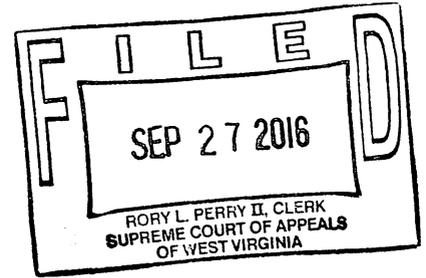


**IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA**



LAWYER DISCIPLINARY BOARD,

Petitioner,

v.

No. 15-0926

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

Respondent.

REPLY BRIEF OF THE LAWYER DISCIPLINARY BOARD

Andrea J. Hinerman [Bar No. 8041]
Senior Lawyer Disciplinary Counsel
Office of Disciplinary Counsel
City Center East, Suite 1200C
4700 MacCorkle Avenue SE
Charleston, West Virginia 25304
ahinerman@wvdc.org
(304) 558-7999
(304) 558-4015 – facsimile

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

I. REPLY TO RESPONDENT’S BRIEF 1

II. ARGUMENT.....2

III. SANCTION8

IV. CONCLUSION.....10

TABLE OF AUTHORITIES

Cases:

<u>Committee on Legal Ethics v. Blair</u> 174 W.Va. 494, 327 S.E.2d 671 (1984).....	2
<u>Committee on Legal Ethics v. Keenan</u> 192 W.Va. 90, 94, 450 S.E.2d 787, 791 (1994).....	8
<u>Committee on Legal Ethics v. McCorkle</u> 192 W.Va. 286, 452 S.E.2d 377 (1994).....	2
<u>Committee on Legal Ethics v. Tatterson (Tatterson II)</u> 177 W.Va. 356, 352 S.E.2d 107 (1986).....	9
<u>Lawyer Disciplinary Board v. Cunningham</u> 195 W.Va. 27, 464 S.E.2d 181 (1995).....	2
<u>Lawyer Disciplinary Board v. Kupec (Kupec I)</u> 202 W.Va. 556, 505 S.E.2d 619 (1998) <i>remanded with directions</i>	9
<u>Lawyer Disciplinary Board v. Kupec (Kupec II)</u> 204 W.Va. 643, 515 S.E.2d 600 (1999).....	9
<u>Lawyer Disciplinary Board v. Scott</u> 213 W.Va. 209, 579 S.E. 2d 550 (2003).....	2
<u>Lawyer Disciplinary Board v. Sturm</u> 237 W.Va. 115, ___, 785 S.E.2d 821, 834 (2016).....	9
<u>Lawyer Disciplinary Board v. Veneri</u> 206 W.Va. 384, 524 S.E. 2d 900 (1999).....	9
<u>Office of Disciplinary Counsel v. Jordan</u> 204 W.Va. 495, 513 S.E.2d. 722 (1998)	9

West Virginia Statutes and Rules:

R. Law Disc. Proc.	Rule 3.15.....	10
R. Professional Conduct	Rule 1.1.....	1

R. Professional Conduct	Rule 1.2(a)	1
R. Professional Conduct	Rule 1.3.....	1, 7
R. Professional Conduct	Rule 1.4(a)	1, 7
R. Professional Conduct	Rule 1.4(b)	1, 7
R. Professional Conduct	Rule 1.5(a)	1, 7
R. Professional Conduct	Rule 1.15(a)	1, 7
R. Professional Conduct	Rule 1.15(b)	1, 7
R. Professional Conduct	Rule 3.1	1, 5
R. Professional Conduct	Rule 5.4(a)	1, 5
R. Professional Conduct	Rule 8.1(a)	1, 8
R. Professional Conduct	Rule 8.4(c)	1, 3, 4, 8
R. Professional Conduct	Rule 8.4(d)	1, 3, 4, 8

I. REPLY TO RESPONDENT'S BRIEF

The Hearing Panel Subcommittee (hereinafter "HPS") properly found that the evidence established that Respondent committed violations of 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) of the Rules of Professional Conduct and concluded that Respondent violated duties he owed to his clients, the public, the legal system, and the legal profession. The HPS also properly found that Respondent acted intentionally and that his misconduct had the potential to cause harm and, in fact, did cause actual harm to his clients, the public, the legal system and the legal profession. The HPS also determined that numerous aggravating factors existed including (1) prior disciplinary offenses, most notably a prior suspension of his law license, (2) a 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. In addition, the HPS found that any mitigation asserted by Respondent was clearly outweighed by the aggravating factors present in this case. The HPS recommended that the Respondent's law license be annulled.

In his brief, Respondent does not dispute the HPS's findings regarding the submission of the Galford filing fee (Count I) to the Supreme Court of Appeals of West Virginia which was returned due to insufficient funds, except that he maintains his conduct in that matter was not intentional, and he does not dispute the HPS's findings regarding his misconduct in the Richard matter (Count III). Respondent disputes the findings in the matters involving his former employees, Lawson (Count II) and Kramer (Count IV), and asserts that his former employees' testimony was untruthful. Respondent further asserts that his conduct was not intentional and that the recommended sanction is "disproportionate to the actual harm done in this case."

II. ARGUMENT

At this stage in the proceedings, this Court has held that “[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.” Lawyer Disciplinary Board v. Cunningham, 195 W.Va. 27, 34, 464 S.E.2d 181, 189 (1995); Committee on Legal Ethics v. McCorkle, 192 W. Va. 286, 290, 452 S.E.2d 377, 381 (1994). Respondent has failed to show that the factual findings of the HPS are not supported by the reliable, probative, and substantial evidence or that annulment is not the proper sanction given consideration of the whole record. This Court gives respectful consideration to the HPS’s recommendations as to questions of law and the appropriate sanction, while ultimately exercising its own independent judgment. Committee on Legal Ethics v. McCorkle, 192 W.Va. 286, 290, 452 S.E.2d 377, 381 (1994). It is also well settled that “[t]his Court is the final arbiter of legal ethics problems and must make the ultimate decisions about public reprimands, suspensions or annulments of attorneys’ licenses to practice law.’ Syllabus point 3, Committee on Legal Ethics of the West Virginia State Bar v. Blair, 174 W.Va. 494, 327 S.E.2d 671 (1984),” Syllabus Point 1, Lawyer Disciplinary Board v. Scott, 213 W.Va. 209, 579 S.E.2d 550 (2003).

In regard to the Galford matter, Respondent continues to deny that he was aware of the December 11, 2013 letter from the Supreme Court advising him that his filing fee check had been returned due to insufficient funds. However, both of Respondent’s former employees who were present in Respondent’s office at the time, Vanessa Lawson and Kristen Taylor, Esquire, testified that they recalled the Supreme Court’s letter arriving into Respondent’s office. Ms. Lawson testified that Respondent was in his office shortly after the letter was received and that she observed Respondent reading the letter. [Tr. 64, 149, 164-165]. Ms. Gaiser, Deputy Clerk of

Court, also testified that the Clerk's December 11, 2013 letter was not returned to the Clerk's office. [Tr. 26-28, 46]. While Respondent maintains that his first notice of the returned check was Ms. Gaiser's telephone call on January 8, 2014, and that he did not willfully disregard the Clerk's letter, it is clear that the HPS did not find Respondent's testimony to be credible.

Likewise, Respondent's testimony that he was unaware that his filing fee check had been returned due to insufficient funds was also found not to be credible. The HPS heard testimony on this issue from Bryan Selbe, Investigator, and Respondent. Mr. Selbe testified 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]. It was, in fact, the deposit of money from the Richard settlement check (Count III) on October 30, 2013, which brought Respondent's "attorney at law" account back from overdraft status, but only until mid-November of 2013. [Tr. 184]. 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 overdraft status and that all of the "positive" balance in October 2013 in his "Attorney at Law" account came from the Richard settlement. [Tr. 461-462]. This is the same settlement money which the HPS found Respondent to have wrongfully misappropriated from Ms. Richard and Dynamic Physical Therapy (hereinafter "Dynamic"). Moreover, Respondent testified that at the time of the deposit of the Richard settlement money, he 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...." [Tr. 528-529]. The evidence clearly supports a finding that Respondent's actions constituted a violation of Rule 8.4(c) and (d) of the Rules of Professional Conduct.

In regard to his withdrawal from representing the Galfords and the finding that he acted in violation of Rule 8.4(c) and (d), Respondent asserts that Mr. Galford's testimony was inconsistent regarding Mr. Galford's knowledge of the status of the appeal and the location of his client file. Respondent's assertion is an attempt to shift his own obligations under the Rules of Professional Conduct to his clients. Respondent, not Mr. Galford, has the burden to explain matters to the extent reasonably necessary to permit clients to make informed decisions about their cases and to do so in a manner that does not involve dishonesty or misrepresentation or conduct that is prejudicial to the administration of justice. Mr. Galford's confusion is certainly understandable considering Respondent's own inconsistent actions. In his brief, Respondent stated that he first filed motions to withdraw at a hearing on October 9, 2013, before the Circuit Court of Preston County. Respondent then filed a notice of appeal on or about October 30, 2013, allegedly to preserve his client's right to appeal, but Respondent also admitted that he never had a discussion with the Galfords about filing the appeal and he did not enter into a new retainer agreement with them or anybody else associated with the underlying matter. [Hrg. Tr. 483-484; Ex. 9, Bates No. 124]. Respondent then had Mr. Galford pick up his client file on December 3, 2013. [Ex. 5, Bates No. 44]. Respondent did nothing until he advised the Supreme Court on January 8, 2014, that "I have already withdrawn from the underlying case and my client picked up their file and have moved on." [Ex. 5, Bates No. 45]. However, since he had not properly withdrawn from the appellate proceeding and the Supreme Court refused to permit Respondent to withdraw from the appeal, Respondent was forced to retrieve the client file from the Galfords. [Ex. 9, Bates No. 89]. Moreover, Mr. Galford could just be confused because he also testified that his wife had the most interaction with Respondent and that the only thing he remembered Respondent telling him after the hearing in Preston County was that "we had so many days to get

us a new lawyer if we wanted it and I said – talk to some of the other people and we decided to forget it, drop it because we put out too much money and didn't get nothing accomplished.” [Tr. 208, 209]. Regardless, the evidence clearly demonstrates that Respondent was neither in sufficient communication with the Galfords regarding the appeal and his withdrawal from the representation, nor was he apparently acting under his clients' instructions to preserve their appellate rights as he asserted in his brief.

In Ms. Lawson's matter, 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. The evidence also supports a finding of a violation of Rule 5.4(a)(3) because in addition to paying Ms. Lawson a salary, he was also sharing his legal fees with her in the form of bonuses. Respondent engaged in conduct involving dishonesty, fraud, deceit or misrepresentation and in conduct prejudicial to the administration of justice. Respondent filed the lawsuit against Ms. Lawson claiming that her bonus checks were loans which she had to pay back. [ODC Ex. 22, Bates 4206-4216]. Respondent submitted as evidence, in his lawsuit against Ms. Lawson, 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 Nos. 4190]. 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]. Finally, Ms. Lawson 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.

In the Kramer matter, the evidence supported a finding that Respondent engaged in conduct involving dishonesty, fraud, deceit or misrepresentation and in conduct prejudicial to the administration of justice when he submitted the charging lien containing information that was not truthful. Mr. Kramer testified that he drafted a number of pleadings and other documents which Respondent claimed in his charging lien. While Respondent maintained that all of the information in his charging lien was truthful, there is evidence to the contrary beyond Mr. Kramer's testimony, such as an email dated August 14, 2013, wherein Respondent indicated to Mr. Kramer that "I'm filing this exactly as you wrote it" and "I'm still debating the other set you drafted for VW – comparing what we already asked them there looked like a lot of duplication and plus of the questions I was struggling to understand. But don;t [sic] feel bad drafting discovery is always a slippery business...." [Ex. 38, Bates No. 4594].

As in the Galford matter, the HPS found the testimony of Ms. Lawson and Mr. Kramer to be more credible than Respondent's testimony. In fact, at the hearing, HPS questioned Respondent about these witnesses' testimony because Respondent maintained at the hearing that Ms. Lawson, Ms. Taylor and Mr. Kramer were all lying under oath. [Tr. 497-504]. When asked why his former employees would all give untruthful testimony, Respondent maintained they lied under oath because they were angry with him about money and that he "... [didn't] understand why they turned on [him] and why they're trying to hurt [him] in the worst possible way." [Tr. 503, 505]. Despite Respondent's assertions to the contrary, these witnesses testified that they enjoyed their employment with Respondent and left only when Respondent was unable to pay them their salaries. Respondent, however, decided to view their departures as a personal betrayal

to which he reacted in various ways. For example, Respondent sent Ms. Lawson numerous inappropriate and threatening texts and then sued her in magistrate court. With Ms. Taylor, Respondent said that she was mad at him for withdrawing from her friend's case and that is why she testified against him at the disciplinary hearing. [Tr. 502-503]. With Mr. Kramer, Respondent filed the charging lien seeking a significant portion of any settlement Mr. Kramer might receive. Even in regard to Ms. Richard, Respondent accused her of extortion when she filed an ethics complaint against him seeking an explanation as to Respondent's failure to pay her medical bill and her belief that he took more money from her settlement than what he was entitled to under their retainer agreement. After reviewing all of the evidence, the HPS simply found the testimony of Respondent's former employees and the other witnesses to be more credible than Respondent's own testimony.

Finally, the HPS properly found that the evidence established that Respondent failed to act with reasonable diligence in the Richard matter when he failed to disburse payment of the Dynamic bill in a timely manner, 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 1.3 and 1.4(a) and (b). The HPS also found that Respondent charged Ms. Richard an unreasonable fee in violation of Rule 1.5(a) of the Rules of Professional Conduct when he unilaterally increased his portion of her settlement in excess of their written fee agreement. 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. Furthermore, the HPS found that Respondent wrongfully misappropriated and converted client funds due Ms. Richard and Dynamic to his own use, and

asserted that Ms. Richard “was just trying to extort money from [Respondent] when she called [to inquire about his failure to pay the medical bill], and with this complaint.” HPS found that this misconduct violated Rules 8.4(c) and 8.4(d) of the Rules of Professional Conduct. The HPS also found that Respondent knowingly made a false statement of material fact in violation of Rule 8.1(a) by stating in his June 23, 2014 verified response to Ms. Richards’ complaint that he was “holding” the money to pay the bill from Dynamic, when in fact, Respondent was aware that his “Attorney at Law” bank account was in overdraft status in October 2013, when the funds were deposited. In the Richard matter, there is no question that Respondent’s misconduct violated his duties owed to his client, the legal system, the legal profession and the public.

III. SANCTION

The principle purpose of attorney disciplinary proceedings is to “protect the public, to reassure it as to the reliability and integrity of attorneys and to safeguard its interest in the administration of justice[.]” Committee on Legal Ethics v. Keenan, 192 W.Va. 90, 94, 450 S.E. 2d 787, 791 (1994). The HPS recommended that the proper sanction in this matter, after taking into consideration all the evidence, is annulment. Respondent asserts that a lesser sanction is more appropriate because he submits that the HPS did not give proper consideration to his mitigating factors, which were personal and financial difficulties. However, the HPS properly recognized that mitigation evidence does not insulate a lawyer who has been found to have violated the Rules of Professional Conduct and caused injury to his clients, the public, the legal system and the legal profession, particularly when he engaged in similar misconduct resulting in the suspension of his license to practice law for two (2) years.

Respondent asserts that during the timeframe of the complaints against him, he was experiencing significant personal and emotional issues relating to his wife’s health concerns, her

unemployment and his own resulting financial difficulties. Respondent also asserts that he ultimately paid the Dynamic bill and that if his law license is annulled or suspended, then he will be without means to make restitution to Ms. Richard. While noting that Respondent may have been dealing with significant personal events, the HPS found that any mitigation in this regard does not outweigh the considerable aggravating factors present in this matter, including Respondent's prior two (2) year suspension, dishonest or selfish motive, pattern of misconduct, multiple offenses, refusal to acknowledge wrongful nature of conduct, substantial experience in the practice of law, and indifference to making restitution. Moreover, while Respondent attempts to downplay his prior disciplinary offenses by arguing "remoteness," prior discipline is of significant consideration 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). This Court stated recently that "[w]hile we understand that sometimes a lawyer's personal problems require the lawyer's utmost attention, this focus of a lawyer's attention cannot come at the client's expense." Lawyer Disciplinary Board v. Sturm, 237 W.Va. 115, ___, 785 S.E.2d 821, 834 (2016).

Furthermore, like most courts, West Virginia holds that absent compelling circumstances, misappropriation or conversion by a lawyer of funds entrusted to his care warrants disbarment. Office of Disciplinary Counsel v. Jordan, 204 W.Va. 495, 513 S.E.2d 722 (1998); and Lawyer Disciplinary Board v. Kupec (Kupec I), 202 W.Va. 556, 561, 505 S.E.2d 619, 631 (1998), *remanded with directions*, see Lawyer Disciplinary Board v. Kupec (Kupec II), 204 W.Va. 643, 515 S.E.2d 600 (1999). In this case, the HPS considered the evidence and evaluated Respondent's mitigation and found that compelling extenuating circumstances do not exist in

this matter. While Respondent may be disappointed in the outcome, in reaching its recommendation as to the sanctions, the HPS properly concluded that Respondent cannot be entrusted with the continuing duties or privileges of a licensed member of the legal profession and thus, his license to practice law should be annulled.

IV. 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, the Office of Disciplinary Counsel urges that this Honorable Court uphold the sanctions as recommended by the HPS.

Respectfully submitted,
The Lawyer Disciplinary Board
By Counsel

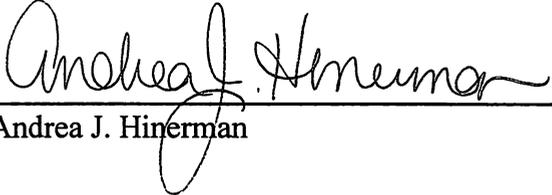


Andrea J. Hinerman [Bar No. 8041]
Senior Lawyer Disciplinary Counsel
Rachael L. Fletcher Cipoletti [Bar No. 8806]
Chief Lawyer Disciplinary Counsel
Office of Disciplinary Counsel
City Center East, Suite 1200C
4700 MacCorkle Avenue SE
Charleston, West Virginia 25304
ahinerman@wvodc.org
(304) 558-7999
(304) 558-4015 – *facsimile*

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 27th day of September, 2016, served a true copy of the foregoing "**Reply 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
235 High Street, Suite 320
Morgantown, West Virginia 26505



Andrea J. Hinerman