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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS

OF WEST VIRGINIA

Re: JAMES B. ATKINS, a member of
The West Virginia State Bar

Bar No.: 8960
Supreme Court No.: 18-0918
I.D. No.: 17-01-009

HEARING PANEL SUBCOMMITTEE'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED SANCTIONS

I. PROCEDURAL HISTORY

Formal charges were filed against James B. Atkins (hereinafter "Respondent") with the Clerk of the Supreme Court of Appeals on or about October 23, 2018, and served upon Respondent via certified mail by the Clerk on October 26, 2018. Senior Lawyer Disciplinary Counsel, filed her mandatory discovery on or about November 15, 2018. Respondent filed his Answer to the Statement of Charges on or about December 14, 2018. Respondent provided his mandatory discovery on December 19, 2018. Senior Lawyer Disciplinary Counsel filed "Agreed Joint Stipulations" on January 30, 2019. The Hearing Panel Subcommittee ("HPS") accepted the stipulations at the telephonic prehearing held on February 7, 2019.

Thereafter, this matter proceeded to hearing in Charleston, West Virginia, on February 21, 2019. The HPS was comprised of Kelly D. Ambrose, Esquire, Chairperson, James R. Akers, II, Esquire, and Loretta Walker Sites, Layperson. Andrea J. Hinerman, Senior Lawyer

Disciplinary Counsel, appeared on behalf of the Office of Lawyer Disciplinary Counsel ("ODC"). Carol P. Smith, Esquire, appeared on behalf of Respondent, who also appeared.[1] The HPS heard testimony from Kirk Brumbaugh, Esquire, and Respondent. In addition, ODC Exhibits 1-17, Respondent's Exhibits 2-23 [filed under seal] and Joint Exhibit 1 were admitted into evidence.[2]

Based upon the evidence and the record, the HPS of the Lawyer Disciplinary Board finds the following Findings of Fact, Conclusions of Law and Recommended Sanctions in this matter by clear and convincing evidence.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent is a lawyer practicing in Buffalo, which is located in Putnam County, West Virginia. Respondent, having passed the bar exam, was admitted to The West Virginia State Bar on April 23, 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.

COUNT I
I.D. No. 17-01-009
Complaint of Kirk E. Brumbaugh, Esquire

2. On or about January 9, 2017, Complainant Kirk E. Brumbaugh, Esquire ("Complainant"), filed a complaint against Respondent. [Tr. 12; ODC Ex. 1]

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[1] On or about April 1, 2019, a Notice of Substitution of Counsel was filed by Ms. Smith, in which Jared M. Tully, Esquire, was named as Respondent's new counsel.

[2] Joint Ex. 1 is the 2nd Agreed Joint Stipulations which clarified certain dates in Paragraphs 17 and 18 of the Statement of Charges. [Tr. 5] *But see*, Tr. 196, wherein Joint Ex. 1 is mistakenly referred to as Joint Ex. 2.

3. Complainant alleged on or about November 17, 2015, Respondent had received funds in the amount of $14,807.55 as a result of a settlement agreement that had been reached with a debtor, but Respondent had yet to remit the funds to Complainant's law firm, Brumbaugh & Quandahl.[3] [Tr. 16-18; ODC Ex. 1, 000002]

4. Complainant alleged Respondent was contacted by email on or about January 4, 2016, to inquire about the status of the matter and Respondent advised that the funds would be received from the debtor in or about February 2016. [Tr. 16-18; ODC Ex. 1, 000012]

5. Complainant alleged Respondent and/or employees of his law office then failed to respond to seven (7) emails sent between March 2016 and September 2016, and nine (9) voicemails left between September 2016 and November 2016, wherein Complainant and/or his staff inquired about the status of the funds. Complainant stated Respondent finally responded to his inquiries on or about December 20, 2016, but Complainant filed the complaint when he did not receive the funds thereafter and he alleged Respondent used the settlement money for his own benefit. [Tr. 16-18; ODC Ex. 1, 000009-000012]

6. In his timely filed response to the complaint, Respondent said he was not advised of the issue until late November of 2016, but maintained he immediately attempted to resolve the dispute with Complainant. Respondent said in late December of 2016, Complainant sent an associate to Respondent's office to review his Brumbaugh & Quandahl files. Respondent and Complainant's associate "worked together to audit every single file, going back over a decade." Respondent denied using any money belonging to

[3] At a September 12, 2017 Sworn Statement, Respondent said that Brumbaugh & Quandahl was a "clearing house in the debt collection industry" whose "job is take the large portfolio of cases that [a national bank] might have and to go and find attorneys that are in the network and to audit them, make sure they're compliant with whatever the terms are of that particular bank or what they think are industry standard and to farm out the cases that happen to be in those states or those regions." Respondent "answered" to Brumbaugh & Quandahl and while his client would be the named plaintiff (i.e., the bank), the client would deal with Brumbaugh & Quandahl. Respondent had been handling

Complainant for his own benefit. Respondent said they had reached an agreement whereby he agreed to close all files associated with Complainant's law firm but he would keep open the file Complainant had referenced in his complaint until Respondent sent the final remittance in "next 30 to 45 days" following the December 2016 file audit. Respondent said he also sent "some follow-up correspondence to [Complainant's] firm regarding the closure cases and [the final] remittance" and provided a copy of the remittance check dated January 25, 2017, which he sent to Complainant along with his response to the ethics complaint. The copy of a check submitted with his response was check No. 086105 in the amount of $11,150.91[4] drawn on the Atkins & Ogle Law Offices, LC, Client Account, dated January 25, 2017, and made out to Brumbaugh & Quandahl, PC. [Tr. 23, 26, 28-29; ODC Ex. 3; *See also*, ODC Ex. 17, 000495]

7. Respondent appeared at the ODC on September 12, 2017, for a sworn statement in this matter. Respondent said the underlying case was "dormant" for a number of years until the debtor wanted to either refinance a loan or purchase a new home. Respondent said his office received a number of telephone calls from the debtor and the title company during that time wherein one or the other asked for a "payoff amount or what would be the settlement amount...." Respondent also said when he and/or his office received these types of calls, he or someone at his office would contact Brumbaugh and Quandahl who, in turn, would contact the bank to determine what amount the bank would take to settle the debt. Respondent said in most cases, once he received notice about the amount, he would send the debtor a letter indicating that if a specific amount was paid within so many days, then the debtor would receive a release. Respondent said in this case, there

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debt collection cases for Brumbaugh & Quandahl for more than a decade. [ODC Ex. 8, 000057-000060]

was a "disagreement" between his office and Complainant's office because Respondent thought there was an opportunity to obtain a payoff of the entire debt rather than a settlement amount for less than the entire amount. However, Respondent said that Brumbaugh & Quandahl indicated that it wanted a settlement letter sent, not a payoff letter. [ODC Ex. 8, 000062-000065]

8. Respondent said that the person in his office who communicated with Brumbaugh & Quandahl advised him that she had responded to their inquiries about the status of the matter. Respondent said he "was inclined to believe her" and that his staff responded by telephone to the inquiries, rather than by email. Nonetheless, Respondent acknowledged that there had been no email responses from his office for approximately eleven (11) months and that he only became involved in late November 2016 to deal with the matter. Respondent acknowledged that he is responsible for the actions of his staff in his law office, that his office had received the debtor's settlement check on or about January 16, 2016, that the funds had been deposited into his client trust account, that he had held the money in that account for a year, and that the funds had not been remitted to Complainant until after the filing of this ethics complaint in January of 2017. [ODC Ex. 8, 000065-000072; 000081; 000087; *See also*, ODC Ex. 9, 000187-188]

9. Upon information and belief, Respondent maintained bank accounts at United Bank until on or about June 30, 2017, and at City National Bank thereafter. These bank accounts included an operating account and client trust accounts, in the name of Atkins & Ogle Law Firm, LC. [ODC Ex. 8, 000054-000055]

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[4] The amount of this check represents the settlement funds minus Respondent's fees and costs. [Tr. 23]

10. On or about November 13, 2017, and November 14, 2017, the ODC received Respondent's bank records from United Bank and City National Bank, respectively, in response to a subpoena issued on October 13, 2017. The subpoenas requested bank records from accounts held in the name of James B. Atkins, Esquire, and/or Atkins & Ogle Law Offices, LC, from January 1, 2017, to present date [of the subpoena]. [ODC Ex. 17 (Sealed)]

11. On or about May 29, 2018, the ODC received additional bank records from United Bank in response to a subpoena issued on May 2, 2018. This subpoena requested bank records from accounts held in the name of James B. Atkins, Esquire, and/or Atkins & Ogle Law Office, LC, from January 1, 2016, through December 31, 2016. [ODC Ex. 16, Vol. II (Sealed)]

12. On January 20, 2016, a check for $14,807.55 from Title Source, Inc., was deposited into Respondent's "Client Account" at United Bank. The payee was Commonwealth Financial Systems, Inc., 105 River Vista Drive, Buffalo, West Virginia, 25033. [Tr. 145-146; ODC Ex. 16, Vol. II, 00391, 003929, 004021; *See also*, ODC Ex. 9, 000187]

13. On January 31, 2016, the ending balance on Respondent's "Client Account" was $13,299.64. [Tr. 146-149; ODC Ex. 16, Vol. II, 003911]

14. The ending balance on Respondent's "Client Account" thereafter from February to October, 2016, returned to a balance over $14,807.55. [Tr. 150-152; ODC Ex. 16, 004036, 004050, 004068, 004084, 004100, 004116, 004129, 004146, 004163]

15. The ending balance of Respondent's "Client Account" on November 30, 2016, however, was $6,614.80. [Tr. 152; ODC Ex. 16, Vol. II, 004178]

16. On December 31, 2016, the ending balance of Respondent's "Client Account" was negative $42.99. [Tr. 152-154; ODC Ex. 16, Vol. II, 004325]

17. On January 31, 2017, the ending balance of Respondent's "Client Account" was $14,572.55. [ODC Ex. 17, 000368]

18. Respondent's bank records indicate a check in the amount of $11,150.91 was negotiated on or about February 14, 2017. [ODC 17, 000464, 000495]

19. Because Respondent failed to act with reasonable diligence in this matter, he has violated Rule 1.3 of the Rules of Professional Conduct, which provides as follows:

> **Rule 1.3. Diligence.**
> A lawyer shall act with reasonable diligence and promptness in representing a client.

20. Because Respondent failed to keep Complainant reasonably informed about the status of the matter and failed to promptly comply with reasonable requests for information, Respondent has violated Rule 1.4(a)(3) and 1.4(a)(4) of the Rules of Professional Conduct, which provides as follows:

> **Rule 1.4. Communication.**
> (a) A lawyer shall:
> ***
> (3) keep the client reasonably informed about the status of the matter;
> (4) promptly comply with reasonable requests for information; ....

21. Because Respondent failed to hold client funds in an account designated as a "client's trust account," he violated Rule 1.15(a) of the Rules of Professional Conduct, which provides as follows:

> **Rule 1.15. Safekeeping property.**
> (a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a

representation separate from the lawyer's own property. Funds shall be kept in a separate account designated as a "client's trust account" in an institution whose accounts are federally insured and maintained in the state where the lawyer's office is situated, or in a separate account elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Such separate accounts must comply with State Bar Administrative Rule 10 with regard to overdraft reporting. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

22. Because Respondent failed to promptly notify Complainant he had received funds in which Complainant had an interest and then failed to promptly deliver the funds to Complainant, he violated Rule 1.15(d) of the Rules of Professional Conduct, which provides as follows:

> **Rule 1.15. Safekeeping property.**
> (d) Upon receiving funds or other property which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

23. Because Respondent wrongfully misappropriated and converted funds belonging to his client or a third party to his own use, he violated Rules 8.4(c) and 8.4(d) of the Rules of Professional Conduct, which provides as follows:

> **Rule 8.4. Misconduct.**
> It is professional misconduct for a lawyer to:
> * * *
> (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;....

24. Because Respondent failed to properly supervise his nonlawyer assistants to ensure that their conduct was compatible with Respondent's professional obligations, he violated Rule 5.3 of the Rules of Professional Conduct, which provides as follows:

> **Rule 5.3. Responsibilities Regarding Nonlawyer Assistance.**
> With respect to a nonlawyer employed or retained by or associated with a lawyer:
> (a) A partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
> (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
> (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional conduct if engaged in by a lawyer if:
> (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
> (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

25. Because Respondent knowingly made a false statement of material fact in connection with a disciplinary matter at his September 12, 2017 sworn statement [ODC Ex. 8, 000087] when he answered "Yes, ma'am" to the question, "[a]nd so that money had been held in your [client] account for a year[,]" when the balance of that bank account fell

below the amount that Respondent was required to safeguard, he violated Rule 8.1(a) of the Rules of Professional Conduct, as set forth below:

> **Rule 8.1. Bar Admission and Disciplinary Matters**
> [A] lawyer in connection with ... a disciplinary matter, shall not:
> (a) knowingly make a false statement of material fact;...

III. DISCUSSION

The Supreme Court of Appeals of West Virginia has long recognized 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. Respondent violated duties to his client, to the legal system and to the legal profession.

It is without question Respondent engaged in conduct in violation of the Rules of Professional Conduct and violated duties owed to his client, the legal system and the legal profession. The evidence clearly and convincingly demonstrates Respondent committed multiple violations of the Rules of Professional Conduct, including: (1) failure to act with reasonable

diligence and promptness in representing his client; (2) failure to communicate effectively with his client; (3) failure to promptly notify his client that client funds had been received and failure to promptly remit those funds to the client which resulted in his failure to safeguard his client's property such that client money was commingled with other law firm money and misappropriated; (4) failure to supervise his nonlawyer staff and to make reasonable efforts to ensure that the firm had in effect measures giving reasonable assurance that the nonlawyer's conduct was compatible with his own professional obligations; (5) knowingly making a false statement of material fact in connection with a disciplinary matter; and thus, (6) engaging in conduct that constitutes misrepresentation and was prejudicial to the administration of justice. [Tr. 161-168]

The Complainant in this matter is Kirk Brumbaugh, Esquire, of Brumbaugh & Quanadahl which is a "clearing house in the debt collection industry." [ODC Ex. 8, 000057]. Mr. Brumbaugh's client is First National Bank of Omaha and First Bank Card Center and he represents entities in consumer credit card accounts throughout the United States. [Tr. 20-21]. Mr. Brumbaugh contracts with attorneys through a "law list" which is "a term of art in the collection/lawyer industry... which are lists that attorneys have to pay to register with to then receive cases. The benefit for clients is at least for two years after placement, a law list provide [sic] fiduciary fidelity bonding coverage." [Tr. 21] Mr. Brumbaugh said Respondent's law firm was forwarded cases "off of a general bar, which is a law list headquartered in Cleveland" and that Respondent's law firm was "a legacy law firm because it still had a case [from 2007] but was not under contract."[5] [Tr. 21-22]

In this matter, the underlying file had been dormant for many years but on October 15,

[5] The process changed after 2012 with the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act which heavily regulated the consumer bank industry. [Tr. 22]. Mr. Brumbaugh stated that since 2012, he enters into a multipage contract with a corresponding attorney which mirrors the contract he has with the bank. [Id.]

2015, Mr. Brumbaugh testified his office received a telephone call from the client [the bank] that there was contact from a title company who offered to settle a judgment that Respondent's law firm had obtained against a debtor in approximately 2013. [Tr. 16; ODC Ex. 1, 000020] Mr. Brumbaugh testified his client, the bank, instructed them to accept the settlement of the debt. [Id.] This instruction was conveyed to Respondent's law firm by email dated November 13, 2015, and then confirmed again through a series of emails on November 17, 2015, including an email from Respondent's employee indicating the letter regarding the acceptance of the $14,807.55 debt settlement would be faxed on that same date. [Tr. 23; ODC Ex. 1, 000013-15, 000021-23] The next communication from Mr. Brumbaugh's office to Respondent's office was on January 4, 2016, and was an inquiry as to when the funds could be expected to be forwarded. [Tr. 20; ODC Ex. 1, 000012, 000023]. Respondent's office responded by email on January 5, 2016, stating that "it would be close to February before we [Respondent's office] received the funds." [ODC Ex. 1, 000012, 000023]. Respondent's bank records show a check in the amount of $14,807.55 from Title Source, Inc., was deposited into account Respondent's "Client Account" at United Bank, account number 0020043338, on January 20, 2016. [Tr. 145-146; ODC Ex. 16, Vol. II, 00391, 003929, 004021] There was no further communication from either Respondent or Respondent's office regarding the January 20, 2016 receipt of funds into his account despite seven (7) emails sent by Mr. Brumbaugh's law firm between March 2016 and September 2016, and nine (9) voicemails left between September 2016 and November 2016. [ODC Ex. 1, 000009-000026] On November 18, 2016, Mr. Brumbaugh's office was finally able to accomplish contact with Respondent. [Id.]

Mr. Brumbaugh testified he sent an employee to Respondent's office in late December 2016 to perform a termination audit and close out the file at issue in this matter. [Tr. 18, 26, 27-29, 56-59, ODC Ex. 1, 000002] Mr. Brumbaugh testified his employee also had instructions

to "either collect the funds or go to make a police report." However, Mr. Brumbaugh said the funds were not collected and "for whatever reason [his employee] could not get [the police report] accomplished in the timeframe that he was there...." [Tr. 59] When the funds were thereafter not timely forwarded to Mr. Brumbaugh, he filed the complaint giving rise to this disciplinary proceeding. [ODC Ex. 1] Respondent finally remitted the funds to Mr. Brumbaugh when he filed his response to the complaint on or about January 25, 2017. [ODC Ex. 2, 000034; See also, ODC Ex. 17, 000495]

At the hearing, Respondent admitted to a violation of Rule 1.15(d) of the Rules of Professional Conduct. [Tr. 161]. The evidence clearly demonstrates Respondent failed to safeguard these client funds once the same was deposited into his "Client Account" at United Bank, account number 0020043338, on January 20, 2016.[6] Respondent admitted at the hearing approximately $10,000.00 in debits occurred in account 0020043338 on the day following the deposit of the $14,807.55. On January 31, 2016, the ending balance on Respondent's "Client Account" was $13,299.64. [Tr. 146-149; ODC Ex. 16, Vol. II, 003911] Moreover, Respondent admitted the account held less than the $14,807.55 deposit at multiple times during the timeframe of this matter. [Tr. 132; 150-152, 160; 150-152; ODC Ex. 16, Vol. II, 004036, 004050, 004068, 004084, 004100, 004116, 004129, 004146, 004163; 004178, 004325] Respondent also testified at the hearing his office was using this account to "front court costs" even though the account was to hold only client funds.[7] [Tr. 146-147; 148]

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[6] Respondent was also charged with violating Rule 1.15(a) which provides in part that "[a] lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation from the lawyer's own property. Funds shall be kept in a separate account designated as a "client's trust account ...." In this matter, the funds in question were deposited into a "client account" which Respondent testified at the hearing held client funds and was a "client trust account." [Tr. 104] The evidence shows that the client funds were almost immediately removed from the "client account" and into the firm's operating account for use by the law firm. [Tr. 146-161]

[7] Respondent testified that his law office has eighteen (18) different bank accounts. [Tr. 132]

Respondent testified the employee with whom Mr. Brumbaugh's office was communicating on this matter was experiencing personal issues and beginning in or about March of 2016, she was in and out of the office for extended periods of time dealing with those personal issues.[8] [Tr. 127; 136-137]. Respondent also reported his law office was experiencing financial strain as a result of changes to the debt collection industry and he had laid off twelve (12) of his twenty-two (22) staff in July of 2015. [Tr. 177-178, 187] However, Respondent admitted that it is ultimately his responsibility to ensure client communication with his office was addressed and during this time, it was not. [Tr. 137] Respondent also testified he only learned about the breakdown in communication with Mr. Brumbaugh and his law firm and his law firm's failure to remit the funds in late November 2016 when he finally spoke personally with a representative from Mr. Brumbaugh's law firm. [Tr. 129] Respondent testified he has since made changes to his office practices to ensure a similar situation does not occur in the future. [Tr. 135-136, 184]

Thus, Respondent's misconduct in dealing with the $14,807.55 deposit are violations of his duties owed to his client, the legal system and the legal profession and at the hearing, Respondent admitted to violations of Rules 1.3, 1.4, 1.15(d) and 5.3. [Tr.161-168] Respondent did not admit to violating Rules 8.1(b) and 8.4(c) & (d) as charged in the Statement of Charges. Respondent admitted however, he did not immediately remit the client funds in December of 2016 even after he was notified about the failure to timely remit the funds to Brumbaugh and Quandahl in November of 2016 or in December 2016 when a representative to Brumbaugh and Quandahl came to his office to perform a termination audit. [Tr. 180]. Respondent also admitted he was not aware of the money being moved from account number 0020043338 (a client account) for use in paying for law firm operating expenses until "[s]ometime after I found out that I would be coming in on these formal charges." [Tr. 170]

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[8] In fact, Respondent testified that this employee had left his employment but had since returned to his office and

B. Respondent acted negligently and knowingly.

The *ABA Standards for Imposing Lawyer Sanctions* states 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 evidence establishes Respondent acted negligently in supervising his non-lawyer staff which resulted in the co-mingling of client funds with law office operating funds. By all accounts, the $14,807.55 of client funds was deposited into a "client account" holding client funds and Respondent's non-lawyer staff transferred money from the "client account" to the law firm's operating account for use by the law firm. Respondent also testified the $14,8057.55 deposit was not properly coded and therefore, the accounting system was unable to track the funds. [Tr. 193] The result of Respondent's negligent conduct was Respondent's client was not promptly advised of the receipt of client funds and thus, the client funds in question were misappropriated from his client account for use in the operation of Respondent's law office.

Senior Lawyer Disciplinary Counsel also asserts Respondent then acted knowingly after November 2016, when he was advised by his client the funds had not been promptly remitted following the receipt of the same in Respondent's office on January 20, 2016. Respondent then failed to remit the client funds following the November 2016, telephone contact requesting same and then again after the December 2016, personal visit from a representative from Mr.

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that he considered her to be a "valued and trusted employee." [Tr. 128]

Brumbaugh's law firm. Instead, Respondent did not remit the funds that were clearly due to his client until late January 2017, and only after the filing of the complaint against him.

C. The amount of real injury is great.

Respondent's client and Mr. Brumbaugh, as the client's representative, suffered real injury when Respondent and his law office did not promptly remit the funds which had been deposited into Respondent's "client account" on January 20, 2016. Because of Respondent's failure to properly supervise his staff, Mr. Brumbaugh and his staff were unable to get anyone to respond to their attempts to contact Respondent for at least eleven (11) months and thus, had no knowledge of what had happened to the funds. Nonetheless, Mr. Brumbaugh testified his client had no choice but to release the lien on the debtor's mortgage at the time because the bank had been notified the funds had been deposited into Respondent's account, even though the funds had not been remitted to the client. [Tr. 18; 25] Mr. Brumbaugh also testified "[his client] has requirements under IRS regulation and an oversight by the Office of the Comptroller of the Currency to make sure that if a balance is written off, the 1099's are timely issued. And so the non-remittance of the funds in addition to making [his] own office look bad was causing regulatory and audit issues with the bank." [Tr. 18] Mr. Brumbaugh testified he also had to expend his own funds to send his representative to Respondent's law office in West Virginia to "either pick up a check or report the matter to local law enforcement." [Id.]

D. 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) substantial experience in the practice of law; and, (2) multiple offenses. Respondent has been licensed to practice law for seventeen (17) years and multiple offenses as set forth above were committed following the receipt and deposit of the $14,807.55 check into Respondent's "client account."

E. The existence of mitigating factors.

In addition to adopting aggravating factors in Scott, the Scott Court also adopted mitigating factors in a lawyer disciplinary proceeding and stated mitigating factors "are any considerations or factors that may justify a reduction in the degree of discipline to be imposed." Scott, 213 W.Va. at 216, 579 S.E.2d at 557 (2003) *quoting ABA Model Standards for Imposing Lawyer Sanctions*, 9.31 (1992).[9] It should be clear that mitigating factors were not envisioned to insulate a violating lawyer from discipline. The mitigating factors present in this case are: (1) absence of a disciplinary record; and, (2) remorse. Respondent has no prior discipline and he did express remorse at his hearing for having created this issue in his office. [Tr. 134]

The Office of Disciplinary Counsel asserts the fact Respondent finally remitted funds to the client in January of 2017, should not be considered as mitigation in Respondent's favor in this matter and we agree. *ABA Model Standards for Imposing Lawyer Sanctions,* 9.4(a) (1992), provides "forced or compelled restitution" is a factor which is neither aggravating nor mitigating. The record is clear Respondent did not timely remit the client funds, which were admittedly

[9] The Scott Court held that mitigating factors which may be considered in determining the appropriate sanction to be imposed against a lawyer for violating the Rules of Professional Conduct include: (1) absence of a prior disciplinary record; (2) absence of a dishonest or selfish motive; (3) personal or emotional problems; (4) timely good faith effort to make restitution or to rectify consequences of misconduct; (5) full and free disclosure to disciplinary board or cooperative attitude toward proceedings; (6) inexperience in the practice of law; (7) character or reputation; (8) physical or mental disability or impairment; (9) delay in disciplinary proceedings; (10) interim rehabilitation; (11) imposition of other penalties or sanctions; (12) remorse; and (13) remoteness of prior offenses.

owed to the client, until after the disciplinary complaint was filed against him by Mr. Brumbaugh.

IV. 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).

Absent any aggravating or mitigating circumstances, the *ABA Model Standards for Imposing Lawyer Sanctions* provide that:

> Standard 4.12. Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.
>
> Standard 4.13 Reprimand is generally appropriate when a lawyer

> is negligent in dealing with client property and causes injury or potential injury to a client.
>
> Standard 4.42. Suspension is generally appropriate when (a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client; or (b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client.
>
> Standard 4.43. Reprimand is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client.
>
> Standard 7.3. Reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public or the legal system.

In regard to Respondent's failure to safeguard client funds in his "client account," the Supreme Court has stated "the penalty for a misappropriation offense must be consistent with the level of intent by the lawyer and the level of injury." Lawyer Disciplinary Board v. Kupec (Kupec II), 204 W.Va. 643, 515 S.E.2d 600 (1999). The Court stated:

> The American Bar Association Model Standards for Imposing Lawyer Sanctions ... classify misappropriation offenses according to the level of intent and level of the injury. The ABA standards are consistent with the general rule in finding disbarment of knowing conversion with injury or potential injury to the owner of entrusted funds. Where there is little or no actual or potential injury to the owner of entrusted funds, and when the lawyer knows or should know he/she is dealing improperly with entrusted funds, the ABA standards suggest suspension. When the lawyer is merely negligent in dealing with entrusted funds, the ABA standards suggest reprimand or admonishment.

Kupec (Kupec II), 204 W.Va. at 648-649, 515 S.E.2d at 605-606. The Kupec I Court had previously recognized that:

> The term misappropriation can have various meaning. In fact, the misuse of another's funds is characterized as misappropriation or conversion. Black's defines misappropriation as '[t]he unauthorized, improper, or unlawful use of funds or other property for purposes other than that for which intended . . . including not only stealing but also unauthorized temporary use for [the] lawyer's own purpose, whether or not he derives any gain or benefit from therefrom. Black's Law Dictionary (6th ed.1990). *See* In re Wilson, 81 N.J. 451, 409 A.2d 1153, 1155 n.1 (1979) (defining misappropriation as 'any unauthorized use by the lawyer of client's funds entrusted to him including not only stealing, but also unauthorized temporary use for the lawyer's own purpose, whether or not he derives any personal gain or benefit therefrom").

Lawyer Disciplinary Board v. Kupec (Kupec I), 202 W.Va. 556, 568, 505 S.E.2d 619, 631.

In Lawyer Disciplinary Board v. Chittum, 225 W.Va. 83, 689 S.E.2d 811 (2010), the Supreme Court issued a reprimand to an attorney found to have co-commingled client funds with his own funds with no intent to convert client funds and no actual injury. The Supreme Court also issued a reprimand to an attorney in Lawyer Disciplinary Board v. Niggemyer, No. 31665 (W.Va. May 11, 2005) (unreported). In that case, Mr. Niggemyer was found to have violated Rules 1.3 (lack of diligence), 1.4(a) (communication, failure to keep the client informed about the status of a case), 1.15(a) (safekeeping funds or property of clients or third parties), 1.15(b) (promptly delivering funds or property to clients or third parties), 1.15(d) (properly maintaining an IOLTA account), 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation) and 8.4(d) (engaging in conduct prejudicial to the administration of justice) stemming from his mishandling of a client's settlement funds.

The facts before us on this matter however, indicate a reprimand is not an appropriate sanction. This is not a case of simple negligence in communication and neglect of legal representation. Respondent committed multiple violations of a number of Rules of Professional

Conduct. Respondent admittedly and clearly failed to properly supervise his non-lawyer staff and should have provided closer oversight and perhaps additional office coverage when a key employee was out of the office for an extended period of time. Moreover, Respondent's inattention to his office staff and his office procedures resulted in the misuse of client funds. Furthermore, due to Respondent's failure, no one in Respondent's office properly dealt with the inquiries of Mr. Brumbaugh and his law firm for nearly a year. This lies solely on the Respondent's shoulders. The evidence is clear Respondent did not advise his non-lawyer staff on the proper use of his law office bank accounts to ensure their conduct, and his own, complies with his obligations under the Rules of Professional Conduct to safeguard his client's property. Finally, the fact Respondent eventually paid Mr. Brumbaugh the funds that were due to the client does not negate the misconduct, is not a defense, and in this case should not mitigate any proposed sanction. Syl. pt. 8, Lawyer Disciplinary Board v. Geary M. Battistelli, 206 W.Va. 197, 523 S.E.2d 257 (1999); Syl. pt. 4, Committee on Legal Ethics v. Hess, 186 W.Va. 514, 413 S.E.2d 169 (1991); and Lawyer Disciplinary Board v. Kupec (Kupec I), 202 W.Va. 556, 569-570, 505 S.E.2d 619, 632-633 (1998), *remanded with directions*, see Lawyer Disciplinary Board v. Kupec (Kupec II), 204 W.Va. 643, 515 S.E.2d 600 (1999). Battistelli and Hess note that mitigation of punishment because of restitution must be governed by the facts of the particular case. Kupec I provides that:

> Where the restitution has been made after the commencement of disciplinary proceedings, or when made as a matter of expediency under the pressure of the threat of disciplinary proceedings, some courts have refused to consider it a mitigating factor.
> Kupec I, 515 S.E.2d at 570, citations omitted.

The West Virginia Supreme Court has issued suspensions in cases wherein an attorney

improperly dealt with client property. In Lawyer Disciplinary Board v. Santa Barbara, 229 W.Va. 344, 729 S.E.2d 179 (2012), the Supreme Court dealt with an attorney who failed to diligently handle client matters, failed to communicate with his clients, failed to competently represent his clients, and failed to properly manage his client trust account, and which resulted in a one (1) year suspension. In Mr. Santa Barbara's case, the Court was also faced with multiple complaints and the attorney's depression which was considered by the Court as a mitigating factor to lessen the ultimate sanction to a one (1) year suspension.

In Lawyer Disciplinary Board v. Harmon-Schamberger, No. 16-0662 (WV 5/16/17) (unreported), the attorney was issued a three (3) month suspension for violating Rules 1.1, 1.4(a) and (b), 1.5(b),1.15(a), 1.15(c) 1.16(d), 5.3(b) and 8.4(c) of the Rules of Professional Conduct. The attorney was found to have acted negligently in the management of her law practice by authorizing an improperly trained employee to handle communication with clients, and collect payments from them on her behalf, without any supervision, resulting in the employee's use of funds for personal use. It was noted the attorney should have recognized the many warning signs presented by the situation and that she could have mitigated damages had she been properly monitoring her employee.

In Lawyer Disciplinary Board v. Hoosier, No. 16-1028 (WV 8/30/17) (unreported), the attorney was found to have violated Rules 1.1; 1.2(a); 1.3; 1.4(a) & (b); 3.2; 1.15(a); 1.15(f); and 7.1(a) in his representation of multiple appointed clients in *habeas* matters. Mr. Hoosier also co-mingled personal funds with client funds when he deposited client settlements into his operating account and had advertising issues. In Hoosier, the Supreme Court issued a three (3) month suspension to the attorney in addition to the imposition of additional continuing legal

education hours in the area of ethics and office management.

In Lawyer Disciplinary Board v. Blyler, 237 W.Va. 325, 787 S.E.2d 596 (2016), the Supreme Court suspended the attorney for sixty (60) days for improperly naming the account in which he had been holding almost $100,000.00 of client funds in trust. The funds were appropriated from the improperly named account by the State to pay the attorney's back taxes. Id. In this case, the Court considered the fact the attorney was dealing with his wife's early onset Alzheimer's disease to be a mitigating factor. Id.

Moreover, other jurisdictions have issued suspensions to attorneys when they fail to oversee their employees' actions in regard to client funds and the employee commingles or wrongfully uses those monies. In these cases, the lawyers do not have to have knowledge they are dealing improperly with client property if it is proven they should have known that improper conduct was occurring and the client suffered injury or potential injury. *See, e.g.* Office of Disciplinary Counsel v. Ball, 618 N.E.2d 159 (Ohio 1993) (in issuing a six (6) month suspension to attorney who failed to supervise a secretary who misappropriated funds from estate and guardianship accounts over a ten (10) year period, it was noted that while the attorney may not have had knowledge of the secretary's misconduct, lawyer had paid little attention to his office's financial matters and failed to set up any safeguards to ensure proper administration of the matters entrusted to him by clients); In re Bailey, 821 A.2d 851 (Del. 2003) (in imposing a six-month suspension the Court agreed with the finding that when the lawyer instructed the bookkeeper to transfer funds from escrow account to operating account, he knew or should have known of firm's financial difficulties due to repeated overdrafts in operating account); Ky. Bar Association v. Lococo, 199 S.W.3d 182 (Ky. 2006) (citing Standard 4.12, court orders six month

suspension for lawyer whose secretary, without lawyer's consent or knowledge, erroneously wrote and distributed $10,000 check to client from funds that had been ordered withheld to pay Medicaid and client's doctors); Attorney Grievance Commission v. Powell, 614 A.2d 102 (Md. 1992) (citing Standard 4.12, the court imposed indefinite suspension for unintentional misappropriation resulting from disorganization and inefficiency of practice; lawyer claimed three checks were mis-deposited by secretary, who at the time was a temporary employee hired from a temporary secretarial service); and In re Marshall, 498 S.E.2d 869 (S.C. 1998) (six-month suspension and restitution for office managers' embezzlement of client trust funds since lawyer should have noticed the many warning signals and could have mitigated damages had office manager been properly monitored).[10]

For the public to have confidence in our disciplinary and legal system, lawyers, like Respondent, who engage in the mishandling of client funds which were to be held in trust, along with failure to properly supervise their nonlawyer staff, failure to act with diligence and failure to effectively communicate with their client, and otherwise engage in conduct prejudicial to the administration of justice, must be removed from the practice of law for a period of time. A license to practice law is a revocable privilege and when such privilege is abused, the privilege should be revoked. Such a sanction is also necessary to deter other lawyers from engaging in similar conduct and to restore the faith of the victim in this case and of the general public in the

[10] During the hearing, Mr. Brumbaugh indicated he had reported similar alleged misconduct in at least two other jurisdictions, namely Colorado and New York, which resulted in discipline issued against attorneys. Senior Lawyer Disciplinary Counsel has attached [*See* Attachment B] the unreported opinion from Colorado, People v. Solomon, 12DJ055 (February 22, 2013) (attorney was retained by a bank to handle collections matters, negotiated settlements without client's consent and converted client funds by ignoring his obligation to hold in trust those settlement matters. Attorney also failed to keep funds belonging to client separate from his own, failed to promptly deliver to his client property it was entitled to receive, failed to provide an accounting regarding his interests in the property, and failed to withdraw from the representation. Attorney was found to have violated Rules 1.2(a), 1.15(a), 1.15(b), 1.15(c), 1.16(a)(3), and 8.4(c), and was disbarred). Senior Lawyer Disciplinary Counsel was unable to locate the opinion from New York.

integrity of the legal profession.

V. RECOMMENDED SANCTIONS

Rule 3.15 of the Rules of Lawyer Disciplinary Procedure provides 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.

For the reasons set forth above, the Hearing Panel Subcommittee recommends the following sanctions:

A. That Respondent's law license be suspended for a period of three (3) months, with automatic reinstatement of his license to practice law pursuant to the provisions and requirements of Rule 3.31 of the Rules of Lawyer Disciplinary Procedure;

B. That prior to reinstatement, Respondent shall complete an additional nine (9) hours of continuing legal education during the current reporting period of which at least 3 hours should be in IOLTA accounts. The other six (6) hours should be in the area of ethics and office management;

C. That Respondent must comply with the mandates of Rule 3.28 of the Rules of Lawyer Disciplinary Procedure; and

D. That Respondent shall be ordered to pay the costs of these proceedings pursuant to Rule 3.15 of the Rules of Lawyer Disciplinary Procedure and that the same shall be paid prior to reinstatement.

Kelly Ambrose, Esquire
Chairperson of the
Hearing Panel Subcommittee

Date: 25 JUNE 2019

J.B. Akers., Esquire
Hearing Panel Subcommittee

Date: 6-24-19

Loretta Sites, Laymember
Hearing Panel Subcommittee

Date: June 25, 2019