

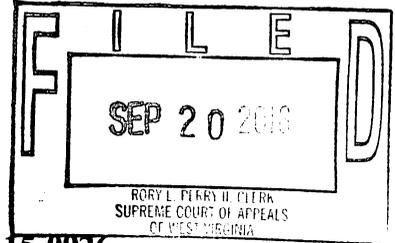
**IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

**LAWYER DISCIPLINARY BOARD,
PETITIONER,**

v.

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

CASE NO. 15-0926



RESPONDENT'S BRIEF

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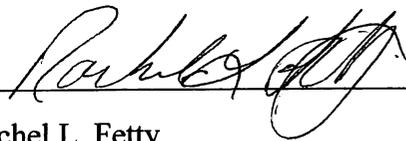
BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

**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

COMES NOW, Counsel for the Respondent, Rachel L. Fetty, and hereby certify that the Respondent's Brief and 10 copies have been hand delivered to the Clerk of the Supreme Court of Appeals of West Virginia, Capitol Complex Bldg. 1 Room E-317, 1900 Kanawha Blvd. East, Charleston West Virginia and that a copy has been hand delivered to Rachel L. Fletcher Cipoletti, Esq. and Andrea Hinerman Esq. at the Office of Disciplinary Counsel, 4700 MacCorkle Ave. SE Ste 1200 C, Charleston, WV 25304 on this the 20th day of September, 2016.



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I. STATEMENT OF THE CASE

A. INTRODUCTION

This disciplinary proceeding involves four complaints brought to the attention of the Office of Disciplinary Counsel between January 8, 2014 and July 15, 2014 relating substantially to events that occurred in 2013. The first, Count I, I.D. No. 14-01-015 was a referral to the Office of Disciplinary Counsel by the Supreme Court of Appeals regarding a check for filing fees that was returned for insufficient funds related to Respondent's representation of a group of campers at the Big Bear Campground, including Mr. and Mrs. Galford. Count II, I.D. No. 14-01-274 was an ethics complaint filed by Respondent's former employee, Vanessa Lawson. Count III, I.D. No. 14-01-274, an ethics complaint brought by Ms. Sonja Richard, regarding Respondent's failure to pay her therapy bill as well as unreasonable attorney fees, was filed on June 9, 2014. Count IV, I.D. No. 14-01-382 was filed by Respondent's former employee, Ronald Kramer, III, Esq. in July.

After a two day hearing in January of 2016, the Hearing Panel Subcommittee concluded that Respondent had violated numerous rules of Professional Conduct. The Hearing Panel accepted the recommendation of the Office of Disciplinary Counsel and recommended that Respondent's law license be annulled.

Respondent has acknowledged and accepts the findings of the Hearing Panel in regards to his client, Sonja Richard in Complaint III and further acknowledges that the return of his check for insufficient funds as well as the financial situation he was in did not reflect the professionalism proscribed by the Rules. However, Respondent denies any intent to engage in misconduct in these matters in Complaint I. Respondent is appealing the Hearing Panel's findings and conclusions related to his former employees in Complaint II and IV and as regards

the Galfords in Count I, for lack of clear, reliable and probative evidence as well as, in one case, the misapplication of Rule 5.4..

Finally, Respondent is requesting that the Supreme Court of Appeals reduce the sanction recommended in the case where mitigating factors and facts exist and were not considered by the Hearing Panel and the sanction of annulment is disproportionate to the actual harm done in this case.

II. SUMMARY OF ARGUMENT

Regarding Count III, the complaint brought by Sonja Richard, Respondent has acknowledged that he acted improperly in her case. Respondent has further acknowledged that he acted improperly regarding the submission of the filing fee to the Supreme Court of Appeals in Count I and that even though he believed the check would be covered that his finances were in an unacceptable state of disarray. To the extent possible, Respondent has made amends to Ms. Richard and has repaid the funds owed to the Supreme Court of Appeals. Despite these efforts, Respondent is aware that his actions merit a sanction and that further restitution is necessary.

Acknowledging the above, Respondent states that numerous findings of fact and conclusions of law regarding his former employees: Ms. Lawson and Mr. Kramer are not supported by clear and convincing evidence or the applicable rules. Additionally regarding these complaints, the findings therein are not supported by “reliable, probative and substantial evidence” where both witnesses demonstrated prior to the hearing a willingness to misstate the truth by affidavit, either willfully or negligently and did so repeatedly with the intent of accusing Respondent of fraud for their own pecuniary gain. Where the Hearing Panel relied specifically on their testimony, even where the witnesses indicated a lack of commitment to the truth at hearing, such findings and reliant conclusions of law should be reversed.

Respondent further objects to the Hearing Panel's recommendations in so far as they find that Respondent's filing of a Notice of Appeal in the Big Bear Galford case was in violation of the rules where that finding is not supported by clear and convincing evidence or the law.

Respondent has had great difficulty in the past two years and admits that he has acted improperly. However, a substantial number of the findings of the Hearing Panel are in error and unsubstantiated and should not be upheld. Furthermore, where the Hearing Panel appears to have disregarded any mitigating factors in this case, Respondent respectfully requests that the Court consider these factors and reduce the recommended sanction.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This matter has been set for oral argument on October 12, 2016 pursuant to this Court's Order on July 11, 2016.

IV. ARGUMENT

A. STANDARD OF PROOF

Charges against an attorney must be proven by clear and convincing evidence. W.Va. Rule of Disc. Pro. 3.7, Lawyer Disciplinary Board v. McGraw, 194 W.Va. 788, 461 S.E. 2d 850. While substantial deference is given to the Lawyer Disciplinary Board's findings of fact, the Supreme Court of Appeals exercises its own independent judgment regarding questions of law and ultimately, the sanctions that are appropriate. McCorkle, 192 W. Va. 286, 452 S.E. 2d 377 (1994) In order to warrant the deference typically granted by the Supreme Court of Appeals, the findings of fact of the Lawyer Disciplinary Board must be supported by reliable, probative and substantial evidence on the whole adjudicatory record. Lawyer Disciplinary Board v. Cunningham, 195 W. Va. 27, 464 S.E. 2d 181 (1995)

The Supreme Court of Appeals makes the final determination on the granting of sanctions against an individual attorney and does so with the considerations raised by West Virginia Rule of Disciplinary Procedure 3.16 In mind. Namely, (1) whether the lawyer has violated a duty owed to a client, to the public, the legal system or to the profession; (2) whether the lawyer acted intentionally, knowingly, or negligently; (3) the amount of the actual or potential injury caused by the lawyer's misconduct; and (4) the existence of any aggravating or mitigating factors.

B. THE FINDINGS OF FACT AND CONCLUSIONS OF LAW RELATED TO THE FOLLOWING CHARGES IN COMPLAINT NO. I, II AND IV ARE NOT SUPPORTED BY RELIABLE, SUBSTANTIVE AND PROBATIVE EVIDENCE.

**1. Supreme Court of Appeals, Complaint No. I, I.D. No. 14-01-015
The Hearing Panel Subcommittee's finding that Respondent violated Rule 8.4 where where he submitted a check that was denied for insufficient funds was not supported by sufficient evidence.**

This matter turns on Respondent's submission of a check to the Supreme Court of Appeals with the Notice of Appeal in the Galford matter. While the facts have been exhaustively described at hearing, the evidence indicates that Respondent believed it would be good when cashed either because funds would be available or because of his overdraft protection. Due to procedures within the Supreme Court, the check was deposited approximately two to three weeks after submission and it was returned for insufficient funds.¹

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 that demonstrate dishonesty...specifically, whether the attorney was aware that the check was

¹ Respondent's Proposed Findings of Fact and Conclusions of Law:

worthless when written and whether the attorney fails to make it good in a reasonable amount of time. *Id.* Syl. Pt. 3. In Mr. Taylor's case, after an indictment for writing several bad checks, he 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.

The Office of Disciplinary Counsel has argued that Rule 8.4 is at issue regarding this matter in part because Respondent has testified that he does not recall seeing, nor has he found, the December 11, 2013 letter sent by the Supreme Court of Appeals advising Respondent of this issue. At hearing, the ODC relied upon Ms. Vanessa Lawson and Ms. Taylor, Esq., both former employees, to support their claim that Respondent is lying about this matter.

Respondent has testified at length that he did not recall seeing the December 11, 2013 letter. It is his testimony that he first became aware of the return of the check on January 8, 2014 during a conversation with Assistant Clerk of Court Ms. Gaiser.² This testimony was countered by testimony from Ms. Lawson who recalled placing the check on his desk and discussing it. Ms. Taylor, also a former employee recalled discussing it with Ms. Lawson. Based upon their testimony, the Hearing Panel found that Respondent had misrepresented these facts and was in violation of the Rules prohibiting attorney misconduct.

The reliance of the Hearing Panel on testimony from Respondent's former employees to determine that Respondent's actions were willful and that he intentionally disregarded a letter from the Supreme Court of Appeals was unreasonable where Vanessa Lawson's testimony during the hearing reflected a disregard for the truth.³ Further, the Hearing Panel's reliance on

² Transcript p. 501

³ Ms. Lawson is also a complainant in this matter. These issues will be addressed in Paragraph B.

Kristen's Taylor's testimony for the same purpose was not proper where her testimony was not probative, indicating only that Ms. Taylor had observed the letter and remembered discussing it with Ms. Lawson.⁴

Respondent has not denied that the Clerk of Court sent the letter, only that he does not recall seeing it and that he would have addressed the matter immediately if he had. This is consistent with his actions in response to his conversation with Ms. Gaiser on January 8, 2013. Immediately after his conversation he forwarded a replacement check and when he received notice that he was required to submit a Certified Check he provided an Official check that was deposited without incident.⁵

The circumstances in this matter do not reflect dishonesty or an intent to defraud the Supreme Court of Appeals and such a finding was not supported by the evidence.

2. The Galfords, Complaint No. I, ID No. 14-01-015

a. The Hearing Panel Subcommittee finding that Respondent violated Rule 1.2 (a) and 1.4(b), "because he failed to discuss with and obtain the Galfords' instructions concerning the objectives of representation in this matter"⁶ and "because he failed to explain a matter to the extent reasonably necessary to permit the Galfords to make informed decisions"⁷ is not supported by clear and convincing evidence or the language of the Rules.

The relevant portions of Rule 1.2 (a) provide that, A lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.

Rule 1.4(b) provides that, A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

⁴ RHPS FOF ¶7. Transcript p. 149 L. 10-19 Transcript p. 501

⁵ ODC Ex. 9 Bates 180-181.

⁶ RHPS ¶19

⁷ RHPS ¶20

The HPS based its findings that Respondent is in violation of 1.2(a) and 1.4 (b) in this matter on Respondent's decision to file a Notice of Appeal to preserve the Galfords' right to appeal prior to obtaining a specific representation agreement.⁸ Additionally, Mr. Galford's testimony at hearing indicated that he was confused regarding some of the matters in the case.⁹ Respondent acknowledges that there was no specific representation agreement and that he had difficulty discussing the specifics of the appeal with the Galfords.¹⁰ However, although there was no separate retainer agreement, the testimony from Mr. Galford and the documentary evidence in this case indicate that Respondent corresponded and communicated with the Galfords by telephone, letter and in person regarding the matters in this case.¹¹ Mr. Galford's testimony indicated that the communication between Respondent and the Galfords was deeply affected by Mrs. Galford's decline in health and memory as she was the primary person who interacted with the Respondent.¹² Further, Mr. Galford testified that he simply did not engage with the communication that Respondent extended. For example, Mr. Galford reported receiving the letters from Mr. Kohout, but indicated that he didn't read them and that he didn't speak on the phone with Mr. Kohout, or anyone except his children, by choice.¹³

Although Mr. Galford's testimony reflected some confusion about the facts, it is unreasonable to impute this confusion to Respondent's wrongdoing when the confusion is easily resolved by reviewing the evidence. For example, Mr. Galford reported that he did not attend civil hearings, but that he did attend the hearings in Preston County where his civil case was

⁸ RHPS ¶15-16

⁹ Transcript p.

¹⁰ RHPS ¶16

¹¹ Transcript pgs. 207, 218-219, 227.

¹² Transcript p. 225 L. 4

¹³ Transcript p. 218, 227

brought.¹⁴ It is unclear why he is inconsistent in this report, but Respondent recalls that Mr. Galford was with him during the hearings. Mr. Galford has stated that he knew about the appeal.

¹⁵ In another moment he testified he could not recall discussing the appeal. ¹⁶Regarding his interactions with Respondent after the civil case in Preston County was dismissed, Mr. Galford reported that he had the file for the Big Bear case in his home because he was not contacted by the Respondent after the hearing in Preston County.¹⁷ However, at the time of the hearing before the Hearing Panel, the Big Bear file was in front of all of the participants, including the Hearing Panel, because Respondent had retrieved it from Mr. Galford after speaking with him and submitted it in 2014 to the Office of Disciplinary Counsel for the ODC's review.¹⁸

Respondent notes that at the time he filed the Notice of Appeal, he had filed the Motion to Withdraw before the Court in Preston County during the Motion for Summary Judgment hearing on October 9, 2013. But he had received no word from the Preston County Circuit Court. Further, despite his efforts, he had not received clear word from his clients regarding their intent or desire to appeal. Under those circumstances Respondent believed he was compelled to preserve his client's rights to appeal and that he was permitted by Rule 1.2(a) to "take such action on behalf of the client as is impliedly authorized to carry out the representation." Under these circumstances, the Hearing Panel Subcommittee's conclusion that Respondent violated Rule 1.2 and 1.4 was unsupported by the facts and the Rule.

b. The Hearing Panel Subcommittee's conclusion that the Respondent engaged in professional misconduct in violation of Rule 8.4 (c) and (d) where he "did not provide prior notice to, or obtain authorization from the Galfords that he was filing

¹⁴ Transcript p. 207, L. 12-19

¹⁵ Transcript p. 208 L 8-24

¹⁶ Transcript p. 209

¹⁷ Transcript p. 227

¹⁸ Transcript p. 495

an appeal with the Supreme Court”¹⁹ is not supported by the evidence or any reasonable interpretation of the Rule.

Rule 8.4 (c) states that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

Rule 8.4 (d) states that it is professional misconduct to engage in conduct that is prejudicial to the administration of justice.

As noted above, Respondent attempted to communicate numerous times with the Galfords. Although his testimony and Motions to Withdraw indicate that he was desperate to withdraw for financial and office management reasons, the evidence is clear that he filed a Notice of Appeal because he wished to preserve his clients rights to appeal where he had not heard from them and he had not received leave to withdraw.²⁰

There is simply no evidence of any dishonesty, fraud, deceit or misrepresentation under these facts. Furthermore, there is no indication that there was any conduct prejudicial to the administration of justice where Respondent’s acts preserved his clients’ rights to appeal and he completed that appeal.

c. The Hearing Panel Subcommittee’s conclusion that Respondent violated 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” is confusing where the evidence indicated that Respondent was paid as the fees were earned and did not belong to the Galfords or other clients related to this matter.

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 for the entire period in which this case proceeded, 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

¹⁹ RHPS ¶22

²⁰ Transcript p. 396 L 12-399, 459-452-455

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.

e. The Hearing Panel's finding that Respondent violated Rules 1.1 and 8.4 where Respondent "then attempted to improperly withdraw from the representation" of the Galfords is not supported by clear and convincing evidence where the facts underlying the allegation of improper withdrawal are unclear and the Galfords wished to discontinue the case.

It is unclear from the Report of the Hearing Panel Subcommittee which facts lie beneath this charge. The Hearing Panel cites facts indicating that it believes that Respondent made a procedural error in his Motion to Withdraw where he did not submit the Certificate required by the Rules. Respondent agrees that he made a procedural error; however, there is no indication that this error was willful, that it was intentional, that it constituted misconduct or that he was unwilling to correct it.

Regarding the timing of the Motions to Withdraw in Preston County and the Supreme Court of Appeals, Respondent had attempted to withdraw in Preston County on the day the motion for summary judgment was heard.²¹ However no order was forthcoming. The evidence indicates that the Clerk of the Supreme Court of Appeals received Respondent's Motion to Withdraw on December 13, 2013. Both HPS and the ODC have hinted that they believe that Respondent submitted the Motion to Withdraw in response to the letter sent by the Clerk's office on December 11, 2013; however, it is unclear how that is possible where mail does not move from Charleston to Morgantown instantaneously and neither document appears to have been sent by facsimile.

²¹ Transcript p. 207-208

The record reflects that Respondent wished to withdraw from the Galfords' case, not because of any improper purpose, but because he was financially and personally struggling. Furthermore, Mr. Galford has stated that he was not reading letters, not speaking on the phone and that his wife was in decline making any effort Respondent could make likely to be unsuccessful. Most importantly, the Galfords, as Respondent represented, did not want to go forward with the appeal. Under these circumstances it is unclear how the Motion to Withdraw was improper. Aside from the procedural error, the evidence does not support a claim that the motion constituted incompetence, and certainly not misconduct under Rule 8.4 (c) or (d).

3. Vanessa Lawson, Case No. 14-01-274 and Ronald G. Kramer, III, Esq. Case No. 14-01-382

The facts related to this matter are quite complicated and many of the relevant facts are also relevant to Mr. Kramer's complaint addressed below. For that reason, Respondent will address these claims together.

In November 2010 Ms. Lawson was hired by Respondent to be his assistant.²² Ms. Lawson reports that she believed she was entitled to bonuses from the start. However there is no evidence that bonuses or loans of any kind were granted until September of 2011. In September of 2011, Ms. Lawson signed an Agreement provided by Respondent. Under that Agreement Respondent would provide additional funds to Ms. Lawson on occasion. Those funds would be considered loans unless she remained employed by the Respondent for five years.²³ Ms. Lawson began receiving these funds after signing the Agreement. Between 2011 and 2012 Respondent transferred funds in excess of Ms. Lawson's paycheck to her for a total of \$4,500.00.²⁴

²² Transcript p. 61 p. 22-24

²³ ODC Ex. 27 B. 4190

²⁴ Transcript p. 97, 99, 370-371, 399-402

In 2012 Respondent began to lose his vision due to cataracts. Ms. Lawson suggested that Respondent borrow money from her mother, for the surgery and to keep Ms. Lawson employed.

²⁵ There was no document setting forth whether these funds, a total of \$5,000.00, were to be a loan or a gift or a loan. Ms. Lawson and Respondent disagree.. Ms. Lawson testified that the funds were for both the cataract surgery and to make sure she was paid.²⁶

In 2012 Mr. Kramer, also a complainant in this matter, began to work in Respondent's office as an intern. In 2013 Respondent agreed to represent Mr. Kramer in his "lemon law" case regarding his Volkswagon.

At the end of 2013 Respondent began having serious financial difficulties and paychecks were returned for insufficient funds. On 12/31/2013 Ms. Lawson resigned without notice, writing Mr. Kohout a note and leaving her keys on the desk. ²⁷ A few days later, Respondent sent Ms. Lawson a letter advising her that he was disappointed that she had left and reminding her that she would need to return the \$4,500.00.²⁸

On January 3, 2014, Mr. Kramer discharged Respondent as his counsel and arrived to pick up his file. Respondent became convinced that he would never be paid and filed an attorney's lien against Mr. Kramer for fees based on the hours he had worked. 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.²⁹ On or around January 9, 2014 Ms. Lawson contacted Kristen Taylor, Esq. who was still working with

²⁵ Transcript p. 123

²⁶ Transcript p. 115, 123

²⁷ Transcript p. 96 L2-3, ODC Ex. Bates no. 3962

²⁸ ODC Ex. 22 B. 4193

²⁹ ODC Ex. 37 Bates Nos. 4518-4532, Transcript p. 380, 430-435, 435-439, 446-447

Mr. Kohout. Ms. Lawson asked Ms. Taylor to meet with her to notarize an affidavit for her.³⁰ The Affidavit alleged that Mr. Kramer had returned two checks to Mr. Kohout for a total of \$230.00.³¹ This was factually incorrect. However, Ms. Lawson signed it without confirming whether anything in it was correct. Ms. Lawson testified at hearing that “I signed it. I didn’t write it.”³² Ms. Lawson testified to this even though she also testified that she had worked out this arrangement with Mr. Kramer and that he had returned any checks directly to her rather than Mr. Kohout.³³

On or around January 15, 2014 at the hearing before Judge Gaugot on Respondent’s attorney’s lien, Mr. Kramer presented Ms. Lawson’s affidavit as evidence.³⁴ It was submitted to Judge Gaugot to assert that Mr. Kohout had committed fraud by countering Mr. Kohout’s claim that he had paid the \$230.00 filing fee in Mr. Kramer’s case.³⁵

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 claim 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 \$150.00.³⁶ When the affidavit was presented in court to discredit him, Respondent became extremely upset with both Ms. Lawson and Ms. Taylor because he believed that they had lied.³⁷

In April of 2014, Ronald Kramer, Esq. entered an appearance on Ms. Lawson’s mother’s behalf requesting the return of the \$5,000.00 that Ms. Lawson’s mother had given to Respondent

³⁰ ODC Ex.21 B. 4023 Transcript p. 270-271

³¹ “[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

³² Transcript p. 108 L. 17

³³ Transcript p. 106

³⁴ Transcript 407-409

³⁵ Respondents Ex. 34

³⁶ ODC Ex. 21 Bates Nos. 4023, Respondent’s Exhibit 35

³⁷ Transcript p. 378-379

for the surgery and to ensure that Ms. Lawson continued to be paid.³⁸ Respondent filed a separate claim in Magistrate Court requesting that Ms. Lawson return the \$4,500.00 in loans under the 2011 Agreement.³⁹ Ms. Lawson followed that with a countersuit for \$5,000.00.⁴⁰

In May of 2016, Mr. Kramer ghostwrote Vanessa Lawson's complaint to the ODC and referred to his own claims of fraud onto her ODC complaint. Ghostwriting a complaint at the time was a violation of L.E.O. 2010-10 which was then in force.⁴¹ Although Mr. Kramer denied that he was representing Ms. Lawson, Ms. Lawson believed that she had an attorney representing her.⁴²

In July 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)⁴³

Despite the fact that ghostwriting Ms. Lawson's complaint to the ODC was a violation of the Professional Rules and the fact Mr. Kramer and Ms. Lawson had conspired to draft, sign and submit a fraudulent affidavit, these matters were not given sufficient attention when weighing the value of their testimony.

a. The Hearing Panel Subcommittee's determination that Respondent violated Rule 3.1 in the case of Ms. Lawson, by filing a lawsuit "against her for the purpose of harassing her" is not supported by the evidence where tangible evidence

³⁸ ODC Ex. 21 B. 4166, 4117, Transcript p. 123

³⁹ ODC Ex. 22, B. 4206

⁴⁰ ODC Ex. 22, 4229

⁴¹ ODC Ex. Bates No. 3954

⁴² Transcript p. 67, Transcript p. 290-291, 298-299

⁴³

supported Respondent's claim that he had a contract with Ms. Lawson and that she violated the terms of the contract.⁴⁴

Pursuant to Rule 3.1 "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."

As noted above Ms. Lawson signed an Agreement in September of 2011 requiring that she remain employed for five years in order to receive the \$4,500 as a bonus. There is no dispute that Ms. Lawson left her employment without notice after approximately two years of employment.⁴⁵ 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 \$4,500.00.⁴⁶ Ms. Lawson does not deny that it was her signature on the Agreement. 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 not without merit. Where Mr. Kohout was clearly in need of the funds he had given to her, particularly where he was being sued for funds that had been used to keep her employed, there is no indication that the lawsuit was brought "solely for the purpose of harassing her". Even though Respondent was admittedly upset when she quit without notice and signed the false affidavit, his frustration or

⁴⁴ RHPC ¶36

⁴⁵ ODC Ex. 20 Bates No. 3962

⁴⁶ ODC Ex. 27 Bates Nos. 4191-4192

anger at her for other things does not void his legal rights to seek the enforcement of his Agreement with his employee.

The Hearing Panel's finding in this matter is not supported by clear and convincing evidence.

b. The Hearing Panel Subcommittee concluded in error that Respondent's actions regarding his suit against Ms. Lawson constituted violations of Rule 8.4 (c & d)

“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.” RHPC ¶ 37

The Hearing Panel's finding that Respondent filed a frivolous lawsuit is simply not supported by the evidence. However, the Hearing Panel extends its finding here to charge Respondent with even more egregious conduct. 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 Respondent was engaged in fraudulent conduct. Furthermore the testimony given by Ms. Lawson contradicting the written agreement is simply not credible, but consistent with her inability to recall details and her willingness to exaggerate. This tendency was reflected even where she discussed facts that were easily rebuttable through the evidence in her possession. For example, Ms. Lawson contended that that Respondent sent her objectionable texts when she left his employ because he was upset she left. However this was false.⁴⁷ Where the allegations are even more serious and Ms. Lawson has reflected repeatedly her poor grasp of the facts and willingness to misstate the truth in order to exaggerate her claims of respondent's

⁴⁷ Transcript p. 1032 L 11-14 but see ODC Exhibit Vanessa Lawson texts.

wrongdoing, her testimony should be viewed with skepticism and should not form the basis of any claim under 8.4.

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

“Because Respondent shared attorney’s fees with a non-lawyer, he has violated Rule 5.4 (a) of the Rules of Professional Conduct.” RHPC ¶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 non-lawyer;” 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 distinguishable from Lawyer Disciplinary Board v. William H. Duty, where Mr. Duty’s license was 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). In the Respondent’s case there is no indication that Ms. Lawson was issued a bonus or loan because she recruited specific clients or performed any legal or other work for any specific client. Rather, the extra funds were meant to encourage a sense of camaraderie.⁴⁸

d. Complaint of Ronald G. Kramer, III, Esq. Case No.13-C-286

The Hearing Panel Subcommittee erred when it determined that Respondent violated Rule 8.4 (c & d) 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., RHPC ¶69

⁴⁸ Transcript p.522-523

Mr. Kramer's claim is not supported unsupported by clear and convincing evidence. Mr. Kohout testified at length about why he decided to file the attorney's lien. Specifically, that he had a breakdown in communication with Mr. Kramer and it was his impression that Mr. Kramer intended to walk off with his file without paying anything.⁴⁹ Although Mr. Kramer and Respondent may have had a disagreement regarding the value of the services rendered, the testimony from both parties indicated that Mr. Kohout was an active participant.⁵⁰ Where Respondent had done work for Mr. Kramer he had a right to request that he be paid.

The evidence supporting Mr. Kramer's claims that he did everything and Respondent did nothing, is his own testimony and the affidavit submitted to Judge Gaugot in support of Mr. Kramer's initial complaint of fraud. As noted, Mr. Kramer testified that he and Ms. Lawson drafted the Affidavit discussed above together over the phone for fifteen minutes.⁵¹ Neither party even attempted to confirm basic facts or whether the documents to be sworn to was true. Despite this, Mr. Kramer submitted the Affidavit to the circuit court to demonstrate that Respondent was a liar. Despite this effort, Mr. Kramer testified that Judge Gaugot was not interested in reviewing the matter and made no findings regarding any fraud.⁵²

Mr. Kramer's testimony in this matter is disingenuous. He denies any wrongdoing in the drafting of an affidavit that was fraudulent by describing any error as mere semantics and blaming his error on Ms. Lawson.⁵³ Even if the factual errors in the Affidavit were simply mistakes it is an extraordinary case of the pot calling the kettle black to have one lawyer submitting a false affidavit to attempt to prove that another lawyer's affidavit is false. Where the

⁴⁹ Transcript p. 472-477

⁵⁰ Transcript 293-295.

⁵¹ Transcript p. 279, 280, 285

⁵² Transcript p. 265

⁵³ Transcript p. 285

Hearing Panel relied on the testimony of Mr. Kramer who demonstrated his loose appreciation of the facts and a willingness to submit a false affidavit to the Circuit Court and the Office of Disciplinary Counsel in support of his own pecuniary gain as well as his intent to have Respondent punished for fraud, such testimony should have been given proper weight and should have been deemed insufficient to find Respondent guilty of misconduct under Rule 8.4 in this matter.

C. THE SANCTION OF ANNULMENT RECOMMENDED BY THE HEARING PANEL SUBCOMMITTEE IS NOT WARRANTED BY THE FACTORS RAISED IN RULE 3.16 AND IS NOT PROPORTIONAL TO THE HARM.

As the body charged with the guidance and discipline of the West Virginia Bar, this Court is charged with the final determination regarding the appropriate level of sanctions. To that end West Virginia Rule of Disciplinary Procedure 3.16 requires a consideration of the type of wrong done, the extent of the harm and other factors reflecting on culpability. The relevant inquiry is both : (1) whether the lawyer has violated a duty owed to a client, to the public, the legal system or to the profession; (2) whether the lawyer acted intentionally, knowingly, or negligently; (3) the amount of the actual or potential injury caused by the lawyer's misconduct; and (4) the existence of any aggravating or mitigating factors and a consideration of how the proposed discipline will affect other members of the Bar. Committee on Legal Ethics v. Walker, 178 W.Va. 150, 358 S.E. 2d 234.

As a review of the many disciplinary complaints before this Court reflects, each attorney's situation is somewhat unique and as this Court has affirmed, attention is given to ensure that 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).

Clearly as the above discussion indicates, Respondent and the Hearing Panel Subcommittee have a different point of view regarding the weight of the evidence in the majority of the complaints brought in this matter. However, that does not mean that Respondent is agnostic to his wrongdoing, is unwilling to accept an appropriate sanction or has been uncooperative.

1. Respondent acknowledges that his actions have caused harm to his client, Ms. Richard, this Court and the profession.

Respondent continues to acknowledge the harm done by his actions in this matter particularly as regards Ms. Richard and the financial and person harm he has caused her. Respondent has acknowledged his wrongdoing in failing to pay Ms. Richard's therapy bill in a timely manner pursuant to the letter of protection he signed.⁵⁴ Further, Respondent acknowledges that his renegotiating his share of the settlement agreement without discussing the matter with Ms. Richard in greater detail was in error.^{55 56}

Regarding the claims pertaining to Ms. Lawson and Mr. Kramer, the timeline of events does not reflect that Mr. Kohout sued Ms. Lawson out of a desire to retaliate for her quitting contrary to her claims. Rather, Ms. Lawson, with her mother as a surrogate sued Mr. Kohout first in response to his letter requesting that she return the funds given to her under the 2011 Agreement. These circumstances are so extraordinary, combined with the false affidavit prepared by Mr. Kramer and signed by Ms. Lawson, that he has great difficulty seeing how they have been harmed.

⁵⁴ Transcript p. 345-346

⁵⁵ Transcript 340-341

⁵⁶ Transcript p. 247-249

Regarding the Supreme Court of Appeals and the submission of a check to the Supreme Court of Appeals that was returned for insufficient funds, Respondent has admitted both the error of his actions and the harm done with the check as well as any offense he may have caused to Ms. Gaiser. Although Respondent acted to submit a good check as soon as he spoke to Ms. Gaiser and became aware that the check had bounced, he acknowledges that he should have been more aware of his financial situation.⁵⁷ Respondent has attempted to resolve these matters by installing a new bookkeeping system and changing his procedures and regrets the harm he has caused.

2. The Hearing Panel's determination that Respondent's actions were universally intentional and knowing is not clear regarding all of the claims.

Respondent acknowledges that his intent in the errors set forth in Ms. Richard's case was self serving and that he knew or should have known that his actions were improper. Although he believed that his actions were defensible at the time, he acknowledges that his judgment and thinking were poor.

Regarding the complaints related to his employees, as he has noted above, the evidence indicates that Respondent's claims against them had merit, that he acted to seek financial recourse because he was in a financially compromised position and that he had a reasonable claim for the recourse he sought. While he acted intentionally to file suit against them, there is no indication that he had the intent to do anything constituting misconduct in those cases.

Respondent has acknowledged that he should have had a better understanding of his financial situation and that his failure in this area detrimentally affected every complaint brought before the Panel. As Respondent noted in his testimony, he was overwhelmed and the situation

⁵⁷ Transcript p. 391-392, 393-394

was so out of control at the time that his judgment was impaired.⁵⁸ Respondent acknowledges that his misjudgment is a poor excuse, but can only acknowledge the problems he was facing as he was not able to address them properly at the time.⁵⁹

Where the evidence indicates that the Respondent acted with a varying degree of intent in the matters before the Panel and the Court, Respondent requests that his level of his intent be considered in the light of the circumstances of each case.

3. The actual and prospective harm in this case will be appropriately addressed by a sanction less severe than annulment.

The Hearing Panel has indicated that only annulment will do as a sanction where Respondent has previously been suspended. This is not a reasonable conclusion in these circumstances. Respondent has assisted many clients successfully since his license was reinstated and complaints from his client are very rare. Respondent acknowledges that he erred and that he was having exceptional difficulties in the 2013-2104 period, but he has addressed many problems in his office in order to avoid the situations he was in during that period of time. Under the circumstances where Respondent finds himself, only a few years from the need to retire, he does not have the option to change careers. His only real opportunity to support himself is to improve his skills and do better work in the career that he has.

While the Hearing Panel's dedication to the public's well being is commendable, the majority of the complaints before them do not constitute professional misconduct, and are the result of rather specific circumstances. Annulment is not necessary to teach either Respondent or the public that a greater level of professionalism is expected from counsel.

⁵⁸ Transcript 283-286

⁵⁹ Transcript 389-391

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

a. 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 Respondent's difficulties between 2013 and 2014. In 2013, during a difficult financial period, Respondent sold his house and used the funds to keep himself, his office and his staff afloat. Despite this effort he 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.⁶⁰ 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.⁶¹ 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. He has acknowledged his wrongdoing in this matter.

b. Timely good faith effort to make restitution

Mr. Kohout has paid the Dynamic Therapy bill. As mentioned earlier, Respondent was in a very distressed state during this period of time. Once Mr. Kohout was able to review the

⁶⁰ Transcript p. 372

⁶¹ Transcript p. 456-458

complaints before him with counsel in November of 2015, he was able to review the matters before him with more objectivity. 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.

c. 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 and cooperative. Mr. Kohout has offered more than was required. Although the Office of Disciplinary Complaint has frequently referenced Respondent's initial responses as faulty in their attitude, Respondent has withheld nothing handing over his files and any document requested.

d. 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. If Respondent does not retain his license to practice and some ability to make a living; however modest his living is,

it is likely going to be impossible to either continue making restitution in this matter or to pay the costs assigned to him in this or any other matter.

e. Remoteness of prior offenses

The Hearing Panel notes at length that Mr. Kohout has been previously suspended. 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 has successfully represented many parties.

CONCLUSION

“Heretofore until he was brought to the cross, there was no attempt and no acknowledgment that there was anything that Mr. Kohout had done incorrectly.”

ODC Counsel, Transcript 1/26/16, p. 7 L. 2-6

As the death penalty, the crucifixion if you will, of the Bar, annulment is the most severe punishment that can be issued. Where many of the complaints brought in this case are procedural errors or the result of difficulties Respondent has experienced with his former employees, the proposed sanction is disproportionate in light of the actual harm done. Where actual harm has been done, as in the case of Ms. Richard, annulment will make it impossible for Respondent to carry out further restitution or to otherwise make amends. Although it has been the ODC’s position that there is nothing Respondent could ever do that would warrant mitigating the proposed sanction, Respondent has attempted to make amends despite very difficult circumstances. Mr. Kohout’s issues in the 2013-2014 period, while errant and grave, do 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. Respondent respectfully requests that the Supreme Court of Appeals reduce the discipline recommended by the Hearing Panel.

Respectfully Submitted By:

A handwritten signature in black ink, appearing to read "Rachel L. Fetty". The signature is fluid and cursive, with the first name "Rachel" being the most legible part.

Rachel L. Fetty
Counsel for the Respondent
(WV #10996)