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



LAWYER DISCIPLINARY BOARD,

Petitioner,

v.

No. 18-0869

DANIEL R. GRINDO,

Respondent.

BRIEF OF THE LAWYER DISCIPLINARY BOARD

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I. STATEMENT OF THE CASE

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

This is a disciplinary proceeding against Respondent Daniel R. Grindo, (hereinafter “Respondent”), arising as the result of a Statement of Charges issued against him and filed with the Supreme Court of Appeals of West Virginia on or about October 9, 2018. Respondent was served with the Statement of Charges on October 17, 2018.

Chief Lawyer Disciplinary Counsel filed mandatory discovery on or about November 7, 2018. Respondent filed his Answer to the Statement of Charges on or about December 6, 2018. Respondent did not file any discovery, and on December 28, 2018, Chief Lawyer Disciplinary Counsel filed a Motion to Exclude Testimony of Witnesses and Documentary Evidence or Testimony of Mitigating Factors. The Hearing Panel Subcommittee (hereinafter referred to “HPS”) granted the Office of Lawyer Disciplinary Counsel’s (hereinafter referred to as “ODC”) motion at the January 14, 2019 pre-hearing. Based upon the sudden unavailability of its only witness, on January 28, 2019, Chief Lawyer Disciplinary Counsel filed a Motion to Continue Hearing, which was granted by the Hearing Panel Subcommittee.

Thereafter, this matter proceeded to hearing at the ODC, Charleston, West Virginia, on February 25, 2019. The HPS was comprised of Timothy E. Haught, Esquire, Chairperson, Stephen M. Mathias, Esquire (participating by telephone), and Rachel Scudiere Vitt, Layperson. Rachael L. Fletcher Cipoletti, Chief Lawyer Disciplinary Counsel, appeared on behalf of the ODC. Respondent appeared *pro se*. The HPS heard testimony from Dana F. Eddy, Esquire, and Respondent. In addition, ODC exhibits 1-12 were admitted into evidence.

On or about August 22, 2019, the HPS issued its decision in this matter and on or about February 6, 2019, filed with the Supreme Court of Appeals of West Virginia its “Report of the Hearing Panel Subcommittee ” (hereinafter “Report”). On September 24, 2019, ODC filed its consent to the recommended decision of the HPS. On that same day, Respondent filed an objection to the recommendation, and a motion to file the same out of time. By Order entered September 27, 2019, the Court did not concur with the recommendation of the HPS and ordered the case to be briefed and argued by the parties.

B. FINDINGS OF FACT

Respondent is a lawyer practicing in Gassaway, which is located in Braxton County, West Virginia. Respondent, having passed the bar exam, was admitted to The West Virginia State Bar on September 24, 2002. As such, Respondent is subject to the disciplinary jurisdiction of the Supreme Court of Appeals of West Virginia and its properly constituted Lawyer Disciplinary Board. A complaint was opened after a review of Respondent’s billing vouchers submitted to the Public Defender Services Corporation (hereinafter referred to as PDS) for work performed on multiple dates. ODC subsequently learned that Respondent had previously entered into a Conciliation Agreement with PDS on June 4, 2015, which stated the following:

WHEREAS, PDS’ audit of the vouchers submitted by [Respondent] found that, since January 1, 2013, [Respondent] has exceeded thirty (30) hours of billing on five (5) dates; twenty-four (24) hours of billing on sixteen (16) dates; twenty (20) hours of billing on forty-seven (47) dates; and fifteen (15) hours of billing on ninety-six (96) dates;

WHEREAS, PDS’ audit did not include the time that was billed by Daniel K. Armstrong for these same dates.¹

...

¹ Mr. Armstrong was an associate in Respondent’s law office.

WHEREAS, [Respondent] disclosed that the business model for the law firm consisted of the utilization of non-attorneys to deliver legal services to clients under the supervision and direction of attorneys and that the time devoted by the non-attorneys to the performance of legal tasks was billed at the rates of compensation for “attorney work” under the Governing Act because [Respondent] claims that, otherwise, his office loses money when using staff to perform such services at the rates permitted for paralegal services under the provisions of the Governing Act;

The agreement further stated that Respondent was cooperative and agreed to various provisions set forth in the agreement. Respondent agreed to make restitution in the amount of \$1,927.86 for payments made to PDS for mileage reimbursements and have been determined to be duplicative and payments made for postage charges which, upon review, were overstated. Respondent further agreed to the reduction of vouchers that were presently held by PDS for payment by one-third of the total amount. The total amount of the reduction amounted to \$40,425.90, and represented reflected legal services provided by non-attorneys, but billed at an attorney rate. [Exhibit 1 Bates 000000-000002]

Respondent filed a timely response to the underlying ethics complaint and admitted that he had made mistakes in his billing, but noted that he had been cooperative with PDS in addressing the issues and correcting them. Respondent stated he had been using a timekeeping system that he had learned from other attorneys who had been practicing for many years. Respondent further noted that the Executive Director of PDS, Mr. Eddy, had advised Respondent that he did not believe Respondent was attempting to defraud PDS. Respondent said he had paid the ordered restitution and had changed his timekeeping practice. With regard to the provision requiring Respondent to consult counsel on the issue of self-reporting, Respondent stated that while he did not seek a formal opinion from counsel, he did speak informally to “several attorneys throughout the process.” Respondent

stated that after those discussions, and his communications with PDS, he was of the belief that the matter was “being treated as a procedural correction.” [Exhibit 3 Bates 000012-000015]

Mr. Eddy testified that in 2015, PDS was able to generate “meaningful reports” to track attorney billing. He testified that Respondent was one of the attorneys who came up in the reports for billing in excess of 24 hours in one day. [Transcript at 73] Mr. Eddy contacted Respondent about concerns regarding his billing submissions by letter dated February 18, 2015. [ODC Exhibit 12 Bates 408-413]

Mr. Eddy testified that when Respondent was confronted about the billing issues he represented to Mr. Eddy that the Circuit Courts were familiar with and were okay with his business model. Eddy testified that he did not believe these assertions, but made certain to include the same in the Conciliation Agreement. [Transcript at 89-90]

Respondent acknowledged that “he [didn’t] recall having a specific conversation with any judge” about his “business model”. [Transcript at 21] And, in fact, claimed that despite executing the conciliation agreement that states that the Circuit Courts were aware and understood his fraudulent billing scheme that he now did not “recall making any assertion that [he] had previously cleared that issue with a judge” [Transcript at 21]

Mr. Eddy testified that despite Respondent’s agreement to repay the \$1,927.86 in overpayment of expenses on or before July 4, 2015, that it was not paid until May 8, 2017. [Transcript at 93-99 and Exhibit 12 at 420-427]

Mr. Eddy testified at the disciplinary hearing that attorneys can bill for non-attorney staff time pursuant to West Virginia Code § 29-21-13(a). [Transcript at 67-68] Mr. Eddy testified that he was “put off” by Respondent’s “business model” characterization of the fraudulent billing scheme

because “it was the first time [he] ever heard any court appointed counsel talk in terms of generating profit from this type of work...” [Transcript at 87]

Respondent further agreed to seek independent counsel regarding his possible obligation to self-report this matter to the ODC. Respondent agreed to report the matter to ODC if counsel advised to do so. If counsel advised him that a self report was not necessary, he was to indicate the same to PDS. The conciliation agreement stated that should Respondent not obtain an opinion, PDS would “independently determine whether the matter should be reported to the Office of Disciplinary Counsel.” [Exhibit 1 Bates 000003]

By letter dated December 27, 2017, ODC inquired of Mr. Eddy who stated that according to his records and notes, Respondent advised Mr. Eddy on August 10, 2015, that he would self-report his conduct to the ODC. Mr. Eddy stated he subsequently contacted Respondent to confirm his self-report and Respondent confirmed that he had conversations with the ODC. [Exhibit 5 Bates 000018-000019]

Respondent was provided a copy of Mr. Eddy’s December 27, 2017 letter and was asked to provide an additional response regarding his representation to ODC. Respondent stated that he did not dispute Mr. Eddy’s recitation of the events, and that it appeared he neglected to make the self-report. [Exhibit 7 Bates 000021]

There is no record that Respondent ever reported this matter to ODC or that he sought informal advice regarding the same.

Mr. Eddy testified that Respondent represented to him both in writing and in several conversations that Respondent did in fact self report to ODC, but Mr. Eddy was now presently aware that despite these representations he did not do so. [Transcript at 112]

C. VIOLATIONS OF THE RULES OF PROFESSIONAL CONDUCT

Mr. Eddy testified that he believed “without a doubt” that Respondent committed violations of West Virginia Code § 29-21-13(a). He further agreed that these violations were committed intentionally and knowingly. [Transcript at 101-103] He further testified that it was his opinion that Respondent violated Rules 1.5, 3.3, and 8.4(d) of the Rules of Professional Conduct. [Transcript at 140-142] Because Respondent submitted vouchers wherein he claimed he billed thirty (30) hours of billing on five (5) dates; twenty-four (24) hours of billing on sixteen (16) dates; twenty (20) hours of billing on forty-seven (47) dates; and fifteen (15) hours of billing on ninety-six (96) dates in various cases wherein he was court appointed to represent indigent clients, he has violated Rule 1.5(a)² of the Rules of Professional Conduct. Because Respondent submitted those false billing vouchers to the Circuit Court for approval, Respondent violated Rule 3.3(a)(1)³ of the Rules of Professional Conduct. Because Respondent engaged in a pattern and practice of submitting vouchers and claims for fees wherein he knowingly billed paralegal services at an attorney rate and therefore failed to accurately comply with W.Va. Code §29-21-13a(g), he has violated Rule 8.4(d)⁴ of the Rules of Professional Conduct.

In an effort to avoid inquiry into his over-billing to PDS that would subject him to disciplinary action, Respondent knowingly deceived and intentionally made false statements to PDS regarding his statements regarding his self report to ODC. Additionally, Respondent’s initial representation to ODC regarding the self-report clause of the agreement was misleading, and as such

² Because Respondent’s misconduct occurred prior to January 1, 2015, the Rules in effect prior to that date are applicable here.

³ Because Respondent’s misconduct occurred prior to January 1, 2015, the Rules in effect prior to that date are applicable here.

⁴ Because Respondent’s misconduct occurred prior to January 1, 2015, the Rules in effect prior to that date are applicable here.

has violated Rules 8.1(a)⁵ and 8.4(c)⁶ of the Rules of Professional Conduct.

Finally, ODC's proposed findings of fact and conclusions of law submitted to the HPS also alleged that Respondent engaged in a fraudulent scheme in violation of W.Va. Code § 61-3-24d⁷ and, as such, Respondent violated Rule 8.4(b)⁸ of the Rules of Professional Conduct. Although ODC consented to the HPS recommendation as to the disposition in this case, ODC notes that the HPS stated reasons for not finding a violation of the 8.4(b) of the Rules of Professional Conduct was the absence of a criminal conviction. [HPS Report at 9] Neither the Rules of Professional Conduct, nor this Court's case law require a criminal conviction to make a finding of a violation of Rule 8.4(b) when there is clear and convincing evidence that the lawyer has committed a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.

II. SUMMARY OF ARGUMENT

Respondent, an experienced lawyer, who has previously been the subject of disciplinary action by the Lawyer Disciplinary Board and this Honorable Court, engaged in a pattern and practice of submitting false vouchers to the Circuit Courts and, as a result, improperly received unearned monies from the State of West Virginia. After being confronted by the PDS regarding the improper billing practices and overpayments, Respondent entered into a conciliation agreement to repay the PDS and made necessary changes to his billing practices. However, Respondent then made false

⁵ Because Respondent's misconduct occurred prior to January 1, 2015, as well as after that date, both version of the Rules apply.

⁶ Because Respondent's misconduct occurred prior to January 1, 2015, as well as after that date, both version of the Rules apply.

⁷ West Virginia Code §61-3-24d states "(a) Any person who willfully deprives another of any money, goods, property or services by means of fraudulent pretenses, representations or promises shall be guilty of the larceny thereof. (b) In determining the value of the money, goods, property or services referred to in subsection (a) of this section, it shall be permissible to cumulate amounts or values where such money, goods, property or services were fraudulently obtained as part of a common scheme or plan."

⁸ Because Respondent's misconduct occurred prior to January 1 2015, the Rules in effect prior to that date are applicable here.

statements to PDS and the ODC about his misconduct and whether he self reported the same to ODC pursuant to the terms of the conciliation agreement to avoid any additional potential consequences.

Based on the Cooke decision and its progeny, the presumptive sanction for devising and carrying out a scheme to defraud the Courts of this State and unethically take the public monies set aside for indigent representation is suspension of the lawyer's license to practice law for a term of years. *See* Lawyer Disciplinary Board v. Cooke, 239 W.Va. 40, 799 S.E.2d 117 (2017). After weighing the aggravating and mitigating factors, ODC urges this Court to adopt the HPS recommendations as set forth below.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 19 of the Rules of Appellate Procedure, the Court set this matter for oral argument on February 12, 2020.

IV. ARGUMENT

A. STANDARD OF PROOF

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

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

McCorkle, Id.; Lawyer Disciplinary Board v. Cunningham, 195 W. Va. 27, 464 S.E.2d 181 (1995).

At the Supreme Court level, "[t]he burden is on the attorney at law to show that the factual findings are not supported by reliable, probative, and substantial evidence on the whole adjudicatory record made before the Board." Cunningham, 464 S.E.2d at 189; McCorkle, 192 W. Va. at 290, 452 S.E.2d at 381.

The charges against an attorney must be proven by clear and convincing evidence pursuant to Rule 3.7 of the Rules of Lawyer Disciplinary Procedure. *See*, Syl. Pt. 1, Lawyer Disciplinary Board v. McGraw, 194 W. Va. 788, 461 S.E.2d 850 (1995). The Supreme Court of Appeals is the final arbiter of formal legal ethic charges and must make the ultimate decisions about public reprimands, suspensions or annulments of attorneys' licenses to practice law. Syl. Pt. 3, Committee on Legal Ethics v. Blair, 174 W.Va. 494, 327 S.E.2d 671 (1984); Syl. Pt. 7, Committee on Legal Ethics v. Karl, 192 W.Va. 23, 449 S.E.2d 277 (1994).

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

The Supreme Court of Appeals of West Virginia has long recognized that attorney disciplinary proceedings are not designed solely to punish the attorney, but also to protect the public, to reassure the public as to the reliability and integrity of attorneys, and to safeguard its interests in the administration of justice. Lawyer Disciplinary Board v. Taylor, 192 W.Va. 139, 451 S.E.2d 440 (1994). Factors to be considered in imposing appropriate sanctions are found in Rule 3.16 of the Rules of Lawyer Disciplinary Procedure. These factors consist of: (1) whether the lawyer has violated a duty owed to a client, to the public, to the legal system, or to the profession; (2) whether the lawyer acted intentionally, knowingly, or negligently; (3) the amount of the actual or potential injury caused by the lawyer's misconduct; and (4) the existence of any aggravating or mitigating

factors. *See also*, Syl. Pt. 4, Office of Disciplinary Counsel v. Jordan, 204 W.Va. 495, 513 S.E.2d 722 (1998). A review of the record in this matter indicates that Respondent has transgressed all four factors set forth in Jordan.

1. Respondent violated duties to his clients, to the public, to the legal system and to the legal profession.

In determining the nature of the ethical duty violated, the standards assume that the most important ethical duties are those obligations which a lawyer owes to clients. In addition to duties owed to clients, the lawyer also owes duties to the general public. Members of the public are entitled to expect lawyers to exhibit the highest standards of honesty and integrity, and lawyers have a duty not to engage in conduct involving dishonesty or interference with the administration of justice.

Lawyers also owe duties to the legal system. Lawyers are officers of the court, and must abide by the rules of substance and procedure which shape the administration of justice. Lawyers must always operate within the bounds of the law, and cannot engage in any other illegal or improper conduct. Finally, lawyers owe duties to the legal profession. Unlike the obligations mentioned above, these duties are not inherent in the relationship between the lawyer and the community. These duties do not concern the lawyer's basic responsibilities in representing clients, serving as an officer of the court, or maintaining the public trust, but include other duties relating to the profession. The evidence in this case establishes by clear and convincing proof that Respondent violated his duties owed to his clients, the general public, the legal system, and the legal profession.

2. Respondent acted intentionally and knowingly.

The most culpable mental state is that of intent, when the lawyer acts with the conscious objective or purpose to accomplish a particular result. The next most culpable mental state is that of knowledge, when the lawyer acts with conscious awareness of the nature or attendant

circumstances of his conduct, both without the conscious objective or purpose to accomplish a particular result. The least culpable mental state is negligence, when a lawyer fails to be aware of a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.

The HPS found that there was “no question” that Respondent acted intentionally and knowingly as it relates to the submission of the vouchers to both the Court and PDS as he acted with the intent to submit non attorney staff time at a rate nearly triple the compensable amount for his own financial gain. However, the HPS noted that there was no evidence to the work was not actually performed, just that the services were improperly billed at the higher rate of compensation. [HPS Report at 12-13]

The HPS further found that Respondent acted intentionally as it relates to the failure to self report and the false statements made to Dana Eddy, and later to ODC regarding the same. The HPS noted that Respondent’s statements were intentional, knowing, fraudulent and deceitful with the intent to mislead Dana Eddy and the ODC. [HPS Report at 13]

3. The amount of real injury is great.

Injury is harm to a client, the public, the legal system, or the legal profession which results from a lawyer’s misconduct. The level of injury can range from “serious” injury to “little or no” injury. A reference to “injury” alone indicates any level of injury greater than “little or no” injury. “Potential injury” is the harm to a client, the public, the legal system or legal profession that is reasonably foreseeable at the time of the lawyer’s misconduct and which, but for some intervening factor or event, would probably have resulted from the lawyer’s misconduct.

There was potential injury to Respondent’s former criminal clients if those clients had been

ordered to pay back to the State the over-billing committed by Respondent. Those clients have the potential of paying for time and work performed by non attorney staff that Respondent billed at the higher attorney rate. Furthermore, real injury to the legal system has occurred a result of Respondent's misconduct. The false vouchers submitted by Respondent and other attorneys have prevented the legislature from considering a raise to the payment rates to court appointed attorneys, and has contributed to a bad reputation of panel attorneys to the public, and may have prevented other attorneys from undertaking such work. The legal system is sorely in need of qualified Panel attorneys, and such misconduct, and the necessary investigation and prosecutions of this misconduct has brought disrepute to the legal system.

4. The existence of any aggravating factors.

Aggravating factors are considerations enumerated under Rule 3.16 of the Rules of Lawyer Disciplinary Procedure for the Court to examine when considering the imposition of sanctions. Elaborating on this rule, the Scott Court held "that aggravating factors in a lawyer disciplinary proceeding 'are any considerations, or factors that may justify an increase in the degree of discipline to be imposed.'" Lawyer Disciplinary Board v. Scott, 213 W.Va. 209, 216, 579 S.E. 2d 550, 557 (2003) *quoting* ABA Model Standards for Imposing Lawyer Sanctions, 9.21 (1992). The aggravating factors present in this case are: (1) prior discipline: four (4) Investigative Panel Admonishments issued in December of 2009 and a Public Reprimand from the Supreme Court in June of 2013; (2) experience in the practice of law; (3) multiple offenses constituting a pattern of misconduct; (4) Respondent benefitted financially from the billing scheme, but the HPS noted that Respondent eventually complied with the restitution agreement; (5) the submission of improper vouchers billing paralegal time as lawyer time in violation of the billing statute he had a duty to

understand and follow; and (6) fraudulent and deceitful statements to Mr. Eddy and ODC regarding his duty to report his conduct of improper billing.

5. The existence of any mitigating factors.

In addition to adopting aggravating factors in Scott, the Scott court also adopted mitigating factors in a lawyer disciplinary proceedings and stated that mitigating factors “are any considerations or factors that may justify a reduction in the degree of discipline to be imposed.” Lawyer Disciplinary Board v. Scott, 213 W.Va. 209, 216, 579 S.E.2d 550, 557 (2003) quoting ABA Model Standards for Imposing Lawyer Sanctions, 9.31 (1992). Mitigating factors were not envisioned to insulate a violating lawyer from discipline. Although ODC argues no mitigating factors exist in this case, the mitigating factors found by the HPS are: (1) the work billed was actually performed by paralegals or other staff and not otherwise unreasonable; (2) Respondent cooperated with Dana Eddy and entered into a conciliation agreement which he eventually fully complied with; (3) Respondent expressed remorse for his actions; and (4) the HPS did not find an intent to defraud, deceive or that Respondent committed a criminal act with regard to the improper billing.

C. SANCTION

The Rules of Professional Conduct state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. Syllabus Pt. 3, *in part*, Committee on Legal Ethics v. Tatterson, 173 W.Va. 613, 319 S.E.2d 381 (1984), *cited in* Committee on Legal Ethics v. Morton, 186 W.Va. 43, 45, 410 S.E.2d 279, 281 (1991). In addition, discipline must serve as both instruction on the standards for ethical conduct and as a deterrent against similar misconduct to other attorneys. In Syllabus Point 3 of Committee on Legal Ethics v. Walker, 178 W.Va. 150, 358 S.E.2d 234 (1987), the Court stated:

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

Moreover, a principle purpose of attorney disciplinary proceedings is to safeguard the public's interest in the administration of justice. Daily Gazette v. Committee on Legal Ethics, 174 W.Va. 359, 326 S.E.2d 705 (1984); Lawyer Disciplinary Board v. Hardison, 205 W.Va. 344, 518 S.E.2d 101 (1999).

Rule 3.15 of the Rules of Lawyer Disciplinary Procedure provides that the following sanctions may be imposed in a disciplinary proceeding: (1) probation; (2) restitution; (3) limitation on the nature or extent of future practice; (4) supervised practice; (5) community service; (6) admonishment; (7) reprimand; (8) suspension; or (9) annulment.

In 2017, the Supreme Court decided a case involving the submission of false PDS vouchers in Lawyer Disciplinary Board v. Cooke, 239 W.Va. 40, 799 S.E.2d 117 (2017), wherein the attorney was suspended for two years. In that case, the attorney had five (5) days of over twenty (20) hours of billable time submitted for payment, and of those five (5) days, two (2) of the days were over twenty-four (24) hours. In addition, the attorney was found to have engaged in what PDS considered “‘value billing,’ i.e. billing the ‘value’ of a task, rather than the actual time it took.” Cooke, 239 W.Va. at 45, 799 S.E.2d at 122. The Supreme Court stated:

“the actual accounting of his time provided by [the attorney] is replete with admittedly excessive charges. [The attorney] maintains, however, that this excess billing reflects ‘clerical errors’ rather than deliberate overbilling. We find that the volume and nature of these errors on dates randomly selected by PDS for further explanation – which are almost exclusively to [the attorney’s] monetary benefit – belie any suggestion that they are inadvertent. While [the attorney’s] explanations are somewhat inscrutable, that portion which is clear is patently demonstrative of excessive billing on its face. . . [The attorney] frequently ‘value billed,’ billed time at far greater than he admittedly documented, and billed for the same activity over

multiple vouchers. Moreover, he frequently billed greater amounts of time than were available during certain windows of activity.”

Id. 239 W.Va. at 50-51, 799 S.E.2d at 127-128. The attorney in Cooke did not have a history of discipline along with entering into a conciliation agreement, but had two additional complaints involving failure to timely file a brief as a guardian *ad litem* in an abuse and neglect case, and failure to communicate and refund funds in a case wherein he took an up-front retainer. Our Supreme Court noted that “with respect to fraudulent billing, suspensions of years, rather than months are the presumptive sanction. This Court considers the protection of the public and the State coffers of paramount importance, particularly as pertains to lawyer disciplinary matters.” Cooke, 239 W.Va. at 55, 799 S.E.2d at 132.

In 2019, in the Hassan case, the Court suspended a lawyer for six months who admittedly engaged in “value billing” and “block billing” to calculate the amounts owed to him by PDS for his court-appointed representation of criminal defendants. Mr. Hassan’s billing practices resulted in impractical absurdities such as billing thirty or more hours on multiple days. Lawyer Disciplinary Bd. v. Hassan, 241 W. Va. 298, 824 S.E.2d 224, 226 (2019). Similar to the instant case, Hassan entered into a conciliation agreement with the PDS that detailed the extent of Mr. Hassan’s billing discrepancies, including billing (1) thirty or more hours on three dates; (2) twenty-four to thirty hours on four dates; (3) twenty to twenty-four hours on eleven dates;⁴ and (4) fifteen to twenty hours on twenty-six dates. Hassan, 824 S.E.2d 224 at 227. Hassan testified in his disciplinary hearing that he engaged in the fraudulent billing because “I can’t make any money. I’ll lose money doing it.” The Court was particularly concerned with this testimony and noted “[w]hile we recognize that Mr. Hassan has been remorseful, we are concerned by his testimony regarding his inability to make money on court-appointed criminal defendants as it appears to be an attempt to rationalize the inaccurate billing.” Hassan, 824 S.E.2d 224, 231 (2019). A critical distinction from Hassan, of

course, is that Hassan self reported the misconduct to ODC and cooperated fully with the investigation, and Respondent not only failed to self report, but lied to Mr. Eddy about reporting.

Finally, most recently, by Order entered April 11, 2019, the Supreme Court suspended the license of Gerald G. Jacovetty, Jr. for a period of two years for fraudulent over-billing to PDS. Jacovetty, admitted to the Bar since 1989, entered into a conciliation agreement with PDS on or about October 27, 2015, and agreed to a reduction of the held vouchers in the amount of \$127,771.55. At the hearing, Jacovetty attributed blame to a legal assistant, but conceded that he was responsible for the work done by the assistant and that he trained her on how to handle billing. Additionally, the legal assistant testified under oath that she completed the billing vouchers from Jacovetty's notes and all were approved by him prior to submission to the Court. Similar to Respondent, Jacovetty did not self report, had a prior Investigative Panel Admonishment, and had substantial experience in the law. Lawyer Disciplinary Board v. Gerald G. Jacovetty, Jr., No. 18-0365 (WV 4/11/19).

West Virginia Code 29-21-13 requires panel attorneys to maintain detailed and accurate records of the time expended and expenses incurred on behalf of eligible clients, and provides that panel counsel be compensated for actual and necessary time expended for services performed and expenses incurred. The submissions that Respondent made to the Court and to PDS were not true and correct and were, instead, fraudulent and dishonest. Respondent engaged in conduct that was prejudicial to the administration of justice because submission of false fees are not in the name of justice, and hinder the ability of the PDS in meeting their goal of representing indigent clients with the limited public funds they receive. The Courts, especially Circuit Judges because of the number of cases they preside over, rely on attorneys to provide the true and accurate time when panel attorneys submit vouchers to be paid, and without such truthfulness, such misconduct casts a dark shadow on the legal system.

While the schemes to defraud may be factually distinctive the decided disciplinary cases dealing with a pattern of fraudulent, over-billing to the public defender services all have similar hallmark rule violations: candor to the court; unreasonable, unearned fees; prejudice to the administration of justice; and fraud, deceit and misrepresentation. The Court relies upon an analysis of the mitigating and aggravating facts in each case to determine the length of the presumptive suspension of the lawyer's license to practice law.

Cooke, Hassan, Jacovetty, and Respondent all entered into conciliation agreements to repay PDS by reduction of the held vouchers. Unlike Cooke, Respondent has one count of misconduct charged in the Statement of Charges, however, Cooke had no prior discipline and Respondent has had four IP admonishments and a Supreme Court Public Reprimand. Similar to Hassan, Respondent's motivation was financial gain, however, a critical distinction is that Hassan self-reported the misconduct to ODC and cooperated fully in the investigation. As with Jacovetty, Respondent has prior discipline and experience in the practice of law. A critical distinction in this case is Respondent's penchant for dishonesty. In addition to the scheme of submitting false and misleading billing vouchers to the Court and to PDS to defraud the people of West Virginia, the record is replete with examples of Respondent's dishonest assertions and half truths to PDS and ODC when confronted with the misconduct. These are intentional acts of deception. The Court in Busch stated:

...the record shows that Mr. Busch was provided with many opportunities to correct the misstatements and inaccuracies that he portrayed to the lower court. When those opportunities arose, he did not take advantage of them. His pattern of misconduct only deepened the misrepresentations made to the court.

If Mr. Busch's actions were truly negligent and not intentional, he had numerous opportunities to make amends. He made a conscious choice, however, to maintain his misrepresentations to the lower court.

Lawyer Disciplinary Board. v. Busch, 233 W. Va. 43, 54, 754 S.E.2d 729, 740 (2014).

When given the opportunity by Chief Counsel to acknowledge he made false, misleading statements to PDS about the Court’s awareness and approval of the fraudulent billing scheme and his self-reports to ODC, instead of acknowledging the same he instead claimed he “didn’t recall” making the specific false statements. [Transcript at 21 and 35] The Munoz Court stated:

We find clear and convincing evidence to support the HPS’s factual finding that he misrepresented the facts surrounding his requests for continuances in his DUI criminal case, despite his characterization of those matters as simply based upon court confusion, misinformation, or contradictory testimony of the prosecuting attorney and the magistrate. We find his behavior egregious and reprehensible. As succinctly stated in Astles’ Case, 134 N.H. 602, 594 A.2d 167 (1991), “[n]o single transgression reflects more negatively on the legal profession than a lie.” Id. at 170. The honor of practicing law “does not come without the concomitant responsibilities of truth, candor and honesty.... [I]t can be said that the presence of these virtues in members of the bar comprises a large portion of the fulcrum upon which the scales of justice rest.” Jones’ Case, 137 N.H. 351, 628 A.2d 254, 259 (1993) (quotation omitted). “Respect for our profession is diminished with every deceitful act of a lawyer.” Disciplinary Counsel v. Fowerbaugh, 74 Ohio St.3d 187, 658 N.E.2d 237, 239 (1995).

Lawyer Disciplinary Board v. Munoz, 240 W. Va. 42, 50–51, 807 S.E.2d 290, 298–99 (2017). Respondent’s lack of candor to the Court and ODC alone justify suspension. *See* Lawyer Disciplinary Bd. v. Smoot, 228 W.Va. 1, 716 S.E.2d 491 (2010) [one year suspension after lawyer intentionally removed a narrative section from a doctor’s report and then provided the redacted report to an administrative law judge and the *pro se* opponent]; Lawyer Disciplinary Board v. Elswick, 231 W.Va. 684, 749 S.E.2d 577 (2013) [two year suspension after lawyer knowingly allowed her paralegal to elicit a false statement from a potential witness, allowed that false statement to be submitted to a court, failed to take any remedial action, and engaged in a romantic “pen-pal” relationship with the witness that was adverse to her client’s objectives]; and Lawyer Disciplinary Board v. Haught, 233 W.Va. 185, 757 S.E.2d 609 (2014) [one year suspension after lawyer failed to properly deposit client funds, lied to ODC about how he handled those funds, and lied to ODC

about the identity of his clients in a real estate transaction]

Sanctions are not imposed only to punish the attorney, but also are designed to reassure the public's confidence in the integrity of the legal profession and to deter other lawyers from similar conduct. Committee on Legal Ethics v. White, 189 W.Va. 135, 428 S.E.2d 556 (1993); Committee on Legal Ethics v. Walker, 178 W.Va. 150, 358 S.E.2d 234 (1987); Committee on Legal Ethics v. Roark, 181 W.Va. 260, 382 S.E.2d 313 (1989); Lawyer Disciplinary Board v. Friend, 200 W.Va. 368, 489 S.E.2d 750 (1997); Lawyer Disciplinary Board v. Keenan, 208 W.Va. 645, 542 S.E.2d 466 (2000) W.Va. 645, 542 S.E.2d 466 (2000) A principle purpose of attorney disciplinary proceedings is to safeguard the public's interest in the administration of justice. Daily Gazette v. Committee on Legal Ethics, 174 W.Va. 359, 326 S.E.2d 705 (1984); Lawyer Disciplinary Board v. Hardison, 205 W.Va. 344, 518 S.E.2d 101 (1999).

V. CONCLUSION

“The right of one charged with a crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.” Gideon v. Wainwright, 372 U.S. 335, 344, 83 S. Ct. 792, 796, 9 L. Ed. 2d 799 (1963) Since the landmark decision in Gideon, lawyers throughout this country and our State have devoted their careers to indigent defense. These often underappreciated lawyers have borne the brunt of a system that is all too often searching for financial resources, but never wanting for a client base. Respondent's actions tarnish the lawyers who admirably defend our indigent citizens with honor and zeal have created a lasting legacy of the preservation of a right to counsel and helped shape the criminal law in our State. Accordingly, ODC requests that given the aggravating factors and mitigating factors and the relevant case law, that the Court should order:

- a. That Respondent's law license be suspended for a period of two years;

- b. That Respondent comply with the provisions of Rule 3.28 of the Rules of Lawyer Disciplinary Procedure;
- c. That pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure, Respondent, if reinstated, shall not engage in any work compensated through Public Defender Services;
- d. That prior to filing a petition for reinstatement pursuant to Rule 3.32 of the Rules of Lawyer Disciplinary Procedure, Respondent must complete an additional six hours of CLE in ethics; and
- e. That prior to filing a petition for reinstatement pursuant to Rule 3.32 of the Rules of Lawyer Disciplinary Procedure, Respondent must reimburse the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure.

Respectfully submitted,
The Lawyer Disciplinary Board
By Counsel



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