuit containing false allegations, he has violated Rules 8.4 (c) and (d) of the Rules of Professional Conduct as set forth above." (R HPC ¶ 37)

The Hearing Panel's finding above is not supported by the preponderance of the evidence. As discussed above, there is no evidence that Mr. Kohout filed a "frivolous lawsuit" where he had a signed Agreement supporting his claim that Ms. Lawson was required to pay him back and Ms. Lawson violated the terms of the Agreement.

Furthermore, as noted above, Ms. Lawson's testimony was tainted where she signed the false affidavit prepared for her by Mr. Kramer one week after Mr. Kohout reminded her that she needed to repay him. At the very least, even if the most charitable point of view was taken as regards Ms. Lawson's testimony, her ability to properly recall facts in this matter was under a cloud where she knew or should have known about the facts and matters asserted in the Affidavit to which she swore and later testified she hadn't bothered to confirm them before swearing to false facts. (Testimony V. Lawson)

The Hearing Panel's grave assertions under Rule 8.4 regarding Ms. Lawson's claims are simply unsupportable where there was no finding in the court below that Mr. Kohout committed any impropriety, the testimony given by Ms. Lawson contradicted the written agreement between the parties and she had demonstrated an intent and willingness to swear to mistruths regarding Mr. Kramer's claims of fraud against Mr. Kohout.

III. The Hearing Panel made an error of law in finding that Mr. Kohout violated Rule 5.4 where he loaned funds to his employee, upon receiving some Rule 5.4 (a)(3) specifically permits compensation of non-lawyer employees and his actions did not compromise the purposes of the Rule.

Rule 5.4 Professional Independence of a lawyer (Count II, I.D. No. 14-01-274, Complaint of Vanessa Lawson)

"Because Respondent shared attorney's fees with a non-lawyer, he has violated Rule 5.4 (a) of the Rules of Professional Conduct." (R HPC ¶38)

The application of Rule 5.4 (a) under the facts of Mr. Kohout's interactions with Ms. Lawson is a misapplication of this rule and its purposes. Rule 5.4 (a) provides that, "A lawyer or law firm shall not share legal fees with a nonlawyer;" however, Rule 5.4 (a) (3) provides a specific exclusion for compensation of a non-lawyer employee. Where Mr. Kohout loaned funds to Ms. Lawson, his employee under the terms of the aforementioned Agreement, Mr. Kohout was not violating either the letter or the intent of Rule 5.4 where the purpose of the Rule was to protect clients from external influence on the decision making in their case.

These facts are not similar to those alleged in Lawyer Disciplinary Board v. William H. Duty, License annulled where Mr. Duty's employee was given approximately 50% of the fee in a case where she recruited a client. 222 W.Va. 758, 671 S.E. 2d 763 (2008).

IV. The recommended discipline of the Hearing Panel does not reflect consideration of the mitigating factors in this matter.

As this Court has noted, each disciplinary case will be decided based on, "the facts and circumstances in each case, including mitigating facts and circumstances..." Lawyer Disciplinary Bd. v. Coleman, 639 S.E.2d 882, 219 W.Va. 790 (W.Va., 2006) (citing Syllabus point 2, in part, Committee on Legal Ethics of the West Virginia State Bar v. Mullins, 159 W.Va. 647, 226 S.E.2d 427 (1976).

Regarding the matters brought before the Hearing Panel concerning Ms. Richard, Mr. Kohout acknowledged in his Supplemental Answer filed in January of 2016 that he had violated the Rules of Professional Conduct in the course of his dealings with her. Mr. Kohout acknowledges further that he avoided communicating with Ms. Richard and Dynamic Physical Therapy and that his refusal to do so was a violation of Rule 1.4(a). Mr. Kohout does not deny that his actions in this matter were beneath the standard required of the profession or that his

initial response to the investigation of the Complaint in this matter was defensive and improper in tone and substance. Mr. Kohout simply requests that the facts warranting mitigation of his discipline be taken into consideration.

A. Mitigating factors exist which warrant the reconsideration of the Hearing Panel's recommendation for annulment of Mr. Kohout's license.

1. In 2013 and 2014 Mr. Kohout was experiencing personal and emotional problems that detrimentally affected his judgment.

The record before the Hearing Panel is weighted with evidence of Mr. Kohout's difficulties between 2013 and 2014. In 2013, during a difficult financial period, Mr. Kohout sold his house and used the funds to keep himself, his office and his staff afloat. Despite this effort Mr. Kohout was completely overwhelmed and unable to keep up with his obligations. As mentioned above, Ms. Lawson, Mr. Kohout's assistant and he believed, friend, quit without notice. While Mr. Kohout acknowledges that he is responsible for the actions of his employees, Ms. Lawson's departure without notice resulted in extreme upheaval in his record keeping, his billing practices, his response to clients and third parties.

There is no doubt that these factors combined with personal matters related to his wife's health concerns and subsequent unemployment, the loss of his health insurance and inability to obtain health care led to Mr. Kohout's beleaguered and defensive state at the time of these complaints and impeded his ability to objectively respond to the claims brought against him. While Mr. Kohout maintains that the complaints brought by his former employees are baseless and that their actions were improper, Mr. Kohout acknowledges that his defensive response to their complaints and their behavior tainted his response to Ms. Richard whose complaint appeared in a firestorm. He acknowledges that his response to her was wrong both because he

did not confirm the facts he asserted before making them as well as in his unreasonably defensive tone.

2. *Timely good faith effort to make restitution,*

Once Mr. Kohout was able to review the complaints before him with counsel in November of 2015, he was able to review the matters before him with more objectivity and made a timely good faith effort to make restitution by paying the Dynamic Therapy Bill. While Mr. Kohout acknowledges that this should have occurred before he obtained counsel, Mr. Kohout simply was not able to address this matter due to his mental state under what he perceived as an onslaught of complaints, financial difficulties and personal problems.

The Hearing Panel has argued against the consideration of Mr. Kohout's efforts to make restitution as mitigation; however, Respondent notes that restitution is the only mechanism that permits an attorney in his position to make amends to the injured party and that refusal to take restitution into an account in *all* cases effectively punishes attorneys who admit their error and attempt to make amends. This outcome seems counter to the objectives of the West Virginia State Bar as a whole, and specifically to the objectives of the Supreme Court which is tasked with protecting the public perception of the Bar. This approach is also not consistent with this Court's discussion regarding restitution in other cases.

In Lawyer Disciplinary Bd. v. Coleman, the Court carefully considered Mr. Coleman's efforts to make restitution to his law firm of over \$170,000.00 in diverted client fees. 639 S.E.2d 882, 219 W.Va. 790 (W.Va., 2006) The Court evaluated Mr. Coleman's efforts based on timeliness and consistency, noting that Mr. Coleman had made a single payment of \$3,000.00, but that,

“[a]lthough Mr. Coleman originally had promised to repay his former law firm on a monthly basis, he has not attempted to make additional payments, of any amount, at any time, since the isolated repayment. Even a monthly payment of \$10 or \$20 would demonstrate a good faith effort at making restitution in spite of limited financial resources and would definitely prove that Mr. Coleman was remorseful for his actions.

Id. at 891.

In that case, while the effort to make restitution was deemed insufficient, restitution was a relevant mitigating factor. In Mr. Kohout’s case, there is clear evidence that Mr. Kohout was struggling, that he was having difficulty understanding how to respond to a flurry of complaints, some of which he continues to believe to be frivolous. In his case, the effort to make restitution to Ms. Richards was significantly related to procuring counsel and an objective party to assist him in his attempts to resolve his administrative woes.

Mr. Kohout respectfully requests that his efforts to make amends to Ms. Richard be considered as a mitigating factor in this matter where he has paid 100% of the medical fee outstanding and understands his obligation to compensate Ms. Richard fully.

3. *Full and free disclosure to the disciplinary board,*

While Mr. Kohout may have been incorrect in some of his responses to the Office of Disciplinary Complaint, he has been prompt, cooperative and disclosive. Mr. Kohout does not dispute that he has been in error in some of his interpretations of the Rules of Professional Conduct and that he should have been more aware of the administrative issues in his office. However, if anything, Mr. Kohout has offered more than was required and been more over zealous in his efforts to rapidly and fully address the claims brought against him.

4. *Remorse*

As noted, Mr. Kohout has begun making amends to Ms. Richard and intends to continue doing so. Mr. Kohout is very aware of the limited value of an apology in this situation, but has done so. Remorse itself, being a feeling of regret or shame, is not easy to quantify, but the

previous language of this Court indicates that it is easiest to quantify or identify, when expressed in substantive action demonstrating a commitment to make things right. Coleman, Id. at 891.

In Mr. Kohout's case, he has done what he can in his present circumstances.

6. *Remoteness of prior offenses*

The Hearing Panel notes at length that Mr. Kohout has been previously disciplined. While acknowledging that his former discipline is an aggravating factor, Mr. Kohout notes that this discipline occurred in 1995. Mr. Kohout is not agnostic to the gravity of the present charges against him or the gravity of the previous charges, but notes that these events took place over twenty years ago, that he worked assiduously to meet the requirements of the Bar in order to return to the practice of law and that the period of time in which these events occurred took place after seventeen years of practice in which he represented many parties without incident or complaint.

CONCLUSION

Mr. Kohout acknowledges that he has erred in numerous respects; however, there are mitigating factors that warrant the reconsideration of the Hearing Panel's Recommendation. Annulment is the most severe of the disciplinary measures that are available to the Court and Mr. Kohout's behavior, while errant and grave, does not reflect the disregard for the law and the Rules of Professional Conduct that has been typical of those practitioners whose licenses have been annulled in cases before this Court.³ Additionally, there are mitigating factors that warrant

³ L.D.B. v. Clifton, No. 13-1128, Annulment issued where Mr. Clifton, a prosecutor blackmailed defendants for sexual favors. L.D.B. v. Scotchel, No. 14-0728, Annulment issued where Mr. Scotchel charged a flat fee of \$242,500.00 which he reduced to \$171,500.00 without maintaining records of his representation agreements and destroying client records. *In cases cited by the Hearing Panel, Office of Disciplinary Counsel v. Jordan*, 204 W.Va. 495, 513 S.E. 2d 722 (1998), Mr. Jordan's license was annulled where he pled guilty to felonious embezzlement of \$507,790.21 from elderly woman for whom he was appointed as committee. Committee on Legal Ethics v. White, 189 W.Va. 135, 428 S.E. 2d 556 (1993) License suspended for two years retroactively where White, a prosecutor, pled guilty to three federal counts of possession of cocaine, marijuana and Percocet. Committee on Legal Ethics v. Walker, 358 S.E. 2nd 234, 178 W.Va. 150 (W.Va. 1987) License annulled where Mr. White did not appear in his own

the reconsideration of this most serious recommendation as well. Mr. Kohout respectfully requests that the Supreme Court of Appeals reduce the discipline ordered in this matter and notes that a suspension would be in line with its decision in cases that are more similar to his own.

Respectfully Submitted By
Counsel for the Respondent



Rachel L. Fetty (WV #10996)

defense at disciplinary hearing on charges that he (among other things): staged a breaking and entering and theft of property from his law office, falsely implicated an innocent party and set fire to his own home. Lawyer Disciplinary Board v. Friend, 200 W.Va. 368, 489 S.E. 2d 750 (1997), License annulled where Mr. Friend took \$511,848.06 as attorney fees and rust funds from deceased woman's estate. Lawyer Disciplinary Board v. Wheaton, 216 W. Va. 673, 610 S.E.2d 8 (2004) License annulled where Mr. Wheaton was found guilty of 31 professional violations including failure to file complaints for cases in which he had been retained and misappropriation of client funds for the purchase of a home. Lawyer Disciplinary Board v. William H. Duty, License annulled where Mr. Duty failed to file complaints timely or to notify clients when statute of limitations was about to run out, misappropriated \$25,000.00 and commingled the funds with his business account and gave 50% of a fee to an employee who recruited the client. 222 W.Va. 758, 671 S.E. 2d 763 (2008).

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

**RE: EDWARD R. KOHOUT, a member of
THE WEST VIRGINIA STATE BAR**

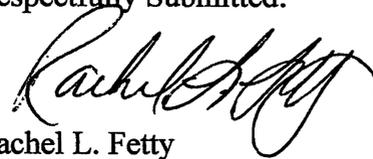
**Bar No. 4837
Supreme Court No.
ID Nos. 14-01-015, 14-01-274,
14-01-301, 14-01-382**

CERTIFICATE OF SERVICE

I hereby affirm that on July 5, 2016 I forwarded a copies of Respondent's Unopposed Motion to File Respondent's Objections to the Recommendations of the Hearing Panel as well as copies of Respondent's Objections to the Recommendations of the Hearing Panel to the Supreme Court and the Office of Disciplinary Counsel by facsimile.

Additionally, the original and ten copies of each document were forwarded to the Supreme Court of Appeals, The Honorable Rory L. Perry II, Clerk of Court State Capitol Room E-317, 1900 Kanawha Blvd. East, Charleston, WV 25305 by U.S. Postage Paid 1st Class Mail and a copy of each document has been forwarded to the Office of Disciplinary Counsel at City Center East, Suite 1200 C, 4700 MacCorkle Ave. SE Charleston, WV, 25304.

Respectfully Submitted:



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