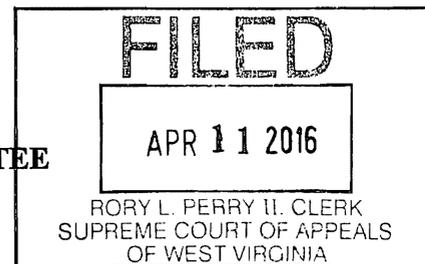


**BEFORE THE HEARING PANEL SUBCOMMITTEE
OF THE
LAWYER DISCIPLINARY BOARD**



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

**Bar No. 4837
Supreme Court No.
ID Nos. 14-01-274 & 14-01-382**

**RESPONDENT'S PROPOSED STATEMENTS OF FACT AND
CONCLUSIONS OF LAW**

I. COUNT I: I.D. No. 14-01-015- Complaint of the Office of Disciplinary Counsel

A. Proposed Findings of Fact

1. On or around October 31, 2014 Respondent submitted a \$200.00 filing fee check with a Notice of Appeal to the West Virginia Supreme Court of Appeals 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. (ODC Ex.1 B 11-15)
2. The check, No. 3149, was drawn from Respondent's United Bank business account and was not drawn from client funds provided to Respondent as a retainer prior to the filing of the appeal. (ODC Ex. 1 B. 5)
3. The Supreme Court of Appeals of West Virginia subsequently entered a scheduling order. (ODC Ex. 1 B. 9-10)
4. On December 11, 2013, the Clerk of Court advised Respondent by letter sent to his business address that the United Bank check No. 3149, had been returned for insufficient funds. (ODC Ex. 1 B. 4-6) (Edythe Nash Gaiser¹)

¹ Respondent could not afford a copy of the transcript. References to testimony will refer to the witness' testimony based on the Respondent and Counsel's notes.

5. Both Kristen Taylor and Vanessa Lawson, Respondent's employees, recall seeing this letter and passing it around after Ms. Lawson opened it. (Kristen Taylor, Vanessa Lawson)

6. Respondent does not recall receiving or reviewing this letter and did not respond to it. (Respondent)

7. Respondent's testimony was that he did not receive letters from the Clerk of Court on a regular basis and would have responded immediately if he had been aware of the letter.

(Respondent)

8. On October 21, 2013, after the underlying case was dismissed, Respondent sent a letter to several of the individual residents of the Big Bear Campground, addressed to "Big Bear Residents" to advise them that an appeal could be brought and requesting a retainer to cover expected fees and expenses. (ODC Ex. 10 B. 2140-2141)

9. This letter was sent to the Galfords, the named Petitioners in the case, as well as the list of other residents who were not named parties in the case. (Respondent) (ODC Ex. Tab 10 B. 1132-1136)

8. Neither the Galfords nor any other resident timely responded with a retainer or significant interest; however, Respondent timely filed the Notice of Appeal in order to preserve his clients' rights to appeal. (Respondent) (ODC Ex. 1, B. 11-15)

9. At hearing Mr. Galford could not recall discussing the appeal with Respondent and did not read the letters sent to the Galfords by Respondent's office. Mr. Galford stated that his wife was the primary contact for Respondent. (Mr. Galford)

10. In addition to being unable to remember the above, Mr. Galford did not recall events where Respondent met with him, including when Respondent returned Mr. Galford's files and retrieved them even though Mr. Galford was present. (Mr. Galford)

11. At the time Respondent believed that failure to preserve his client's right to appeal, would have been an abrogation of his duties as their counsel. (Respondent)
12. On December 13, 2013, after hearing nothing from the Galfords or the other Big Bear resident Respondent filed a Motion to Withdraw from the Appeal. (ODC Ex. 17 B. 3882)
13. On January 8, 2014, the Supreme Court of Appeals issued an order denying Respondent's Motion to Withdraw and referred the matter to the ODC, specifically inquiring whether the funds to be used for the filing fee at issue were client funds. (ODC Ex. 17 B. 3882-3883)
14. On January 10, 2014 Ms. Gaiser contacted Respondent to advise him of the outcome of the Court conference on his Motion to Withdraw. (Edythe Gaiser)
15. Respondent spoke to Ms. Gaiser regarding this matter and was surprised when he was advised that his Motion to Withdraw had been denied and that the check had not been honored. (Respondent)
16. Respondent and Ms. Gaiser disagree regarding whether Respondent uttered a profane exclamation; however both agree that Respondent was upset. (Edythe Gaiser, Respondent)
17. Respondent immediately forwarded another check from a BB&T Bank account to the Clerk and sent copies of the check along with a letter by facsimile on that same day. (ODC Ex. 9 B. 180-181)
18. On January 15, 2014 Respondent sent a second replacement check, this one a certified check, identified as an "Official Check" No. 5006168607 to the Clerk's office. (ODC Ex. B 46-48)
19. Pursuant to the Supreme Court of West Virginia's Order, Respondent carried out the appeal of the Galfords' case and timely filed an appellate brief. (Respondent, Edythe Gaiser)

20. Prior to the appeal and in the case below, Respondent discussed the progress of the Galford case with the Galfords, by phone with Mrs. Galford, through correspondence at hearings on the underlying matter and in person when the Galfords picked up their file. After filing the appeal, Respondent discussed the appeal with them further, including the requirement of the Supreme Court of Appeals that he perfect the appeal. (ODC Ex. Tab 10 B. 1601-1614)

(Respondent)

21. From the onset of the case Respondent received small payments from numerous parties interested in resolving the matters contained in the Galford matter. (ODC Ex. 10 B. 1132-1136)

22. Respondent did not require a large retainer from any interested party to the Galford matter and this was consistent with his practice generally where he does not typically demand a large upfront fee from clients who cannot afford them. (ODC Ex. 10 B. 1132-1136) (Respondent,

Kris Warner)

23. The total of all of the payments made during the pendency of the underlying case was \$4,850.00 which was not an unreasonable fee and was forwarded in a “pay as you go” by multiple clients in \$50.00 increments over a period of over a year. (ODC Ex. 10 B. 1132-1136)

(Respondent)

24. Respondent’s sole interest in filing the Notice of Appeal was to preserve his client’s rights to an appeal in a timely manner. (Respondent)

25. Had he failed to file the Notice of Appeal, and failed to preserve his clients’ rights to an appeal Respondent would have risked violations of the Rules that would have harmed his clients which Respondent was loathe to do. (Respondent)

B. Proposed Conclusions of Law re: I.D. No. 14-01-015

1. Respondent did not violate Rule 1.2. Scope of Representation, where Respondent filed a Notice of Appeal and paid the filing fee for the same from his operating account without a separate retainer or written agreement and his intent was to preserve his client's rights to appeal while he waited for a clear response from the Galfords and other interested parties.

2. If Respondent did violate Rule 1.2, by filing a Notice of Appeal without a separate retainer agreement or payment of a retainer fee, in order to preserve his clients' rights, such violation was done without pecuniary or selfish motive; Respondent violated no duty to his client, the legal system or the profession; harm to his clients was avoided and there are no factors under Rule 3.1 warranting discipline.

3. Respondent did not violate Rule 1.4 regarding communication where he advised the Galfords by correspondence about the outcome of the case and requested that they participate; the Galfords attended the final hearing in the underlying matter and received their file; the Galfords were contacted by telephone and the Galfords were contacted in person when they returned the file to Respondent after he was ordered to perfect the Appeal.

4. If Respondent did violate Rule 1.4 by inadequately communicating with his clients, it was not because he did not request their input. Respondent did not violate a duty to his clients the legal system or the profession where he avoided any harm and proceeded to preserve his clients' rights to appeal and perfected the same without payment of a retainer. There are no factors under Rule 3.1 warranting discipline.

5. Respondent did not violate Rule 1.15 where neither the Galfords nor any interested party paid any fees in advance for the Appeal and Respondent paid for the filing fee out of his business accounts.

6. There is no clear and convincing evidence that Respondent violated Rule 1.1 where the evidence demonstrates that Respondent repeatedly communicated with the Galfords prior to filing the appeal; he paid for the filing fee out of his business account; when he was advised that his check was returned he promptly replaced it, not once, but twice; and he attempted to properly withdraw after receiving no commitment from his clients authorizing him to proceed.

7. If Respondent did violate Rule 1.1 regarding competence where he submitted a check for filing fees from his business account that was returned for insufficient funds, such a violation is mitigated by Respondent's immediate efforts to cover the check as soon as he became aware of the problem on January 8th and 15th of 2014, his timely filing of the Notice of Appeal and his timely perfection of the Appeal.

8. Respondent has admitted at length his financial difficulties and his errors in attempting to keep his business and staff afloat. However, these errors, specifically related to Respondent's overdrafts and floating of expenses on his overdraft protection are not clear and convincing evidence of a violation of Rule 8.4, specifically 8.4 (c). Respondent admits his mistakes of both judgment and fact; however, fraud, dishonesty and misrepresentation require intent and there is no indication that Respondent was intentionally defrauding the West Virginia Supreme Court of Appeals or any other party where he promptly and repeatedly attempted to correct any harm and he had overdraft protection that he believed was in place to cover his errors.

9. Mitigating factors exist where during this period of time, particularly in December 2013 and January of 2014, Respondent was having severe difficulties keeping his office and staff afloat due to multiple economic factors; his secretary, Vanessa Lawson, departed without notice on December 31, 2013 and Respondent has admitted that he was distressed and unable to keep his business afloat or to properly attend to details.

II. COUNT II, I.D. No. 14-01-274, Complaint of Vanessa D. Lawson

A. Proposed Findings of Fact

1. Ms. Lawson was hired as Respondent's office administrator and secretary around November of 2011. (Vanessa Lawson)
2. During the course of her work with Respondent they had an amicable working relationship and Respondent was generous with leave and the office environment was "like a family". (Vanessa Lawson)
3. Ms. Lawson opened the mail, made copies, typed and ran errands. (Vanessa Lawson)
4. Ms. Lawson testified that Respondent was having severe financial difficulties between October and December of 2013. (Vanessa Lawson)
5. Respondent had difficulty covering paychecks and checks to other entities. However, Respondent covered checks that were returned. (Vanessa Lawson, Kristen Taylor)
6. In September of 2011 Respondent entered into an agreement with Ms. Lawson in which he agreed to give her additional funds after the receipt of large settlements as a loan until she had served for five years at which point they would become gifts. (ODC Ex. 27 B. 4190) (Respondent)
7. Ms. Lawson did not recall the Agreement, but stated that it looked like her signature. (ODC Ex. 27 B. 4190) (Vanessa Lawson)
8. Although there were occasionally times when the financial situation was better than others, Respondent could not afford to give bonuses to staff and would not have given large bonuses to his office staff without a guarantee that they would stay. (Respondent)
9. The total amount of loans/bonuses given to Ms. Lawson between 9/6/11 and 12/11/12 was \$4,500.00. (Respondent) (ODC Ex. 27 B. 4191-4192)

10. Ms. Lawson asserts that she believed the additional funds were given a bonuses without restriction. (ODC Ex. 22 B. 4228) (Vanessa Lawson)
11. In July or August of 2012 Ms. Lawson's mother (Judith Ann Beal) gave or loaned Respondent \$5,000.00 for cataract surgery. (Respondent)
12. Ms. Lawson told her mother that she was not sure she would have a job and her mother offered to provide the money to Respondent. (Vanessa Lawson)
13. There was no document between the Respondent and Ms. Lawson's mother regarding the nature of the financial matters between them and it is not clear that Ms. Beal and Respondent ever directly discussed the matter.
14. In May of 2013 Respondent sold his house and put the proceeds in his general office account. He used these funds for his office and personal expenses, but soon reached the end of the funds. (Respondent)
15. Respondent attributes his financial difficulties to many factors including a slow down in business and the loss of significant clients and his wife's loss of employment, illness and unexpected legal difficulties. (Respondent)
16. In late fall, two of Respondent's paychecks to Ms. Lawson were returned for insufficient funds. (Vanessa Lawson)
17. Respondent repaid her. (Vanessa Lawson)
18. On December 31, 2013, despite an amicable working relationship, Ms. Lawson quit without notice. She retrieved her items while Respondent was out of the office and left him a note. (Respondent) (ODC Ex. 20 B. 3962)
9. On January 2, 2013, Respondent sent Ms. Lawson a letter regarding her departure. (ODC Ex. 22 B. 4193)

10. On January 8, 2014 Respondent responded by text suggesting that she could have handled the situation better, but cooperated with all of her requests to facilitate her receipt of Workman's Compensation. (Vanessa Lawson-Supplemental Exhibit)
11. On January 9, 2014, Ms. Lawson met with Ronald Kramer, Esq., Respondent's former law clerk, and signed an affidavit drafted by Mr. Kramer. (ODC Ex.21 B. 4023) (Kristen Taylor, Vanessa Lawson, Ronald Kramer)
12. Among other things, the affidavit asserted that, "[o]n or about April 12, 2013, Ronald Kramer return (sic) two paychecks to me, in my capacity as office manager, in full payment of the filing and service fees in the amount of \$230.00 for the civil action number 13-C-286." (ODC Ex. 21 B. 4023)
13. Ms. Lawson testified that she had signed the affidavit as written. (Vanessa Lawson)
14. Two voided checks made out to Mr. Kramer were submitted as evidence, one for \$50.00 and one for \$100.00. Ms. Lawson recognized them. (T-V. Lawson) (Respondents Ex. 34)
15. Mr. Kramer testified that he was paid \$10 per hour and he typically received checks for \$100.00, but sometimes \$50.00. (Ronald Kramer)
16. The Affidavit was factually incorrect where Mr. Kramer returned two checks for a total of \$150.00 which did not cover the filing and service fees paid by Respondent in civil action 13-C-286. (Vanessa Lawson)
17. Both Vanessa Lawson and Ronald Kramer testified that they believed the other had confirmed that the Affidavit was correct. (Vanessa Lawson, Ronald Kramer)
18. On January 15, 2014, Mr. Kramer submitted the Affidavit signed by Ms. Lawson to the Monongalia Circuit Court as evidence that Respondent had committed fraud in an attorney's lien. (Respondent) (Ronald Kramer)

19. Immediately thereafter, Respondent sent a text to Ms. Lawson stating that he had been “blindsided” by the affidavit and felt betrayed. Respondent then followed this text with a series of texts using foul language. (Vanessa Lawson-Supplemental evidence)
20. Respondent’s testimony indicated that he did not know that Ms. Lawson and Mr. Kramer had entered into an arrangement to permit Mr. Kramer to pay the filing fees by returning his paychecks. (Respondent)
21. In April of 2014, Ronald Kramer, Esq. entered an appearance on Ms. Lawson’s mother’s behalf requesting the return of funds that Respondent believed was a gift from Ms. Lawson’s mother. (ODC Ex. 21 B. 4166, 4117)
22. Respondent sued for the funds that he had advanced Ms. Lawson throughout her employment pursuant to the Agreement signed by Ms. Lawson and additionally alleged that Ms. Lawson had defamed him with false charges of criminal and ethical behavior before the ODC. (ODC Ex. 22, B. 4206)
23. Ms. Lawson counterclaimed for \$5,000.00 to “punish and deter future abhorrent, malicious behavior”. (ODC Ex. 22, 4229)
24. Both claims were dismissed.
25. Although Respondent was upset by Ms. Lawson’s actions, he had a good faith belief that the Agreement he entered into with Ms. Lawson prior to advancing funds to her was a binding Agreement and that Ms. Lawson should have repaid the funds to him when she quit without notice before satisfying the terms of the Agreement and the claim was not malicious. (Respondent)
26. On May 16, 2014 Ronald Kramer Esq. ghostwrote Ms. Lawson’s complaint to the Office of Disciplinary Counsel. Among other claims, the complaint asserted that, “Mr. Kohout has also

submitted fraudulent Attorney's Charging Lien against client" referencing the aforementioned affidavit and Mr. Kramer's ongoing claims against Respondent. As will be discussed below Mr. Kramer did not identify himself as the author or identify his own ongoing pecuniary interest in having Respondent's Attorney's Lien deemed fraudulent.

B. Proposed conclusions of law re: Case I.D. No. 14-01-274

1. Respondent did not violate Rule 3.1 where he filed a lawsuit based on a written Agreement signed by Ms. Lawson stating that funds advanced after the receipt of settlements would be considered loans until Ms. Lawson had completed five years of loyal service. Ms. Lawson was very aware that Respondent was so financially strapped he could not afford to give bonuses to office staff with minimal duties and little responsibility for bringing business into the office. Nevertheless, despite the Agreement, Ms. Lawson quit her job without notice after two years and signed an Affidavit which was used to accuse Respondent of committing fraud without confirming whether the facts stated therein were correct. None of these actions met the basic requirements of the Agreement or a basic understanding of how employees should behave, even under financially precarious circumstances.

2. Respondent did not violate Rule 3.1 where he believed he had a meritorious claim for defamation where his former employee's statements were used to allege that he was committing fraud based on a factually inaccurate and misleading Affidavit.

2. Respondent did not violate Rules 8.4 (c) and 8.4 (d) where he did not file suit against Ms. Lawson for a malicious purpose but wished to address genuine conflicts that had arisen since her departure. The dismissal of Respondent's claim against Ms. Lawson is not dispositive regarding his intentions in this matter and is not clear and convincing evidence sufficient to support the ODC's claims of misconduct regarding the suit he brought against Ms. Lawson.

III. Count III, Complaint I.D. No. 14-01-301, Sonja Richard

A. Proposed Findings of Fact

1. Respondent's Supplemental Answer to Ms. Richards' Complaint and testimony at hearing contained Respondent's acknowledgement that the settlement payment made to Ms. Richard in October of 2013 should have been deposited in his IOLTA account pursuant to Rule 1.15 (a).
2. Respondent further acknowledged in his supplemental answer and at hearing that he had an obligation to pay Ms. Richard's Dynamic Therapy bill prior to disbursing the funds and that this matter should have been addressed prior to transferring any funds into his operating account pursuant to Rule 1.15(c).
3. Respondent has acknowledged that he acted with an improper understanding of Rule 1.15 that there was a distinction between a retainer obtained prior to the beginning of representation which required the retainer to be placed in trust until earned and a settlement obtained after representation was completed that would permit him to rely on the settlement disbursement letter to clarify any future obligations to the client or third parties.
4. Respondent affirms that his errors in this matter have been compounded by his failure to communicate with his client regarding her wishes regarding the settlement pursuant to Rule 1.4 as well as the use of a settlement letter that was not sufficiently specific to clarify how his fee and costs would be determined as required by Rule 1.5 as well as an overly defensive manner.
5. Respondent has taken affirmative steps to resolve this matter including paying Ms. Richard's Dynamic Therapy Bill of \$985.00 and apologizing to Ms. Richard in writing and in person at hearing. At hearing it was discovered that Respondent did not have Ms. Richards' current address and that correspondence sent to her had been returned.

6. Regarding the fees and costs associated with this matter, Respondent testified that he weighed the factors permitted for consideration under Rule 1.5 and believed that proposing the division of settlement proceeds that was accepted (\$20,000.00 for Ms. Richards and \$15,000.00 for Respondent) was permitted under the factors.

7. Factors weighing in favor of a larger disbursement for Respondent included, in Respondents' view, the significance of the settlement in light of the injury suffered by Ms. Richards the absence of lost wages, and his experience which he considered to be dispositive in securing a larger settlement than what would be typical under the circumstances where there were no unrelated witnesses.

8. Respondent acknowledges that he responded to Ms. Richards' complaint in an overly defensive and hostile manner and has apologized for improperly impugning her character.

9. Regarding allegations that Respondent has lied to the Office of Disciplinary Counsel, Respondent states that he has been overly defensive; however he believed he was correct in his interpretation of the Rules at the time. Respondent states that he believed that he was "keeping funds" for Ms. Richards' bill where he had funds in a BB&T account which he had set up due to his financial woes at United Bank. Respondent acknowledges that this was an incorrect mechanism for addressing this problem and understands that the rules required that he place any funds intended for payment to any third party in an IOLTA account.

10. Respondent is aware that misappropriation of funds is a serious offense and understands that sanctions will be imposed.

B. Proposed Conclusions of Law

1. Respondent violated Rule 1.15 regarding Safekeeping Property where he did not promptly pay Ms. Richards' physical therapy bill of \$985.00 upon distribution of settlement proceeds.
2. Respondent violated Rule 1.15 regarding Safekeeping Property where he did not place all funds reserved for a third party in an IOLTA account.
3. Respondent violated Rule 1.4 where he did not promptly return Ms. Richards' phone calls or address her concerns regarding the allocation of the settlement and his costs and fees.

C. Mitigating Factors

1. Respondent has paid Ms. Richards' physical therapy bill.
2. All of these events occurred during a period of time in which Respondent admits he lost control over his financial situation and was not managing his business or finances appropriately.
3. Efforts to resolve these matters have backfired where Respondent has relied on staff who were unqualified or unable to assist him resolve these matters. Looking for assistance, Respondent over hired and over paid staff to address temporary surges in business only to find that he could not maintain his payroll resulting in ever greater difficulties.
5. These issues, compounded with personal matters related to his wife's health concerns and subsequent unemployment, Respondent's own health concerns and the loss of health insurance as well as staff related problems and financial issues have plagued Respondent since the end of 2013.
6. Respondent has made a concerted effort to remedy his administrative and office management difficulties, particularly in regards to ways in which those difficulties may affect clients such as Ms. Richards in the future.

7. To Respondent's knowledge, this is the sole such instance where these violations have occurred and he has made efforts to insure such violations never occur again.

IV. Count IV, I.D. No. 14-01-382, Complaint of Ronald G. Kramer, II, Esq.

1. Ronald G. Kramer, II, was hired as Respondent's law clerk in January or February of 2012. (Ronald Kramer)

2. During the course of his employment Mr. Kramer made approximately \$10.00 an hour and worked between five and ten hours per week depending on his class schedule. (Ronald Kramer)

3. In April 2013, Mr. Kramer requested that Respondent represent him in a case in which his leased Volkswagon had a defective door that appeared unrepairable. (ODC Ex. 39 B 4626-4631)

4. On April 12, 2013 Respondent filed the complaint and paid the filing fee of \$230.00. and service fees of \$60.00 with business checks. (ODC Ex. 37 B. 4529-4530)

5. Respondent worked on Mr. Kramer's case for approximately nine months until January 3, 2016. (ODC Ex. 4626-4631)

6. During this period of time the Mr. Kramer and Respondent spoke often about his case and Respondent advised Mr. Kramer that he would be keeping track of his time. (Respondent)

7. Respondent drafted, edited and filed numerous documents and correspondence and attended depositions on Mr. Kramer's behalf. (ODC Ex. 37 B. 4522-4532, 4533-4511)
(Respondent) (Respondents Supplemental Exhibits)

8. On January 3rd of 2014, Respondent and Mr. Kramer had a difference of opinion regarding the direction of the case and Respondent realized that Mr. Kramer had no intention of paying him for his time or reimbursing any costs that Respondent had paid. (Respondent)

9. Respondent filed a Notice of Attorney's Charging Lien with an attached Invoice for Legal Services on January 3, 2014. (ODC Ex. 37 B. 4522)
10. Respondent testified that the Notice and Invoice represented the time spent on the case including depositions, discovery, conferences, calls, correspondence and other matters.
(Respondent) (Respondents Supplemental Evidence)
11. On January 9, 2014 Mr. Kramer met with Ms. Lawson and provided the above mentioned Affidavit for her signature. (ODC Ex. 21 B. 4023)
12. As noted above the Affidavit was factually inaccurate stating that two checks for \$230.00 had been returned to cover filing costs in the case, when the cancelled checks amounted to \$150.00. (ODC Ex. 21 Ex B. 4023, Respondent's Exhibit 35) (Ronald Kramer, Respondent, Vanessa Lawson)
13. Furthermore the Affidavit was misleading where it was introduced by Mr. Kramer to claim that Respondent was committing fraud by lying about the payment made for the filing fee when Respondent was not aware of the arrangement between Ms. Lawson and Mr. Kramer and wrote the checks for the filing fees and service fees from his own account. (Respondent) (ODC Ex. 37 B. 4529-4530)
14. On January 15, 2014, without providing a copy to Respondent before the hearing Mr. Kramer introduced the Lawson Affidavit before Judge Gaugot as proof that Respondent had committed fraud. (Respondent)
15. Regarding Mr. Kramer's other assertions that Respondent did virtually nothing and that Mr. Kramer simply e-mailed the documents to Respondent, this appears to be a conflict of opinion. However Respondent has acknowledged that Mr. Kramer did some of his own work while Mr. Kramer continues to insupportably argue that he did everything himself. If this is the

case, there was no reason to hang onto the Respondent for eight months, to repeatedly request and insist on a more aggressive approach or to accuse Respondent of fraud eight months after hiring him. (R. Kramer)

16. Mr. Kramer's claims that Respondent refused settlements without his consent are not supported by the record. (Respondent)

17. Respondent discussed both offers he received with Mr. Kramer one for \$2,500.00 and one for \$1,000. (Respondent)

18. Respondent did not receive any offers aside from these and any conversation with opposing counsel regarding amounts that would be acceptable to Mr. Kramer took into consideration that he wanted the return of his lease payments or an alternate car until his term was up. Respondent never received any counter offers or any serious response to his proposals to settle. (Respondent)

19. On January 3, 2014 Mr. Kramer requested that Respondent withdraw and picked up his file on January 6, 2014. (ODC. B. 4546- 4547)

20. On January 14, 2014 Respondent was released from the case. (ODC Ex. 37 B. 4542)

21. Despite Mr. Kramer's request that Respondent withdraw and refusal to compensate Respondent for any of his time or costs, Mr. Kramer advised Respondent on February 17, 2014 by correspondence that "you are responsible for these expenses (deposition costs) as well as the late fees pertaining to said invoices." Mr. Kramer further stated, "[s]ince your compensation for work performed on my case is contingent upon recovery, it is in your best interest to avoid compounding interest charges". (ODC Ex. 37 B. 4548)

22. Mr. Kramer had no intention of paying any fee or expense associated with his representation even where he was well aware that Respondent did not have excess funds to pay

the costs associated with Mr. Kramer's litigation, there was no agreement between the parties requiring Respondent to pay the costs and Mr. Kramer was aware that the costs had been accumulated at his direction. (Respondent) (ODC Ex. 37 B. 4548)

24. On May 16, 2014 Mr. Kramer ghostwrote Ms. Lawson's Office of Disciplinary Complaint against the Respondent alleging as stated above that, "Mr. Kohout has also submitted fraudulent attorney's lien." (Ms. Lawson's Complaint No. 14-01-274)

25. Mr. Kramer failed to identify himself as the ghostwriter of Ms. Lawson's complaint in violation of L.E.O. 2010-01² or to disclose that he had an ongoing pecuniary interest in discrediting Respondent particularly regarding Respondent's outstanding Attorney's Lien. (Ms. Lawson's Complaint No. 14-01-274)

26. On July 15, 2014 Mr. Kramer filed his own Complaint against Respondent alleging among other things that: (Respondent) "[a]lso submitted fraudulent lien to court documenting hours and expenses that were knowingly false.... The court file has an affidavit from his former secretary notarized, stating that the lien he submitted was fraudulent." (R. Kramer Complaint No. 14-01-382)

27. At the time of filing his complaint, Mr. Kramer did not disclose that he had drafted the Affidavit in contemplation of his defense against Respondent's attorney lien and he did not attach the Affidavit itself, which did **not** in fact "state... that the lien he (respondent) submitted was fraudulent." (ODC Ex. 21 B. 4023)

28. Regarding the outcome of Respondent's attorney lien, the Circuit Court ordered Mr. Kramer to pay Respondent 1/3 of his \$5,000.00 settlement and to pay his own costs of litigation. (ODC Ex. 40 B. 4868)

² L.E.O. 2010-01, *Ghostwriting or undisclosed representation: What is permissible and what is not permissible.*

B. Proposed Conclusions of Law

1. There is no clear and convincing evidence to support a claim that Respondent violated Rules 8.4 (c) and 8.4 (d) of the Rules of Professional Conduct in this matter.
2. Respondent and Mr. Kramer had a clear difference of opinion regarding Respondent's time; however, Respondent's insistence that he be paid for his time was not inherently unreasonable where the "Lemon Laws" permit recovery of attorney's fees from manufacturers and a contingency recovery fee was not the only remedy.
3. Mr. Kramer's statements regarding the "Affidavit" were factually incorrect and materially misleading. Mr. Kramer's use of the Affidavit for the purpose of discrediting Respondent was inappropriate.
5. The value of Mr. Kramer' testimony is further limited by his repeated inaccuracies and repeated use of the Affidavit he drafted to impugn Respondent.
6. Respondent in this case filed a Motion to dismiss this claim and Ms. Lawson's because Mr. Kramer ghostwrote Ms. Lawson's claim and included his claim for a fraudulent lien. He further misrepresented the Affidavit he drafted in contemplation of his own litigation before the ODC. The ODC opposed this request partially because the ghostwriting limitations have since been changed and Mr. Kramer was assisting Ms. Lawson to "fill out a form"; however, the ODC did not address the fact that Mr. Kramer was doing more than assisting an indigent client participate in a legal process. Mr. Kramer used Ms. Lawson's disciplinary complaint to further his own pecuniary interest and claims of fraud against the Respondent *in an ongoing lawsuit*. Mr. Kramer's failure to disclose that he was an attorney writing Ms. Lawson's complaint and that he had a personal pecuniary interest in impugning Respondent's integrity was misleading and in itself prejudicial to the administration of justice under Rule 8.4.

CONCLUSION

Respondent acknowledges that the attorney disciplinary proceedings before the panel have highlighted the difficulties of the period between 2013 and 2014 as well as his many glaring difficulties in both his personal and business life. Respondent is further aware, in the case of Sonja Richard, that he violated his obligations to her as his client and he understands that restitution is required and that other sanctions are to be expected.

Regarding the other claims brought by the ODC, Respondent understands that the evidence in this case is replete with indications of his failings; however, there is no clear and convincing evidence supporting the claims brought by the ODC. Respondent should not have bounced a check; he should not have been floating beyond his overdraft protection, but Respondent did regularly communicate with the Galfords; he did not misuse client fund and his efforts to preserve their rights to appeal were in the best interest of the Galfords.

Regarding Vanessa Lawson and Ronald Kramer, Respondent should not have tried to employ so many people when he could not afford it. Respondent should not have used the funds from the sale of his house to pay his staff or pay Mr. Kramer's filing fees. However, these are not the claims brought by the ODC. Respondent's disputes with both of these individuals had merit, he had his own opinion regarding the value of his services and the value he placed on having stable employees and his conduct in submitting his disputes to a court of law was not "conduct involving dishonesty, fraud deceit or misrepresentation or prejudicial to the administration of justice".

Respondent is acutely aware that he has previously been disbarred for errors in his application for the Bar and that he was required to work very hard for many years to return to the practice of law. However, he requests that the panel permit him to continue to work as he is

certain that there is no other way he can address the debts he will incur as a result of these proceedings and prior proceeding brought by the JIC and there is no way he will be able to make restitution.

In addition to the other matters raised before the Panel, Respondent requests that the Panel weigh the following factors as mitigation:

1. Respondent has faithfully represented many clients who turned to him when no one else would represent them. (Kris Warner, Cathy Brady)

2. Respondent has made efforts to address the stress and anxiety related to his inability to maintain his composure and other factors affecting his ability to interact in stressful situations.

3. Respondent has made a full and fair disclosure to the Panel and the ODC despite differences of opinion or understanding regarding the Rules. Respondent has provided every record known available to him and attempted to promptly respond to every inquiry.

4. Respondent is facing concurrent sanctions from the JIC requiring monthly payments or the imposition of further sanctions.

5. Respondent has made efforts to address the difficulties in his office and personal life that have affected his business.

6. Respondent has addressed his office procedures to ensure greater compliance with the Rules and the avoidance of communication difficulties.

7. Respondent has reduced his staff to a more manageable level and is reducing his case load to permit more attention be given to each case.

It is Respondent's understanding that the ODC intends to request annulment of his license. Where annulment is the death penalty of the Bar, and has been reserved primarily for

those engaged in behavior that is shocking, prurient or involving extreme factors such as the destruction of evidence, this proposal seems extreme³ particularly in light of other decisions where sanctions are issued in unpredictable ways.⁴ Respondent requests that the Panel's recommendation permit the Respondent to continue to make amends, make a living and serve his clients.

Respectfully Submitted,

/s/

Rachel L. Fetty
WV Bar No. 10996
235 High St. Ste. 320
Morgantown, WV 26505
(304) 413-2105

³ E. G. L.D.B. v. Clifton, No. 13-1128, Mr. Clifton's license was annulled where he was a prosecutor and engaged in sexual acts or demanded them under threats of blackmail or promises to avoid day report. L.D.B. v. Scotchel, No. 14-0728, Mr. Scotchel's license was annulled where he charged a "flat fee" of \$242,500.00 which he reduced to \$171,500.00. Mr. Scotchel destroyed his billing records and was unable to document fees charged.

⁴ E. G. L.D.B. v. Connor, Ms. Connor's license was suspended for 90 days and she was ordered to reimburse a retainer fee where she failed to perfect an appeal for a life sentence after two orders from the West Virginia Supreme Court of Appeals to do so. L.D.B. v. Ames, a prosecutor, was suspended for 75 days after he picked up a parent in a CPS case at a strip club, looked into her children's bedrooms on his request and engaged in sexual contact with her under the premise that he would influence her case. L.D.B. v. Rossi, Mr. Rossi was suspended for three years for multiple cases of refusals to return retainers and files and the entry of a default judgment where he failed to file an answer and L.D.B. v. Murphy where Mr. Murphy was admonished for an assault on a fellow Bar member in a courthouse and choking his domestic partner.

CERTIFICATE OF SERVICE

I, Rachel L. Fetty, attorney at law, hereby certify that a copy of the above Respondent's Proposed Findings of Fact and Conclusions of Law was mailed to the following parties by UPS Priority mail on this the 5th of April, 2016 and sent by e-mail where available.

Lt. Col. Kelly D. Ambrose, Esq.
1703 Coonskin Dr.
Charleston, WV 25311

Rachael L. Fletcher Cipoletti, Esq. and
Andrea J. Hinerman, Esq.
Office of Disciplinary Counsel
4700 MacCorkle Avenue SE, Suite 1200C
Charleston, West Virginia 25304

Timothy E. Haught, Esq.
925 Third St.
New Martinsville, WV 26155

Cynthia L. Pyles
24 Sharpless St.
Keyser, WV 26726

Rachel L. Fetty (WV #10996)